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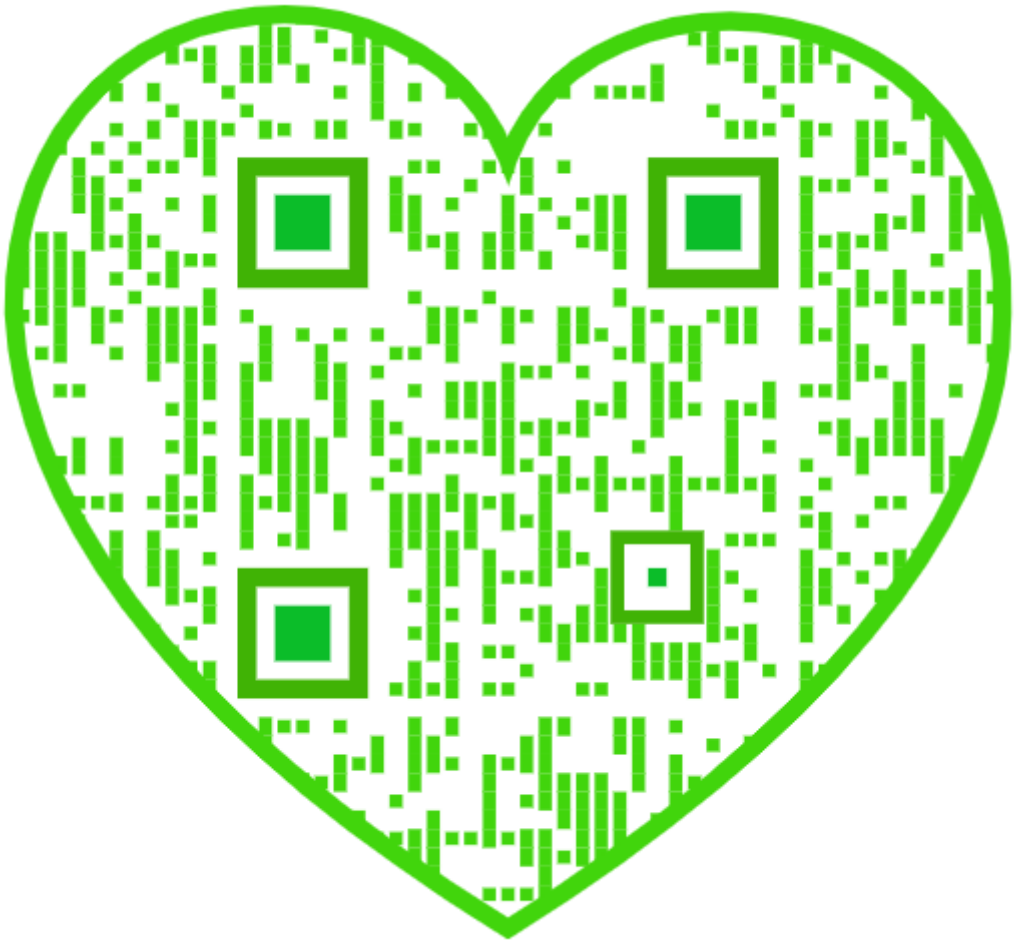

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CROSS-REFERENCES*

For Matters Relating to:

Agricultural Societies, see AGRICULTURE.
Aqueduct Companies, see WATERS.
Asylums, see ASYLUMS.
Banks, see BANKS AND BANKING.
Beneficial Associations, see MUTUAL BENEFIT INSURANCE.
Boom Companies, see LOGS AND LOGGING.
Building and Loan Associations, see BUILDING AND LOAN SOCIETIES.
Canal Companies, see CANALS.
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Cemetery Companies, see CEMETERIES.
Charitable Corporations, see CHARITIES.
Clubs, see CLUBS.
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Corporations Owned or Controlled by States, see STATES.
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Ferry Companies, see FERRIES.
Foreign Corporations, see FOREIGN CORPORATIONS.
Franchises Generally, see FRANCHISES.
Gas Companies, see GAS.
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Insurance Companies, see INSURANCE.
Irrigation Companies, see WATERS.
Joint-Stock Companies, see JOINT-STOCK COMPANIES.
Levee Improvement Companies, see LEVEES.
Logging Companies, see LOGS AND LOGGING.
Lottery Companies, see LOTTERIES.
Manufacturing Companies, see MANUFACTURES.
Mercantile Agents, see MERCANTILE AGENCIES.
Mining Companies, see MINES AND MINING.
Monopolies, see MONOPOLIES.
Mortgage Loan Companies, see MORTGAGES.
Municipal Corporations, see MUNICIPAL CORPORATIONS.
Navigation Improvement Companies, see NAVIGABLE WATERS.
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Telegraph and Telephone Companies, see TELEGRAPHS AND TELEPHONES.
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Trust Companies, see BANKS AND BANKING.
Turnpike and Toll-Road Companies, see TOLL-ROADS.
Unincorporated Associations, see ASSOCIATIONS.
Warehouse Companies, see WAREHOUSEMEN.
Water Companies, see WATERS.

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I. NATURE, KINDS, AND ORGANIZATION.

A. What Is a Corporation — 1. Definition[1] Suggested by Author. A corporation is a collection of natural persons, joined together by their voluntary action or by legal compulsion, by or under the authority of an act of the legislature, consisting either of a special charter or of a general permissive statute, to accomplish some purpose, pecuniary, ideal, or governmental, authorized by the charter or governing statute, under a scheme of organization, and by methods thereby prescribed or permitted; with the faculty of having a continuous succession during the period prescribed by the legislature for its existence, of having a corporate

1. **As defined by the ancient common law** a corporation is "a franchise created by the king, and is a body constituted by policy, with a capacity to take or to do." Central R., etc., Co. *v.* State, 54 Ga. 401, 406 [*citing* 4 Comyn Dig. 465].

Other definitions are as follows: "A legal institution devised to confer upon the individuals of which it is composed powers, privileges and immunities which they would not otherwise possess." Coyle *v.* McIntire, 7 Houst. (Del.) 44, 88, 30 Atl. 728, 40 Am. St. Rep. 109.

"An artificial person, created by the Legislature." South Carolina R. Co. *v.* McDonald, 5 Ga. 531, 535.

"An artificial being created by law, and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person." Fietsam *v.* Hay, 122 Ill. 293, 295, 13 N. E. 501, 3 Am. St. Rep. 492.

"A personification of certain legal rights under a description imposed upon it, by the power which created it." U. S. Bank *v.* State, 12 Sm. & M. (Miss.) 456, 459.

"'A body politic or corporate, formed and authorized by law' to act as a single person." Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. (N. Y.) 172, 176, 23 N. Y. Suppl. 675, 53 N. Y. St. 214 [*quoting* Imperial Dict.].

"A collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person." People *v.* Watertown, 1 Hill (N. Y.) 616, 620 [*quoted* in Sandford *v.* New York, 15 How. Pr. (N. Y.) 172; Niagara County *v.* People, 7 Hill (N. Y.) 504, 507].

"An artificial person created by law as the representative of those persons, natural or artificial, who contribute to, or become holders of shares in, the property entrusted to it for a common purpose." Gibbs' Estate, 157 Pa. St. 59, 69, 33 Wkly. Notes Cas. (Pa.) 120, 27 Atl. 383, 22 L. R. A. 276.

"An artificial person created by law for the purpose of becoming the business representative, agent or trustee of so many persons as may join to furnish the money with which the business to be done by the corporation may be carried on." Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 494, 26 Atl. 1071.

"A creature of the law, having certain powers and duties of a natural person." Cal. Civ. Code, § 283 [*quoted* in San Luis Water Co. *v.* Estrada, 117 Cal. 168, 177, 48 Pac. 1075; Dean *v.* Davis, 51 Cal. 406, 410].

"An artificial person created by law for specific purposes, the limit of whose existence, powers and liabilities is fixed by the act of incorporation, usually called its charter." Ga. Code, § 1670 [*quoted* in Central R., etc., Co. *v.* State, 54 Ga. 401, 406].

"An intellectual body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continue always the same, notwithstanding the change of the individuals who compose it, and which, for certain purposes, is considered as a natural person." La. Civ. Code, art. 427 [*quoted* in State *v.* Kohnke, 109 La. 838, 33 So. 793].

"A legal person with a special name composed of such members and endorsed with such powers and such only as the law prescribes." 1 Dillon Mun. Corp. (3d ed.) § 18 [*quoted* in Coyle *v.* McIntire, 7 Houst. (Del.) 44, 88, 30 Atl. 728, 40 Am. St. Rep. 109; Andrews Bros. Co. *v.* Youngstown Coke Co., 10 Ohio Fed. Dec. 306, 311].

"A franchise possessed by one or more individuals who subsist as a body politic, under a special denomination, and are vested by the policy of the law with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual." 2 Kent Comm. 295 [*quoted* in Porter *v.* Rockford, etc., R. Co., 76 Ill. 561, 573; State *v.* Payne, 129 Mo. 468, 478, 31 S. W. 797, 33 L. R. A. 576; Farmers' L. & T. Co. *v.* New York, 7 Hill (N. Y.) 261, 283].

"A collection of many individuals, united into one body, under a specific denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual." 1 Kyd Corp. 13 [*quoted* in Phillips Academy *v.* King, 12 Mass. 546, 554; People *v.* North River Sugar Refining Co., 3 N. Y. Suppl. 401, 407, 19 N. Y. St. 853, 22 Abb. N. Cas. (N. Y.) 164; Warner *v.* Beers, 23 Wend. (N. Y.) 103, 173; State *v.* Standard Oil Co., 49 Ohio St. 137, 178, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145; Toledo Bank *v.* Toledo, 1 Ohio

name by which it may make and take contracts, and sue and be sued, and with the faculty of acting as a unit in respect of all matters within the scope of the purposes for which it is created.[2]

2. Definition of Chief Justice Marshall. The following definition of a corporation was given by Chief Justice Marshall in the celebrated Dartmouth College case:[3] "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."[4]

St. 622, 642; *In re* German Lutheran, etc., Church, 9 Pa. Co. Ct. 12, 13].

2. This is substantially the author's definition in his work on the subject. 1 Thompson Corp. § 1.

3. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636, 4 L. ed. 629.

4. The first part of this celebrated definition, ending with the words "incidental to its very existence," was quoted with approval by Taney, C. J., in Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 587, 10 L. ed. 274.

The entire passage was quoted, *arguendo*, by Wayne, J., in giving the opinion of the court in Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 558, 11 L. ed. 353, in favor of the proposition that a corporation may be regarded as a "citizen" within the meaning of the federal constitution and Judiciary Act, for the purposes of federal jurisdiction founded upon diverse state citizenship. It was also quoted in the following cases:

Alabama.— Dillard *v.* Webb, 55 Ala. 468, 474.

Arkansas.— *Ex p.* Conway, 4 Ark. 302, 351.

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369, 372.

Connecticut.— Coite *v.* Savings Soc., 32 Conn. 173, 185.

Delaware.—Higgins *v.* Downward, 8 Houst. 227, 240, 32 Atl. 133, 40 Am. St. Rep. 141; Coyle *v.* McIntire, 7 Houst. 44, 88, 30 Atl. 728, 40 Am. St. Rep. 109; Deringer *v.* Deringer, 5 Houst. 416, 429, 1 Am. St. Rep. 150.

Georgia.— Goldsmith *v.* Rome, etc., R. Co., 62 Ga. 463, 481.

Illinois.— Mather *v.* Ottawa, 114 Ill. 659, 664, 3 N. E. 216.

Indiana.— Cutshaw *v.* Fargo, 8 Ind. App. 691, 693, 34 N. E. 376, 36 N. E. 650.

Kansas.— State *v.* Stormont, 24 Kan. 686, 690 (holding that "immortality is a legitimate attribute to be conferred on a corporation"); Land Grant R., etc., Co. *v.* Coffey County, 6 Kan. 245, 253.

Maine.— Miller *v.* Ewer, 27 Me. 509, 518, 46 Am. Dec. 619.

Michigan.— Swan *v.* Williams, 2 Mich. 427, 433.

Nebraska.— Horbach *v.* Tyrrell, 48 Nebr. 514, 526, 67 N. W. 485, 489, 37 L. R. A. 434.

New Jersey.— Cole *v.* Bergen County Mut. Assur. Assoc., 26 N. J. L. 362, 365, holding that "the great object of an incorporation is to bestow the character and properties of personality and individuality upon the legal entity called the corporation, as distinct from the persons of the corporators."

New York.— Codd *v.* Rathbone, 19 N. Y. 37, 40 (holding that individuals engaged in carrying on the business of banking under the banking law of New York of 1838 are not corporations); Curtis *v.* Leavitt, 15 N. Y. 9, 209, 257; Gifford *v.* Livington, 2 Den. 380, 395 (in which Senator Hand adds his mite [might?] to the many attempts to define a corporation); Warner *v.* Beers, 23 Wend. 103, 124, 143 (dealing with definitions of a corporation); Thomas *v.* Dakin, 22 Wend. 9, 100 (referring especially to the quality of perpetual succession).

South Carolina.— McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 110, 16 S. E. 429, 18 L. R. A. 440 (adding that "one of the rights conceded in this country to corporations is that of being a person in the eyes of the law"); Charleston Ins., etc., Co. *v.* Sebring, 5 Rich. Eq. 342, 346 (dealing with the definitions of a corporation).

Texas.— Waterbury *v.* Laredo, 60 Tex. 519, 521.

Virginia.— Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 824, 14 S. E. 665.

West Virginia.—Richardson *v.* Clarksburg, 30 W. Va. 491, 494, 4 S. E. 774; Hope *v.* Valley City Salt Co., 25 W. Va. 789, 797.

3. A Collection of Natural Persons. The conception of Marshall that a corporation is "invisible, intangible, and existing only in contemplation of law" is a mere remnant of the mysticism of the middle ages. Corporations are but associations of individuals.[5]

4. A Joint-Stock Company May Be Regarded as a Corporation. In order that an aggregate body should be regarded as a corporation it is not necessary that it should be called such in its charter or governing statute.[6] For example an English joint-stock company may be regarded as a corporation for purposes of taxation in the United States.[7]

5. Resemblances and Differences Between Corporations and Joint-Stock Companies. The points of resemblance between corporations and joint-stock companies are: (1) That they both enjoy what is called perpetual succession, so that a transfer by any member of his shares, whereby a stranger is introduced into membership, does not work a dissolution of the body; (2) that they both act through the official agency of a board of directors, trustees, or governors, and that the individual members have no agency by virtue of their membership, which entitles them to act for the aggregate body.[8] Their chief points of difference are: (1) That a corporation generally brings and defends actions in its corporate name, while a joint-stock company sues and defends by the name of a designated officer empowered thereto.[9] (2) The members of a corporation are not liable for the debts of the company except under special circumstances and when made so by statute, whereas the members of a joint-stock company are in general liable as partners.[10] In short a joint-stock company is regarded in England as nothing

United States.— Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 44, 20 S. Ct. 518, 44 L. ed. 657; U. S. *v.* Stanford, 70 Fed. 346, 357 (per Gilbert, J.).

Canada.— Ulrich *v.* National Ins. Co., 42 U. C. Q. B. 141, 158.

5. Lumpkin, J., in Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412. In a joint-stock corporation these individuals are called shareholders. Lowe, J., in Gelpcke *v.* Blake, 19 Iowa 263.

6. For the purpose of being sued in New Jersey, a joint-stock company or association organized under the laws of New York, and having the capacity of suing by the name of its treasurer, was regarded as a corporation. Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940. To a similar effect see State *v.* Adams Express Co., 3 Ohio S. & C. Pl. Dec. 326, 2 Ohio N. P. 98.

For the purpose of a controversy with one of its own shareholders a joint-stock company has been so treated. Westcott *v.* Fargo, 6 Lans. (N. Y.) 319 [*affirmed* in 61 N. Y. 542, 19 Am. Rep. 300, holding that a shareholder might sue the company at law, which he could not do if it were to be regarded as a partnership]; Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157 (where the United States Express Company was treated as a corporation for this purpose).

For the purpose of removing suits, brought by or against it in a state court, into a court of the United States, on the ground of being a "citizen" of the state of New York without regard to the citizenship of its members a joint-stock company has been so treated. Fargo *v.* McVicker, 55 Barb. (N. Y.) 437.

For the purpose of maintaining an action in a court of the United States on the ground of diverse state citizenship this has been held true. Fargo *v.* Louisville, etc., R. Co., 6 Fed. 787, 10 Biss. 273; Maltz *v.* American Express Co., 16 Fed. Cas. No. 9,002, 1 Flipp. 611.

7. Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531 [*affirmed* in Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029].

What not necessary to the conception of a corporation.—A collection of individuals may be none the less a corporation, because such individuals may be personally liable for the debts of the collective body; because it has not been clothed with the capacity to sue and be sued in the corporate name, although such capacity is one of the usual incidents of a corporation; it is sufficient that it may sue and be sued by the name of a designated officer; or because the legislature has not, in its charter or governing statute, used the word "corporation." Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029 [*affirming* Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531].

8. Burnes *v.* Pennell, 2 H. L. Cas. 497, 13 Jur. 597.

9. Taft *v.* Ward, 106 Mass. 518; Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531; Bartlett *v.* Pentland, 1 B. & Ad. 704, 20 E. C. L. 657; Wormwell *v.* Hailstone, 6 Bing. 668, 8 L. J. C. P. O. S. 264, 4 M. & P. 512, 19 E. C. L. 301; Matter of Monmouthshire, etc., Banking Co., 2 De G. M. & G. 562, 51 Eng. Ch. 439; Harrison *v.* Pimmins, 7 Dowl. P. C. 28, 8 L. J. Exch. 94, 4 M. & W. 510; Wordsworth Joint Stock Cos. 66.

10. Frost *v.* Walker, 60 Me. 468; Whitman *v.* Porter, 107 Mass. 522; Bodwell *v.*

more or less than a numerous partnership having some of the features of an incorporated company,[11] and this is the generally accepted view in America.[12] Non-liability to creditors, however, is not a factor which determines this question; since, as will appear hereafter, in many corporations, by statute, the shareholders are liable to the creditors.[13]

6. DISTINCTION BETWEEN JOINT-STOCK CORPORATION AND SOCIETY. This distinction hardly needs to be adverted to further than to say that in England a guild, fraternity, or society is not necessarily a corporation, as it does not require a sovereign act for its creation.[14] Another distinction between a joint-stock corporation and an incorporated society relates to the question who or what constituencies are to be deemed the incorporated body. In the case of societies it is in many cases the trustees that are incorporated;[15] in the case of a municipal corporation it is usually the governing body, the mayor and common council, that is incorporated;[16] but in the case of joint-stock corporations it is the shareholders.

7. DISTINCTION BETWEEN CORPORATION AND PARTNERSHIP. The essential distinctions between a corporation and a partnership are: (1) A corporation possesses "perpetual succession," while a partnership does not; that is to say, the members of a corporation (and this applies to an unincorporated joint-stock company) may freely transfer their shares to outside persons, except so far as restrained from so doing by the terms of the charter or other constituent instrument, and thus introduce new members into the corporation in their stead, while in case of a partnership if a member retires from the firm or dies it works a dissolution. (2) In the case of a corporation the members are not agents for the incorporated body, unless specially clothed with power as such.[17] The shareholders act through a board which they create and cannot in general bind the corporation by their individual action, although all of them concur.[18] Whereas in a general partnership each member is an agent for the partnership with respect to all matters within the scope of the partnership business.[19] (3) The members of a general partnership are individually liable for the debts of the firm, jointly and severally; whereas, subject to statutory and special qualifications hereafter explained in this article, the members of a corporation are not so liable.[20]

8. CORPORATIONS MAY BE COMPOSED OF PARTNERSHIPS OR OF OTHER CORPORATIONS.[21]

Eastman, 106 Mass. 525; Taft *v.* Ward, 106 Mass. 518; Hoadley *v.* Essex County, 105 Mass. 519 (per Morton, J.); Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531; Tyrrell *v.* Washburn, 6 Allen (Mass.) 466; Tappan *v.* Bailey, 4 Metc. (Mass.) 529; Dow *v.* Sayward, 12 N. H. 271; Townsend *v.* Goewey, 19 Wend. (N. Y.) 424, 32 Am. Dec. 514; Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539; Angell & A. Corp. § 591.

11. *Ex p.* Warkworth Dock Co., 18 Beav. 629.

12. Bullard *v.* Kinney, 10 Cal. 60; Taft *v.* Ward, 106 Mass. 518; Hoadley *v.* Essex County, 105 Mass. 519; Tyrrell *v.* Washburn, 6 Allen (Mass.) 466; Tappan *v.* Bailey, 4 Metc. (Mass.) 529; Wells *v.* Gates, 18 Barb. (N. Y.) 554 (per Clerke, J.). *Compare* Woods *v.* De Figaniere, 1 Rob. (N. Y.) 659; Opdyke *v.* Marble, 18 Abb. Pr. (N. Y.) 266 [*affirmed* in 18 Abb. Pr. (N. Y.) 375]; People *v.* Watertown, 1 Hill (N. Y.) 616; Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539; Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573; Matter of Monmouthshire, etc., Banking Co., 2 De G. M. & G. 562, 51 Eng. Ch. 439; Harrison *v.* Pimmins, 7 Dowl. P. C. 28, 8 L. J. Exch. 94, 4 M. & W. 510.

13. What voluntary associations are not corporations see Davidson *v.* Hobson, 59 Mo. App. 130. That a joint-stock association brought into being wholly by the contract of its individual members is not a corporation see Gregg *v.* Sanford, 65 Fed. 151, 12 C. C. A. 525. See also, generally, JOINT-STOCK COMPANIES.

14. Robinson *v.* Groscot, Comb. 372; Rex *v.* Beardwell, 2 Keb. 52; Clements Inn Case, 1 Keb. 135; Y. B. 49 Edw. III, 4*b*.

15. Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642; Legrand *v.* Hampden Sidney College, 5 Munf. (Va.) 324.

16. Rex *v.* Chalk, Comb. 396.

17. Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Dayton, etc., R. Co. *v.* Hatch, 1 Disn. (Ohio) 84, 12 Ohio Dec. (Reprint) 501; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223.

18. Warner *v.* Mower, 11 Vt. 385. And the same is true of an incorporated society. Society for Illustration, etc. *v.* Abbott, 2 Beav. 559, 4 Jur. 453, 9 L. J. Ch. 307, 17 Eng. Ch. 559.

19. Galway *v.* Matthew, 1 Campb. 403, 10 East 264, 10 Rev. Rep. 289.

20. Liability of shareholders see *infra*, VIII.

21. Who may be corporators or members generally see *infra*, I, F.

It is not necessary that the shareholders of a joint-stock corporation should be individuals. Except where restrained by constitutional provisions or by statutes they may be collections of individuals, such as partnerships, private corporations,[22] or even municipal corporations.[23]

Who may become shareholders see *infra*, VI, G.

22. Evans *v.* Bailey, 66 Cal. 112, 4 Pac. 1089; Hill *v.* Nisbet, 100 Ind. 341; Booth *v.* Robinson, 55 Md. 419.

23. *Alabama.*— *Ex p.* Selma, etc., R. Co., 45 Ala. 696, 6 Am. Rep. 722; Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410; Wetumpka *v.* Winter, 29 Ala. 651 (plank-road case); Stein *v.* Mobile, 24 Ala. 591.

California.— People *v.* San Francisco, 27 Cal. 655; People *v.* Coon, 25 Cal. 635; French *v.* Teschemaker, 24 Cal. 518; Robinson *v.* Bidwell, 22 Cal. 379; Hobart *v.* Butte County, 17 Cal. 23; Pattison *v.* Yuba County, 13 Cal. 175.

Connecticut.— Savings Soc. *v.* New London, 29 Conn. 174; Bridgeport *v.* Housatonic R. Co., 15 Conn. 475.

Florida.— Cotten *v.* Leon County, 6 Fla. 610.

Georgia.— Powers *v.* Dougherty County, 23 Ga. 65; Wiun *v.* Macon, 21 Ga. 275.

Illinois.— Keithburg *v.* Frick, 34 Ill. 405; Piatt *v.* People, 29 Ill. 54; Butler *v.* Dunham, 27 Ill. 474; Clarke *v.* Hancock County, 27 Ill. 305; Perkins *v.* Lewis, 24 Ill. 208; Johnson *v.* Stark County, 24 Ill. 75; Robertson *v.* Rockford, 21 Ill. 451; Prettyman *v.* Tazewell County, 19 Ill. 406, 71 Am. Dec. 230; Ryder *v.* Alton, etc., R. Co., 13 Ill. 516.

Indiana.— Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413; Bartholomew County *v.* Bright, 18 Ind. 93; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Aurora *v.* West, 9 Ind. 74.

Iowa.— Whittaker *v.* Johnson County, 10 Iowa 161; McMillen *v.* Lee County Judge, etc., 6 Iowa 391; McMillen *v.* Boyles, 6 Iowa 304; Ring *v.* Johnson County, 6 Iowa 265; Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678; State *v.* Bissell, 4 Greene 328; Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene 1.

Kansas.— Leavenworth County *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

Kentucky.— Maddox *v.* Graham, 2 Metc. 56; Slack *v.* Maysville, etc., R. Co., 13 B. Mon. 1; Justices Clark County Ct. *v.* Paris, etc., Turnpike Co., 11 B. Mon. 143; Talbot *v.* Dent, 9 B. Mon. 526.

Louisiana.— Vicksburg, etc., R. Co. *v.* Ouachita Parish, 11 La. Ann. 649; Parker *v.* Scogin, 11 La. Ann. 629; New Orleans *v.* Graihee, 9 La. Ann. 561; Police Jury *v.* McDonough's Succession, 8 La. Ann. 341.

Maine.— Augusta Bank *v.* Augusta, 49 Me. 507.

Mississippi.— Strickland *v.* Mississippi Cent. R. Co. [*cited* in Williams *v.* Cammack, 27 Miss. 209, 224, 61 Am. Dec. 508].

Missouri.— St. Joseph, etc., R. Co. *v.* Buchanan County Ct., 39 Mo. 485; Flagg *v.* Palmyra, 33 Mo. 440; St. Louis *v.* Alexander, 23 Mo. 483.

New York.— People *v.* Mitchell, 35 N. Y. 551; Clarke *v.* Rochester, 28 N. Y. 605 [*affirming* 24 Barb. 446]; Starin *v.* Genoa, 23 N. Y. 439; Rome Bank *v.* Rome, 18 N. Y. 38; People *v.* Mitchell, 45 Barb. 208; Gould *v.* Venice, 29 Barb. 442; Benson *v.* Albany, 24 Barb. 248; Grant *v.* Courter, 24 Barb. 232.

North Carolina.—Caldwell *v.* Burke County Justices, 57 N. C. 323; Taylor *v.* Newberne, 55 N. C. 141, 64 Am. Dec. 566 (a navigation case).

Ohio.— State *v.* Goshen Tp., 14 Ohio St. 569; State *v.* Perrysburg, 14 Ohio St. 472; Knox County *v.* Nichols, 14 Ohio St. 260; State *v.* Hancock County, 12 Ohio St. 596; State *v.* Union Tp., 8 Ohio St. 394; State *v.* Van Horne, 7 Ohio St. 327; Thompson *v.* Kelly, 2 Ohio St. 647; Cass *v.* Dillon, 2 Ohio St. 607; Steubenville, etc., R. Co. *v.* North Tp., 1 Ohio St. 105; Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77.

Pennsylvania.— Com. *v.* Perkins, 43 Pa. St. 400; Com. *v.* Pittsburgh, 41 Pa. St. 278; Com. *v.* Allegheny County, 32 Pa. St. 218; Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Com. *v.* McWilliams, 11 Pa. St. 61 (a turnpike case); Harvey *v.* Lloyd, 3 Pa. St. 331.

South Carolina.— State *v.* Charleston, 10 Rich. 491.

Tennessee.— Campbell County Justices *v.* Knoxville, etc., R., Coldw. 598; Byrd *v.* Ralston, 3 Head 477; Hord *v.* Rogersville, etc., R. Co., 3 Head 208; Louisville, etc., R. Co. *v.* Davidson County, 1 Sneed 637, 62 Am. Dec. 424; Nichol *v.* Nashville, 9 Humphr. 252.

Virginia.— Langhorne *v.* Robinson, 20 Gratt. 661; Harrison County Justices *v.* Holland, 3 Gratt. 247; Goddin *v.* Crump, 8 Leigh 120; *In re* County Levy Case, 5 Call 139.

Wisconsin.— Bushnell *v.* Beloit, 10 Wis. 195; Clark *v.* Janesville, 10 Wis. 136.

United States.— Kenosha *v.* Lamson, 9 Wall. 477, 19 L. ed. 725; Lee County *v.* Rogers, 7 Wall. 181, 19 L. ed. 160; U. S. *v.* Keokuk, 6 Wall. 518, 18 L. ed. 918; U. S. *v.* Keokuk, 6 Wall. 514, 18 L. ed. 933; Weber *v.* Lee County, 6 Wall. 210, 18 L. ed. 781; U. S. *v.* Johnson County, 6 Wall. 166, 18 L. ed. 768; Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. ed. 403; Larned *v.* Burlington, 4 Wall. 275, 18 L. ed. 353; Mitchell *v.* Burlington, 4 Wall. 270, 18 L. ed. 350; Rogers *v.* Burlington, 3 Wall. 654, 18 L. ed. 79; Thompson *v.* Lee County, 3 Wall. 327, 18 L. ed. 177; Havemeyer *v.* Iowa County, 3 Wall. 294, 18 L. ed. 38; Sheboygan County *v.* *v.* Parker, 3 Wall. 93, 18 L. ed. 33; Myer *v.* Muscatine, 1 Wall. 384, 17 L. ed. 564; Von

9. Corporations Sole. Corporations sole may be here referred to merely for the purposes of distinction, with the statement that corporations of this character are anomalous, at least in the United States, and that a consideration of their peculiarities does not fall within the scope of this article.[24]

10. Definitions of Corporations in State Constitutions. In many of the state constitutions, in which restraints have been imposed upon the legislature with respect to corporations, and in which prohibitions and regulations have been directly imposed upon them, it has been thought necessary to define the word "corporation" as used in the particular constitution. The term as used in several recent constitutions is to be construed as meaning any association or joint-stock company exercising powers and privileges not possessed by partnerships or individuals.[25]

B. Ordinary Powers and Characteristics of a Corporation — 1. General Statement. The ordinary powers of corporations are: (1) Perpetual succession. (2) To sue and be sued, and to receive and grant, by their corporate name. (3) To purchase and hold lands and chattels. (4) To have a common seal. (5) To make by-laws. Some of these powers are incident to a corporation, but they are all, generally, expressly given by statute in this country.[26]

2. Perpetual Succession — Immortality. It is frequently said that one of the attributes of a corporation aggregate is immortality.[27] Most of the charters of private corporations provide in terms that they shall have "perpetual succession," and general statutes governing the organization of corporations frequently contain the same provision. This means in a general sense that the corporation is endowed with the faculty of existing forever, unless the same or another statute or the constitution has fixed a limit to the term of its existence. In other words the term "perpetual succession" is understood to mean indefiniteness of duration.[28] It has been held that these words "perpetual succession" do not refer to

Hostrup *v.* Madison City, 1 Wall. 291, 17 L. ed. 538; Seibert *v.* Pittsburg, 1 Wall. 272, 17 L. ed. 553; Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. ed. 520; Mercer County *v.* Hackett, 1 Wall. 83, 17 L. ed. 548; Moran *v.* Miami County, 2 Black 722, 17 L. ed. 342; Woods *v.* Lawrence County, 1 Black 386, 17 L. ed. 122; Knox County *v.* Aspinwall, 24 How. 376, 16 L. ed. 735; Amey *v.* Allegheny City, 24 How. 364, 16 L. ed. 614; Bissell *v.* Jeffersonville, 24 How. 287, 16 L. ed. 664; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. ed. 488; Knox County *v.* Wallace, 21 How. 546, 16 L. ed. 211; Knox County *v.* Aspinwall, 21 How. 539, 16 L. ed. 208.

The state may be the sole shareholder in a corporation, of which numerous examples were shown in the state banks of a former day. For example see State *v.* State Bank, 1 S. C. 63, in which case the state was deemed to have *pro hac vice*, divested itself of a portion of its sovereignty and taken the position that a private person or corporation would have occupied as a shareholder. See also U. S. Bank *v.* Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244. *Compare* Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705.

24. See 1 Thompson Corp. § 8.

25. *Idaho.*— Const. (1899), art. 11, § 16.
Kentucky.— Const. (1891), § 208.
Louisiana.— Const. (1898), art. 268.
Mississippi.— Const. (1890), § 199.
New York.— Const. (1894), art. 8, § 3.
North Carolina.— Const. (1901), art. 8, § 3.
North Dakota.— Const. (1889), § 144.
South Dakota.— Const. (1889), art. 17, § 19.
Utah.— Const. (1895), art. 12, § 4.
For other constitutional provisions defining the word "corporation" as used in the particular constitution see:
1 Thompson Corp. § 567.
Alabama.— Const. (1875), art. 13, § 13.
California.— Const. (1879), art. 12, § 4.
Kansas.— Const. (1859), art. 12, § 6, in substance.
Michigan.— Const. (1850), art. 15, § 11, in substance.
Minnesota.— Const. (1857), art. 10, § 1.
Missouri.— Const. (1875), art. 12, § 11, in substance.
Montana.— Const. (1889), art. 15, § 18.
North Carolina.— Const. (1876), art. 8, § 3.
Pennsylvania.— Const. (1873), art. 16, § 13.
Washington.— Const. (1889–1890), art. 12, § 5, in substance.

26. McLean, J., in Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195, 198.

27. Fuller *v.* Plainfield Academic School, 6 Conn. 532.

28. State *v.* Stormont, 24 Kan. 686; Krutz *v.* Paola Town Co., 20 Kan. 397; Fairchild *v.* Masonic Hall Assoc., 71 Mo. 526; Steadman *v.* Merchants', etc., Bank, 69 Tex. 50, 6 S. W. 675.

length of time, but rather convey the idea of regularity or unbroken continuity of existence.[29]

3. In What Sense a "Person." For many, perhaps most, purposes a corporation is in law an ideal person. It is regarded as a unit for most purposes of legal procedure. It makes and takes contracts by its corporate name and in that name it sues and is sued. The word "person" in a statute may be construed to refer to a corporation as well as to a natural person.[30] Accordingly a corporation has been held to be embraced within the words of the statute of Anne, reënacted in the various American states, which provides that "all notes in writing made and signed by any person, whereby he shall promise to pay to another person, or his order," etc., "shall be negotiable," etc. Here the word "person" includes a corporation, and accordingly a note made payable to a corporation is by force of this statute negotiable.[31] So the word "debtor" in a statute authorizing assignments for creditors may include corporations,[32] at least corporations engaged in banking,[33] and statutes giving liens to mechanics and materialmen extend to corporations, although corporations are not named in the statute.[34] Corporations, both foreign and domestic, are deemed "persons" within the meaning of statutes giving remedies by attachment and garnishment.[35] So a corporation is a "person" within the meaning of statutes relating to the assessment and collection of taxes.[36] And this rule applies to foreign corporations.[37] So statutes of limitation apply to corporations, although not expressly named therein, in like manner as to individuals,[38] and the word "persons" when used in a statute applies to foreign corporations when it can be applied to them as well as to natural persons residing without the

29. Scanlan *v.* Crawshaw, 5 Mo. App. 337.

30. Wales *v.* Muscatine, 4 Iowa 302; U. S. Telegraph Co. *v.* Western Union Tel. Co., 56 Barb. (N. Y.) 46; Cary *v.* Marston, 56 Barb. (N. Y.) 27; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

31. Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Douglass *v.* Pacific Mail Steamship Co., 4 Cal. 304; Gaskell *v.* Beard, 58 Hun (N. Y.) 101, 11 N. Y. Suppl. 399, 33 N. Y. St. 852; Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

32. South Carolina R. Co. *v.* McDonald, 5 Ga. 531 (is a "person," "party," "defendant," "debtor," within the meaning of an attachment law); Hutchinson *v.* Green, 91 Mo. 367, 1 S. W. 853; Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429; Shockley *v.* Fisher, 75 Mo. 498; Shultz *v.* Sutter, 3 Mo. App. 137.

33. Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400, 43 N. W. 60.

34. Loudon *v.* Coleman, 59 Ga. 653; Stout *v.* McLachlin, 38 Kan. 120, 15 Pac. 902; Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324; Doane *v.* Clinton, 2 Utah 417.

35. *Connecticut.*— Bray *v.* Wallingford, 20 Conn. 416; Knox *v.* Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33.

Georgia.— South Carolina R. Co. *v.* McDonald, 5 Ga. 531.

Illinois.— Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Pennsylvania.— Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. 173.

Virginia.— Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

Compare Burns *v.* Provincial Ins. Co., 35 Barb. (N. Y.) 525, 13 Abb. Pr. (N. Y.) 425.

It comes within the designation of "debtor" and "creditor" employed in such statutes. South Carolina R. Co. *v.* McDonald, 5 Ga. 531; Union Bank *v.* U. S. Bank, 4 Humphr. (Tenn.) 369.

That corporations are liable to attachment see Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Hazard *v.* Mississippi Agricultural Bank, 11 Rob. (La.) 326; Martin *v.* Alabama Branch Bank, 14 La. 415.

That the right of a foreign corporation to a sheriff's deed conveying land is an attachable chose in action see Wright *v.* Douglass, 2 N. Y. 373.

Garnishment.— Under the operation of this principle of interpretation, as well as of expressed statutes, a corporation may be summoned as garnishee, answering by its appropriate officer, or by an officer designated by statute. Clark *v.* Chapman, 45 Ga. 486; Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421; Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395; Pierce *v.* Milwaukee Constr. Co., 38 Wis. 253; Ballston Spa Bank *v.* Marine Bank, 18 Wis. 490.

36. People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243. See also Rex *v.* Gardner, 2 Coke Inst. 703, 1 Cowp. 79.

37. Boston Loan Co. *v.* Boston, 137 Mass. 332; British Commercial L. Ins. Co. *v.* New York Tax, etc., Com'rs, 31 N. Y. 32, 18 Abb. Pr. (N. Y.) 118, 28 How. Pr. (N. Y.) 41.

38. State *v.* Central Pac. R. Co., 10 Nev. 47; Robinson *v.* Imperial Silver Min. Co., 5 Nev. 44 [*overruling* Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 361, 93 Am. Dec. 409]; Rathbun *v.* Northern Cent. R. Co., 50 N. Y. 656; Olcott *v.* Tioga R. Co., 20 N. Y. 210, 75 Am. Dec. 393 [*overruling* Faulkner *v.* Delaware, etc., Canal Co., 1 Den. (N. Y.) 441].

state, as for example in statutes of limitation.[39] Corporations are sometimes, although not generally, included by implication in the terms of statutes denouncing penalties, although not expressly named therein; such for example as a statute prohibiting the sale of intoxicating liquors.[40]

4. In What Sense a "Citizen." By judicial construction of the constitution of the United States[41] and of the Federal Judiciary Act[42] a corporation is a "citizen," for the purposes of federal jurisdiction,[43] of the state by which its charter has been granted, or under whose laws it has been created — and this without regard to the residence of the shareholders or members who compose the corporation.[44] When a corporation chartered by or created under the laws of a foreign state is sued in a state court, it may therefore remove the cause to the circuit court of the United States in like manner as a non-resident citizen may, without regard to the question of the residence of its shareholders or members.[45] But it is a settled principle of constitutional law that a corporation is not a citizen within the meaning of that clause of the constitution of the United States[46] which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[47]

C. Names of Corporations[48] — 1. Importance and Necessity of Corporate Name. Names are necessary to the very existence of corporations. The corporate name has been said to be "the very being of the constitution; the knot of their combination, without which they could not do their corporate acts; for it is unable to plead and be impleaded, to take and give, until it hath gotten a name."[49]

39. Olcott *v.* Tioga R. Co., 20 N. Y. 210, 75 Am. Dec. 393 [*overruling* Faulkner *v.* Delaware, etc., R. Co., 1 Den. (N. Y.) 441, and *followed* in Thompson *v.* Tioga, R. Co., 36 Barb. (N. Y.) 79]. So under the code of Kansas. North Missouri R. Co. *v.* Akers, 4 Kan. 453, 96 Am. Dec. 183.

40. Stewart *v.* Waterloo Turn Verein, 71 Iowa 226, 32 N. W. 275, 60 Am. Rep. 786.

41. U. S. Const. art. 3, § 2.

42. Judiciary Act of 1789, 11; U. S. Rev. Stat. (1872), § 629.

43. Western Union Tel. Co. *v.* Dickinson, 40 Ind. 444, 13 Am. Rep. 295; Herryford *v.* Ætna Ins. Co., 42 Mo. 148; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Covington Drawbridge Co. *v.* Shepherd, 20 How. (U. S.) 227, 15 L. ed. 896; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80, 14 L. ed. 335; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353 [*overruling* U. S. Bank *v.* Deveaux, 5 Cranch (U. S.) 61, 3 L. ed. 38; Strawbridge *v.* Curtiss, 3 Cranch (U. S.) 267, 2 L. ed. 435]; Booth *v.* St. Louis Fire-Engine Mfg. Co., 40 Fed. 1; Maltz *v.* American Express Co., 16 Fed. Cas. No. 9,002, 1 Flipp. 611.

44. Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Minot *v.* Philadelphia, etc., R. Co., 17 Fed. Cas. No. 9,645, 2 Abb. 323; Hatch *v.* Chicago, etc., R. Co., 11 Fed. Cas. No. 6,204, 6 Blatchf. 105.

Distinction between citizenship and residence of corporations.— The citizenship here spoken of must not be confounded with residence, for the purposes of jurisdiction, as dependent on venue. While a corporation can only be in the theory of the law for the purposes of federal jurisdiction a citizen of the state under whose charter or laws it has been created, for the purposes of jurisdiction as dependent upon venue, or the place where sued, it may become a resident of another state. Bank of North America *v.* Chicago, etc., R. Co., 82 Ill. 493; Bristol *v.* Chicago, etc., R. Co., 15 Ill. 436.

45. Hobbs *v.* Manhattan Ins. Co., 56 Me. 417, 96 Am. Dec. 472. To the same effect is Morton *v.* New York Mut. L. Ins. Co., 105 Mass. 141, 7 Am. Rep. 505; Knorr *v.* Home Ins. Co., 25 Wis. 143, 3 Am. Rep. 26.

46. U. S. Const. art. 4, § 2.

47. Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529; Tatem *v.* Wright, 23 N. J. L. 429; People *v.* Imlay, 20 Barb. (N. Y.) 68; Wheeden *v.* Camden, etc., R. etc., Co., 2 Phila. (Pa.) 23, 13 Leg. Int. (Pa.) 12.

48. **Names of corporations in actions** see *infra*, XXII, D, 2, a, (I) *et seq.*

Misnomer of corporations in pleading see 1 Thompson Corp. § 291 *et seq.*; Pleading.

Misnomer of corporations in written obligations see 1 Thompson Corp. § 294.

Misnomer of corporations in wills see *infra*, 1 Thompson Corp. § 295.

49. 2 Bacon Abr. Corporations (C) [*quoted* in Smith *v.* Tallassee Branch Cent. Plank Road Co., 30 Ala. 650, 664].

When name need not be given in patent of incorporation.— It does not follow from the above that it is necessary in every case that the name of the corporation should be mentioned in the patent or charter, although this is usual. For example it is said that the inhabitants of Dale might be incorporated without the name of the corporation being stated in the patent, in which case they would be known by the name of the Mayor and Commonalty of Dale. **Anonymous**, 1 Salk. 191. So where natural persons are allowed to form

2. CORPORATE NAMES MAY BE ACQUIRED BY USAGE AND REPUTATION. So far from it being strictly necessary that the name of a corporation should be stated in its charter or other instrument of incorporation, corporations may hold and take property by names acquired by usage and reputation merely,[50] and, although the name of a corporation has been changed by an act of the legislature, if the corporation continues to conduct its business in its original name and otherwise exclusively uses that name after the passage of the act it may by usage regain such original name, and can be lawfully sued and proceeded against in bankruptcy by that name.[51]

3. CORPORATE NAMES NOT STRICTLY FRANCHISES BUT PROTECTED IN EQUITY LIKE TRADE-MARKS. While the name of a corporation is not in strictness a franchise, yet the exclusive right to its use may be protected in equity by the writ of injunction by analogy to the protection of trade-marks, just as the name of an individual, a partnership, or a voluntary association may be so protected;[52] and

themselves into a corporation under general enabling statutes by complying with certain forms and conditions they frequently take to themselves a corporate name at pleasure. See Minot *v.* Curtis, 7 Mass. 441; Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195.

Distinction between names of natural persons and of corporations.—It has been pointed out that, whereas the alteration of a letter or the transposition of a word in the name of a natural person may make a totally different name, yet where the name of a corporation consists of special descriptive words, the transposition of them, an interpolation among them, an omission from them, or an alteration of some of them may make no essential difference in their sense, and that the altered name may still be regarded as the name of the corporation. Newport Mechanics' Mfg. Co. *v.* Starbird, 10 N. H. 123, 34 Am. Dec. 145, per Upham, J.

50. *Alabama.*— Smith *v.* Tallassee Branch Cent. Plank Road Co., 30 Ala. 650, holding that a corporation may acquire a name by usage.

Connecticut.— South School Dist. *v.* Blakeslee, 13 Conn. 227.

Massachusetts.— Episcopal Charitable Soc. *v.* Dedham Episcopal Church, 1 Pick. 372.

New Hampshire.— Society for Propagating Gospel *v.* Young, 2 N. H. 310.

New Jersey.—Alexander *v.* Berney, 28 N. J. Eq. 90.

England.— Reg. *v.* Joint Stock Companies, 10 Q. B. 839, 59 E. C. L. 839; Ayray's Case, 11 Coke 18*b*; Rex *v.* Morris, 1 Ld. Raym. 337; Dutch West-India Co. *v.* Van Moses, 1 Str. 612.

When a corporation receiving a new charter retains its old name see Reg. *v.* Ipswich, 2 Ld. Raym. 1232.

51. Alexander *v.* Berney, 28 N. J. Eq. 90.

52. *Connecticut.*— Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; Holmes *v.* Holmes, etc., Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324.

District of Columbia.— Morrow *v.* Edwards, 20 D. C. 475, 20 Wash. L. Rep. 230.

Illinois.— Young Woman's Christian Assoc. *v.* International Committee of Young Woman's Christian Assoc., 86 Ill. App. 607; German Hanoverian, etc., Coach House Assoc. of America *v.* Oldenberg Coach House Assoc. of America, 46 Ill. App. 281.

Iowa.— Grand Lodge A. O. U. W. *v.* Graham, 96 Iowa 592, 65 N. W. 837, 31 L. R. A. 133.

Massachusetts.—American Order of Scottish Clans *v.* Merrill, 151 Mass. 558, 24 N. E. 918, 8 L. R. A. 320, in the absence of statute.

Michigan.— Lamb Knit Goods Co. *v.* Lamb Glove, etc., Co., 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841.

Missouri.— Plant Seed Co. *v.* Mitchell Plant, etc., Co., 23 Mo. App. 579, 37 Mo. App. 313.

New Jersey.— St. Patrick's Alliance of America *v.* Byrne, (1899) 44 Atl. 716.

New York.— Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42 [*reversing* 71 Hun 101, 24 N. Y. Suppl. 801, 54 N. Y. St. 89]; Society of War of 1812 *v.* Society of War of 1812, 46 N. Y. App. Div. 568, 62 N. Y. Suppl. 355.

Pennsylvania.— Ft. Pitt Bldg., etc., Assoc. *v.* Model Plan Bldg., etc., Assoc., 159 Pa. St. 308, 33 Wkly. Notes Cas. 457, 28 Atl. 215; New York Belting, etc., Co. *v.* Goodyear Rubber Hose, etc., Co., 20 Pa. Co. Ct. 493.

Rhode Island.—Aiello *v.* Montecalfo, 21 R. I. 496, 44 Atl. 931; Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

Tennessee.— *Ex p.* Walker, 1 Tenn. Ch. 97.

United States.— Investor Pub. Co. *v.* Dobinson, 72 Fed. 603; R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 70 Fed. 1017, 17 C. C. A. 576; Le Page Co. *v.* Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94; Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,144, Deady 609.

England.— Tussaud *v.* Tussaud, 44 Ch. D. 678, 59 L. J. Ch. 631, 62 L. T. Rep. N. S. 633, 2 Meg. 120, 38 Wkly. Rep. 503; Hendriks *v.* Montagu, 17 Ch. D. 638, 50 L. J. Ch. 456, 44 L. T. Rep. N. S. 879, 30 Wkly. Rep. 160; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Merchant Banking Co. *v.* Merchants' Joint Stock Bank, 9 Ch. D. 560, 47 L. J. Ch. 828, 26 Wkly. Rep. 847.

the absence of a fraudulent intent is no defense to an action for such relief.[53] It seems that this principle does not extend so far as to give a foreign corporation a standing in a domestic court to contest the right of a domestic corporation to use the name given to it by the domestic state in its articles of incorporation;[54] nor on the other hand does it extend so far as to allow a domestic corporation to contest the right of a foreign corporation doing business in a domestic state to the use of its own corporate name,[55] especially where the governing statute of the domestic state, prohibiting the use of similar names of corporations, uses the expression "a corporation of this State."[56] This doctrine, which seems to obtain generally both in England and America, that a corporation will not be allowed

See 12 Cent. Dig. tit. "Corporations," § 137.

Right of voluntary society to restrain unauthorized use of name see ASSOCIATIONS, 4 Cyc. 304, note 21.

In England such a restraining order can be avoided by defendant by giving an undertaking not to carry on business in the threatened name, but to assume another name which will not lead to confusion. Guardian F., etc., Assur. Co. *v.* Guardian, etc., Ins. Co., 50 L. J. Ch. 253, 43 L. T. Rep. N. S. 791.

The supreme court may enter the proper decree disposing of the whole case where it has the whole matter before it as matter of record. Ft. Pitt Bldg., etc., Assoc. *v.* Model Plan Bldg., etc., Assoc., 159 Pa. St. 308, 33 Wkly. Notes Cas. (Pa.) 457, 28 Atl. 215.

Organization in name calculated to deceive. — That a new company which organizes in a name so nearly resembling the name of a competing company as to deceive the public is within the provision of the English Companies Act (1892), § 20, which provides that no company shall be registered under a name identical with that under which an existing company is already registered, "or so resembling the same as to be calculated to deceive," see Manchester Brewery Co. *v.* North Cheshire, etc., Brewery Co., [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 46 Wkly. Rep. 515.

Right to reincorporate under same name which is similar to that of existing corporation. — The statutory right to reincorporate under the same name is not affected by the fact that the name is similar to that of an existing corporation (People *v.* Payn, 161 N. Y. 229, 55 N. E. 849 [*affirming* 43 N. Y. App. Div. 621, 60 N. Y. Suppl. 1146 (*affirming* 28 Misc. (N. Y.) 275, 59 N. Y. Suppl. 851)]), and the New York statute granting this right applies to a mutual benefit fraternity (People *v.* Payn, 28 Misc. (N. Y.) 275, 59 N. Y. Suppl. 851).

Right to use name on purchase of plant, etc. — That the purchase of the plant, etc., of a corporation does not give the right to take the name of the corporation, although it does give the right to take the name of the articles which were manufactured by it, and that the vote of a corporation, which is voluntary and without consideration, to assign the right to use the corporate name to a new corporation which has previously purchased the plant of the corporation so voting, is ineffectual as against the dissenting minority of shareholders see Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

Effect on subscribers of change of name. — That a change in the name of a proposed corporation by reason of the fact that the secretary of state refuses, under the statute, to receive and file the certificate of incorporation because the name infringes that of another domestic corporation does not release subscribers to the shares to the corporation where the purposes of the corporation remain the same see Yonkers Gazette Co. *v.* Taylor, 30 N. Y. App. Div. 334, 51 N. Y. Suppl. 969. And, generally, that subscriptions to the shares of corporations are not released by the fact that the name of the corporation is subsequently changed see Reading *v.* Wedder, 66 Ill. 80; Com. *v.* Pittsburgh, 41 Pa. St. 278.

53. Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

That the rule governing trade-marks should not be applied with strictness in actions to restrain the use of a similar corporate name was held in Colonial Dames of America *v.* Colonial Dames of New York, 29 Misc. (N. Y.) 10, 60 N. Y. Suppl. 302, in which case an injunction was refused in the case of a society or societies organized for ideal purposes, where the only confusion was the miscarriage of mails.

54. Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339; Continental F. Ins. Co. *v.* Continental F. Assoc., 101 Fed. 255, 41 C. C. A. 326.

A federal court will not interfere to prevent the organization of a corporation, under the statute of the state where such court is located, hearing the same name as a corporation organized under the laws of another state, at the suit of the latter. Lehigh Valley Coal Co. *v.* Hamblen, 23 Fed. 225.

May protest against granting such name. — In Pennsylvania, however, a foreign corporation doing business in that state will be allowed to enter a protest with the executive department of the state government against granting a charter under a name which infringes its corporate name. *In re* Bradley Fertilizer Co., 6 Pa. Dist. 423, 19 Pa. Co. Ct. 271.

55. International Trust Co. *v.* International L. & T. Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758.

56. People *v.* Home L. Assur. Co., 111 Mich. 405, 69 N. W. 653.

the use of a name which infringes and conflicts with the name of a domestic corporation already existing is denied in Massachusetts, substantially on the ground that the name of a corporation is in the nature of a franchise and that the certificate of the secretary of state, made in compliance with a statute, whereby a corporation is formed under a name stated therein, is conclusive, not only of the right to be a corporation but also of the right of the incorporators to use that name as their corporate name.[57] A distinction has been taken in this respect between corporations formed under general laws, where the corporate name is voluntarily assumed, and corporations created by special acts of legislation which fix the name of the corporation; with the conclusion that in the latter case the corporate name can no more be annulled in a private proceeding than can its franchise to be a corporation.[58] But the general doctrine unquestionably is that the action of the secretary of state or other state officer in this respect is not conclusive, and that a court of equity may by injunction protect the right of an existing company to the exclusive use of its corporate name.[59] The doctrine, prior in time, prior in right, prevails; so that the body which first becomes entitled to use a particular corporate name will be protected in the use of that name as against another body, incorporating at a later period and assuming the same name.[60] The rule extends so far that a person may be enjoined from using his own name, where he has caused it to be embodied in the name of a corporation for the purpose of dishonestly imposing upon the public his own goods as the goods of another existing corporation using the same or a similar name,[61] in which case he may be enjoined from stamping his goods with the corporate name which he has thus assisted in assuming.[62] It will be no defense to an application for such an injunction that plaintiff is engaged in an unlawful business, since this question is not properly raised in a collateral proceeding, but should be left to be determined in a proceeding by the state against the offending body.[63]

4. Circumstances Under Which Injunctive Relief Not Granted. By analogy to a principle in the law of trade-marks,[64] an injunction will not be granted at the

57. American Order of Scottish Clans *v.* Merrill, 151 Mass. 558, 24 N. E. 918, 8 L. R. A. 320; Boston Rubber Shoe Co. *v.* Boston Rubber Co., 149 Mass. 436, 21 N. E. 875; Rice *v.* Commonwealth Nat. Bank, 126 Mass. 300. *Contra*, in England. Tussaud *v.* Tussaud, 44 Ch. D. 678, 59 L. J. Ch. 631, 62 L. T. Rep. N. S. 633, 2 Meg. 120, 38 Wkly. Rep. 503; Hendriks *v.* Montagu, 17 Ch. D. 638, 50 L. J. Ch. 456, 44 L. T. Rep. N. S. 879, 30 Wkly. Rep. 160.

58. Paulino *v.* Portuguese Beneficial Assoc., 18 R. I. 165, 26 Atl. 36, 20 L. R. A. 272.

The distinction embodies this fallacy: That if the right of the second corporation to use the name which the legislature has conferred upon it as a part of its franchise exists, then the same right to the exclusive use of this name resides in the prior corporation; and on the same grounds the franchise thus conferred on the prior corporation to use the particular name is a grant from the state which, when accepted by the incorporators, becomes an inviolable contract, protected as such by the constitution of the United States under the doctrine of the Dartmouth College case: Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. The second legislative grant, in so far as it infringes that right, is therefore absolutely void, and the prior corporation has the plain right to have an injunction under such circumstances and ought not to be left to the support of the discretionary action of the state's officer who may feel himself bound by the action of the state legislature in making the second grant.

59. Grand Lodge A. O. U. W. *v.* Graham, 96 Iowa 592, 65 N. W. 837, 31 L. R. A. 133; Cincinnati Vici Shoe Co. *v.* Cincinnati Shoe Co., 9 Ohio S. & C. Pl. Dec. 579, 7 Ohio N. P. 135.

60. German Hanoverian, etc., Coach House Assoc. of America *v.* Oldenberg Coach House Assoc. of America, 46 Ill. App. 281.

61. Wm. Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395; Rogers *v.* Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78; El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823; R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 70 Fed. 1017, 17 C. C. A. 576; Wm. Rogers Mfg. Co. *v.* Rogers, etc., Mfg. Co., 11 Fed. 495.

62. R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 70 Fed. 1017, 17 C. C. A. 576 [*affirming* 66 Fed. 56]. Somewhat to the same effect and embodying the same doctrine see Wm. Rogers Mfg. Co. *v.* Rogers, etc., Mfg. Co., 11 Fed. 495.

63. Grand Lodge A. O. U. W. *v.* Graham, 96 Iowa 592, 65 N. W. 837, 31 L. R. A. 133.

64. See with reference to this principle Bolander *v.* Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350; Candee *v.* Deere, 54 Ill.

suit of one corporation to restrain another corporation from the use of a corporate name descriptive of a place or of an employment, there being no fraud or intent to deceive.[65] So a foreign corporation named the "Employers' Liability Assurance Corporation, Limited" could not assert as against a domestic corporation the right to the exclusive use of the words "Employers' Liability," although confusion might result, the words being descriptive of the well-known business.[66] Again one corporation cannot have an injunction restraining another corporation in the use of its corporate name, on the ground that the latter corporation has forfeited its franchise, this being a question which can be raised only in a proceeding instituted by the state.[67] Nor will a corporation be protected in the use of the name of a voluntary association organized previously to the organization of the corporation, as against such association, so as to deprive it of the right to use the name which the corporation has appropriated.[68] On the other hand where the use by unincorporated persons of a corporate name under which they are afterward incorporated is in violation of a statute,[69] such use will confer no rights which will be enforced by the courts of the state.[70] The right to an injunction to restrain another corporation from using the corporate name of plaintiff may, like the right to any other species of equitable relief, be lost by laches,[71] or by assent, acquiescence, or estoppel.[72] This species of relief has also been denied in many cases on grounds relating to the merits of the particular cases, of which examples may be found in the cases cited in the note below.[73]

5. Charters and Certificates of Incorporation Not Granted Which Infringe Existing Corporate Names,[74] Enabling acts which provide for the granting of

439, 5 Am. Rep. 125; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 33 N. Y. St. 267, 9 L. R. A. 576; Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599; Glendon Iron Co. *v.* Uhler, 75 Pa. St. 467, 15 Am. Rep. 599; York Card, etc., Co. *v.* York Wall Paper Co., 4 Pa. Dist. 128, 15 Pa. Co. Ct. 554, 35 Wkly. Notes Cas. (Pa.) 574; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. ed. 247; Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 9 S. Ct. 166, 32 L. ed. 535; Delaware, etc., Canal Co. *v.* Clark, 13 Wall. (U. S.) 311, 20 L. ed. 581; Rumford Chemical Works *v.* Muth, 35 Fed. 524, 1 L. R. A. 44.

65. Thus the Elgin Butter Company could not enjoin the Elgin Creamery Company. Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616.

66. Employers' Liability Assur. Corp. *v.* Employers' Liability Ins. Co., 61 Hun (N. Y.) 552, 16 N. Y. Suppl. 397, 41 N. Y. St. 390.

The prohibition in Nebr. Sess. Laws (1891), c. 14, against the use of distinctive terms relating to building and loan associations to designate corporations of different classes does not apply to corporations organized in 1887. York Park Bldg. Assoc. *v.* Barnes, 39 Nebr. 834, 58 N. W. 440.

Granting a change of name, but requiring alteration so as to show change of sphere of operations, see *In re* Indian Mechanical Gold Extracting Co., [1891] 3 Ch. 538, 61 L. J. Ch. 33, 40 Wkly. Rep. 184.

67. Supreme Ct. S. O. of F. *v.* Supreme Ct. U. O. of F., 94 Wis. 234, 68 N. W. 1011.

68. Grand Lodge A. O. U. W. *v.* Graham, 96 Iowa 592, 65 N. W. 837, 31 L. R. A. 133; Hygeia Water Ice Co. *v.* New York Hygeia Ice Co., 19 N. Y. Suppl. 602, 47 N. Y. St. 71.

69. Ill. Rev. Stat. c. 38, § 220.

70. Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430].

71. As by a delay of ten years. Grand Lodge A. O. U. W. *v.* Graham, 96 Iowa 592, 65 N. W. 837, 31 L. R. A. 133.

A similar rule prevails with reference to enjoining the counterfeiting of trade-marks. See, generally, Trade-Marks and Trade-Names.

72. Of which a good illustration will be found in Clark Thread Co. *v.* Armitage, 74 Fed. 936, 21 C. C. A. 178 [*modifying* and *affirming* 67 Fed. 896].

73. Ottoman Cahvey Co. *v.* Dane, 95 Ill. 203 (holding that the members of a dissolved foreign corporation had the right to carry on their business in the corporate name which they had previously adopted, and that a domestic corporation could not enjoin them from so doing); Converse *v.* Hood, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521; Nebraska L. & T. Co. *v.* Nine, 27 Nebr. 507, 43 N. W. 348, 20 Am. St. Rep. 686 (loan and trust company not enjoined from using the word "Nebraska" in its corporate name at the suit of another such company so using the same word, and doing business one hundred miles away); Merchant Banking Co. *v.* Merchants' Joint Stock Bank, 9 Ch. D. 560, 47 L. J. Ch. 828, 26 Wkly. Rep. 847 (injunction refused in favor of "The Merchant Banking Company of London, Limited," and against "The Merchants' Joint Stock Bank, Limited").

74. Change of name to an existing name not allowed see *infra*, I, C, 6, b.

so-called charters or certificates of incorporation by the secretary of state or other ministerial state officer generally prohibit the granting of such charters or certificates where the name assumed conflicts with the name of an existing corporation. Under such a statute, it has been well held that, although the office of the secretary of state in this respect is a ministerial one, yet his power of refusing such a certificate is not restrained to cases where the assumed corporate name is an exact imitation of the name of the preëxisting corporation, but that he has a discretion to refuse such a certificate where the name assumed so nearly resembles that of an existing corporation that confusion on the part of the public would be likely to arise between the two companies.[75] The rulings of the executive department of the commonwealth of Pennsylvania have reference principally to preventing confusion in the special departments of the state government with respect to taxation, judicial purposes, etc.[76] In many other cases the resemblance of the corporate name chosen by the associates was not sufficiently close to the name of the existing corporation making the protest to warrant a refusal of the charter or of the application to change the corporate name.[77] The principle which restrains the granting of charters or certificates of incorporation to a new corporate body under the same or a similar name to that of an existing corporation does not of course apply in the very common case where a railroad corporation is created to operate an interstate railroad — that is to say, a railroad crossing one or more interstate boundaries — in which case it has been the custom to procure a charter under the same name and, contemplating an identity of organization, from the legislature of each of the states in which an operation of its railway line was to be built,[78] a subject separately considered hereafter.[79] The license granted by the secretary of state to a body of adventurers to use a corporate name not in use by any existing domestic corporation will not be revoked, because an existing corporation having a different name has passed a resolution and given notice of a corporate meeting to vote to change its name to that selected by the new corporation; nor will a mandamus be issued to the secretary of state to receive and file the certificate of the old corporation changing its name to that of the new one.[80]

6. Changing Names of Corporations — a. In General. A corporation cannot

75. State *v.* McGrath, 92 Mo. 355, 5 S. W. 29, where the secretary of state was not compelled by mandamus to grant a certificate of incorporation to "The Kansas City Real Estate Exchange," where he had previously granted a certificate to "The Kansas City Real Estate and Stock Exchange."

76. *Re* Kidd Bros., etc., Steel Wire Co., 5 Pa. Dist. 56, 17 Pa. Co. Ct. 238; *In re* North Fifth St. Mut. Land Assoc., 8 Pa. Co. Ct. 15.

With this end in view a charter was refused to "The Bradley Fertilizer Company of Philadelphia," against the objection of a Massachusetts corporation doing business in Pennsylvania, under the corporate name of "The Bradley Fertilizer Company" merely (*In re* Bradley Fertilizer Co., 19 Pa. Co. Ct. 271), to the "Gas Company of Altoona" against the protest of the "Altoona Gas Company" (Altoona Gas Co. *v.* Altoona Gas Co., 17 Pa. Co. Ct. 662), and, by the Philadelphia court of common pleas, to the "Waverly Ladies of the Red Cross," against the protest of the "Associate Society of the Red Cross of Philadelphia," but approving the application after the insertion of the words "Order of," in the name (*In re* Waverly Ladies of Red Cross, 1 Pa. Dist. 605, 30 Wkly. Notes Cas. (Pa.) 257).

77. International Trust Co. *v.* International L. & T. Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758 (injunction refused to restrain a foreign corporation from doing any business within the domestic state, but granted to restrain the doing of the same business as that of the protesting domestic corporation); Matter of Attica Bank, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 648, 35 N. Y. St. 708; *In re* Kidd Bros., etc., Steel Wire Co., 5 Pa. Dist. 56, 17 Pa. Co. Ct. 238; York Card, etc., Co. *v.* York Wall Paper Co., 4 Pa. Dist. 128, 15 Pa. Co. Ct. 554, 35 Wkly. Notes Cas. (Pa.) 574; *In re* Duquesne College, 2 Pa. Dist. 555, 12 Pa. Co. Ct. 491; *In re* Carlin Mfg. Co., 1 Pa. Dist. 14, 10 Pa. Co. Ct. 667, 29 Wkly. Notes Cas. (Pa.) 158; *In re* Dime Sav. Bank, 9 Pa. Co. Ct. 369, 26 Wkly. Notes Cas. (Pa.) 77; *In re* Citizens' Trust, etc., Co., 9 Pa. Co. Ct. 366, 27 Wkly. Notes Cas. (Pa.) 437; *In re* North Fifth St. Mut. Land Assoc., 8 Pa. Co. Ct. 15; *In re* Columbus Security Order, 27 Wkly. Notes Cas. (Pa.) 36.

78. Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378.

79. See *infra*, I, H.

80. Illinois Watch Case Co. *v.* Pearson, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429.

For other grounds on which charters were

change its name at pleasure by mere corporate action, but it must have the consent of the state in the form of a statutory permission.[81] Such an attempt does not, however, of itself operate to dissolve the corporation, and where a corporation has assumed to change its name without authority of law, a suit begun in its lawful name may be prosecuted to judgment and the judgment will be good.[82] Many of the enabling statutes relating to corporations provide that corporations may change their names by corporate action in the mode pointed out, which is, under some statutes, by procuring amended articles or certificates of incorporation,[83] under others, by an application to a judicial court, in which case good cause must be shown.[84] With reference to the effect of changing the corporate name it may be said that it has no effect whatever, in theory of law, upon the identity of the corporation,[85] although it may have the effect of inducing additional averments in pleading in particular cases.[86] The corporation continues as before responsible for all debts which it had previously contracted.[87] Subscriptions to stock are not invalidated,[88] and it may sue and recover upon such contracts by its new name.[89] If the change of name takes place pending a suit, it has no effect upon the rights of plaintiff;[90] and if the suit is by a corporation, and pending the suit there is a change of the name, it will be too late after judgment for defendant to set up that there was no corporation, especially if he fails to make it appear that the corporators accepted the new name.[91] When by the terms of its charter a corporation is to be the successor of an insolvent corporation having the same functions, franchises, powers, and privileges, and is to become bound for the payment of certain claims against the first corporation, an action of debt or assumpsit may be maintained against the new corporation.[92]

b. Names Which Infringe Existing Names Not Allowed.[93] Petitions addressed

refused by reason of questions relating to names see *In re* Nether Providence Assoc., 2 Pa. Dist. 702, 12 Pa. Co. Ct. 666; *In re* St. Ladislaus Roman Catholic Sick, etc., Assoc., 19 Pa. Co. Ct. 25.

81. Where a name has been given to a corporation by charter or statute this cannot be changed by corporate action, either directly or by user, without statutory permission. Sykes *v.* People, 132 Ill. 32, 23 N. E. 391; Reg. *v.* Joint Stock Companies, 10 Q. B. 839, 59 E. C. L. 839; 1 Dillon Mun. Corp. (4th ed.) § 178. See also Episcopal Charitable Soc. *v.* Dedham Episcopal Church, 1 Pick. (Mass.) 372.

82. O'Donnell *v.* Johns, 76 Tex. 362, 13 S. W. 376.

83. Anthony *v.* International Bank, 93 Ill. 225 (pointing out what corporate action is sufficient under a statute of Illinois); Chicago, etc., R. Co. *v.* Keisel, 43 Iowa 39.

84. *In re* Bank of North America, 2 Pa. Co. Ct. 97. See also *In re* Excelsior Oil Co., 3 Pa. Co. Ct. 184.

The Pennsylvania act of April 20, 1869, conferring on counties the power to change the names of corporations, applies to religious corporations and is not repealed by the Pennsylvania act of April 29, 1874. *In re* Bloomfield First Presb. Church, 111 Pa. St. 156, 2 Atl. 574.

A statute of California (Cal. Code Civ. Proc. § 1276), providing that any religious, benevolent, literary, scientific, "or other corporation," may apply for a change of name embraces by these terms corporations which are formed for private gain. *In re* La Société Francaise D'Epargnes et De Prevoyance Mutuelle, 123 Cal. 525, 56 Pac. 458.

85. Welfley *v.* Shenandoah Iron, etc., Co., 83 Va. 768, 3 S. E. 376; Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53; Atty.-Gen. *v.* Corporation of Leicester, 9 Beav. 546; Atty.-Gen. *v.* Kerr, 2 Beav. 420, 4 Jur. 406, 9 L. J. Ch. 190, 17 Eng. Ch. 420; Atty.-Gen. *v.* Wilson, Cr. & Ph. 1, 18 Eng. Ch. 1, 9 Sim. 30, 16 Eng. Ch. 30; Ludlow *v.* Tyler, 7 C. & P. 537, 32 E. C. L. 746; Scarborough *v.* Butler, 3 Lev. 237; Doe *v.* Norton, 11 M. & W. 913, 7 Jur. 751, 12 L. J. Exch. 418.

86. An action may be maintained against it in its new name by showing the fact that its name has been changed without any change of its corporate composition. Welfley *v.* Shenandoah Iron, etc., Co., 83 Va. 768, 3 S. E. 376.

87. Longley *v.* Longley Stage Line Co., 23 Me. 39 (where the corporators concluded to "rub out and begin anew"); Dean *v.* La Motte Lead Co., 59 Mo. 523.

88. Reading *v.* Wedder, 66 Ill. 80; Com. *v.* Pittsburgh, 41 Pa. St. 278.

89. Bucksport, etc., R. Co. *v.* Buck, 68 Me. 81; Greeneville, etc., R. Co. *v.* Johnson, 8 Baxt. (Tenn.) 332.

90. Welfley *v.* Shenandoah Iron, etc., Co., 83 Va. 768, 3 S. E. 376.

91. Water Lot Co. *v.* Brunswick Bank, 53 Ga. 30.

92. St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199.

93. Granting charters which infringe existing names see *supra*, I, C, 5.

to a judicial court under the authorization of a statute praying for the change of a corporate name will not be allowed where the name which it is proposed to assume will conflict with the name of an existing corporation.[94]

D. Distinction Between Public and Private Corporations With Reference to Question of Public Control. A very important distinction exists between public corporations on the one hand and private corporations on the other, with respect to governmental control: The distinction being that public corporations are subject to governmental visitation and control, being mere creatures or instrumentalities of the state, whereas private corporations are not subject to visitation or control on the part of the state, except in the exercise of the police power, their charters being contracts within the meaning of the contract clause of the federal constitution which the states are prohibited from impairing.[95] This doctrine has been carried to the length of holding that with respect

94. *In re* U. S. Mercantile Reporting, etc., Agency, 115 N. Y. 176, 21 N. E. 1034, 24 N. Y. St. 548 [*affirming* 4 N. Y. Suppl. 916, 22 N. Y. St. 494]; Matter of Manhattan Dispensary, 7 N. Y. St. 871. *Compare* Matter of U. S. Mortgage Co., 83 Hun (N. Y.) 572, 32 N. Y. Suppl. 11, 65 N. Y. St. 134, where the court held it error to refuse the application of the "United States Mortgage Company," to change its name to the "United States Mortgage and Trust Company," against the opposition of a corporation whose name was "The United States Trust Company of New York," both companies being engaged in the same business and having extensive foreign connections. The dissenting opinion of Van Brunt, P. J., in this case is to be preferred. A better decision in the same state was to the effect that a corporation would not be allowed, on a petition for a change of its name, to take the name of the "United States Commercial Agency and Collecting Company," against the opposition of the "United States Mercantile Reporting Company." Matter of U. S. Mercantile Reporting, etc., Assoc., 4 N. Y. Suppl. 916, 22 N. Y. St. 494.

95. *Alabama.*— Wolfe *v.* Underwood, 91 Ala. 523, 8 So. 774; Mobile *v.* Stonewall Ins. Co., 53 Ala. 570; Mobile Branch State Bank *v.* Collins, 7 Ala. 95 (holding that a bank whose stock belongs exclusively to the state is a public corporation and subject to legislative control); State University *v.* Winston, 5 Stew. & P. 17 (holding that the University of Alabama was a public corporation and subject to legislative control).

Arkansas.— State *v.* Burk, 63 Ark. 56, 37 S. W. 406; Wells *v.* Cole, 27 Ark. 603; State *v.* Curran, 12 Ark. 321 [*reversed* in 15 How. (U. S.) 304, 14 L. ed. 705, the court below holding that the State Bank of Arkansas was a public corporation and subject to legislative control].

California.— Hart *v.* Burnett, 15 Cal. 530.

Colorado.— Johnson *v.* People, 6 Colo. App. 163, 40 Pac. 576.

Connecticut.— Hooker *v.* New Haven, etc., Co., 15 Conn. 312, holding that a canal company is a private corporation.

Delaware.— Coyle *v.* Gray, 7 Houst. 44, 30 Atl. 728, 40 Am. St. Rep. 109; Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. 506.

Florida.— State *v.* Knowles, 16 Fla. 577; Holland *v.* State, 15 Fla. 455; Cotten *v.* Leon County, 6 Fla. 610.

Georgia.— Dart *v.* Houston, 22 Ga. 506 (holding that the legislature has plenary power over the charter of an educational corporation which is endowed entirely by the state); Cleaveland *v.* Stewart, 3 Ga. 283.

Indiana.— Downing *v.* Indiana State Bd. of Agriculture, 129 Ind. 443, 28 N. E. 123, 12 L. R. A. 664 (Indiana State Board of Agriculture a private corporation); State *v.* Carr, 111 Ind. 335, 12 N. E. 318 (Indiana State University a private corporation); Lucas *v.* Tippecanoe County, 44 Ind. 524; State *v.* Springfield Tp., 6 Ind. 83; Sloan *v.* State, 8 Blackf. 361.

Iowa.— Duhuque *v.* Illinois Cent. R. Co., 39 Iowa 56, in the dissenting opinion of Cole, J.

Kentucky.—Louisville *v.* Louisville University, 15 B. Mon. 642.

Louisiana.—Montpelier Academy *v.* George, 14 La. 395, 33 Am. Dec. 585.

Maine.— Yarmouth *v.* North Yarmouth, 34 Me. 411, 56 Am. Dec. 666; New Gloucester School Fund *v.* Bradbury, 11 Me. 118, 26 Am. Dec. 515; Bradford *v.* Cary, 5 Me. 339.

Maryland.— Lake Roland El. R. Co. *v.* Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126 (holding that an ordinance authorizing a railroad company to lay double tracks on a side street may be repealed and the company restricted to a single track); Frederick *v.* Groshon, 30 Md. 436, 96 Am. Dec. 591; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; State *v.* Baltimore, etc., R. Co., 12 Gill & J. 399, 38 Am. Dec. 317 (holding that a provision in a railroad charter that if the company shall not locate the road in the manner prescribed therein, it shall forfeit one million dollars for the use of the particular county, was not a contract between the railroad company and the county, such as the legislature could not impair, but was a penalty which the legislature might release at pleasure).

Massachusetts.— Newcomb *v.* Boston Protective Dept., 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778 (holding that a corporation consisting of an association of insurance companies for their mutual benefit is a private corporation); Hale *v.* Hampshire County,

to private or corporate property, a municipal corporation is to be deemed a private corporation in the sense which brings it within the protection of the contract

137 Mass. 111 (holding that railroad corporations are private corporations).

Michigan.— State University *v.* Board of Education, 4 Mich. 213, 225 (holding that "the institution was erected and has been supported by a public fund, and the corporators have no private interest whatever connected with their corporate character"); Swan *v.* Williams, 2 Mich. 427 (where corporations are divided into three classes).

Minnesota.— State *v.* McFadden, 23 Minn. 40, holding that the power of the legislature over counties is supreme, except as restrained by the constitution.

Missouri.—St. Louis *v.* Russell, 9 Mo. 507; Conner *v.* Bent, 1 Mo. 235.

Nebraska.— State University *v.* McConnell, 5 Nebr. 423, holding that the University of Nebraska is a public corporation, and subject to the control of the legislature.

Nevada.— Esser *v.* Spaulding, 17 Nev. 289, 30 Pac. 896.

New Hampshire.— Wooster *v.* Plymouth, 62 N. H. 193; *In re* Farnum, 51 N. H. 376 (holding that school districts are public corporations and subject to legislative control).

New Jersey.—Milburn *v.* South Orange, 55 N. J. L. 254, 26 Atl. 75; Taylor *v.* Griswold, 14 N. J. L. 222, 27 Am. Dec. 33.

New York.— Demarest *v.* New York, 74 N. Y. 161; People *v.* Pinckney, 32 N. Y. 377; Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313; People *v.* Morris, 13 Wend. 325; Brick Presb. Church Corp. *v.* New York, 5 Cow. 538 (holding that the obligee in a contract made by a municipal corporation is entitled to the same remedy as if the contract had not been made in its legislative capacity).

North Carolina.— Gooch *v.* Gregory, 65 N. C. 142 (holding that an execution cannot be issued against a county); Mills *v.* Williams, 33 N. C. 558 (holding that the legislature has the power to abolish a county).

Ohio.— Marietta *v.* Fearing, 4 Ohio 427, holding that the legislature may amend the charters of a municipal corporation at any time.

Oregon.—Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

Rhode Island.—Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217, holding that the commissioners of the "North Burial Ground" were a public corporation and subject to legislative control.

South Carolina.— State *v.* State Bank, 1 S. C. 63 (holding that the Bank of South Carolina was a public corporation, its capital having been furnished by the state); State *v.* State Bank, 1 Speers 433 (Harper, Ch., saying that until the Dartmouth College decision the definition of corporations into public and private had not been generally recognized, but that previous to that time the general definition had been into eleemosynary and civil).

[I, D]

Virginia.— Wambersie *v.* Orange Humane Soc., 84 Va. 446, 5 S. E. 25; Prince William School Bd. *v.* Stuart, 80 Va. 64 (holding that a bequest to the vestry of a parish to be expended for the education of the poor of the county is subject to legislative control; but to the contrary see the dissenting opinion of Lewis, P., at page 73, referring to the Dartmouth College case at pages 74 and 80); Lewis *v.* Whittle, 77 Va. 415 (medical college endowed by the state a public corporation).

West Virginia.—Wilson *v.* Ross, 40 W. Va. 278, 21 S. E. 868.

Wisconsin.—Burhop *v.* Milwaukee, 21 Wis. 257, holding that railroad companies are private corporations.

United States.— New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943; Essex Public Road Bd. *v.* Skinkle, 140 U. S. 334, 11 S. Ct. 790, 35 L. ed. 446; Williamson *v.* New Jersey, 130 U. S. 189, 9 S. Ct. 453, 32 L. ed. 915; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629 [*quoted* in Frederick *v.* Groshon, 30 Md. 436, 96 Am. Dec. 591, and many other cases]; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205; Sweatt *v.* Boston, etc., R. Co., 23 Fed. Cas. No. 13,684, 3 Cliff. 339 (holding that railroad corporations are private commercial corporations and subject to proceedings in bankruptcy); Adams *v.* Boston, etc., R. Co., 1 Fed. Cas. No. 47, 1 Holmes 30 (holding that railroad corporations are private commercial corporations); Allen *v.* McKean, 1 Fed. Cas. No. 229, 1 Sumn. 276 (holding that Bowdoin College is a private and not a public corporation); Rundle *v.* Delaware, etc., Canal Co., 21 Fed. Cas. No. 12,139, 1 Wall. Jr. 275 (learned opinion by Grier, J., showing that a canal or navigation company is a private corporation and hence liable in damages for its torts).

See 12 Cent. Dig. tit. "Corporations," § 9.

What are public and quasi-public corporations for the purposes of this distinction see Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 30.

Views of Chancellor Kent on this subject see 2 Kent Comm. 275, 276.

Further as to the distinction between public and private corporations see 1 Thompson Corp. § 24, and the following cases:

Indiana.— State *v.* Vincennes University, 5 Ind. 77.

Missouri.—Heller *v.* Stremmel, 52 Mo. 309.

New Jersey.— Tinsman *v.* Belvidere, etc., R. Co., 26 N. J. L. 148, 69 Am. Dec. 565.

Pennsylvania.—Pittsburgh's Appeal, 123 Pa. St. 374, 16 Atl. 621, 23 Wkly. Notes Cas. 91.

United States.— Rundle *v.* Delaware, etc., Canal, 21 Fed. Cas. No. 12,139, 1 Wall. Jr. 275.

A joint-stock bank, all of whose shares belong to the state, has been held to be a pub-

clause of the federal constitution as interpreted in the Dartmouth College case.[96] This doctrine creates a marked exception to the general rule that municipal corporations incur no responsibility by reason of their neglect to perform duties which rest upon them in their public or governmental capacity.[97] So although

lic corporation, because all the interest therein belongs to the government. Cleaveland *v.* Stewart, 3 Ga. 283. But this is doubtful. The sound view seems to be that if a state goes into a banking business it divests itself of its sovereignty and becomes *pro hac vice* a private corporation. State Bank *v.* Gibson, 6 Ala. 814; State Bank *v.* Clark, 8 N. C. 36; State Bank *v.* Gibbs, 3 McCord (S. C.) 377; Kentucky Bank *v.* Wister, 2 Pet. (U. S.) 318, 7 L. ed. 437; U. S. Bank *v.* Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

Untenable view that a bank which issues circulating notes is a public corporation whereas other banks are private see State *v.* Simonton, 78 N. C. 57.

Public school corporations and hospitals.— Whether public school corporations, such as school districts, school trustees, academies, etc., are to be deemed public or private corporations see 1 Thompson Corp. § 25; and that an incorporated hospital, creating a charity, deriving its funds mainly from public and private charity, is a public corporation in the sense of not being liable for the negligence of a surgeon selected by its trustees even to a pay patient see McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529. That the board of education of the state of Illinois is a private eleemosynary and not a public corporation see Board of Education *v.* Bakewell, 122 Ill. 339, 10 N. E. 378.

Municipal corporations are deemed private corporations with respect to the ownership and control of private or corporate property, as distinguished from property devoted strictly to public or governmental uses (Bullmaster *v.* St. Joseph, 70 Mo. App. 60; Whitfield *v.* Carrollton, 50 Mo. App. 98; Millburn *v.* South Orange, 55 N. J. L. 254, 26 Atl. 75; Bailey *v.* New York, 3 Hill (N. Y.) 531 [*affirmed* in 2 Den. (N. Y.) 433]; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9, 31 Am. Dec. 313), as where it maintains a dam to supply its inhabitants with water (Bailey *v.* New York, 3 Hill (N. Y.) 531 [*affirmed* in 2 Den. (N. Y.) 433]), a public building partly rented for profit to private persons (Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485), a wharf from which it derives profit (Macauley *v.* New York, 67 N. Y. 602; Memphis *v.* Kimbrough, 12 Heisk. (Tenn.) 133), or public sewers, although these have a strict relation to the public health (Lloyd *v.* New York, 5 N. Y. 369, 55 Am. Dec. 347).

96. *Illinois.*— Richland County *v.* Lawrence County, 12 Ill. 1.

Iowa.— Warren *v.* Lyons City, 22 Iowa 351.

Kentucky.— Louisville *v.* Louisville University, 15 B. Mon. 642.

Massachusetts.— Hampshire County *v.* Franklin County, 16 Mass. 76.

Michigan.—People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

New York.— People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

South Carolina.— *In re* Malone, 21 S. C. 435, holding that a legislative grant of escheated property to the city of Charleston for the benefit of its orphan house could not be resumed by the state, even by a constitutional ordinance.

Tennessee.— Woodfork *v.* Union Bank, 3 Coldw. 488.

Texas.—Milam County *v.* Bateman, 54 Tex. 153; Galveston County *v.* Tankersley, 39 Tex. 651 (holding that a title of a county to school lands granted by the state could not be divested by the legislature after patent issued); Brownsville *v.* Basse, 36 Tex. 461 (holding that a grant of land by the state to a municipal corporation created by it could not be repealed).

Vermont.— White *v.* Fuller, 38 Vt. 193; Atkins *v.* Randolph, 31 Vt. 226; Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748 (holding that a statute dividing an incorporated town could not be allowed to have any effect upon properties held by the town in trust for the specific purpose named in its charter, and which was not designed for its use as a municipal corporation); Montpelier *v.* East Montpelier, 27 Vt. 704 (discussion).

Wisconsin.— State *v.* Haben, 22 Wis. 660 (applying the same doctrine to counties); Milwaukee *v.* Milwaukee City, 12 Wis. 93 (holding that the legislature cannot annex a portion of land of one town to another).

See and *compare* the following cases:

Arkansas.— Pearson *v.* State, 56 Ark. 148, 19 S. W. 499, 35 Am. St. Rep. 91.

California.— Grogan *v.* San Francisco, 18 Cal. 590.

Indiana.— Lucas *v.* Tippecanoe County, 44 Ind. 524, where the whole doctrine is shaken up pro and con in the opinion and the dissenting opinions.

Louisiana.— New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 478, 517.

Maryland.—Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

United States.— Pawlet *v.* Clark, 9 Cranch 292, 3 L. ed. 735; Terrett *v.* Taylor, 9 Cranch 43, 3 L. ed. 650.

97. Durkes *v.* Union, 38 N. J. L. 21; Pray *v.* Jersey City, 32 N. J. L. 394; Livermore *v.* Camden, 31 N. J. L. 507 [*affirming* 29 N. J. L. 245]; Cooley *v.* Essex, 27 N. J. L. 415; Sussex County *v.* Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Darlington *v.* New

the business of banking is subject to state supervision and regulation in the exercise of the police power, yet an incorporated bank having a joint stock which is owned by private individuals is a private corporation in the sense that the legislature cannot alter its charter without the consent of its corporators.[98] This is not true of a bank which is organized primarily to further the fiscal operations of the government and whose stock is exclusively owned by the government;[99] but a private bank whose stock is owned by private persons is a private corporation, although it is erected by the government and its obligations and operations partake of a public nature.[1]

E. Purposes For Which Corporations May Be Formed — 1. In General. The answer to this question must be sought with reference to national corporations, in the constitution of the United States and in the decisions of the federal courts; with reference to state corporations, in the constitution and the statute law of each particular state. Assuming that the question has been properly raised in an action prosecuted by the state, the question whether the purposes for which a given corporation has been formed are lawful purposes is to be determined by the description of those purposes as given in its instrument of incorporation.[2] If, as expressed on the face of this instrument of incorporation, the purpose for which the corporation is formed is not necessarily unlawful, it will be presumed that it was for a purpose for which corporations might lawfully be formed;[3] and this presumption holds in a case of a foreign corporation.[4] If, upon an inspection of the instrument of incorporation, its primary object — such as a lottery scheme — is unauthorized by law, the corporation will be dissolved in a proper proceeding, although the instrument of incorporation may set forth secondary objects — relating, for example, to the mode of distribution of the money thus raised — which may be lawful and even praiseworthy.[5]

York, 31 N. Y. 164, 88 Am. Dec. 248; Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

What corporations have been deemed public. — Overseers of the poor in New York (Rouse *v.* Moore, 18 Johns. (N. Y.) 407), trustees of the poor in Mississippi (Governor *v.* Gridley, Walk. (Miss.) 328. *Compare* Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122), park commissioners in Illinois (Andrews *v.* People, 84 Ill. 28; Andrews *v.* People, 83 Ill. 529), navigation improvement companies in Pennsylvania (Bennett's Branch Imp. Co.'s Appeal, 65 Pa. St. 242), and levee districts in California (People *v.* Williams, 56 Cal. 647; Dean *v.* Davis, 51 Cal. 406).

Corporations formed to promote public objects for private gain. — It does not follow that because the object which the corporation is organized to promote is a public object, that is to say, an object in which the public generally have an interest, the corporation is for that reason to be deemed a public corporation in the sense which places it under governmental control (Tinsman *v.* Belvidere, etc., R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Whiting *v.* Sheboygan, etc., R. Co., 25 Wis. 167, 3 Am. Rep. 30), such as railway companies (Tinsman *v.* Belvidere, etc., R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625, and note) and canal companies (Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233).

Levee district companies are therefore deemed private corporations, and that a levee district board is a private corporation in the sense that it cannot be clothed with the power of taxation see Board of Directors, etc. *v.* Houston, 71 Ill. 318.

98. State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30; Logwood *v.* Planters', etc., Bank, Minor (Ala.) 23.

99. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

1. Story, J., in Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. To the same effect see Piqua State Branch Bank *v.* Knoop, 16 How. (U. S.) 369, 14 L. ed. 977. *Compare* Curran *v.* Arkansas, 15 How. (U. S.) 304, 74 L. ed. 705, where the doctrine seems to have been considerably modified.

2. Detroit Driving Club *v.* Fitzgerald, 109 Mich. 670, 67 N. W. 899; Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287.

3. U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58, 42 N. E. 403.

4. U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 38 N. E. 729; Demarest *v.* Flack, 128 N. Y. 205, 28 N. E. 645, 40 N. Y. St. 383.

What extrinsic evidence will not overthrow this presumption see U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58, 42 N. E. 403 [*affirming* 74 Hun (N. Y.) 435, 26 N. Y. Suppl. 632, 57 N. Y. St. 261].

5. State *v.* Inter-National Invest. Co., 88 Wis. 512, 60 N. W. 796, 43 Am. St. Rep. 920.

2. Formation For Illegal Objects. The formation of corporations is not permitted under enabling statutes, where the real purpose of the incorporation is to cloak an illegal object or an unlawful business; but in such a case the fiction of the existence of a corporation will be disregarded by a court of justice when the question arises in a proper proceeding, and the acts of the real parties will be dealt with as though no such corporation had been formed;[6] and the same is true for stronger reasons where an illegal purpose is expressed in the articles, as where the so-called charter of an educational corporation attempts to clothe the directors with power to confer degrees[7] or where it provides for the holding of business meetings on Sunday.[8] Upon the question what objects are illegal, it has been held that an application under a statute for a so-called charter for the maintenance of a private park or a lake is ostensibly for a lawful purpose, it not appearing that the object of the incorporation is to reduce the lake to private dominion.[9] Where the general law of the state permits the consolidation of corporations, it is not against public policy for a corporation to be formed under a general enabling statute, merely because the ulterior purposes of the coadventurers is to have the corporation consolidated with another.[10]

3. Statutes Under Which Single Corporation Cannot Be Formed For More Than One Purpose. Where the statute permits corporations to be formed for several purposes named in the alternative, separated by the disjunctive conjunction "or," it is held that a single corporation cannot be organized for more than one of such purposes, and that articles of incorporation which include more than one of them are void, and that incorporation under such articles will be refused.[11] This has

6. Chicago First Nat. Bank *v.* Trebein Co., 59 Ohio St. 316, 52 N. E. 834.

7. *In re* Duquesne College, 2 Pa. Dist. 555, 12 Pa. Co. Ct. 491.

8. Matter of Agudath Hakchiloth, 18 Misc. (N. Y.) 717, 42 N. Y. Suppl. 985.

9. *In re* Lake Wynola Assoc., 3 Pa. Co. Ct. 626.

10. Hill *v.* Nisbet, 100 Ind. 341.

11. *Georgia.*— *In re* Deveaux, 54 Ga. 673.

Indiana.—State *v.* Beck, 81 Ind. 500; Newton County Draining Co. *v.* Nofsinger, 43 Ind. 566 [*distinguishing* Shick *v.* Citizens' Enterprise Co., 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep. 230]; Skelton Creek Draining Co. *v.* Mauck, 43 Ind. 300; O'Reiley *v.* Kankakee Valley Draining Co., 32 Ind. 169; West *v.* Bullskin Prairie Ditching Co., 32 Ind. 138; Williams *v.* Citizens' Enterprise Co., 25 Ind. App. 351, 57 N. E. 581.

Michigan.—Isle Royale Land Corp. *v.* State Secretary, 76 Mich. 162, 43 N. W. 14.

Minnesota.— State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

New York.— People *v.* Beach, 19 Hun 259.

Pennsylvania.— *In re* Skandinaviska, 3 Pa. Dist. 235; *In re* Pennsylvania State Sportsmen's Assoc., 1 Pa. Dist. 763; *In re* Richmond Retail Coal Co., 9 Pa. Co. Ct. 172. But it has been held in Pennsylvania that a so-called charter presented to a judicial court for a corporation to manufacture and supply gas, and also to supply light and heat by any other means than gas, is not void by reason of combining such powers; but that so much of it by which the coadventurers undertake to acquire a right either to supply light by other means than gas and also to furnish fuel is invalid. West Manayunk Gas Light Co. *v.* New Gas Light Co., 21 Pa. Co. Ct. 369.

England.— *In re* Crown Bank, 44 Ch. D. 634, 59 L. J. Ch. 739, 62 L. T. Rep. N. S. 823, 38 Wkly. Rep. 666.

Under the Pennsylvania corporation act of 1874, charters have been uniformly refused to bodies seeking to become incorporated for business purposes, where the proposed charter set forth more than one purpose — as the manufacture of gas meters, machines, and regulators, and also the purpose of dealing in any kind of goods at wholesale (*In re* Application for Charter, 5 Pa. Dist. 243), the purpose of "manufacturing gas for illuminating," and also "manufacturing, leasing, buying and selling all goods, materials, apparatus and appliances, with the right to acquire and hold patent rights for inventions and designs relating thereto, and receiving and granting licenses thereunder" (*In re* McClurg Gas Constr. Co., 4 Pa. Dist. 349); "the supply, storage, or transportation of water and water power for commercial or manufacturing purposes" (*In re* Sowego Water, etc., Co., 4 Pa. Dist. 181, 182, where afterward the purpose of supplying water to the public was omitted and the charter was refused on other grounds); for the manufacture and supply of gas, and for the supply of light and heat by other means than gas (*In re* New Gas Light Co., 7 Pa. Dist. 151); to supply gas to portions of two counties (West Manayunk Gas Light Co. *v.* New Gas Light Co., 21 Pa. Co. Ct. 369); for carrying on "mechanical, mining, quarrying, and manufacturing business," although it was said that two of such pursuits may be so closely kindred and cognate as to authorize,

been held not to preclude the incorporation of a company for two cognate purposes, but a purpose expressed to be "for the mining and for the manufacturing of oil and gas" was held too general and indefinite to justify the granting of a charter, since it might be held to combine the provisions of different statutes, regulating the formation of corporations.[12]

4. WHAT IS A "MECHANICAL" OR "MANUFACTURING" CORPORATION. The mining of iron ore is a "mechanical business" within the meaning of a constitutional provision granting exemption from superadded liability to shareholders of corporations organized for the purpose of carrying on "any kind of manufacturing or mechanical business."[13] A corporation organized to supply light by means of electricity is a manufacturing corporation within the meaning of a statute relating to taxation,[14] and also within the meaning of a statute permitting one or more manufacturing corporations to consolidate.[15] But a corporation formed under a statute authorizing the formation of corporations "for the purpose of collecting, storing and preserving ice, of preparing it for market, of transporting it . . .; and of vending the same," and whose business is confined to the purposes expressed in the act, is not a manufacturing corporation within a statute creating an exemption from taxation; otherwise it is conceded if it manufactures ice by artificial means.[16] An aqueduct corporation is not a manufacturing corporation, and its pipes and appliances for purifying and controlling a water-supply are not machinery employed in manufacture within the meaning of a statute exempting the value of such machinery in the taxation of shares.[17] A corporation organized for the purpose of mining coal is not a manufacturing corporation within the meaning of a statute defining and regulating the enforcement of liabilities of officers and shareholders of manufacturing corporations.[18] A corporation organized for the purpose of "constructing, using and providing one or more dry-docks or wet-docks or other conveniences and structures for building, raising, repairing or coppering vessels and steamers of every description" is not a manufacturing

under special circumstances, the formation of a corporation embracing both objects (*In re* Newton-Hamilton Oil, etc., Co., 10 Pa. Co. Ct. 452, 453); or for mining and boring for petroleum and natural gas, and for buying, selling, producing, storing, transporting, and shipping the same, with the right to purchase land, etc., where the proposed charter asks for the additional privilege of a pipe-line company with the right of eminent domain under another statute (*In re* Washing Min., etc., Co., 9 Pa. Co. Ct. 323).

Under the Pennsylvania act of 1895, permitting the creation of corporations for buying, selling, trading, and merchandising at wholesale, a corporation cannot be organized, not only for the manufacture of certain kinds of articles of commerce, but also for the purpose of dealing in any kinds of goods, wares, and merchandise at wholesale; since this would warrant the corporation in engaging in any and all kinds of merchandising at wholesale, which the statute was understood not to warrant. *In re* Charter Purposes, 17 Pa. Co. Ct. 577. Nor can a charter be granted, under the Pennsylvania act of May 23, 1895, to a company whose purpose is stated to be both life and property insurance. *In re* Charter for Ins. Co., 5 Pa. Dist. 315. Nor is the organization of corporations for buying and selling vinous, spirituous, and malt liquors at wholesale authorized by the Pennsylvania act of June 25, 1895, providing for the incorporation of companies for "buying, selling, trading or dealing in any kind or kinds of goods, wares, and merchandise at wholesale . . . The legislature has always dealt with the liquor traffic on a basis different from other kinds of business and trade." *In re* Pennsylvania Bottling, etc., Co., 6 Pa. Dist. 530, 531, 19 Pa. Co. Ct. 593.

A partnership formed simply for the purpose of being incorporated under the English Companies Act of 1862 in order that it may be forthwith wound up and not for carrying on business, cannot be registered as a company under part 7 of the act. Reg. *v.* Joint Stock Companies, [1891] 2 Q. B. 598, 61 L. J. Q. B. 3, 65 L. T. Rep. N. S. 392, 39 Wkly. Rep. 708.

12. *In re* Newton Hamilton Oil, etc., Co., 10 Pa. Co. Ct. 452.

13. Cowling *v.* Zenith Iron Co., 65 Minn. 263, 68 N. W. 48, 60 Am. St. Rep. 471, 33 L. R. A. 508.

14. People *v.* Wemple, 129 N. Y. 543, 29 N. E. 808, 42 N. Y. St. 272, 14 L. R. A. 708.

15. Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94.

16. People *v.* Knickerbocker Ice Co., 99 N. Y. 181, 1 N. E. 669.

17. Dudley *v.* Jamaica Pond Aqueduct Corp., 100 Mass. 183.

18. Byers *v.* Franklin Coal Co., 106 Mass. 131.

corporation within the meaning of a statute exempting such corporations from taxation.[19] A company organized for the purpose of manufacturing and supplying gas is entitled to the exemption from taxation granted by the laws of New York to "manufacturing corporations carrying on manufactures within this State."[20]

5. Corporations Formed "For Any Lawful Business or Purpose Whatever." Where an enabling statute authorizes the formation of corporations for enumerated purposes, and adds "or for any lawful business or purpose whatever, except," etc., this last clause is not so construed as to authorize the formation of any and every kind of corporation for any or every kind of lawful business and purpose, but is restrained in its meaning by the principle *noscitur a sociis*, and merely authorizes the formation of corporations of a like kind or for a like business or purpose as those specifically authorized.[21]

6. Purposes For Which Corporations May Be Formed Under Various Statutes. Under an act authorizing the formation of corporations for trade or for carrying on any lawful mechanical, manufacturing, or agricultural business, a corporation may be formed for the purpose of buying, owning, improving, selling, and leasing lands, tenements, hereditaments, real, personal, and mixed estates, and property, including the constructing and leasing of a building.[22] A corporation for the sale of goods, mining supplies, etc., may be organized under a statute,[23] providing that the legislative assemblies of the several territories may by general incorporation acts permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other "industrial pursuits."[24] A corporation which has for its object the purchase of land and the construction of houses thereon — the funds being raised from the capital stock paid in by subscribers in instalments — and finally the allotment of the lot and houses among the shareholders in satisfaction of their stock is authorized under a statute[25] permitting any number of persons to become incorporated for the transaction of any lawful business.[26] The provision of the Missouri statute[27] authorizing the incorporation of companies for various purposes therein specified, and for any other purpose intended for pecuniary profit or gain not otherwise especially provided for, and not inconsistent with the state laws and constitution, is broad enough to authorize incorporation for the purpose of issuing and selling bonds to be redeemable at prescribed periods and in a prescribed order.[28] A laundry business operated by the use of machines and mechanical instruments instead of manual labor is within a statute[29] providing for the incorporation of companies to do "mechanical business."[30] A corporation to buy and sell stock, bonds, and public securities may be

19. People *v.* New York Floating Dry Dock Co., 92 N. Y. 487.

20. Nassau Gas Light Co. *v.* Brooklyn, 25 Hun (N. Y.) 567 [*affirmed* in 89 N. Y. 409].

The attorney-general of Pennsylvania has construed the term "mechanical business," as used in a statute of that state relating to the organization of corporations (Pa. Act of April 29, 1874) as referring to the employment of skilled labor in shaping materials into structures or products of utility and not as incidental to one of the arts or professions. He consequently rules that preparing and mechanically executing designs for decorating and furnishing buildings is not a business; nor is dredging and excavating in rivers and executing submarine work. *In re* Mechanical Business Cases, 9 Pa. Co. Ct. 1.

21. Thus if a statute authorizes the formation of telegraph corporations and adds the words above given in quotations, these words will authorize the formation of telephone companies, since they are of a like kind with telegraph companies. Wisconsin Telephone Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

That a Telephone company may be regarded as a telegraph company see Atty.-Gen. *v.* Edison Telephone Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

22. Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

23. U. S. Rev. Stat. (1872), § 1889.

24. Bashford-Burmister Co. *v.* Agua Fria Copper Co., (Ariz. 1894) 35 Pac. 983.

25. Nebr. Comp. Stat. c. 16, § 123.

26. York Park Bldg. Assoc. *v.* Barnes, 39 Nebr. 834, 58 N. W. 440.

27. Mo. Rev. Stat. (1889), § 2771, subs. 11.

28. State *v.* Talbot, 123 Mo. 69, 27 S. W. 366; State *v.* Corkins, 123 Mo. 56, 27 S. W. 363.

29. Pa. Act April 29, 1874.

30. *In re* Keystone Laundry Co., 5 Pa. Dist. 735, 18 Pa. Co. Ct. 444.

organized under the Pennsylvania statute authorizing companies for "trade and commerce."[31] A corporation may take to itself, under the statute law of Tennessee, the power to purchase specific property, provided the property is useful, convenient, and suitable to the general purposes of the corporation, and provided also that such purposes are legal.[32] A general statute authorizing the formation of corporations "for the erection of buildings" authorizes the formation of corporations for the purpose of engaging as a business in the erection of buildings.[33] A corporation organized to carry on the business usually performed by an express company is organized for the prosecution of "an industrial pursuit."[34] Under a statute which after enumerating many special purposes for which corporations could be formed, contained a subdivision reading, "for any other purpose intended for mutual profit or benefit, not otherwise specially provided for and not inconsistent with the Constitution and laws of this State,"[35] a corporation might be formed "for the purpose of buying, selling, and dealing in real estate, live stock, bonds, securities, and other properties of all kinds, on its own account and for commission in the United States and elsewhere," the constitution and statute law of the state containing no express or implied prohibition of such business.[36] A statute[37] which, after enumerating the purposes for which corporations may be formed, adds the clause, "or other lawful business," authorizes the formation of a corporation, the purpose of which is recited as the "purchasing and holding real estate, subdividing the same into town or village lots and townsites, and selling and disposing of the same."[38] The business of preparing ice in its natural state for use as an article of consumption is within a statute authorizing the formation of corporations for "manufacturing purposes."[39] The manufacture of lumber, flour, and meal is within the purview of a statute authorizing "the formation of corporations for manufacturing, agricultural, mining, or mechanical purposes."[40] The establishment and maintenance of a wharf-boat and steam elevator at a city situated on a navigable stream, for a general storage and forwarding business, is a "work of public utility," within the meaning of a statute[41] enumerating the purposes for which corporations may be formed.[42] A corporation may be organized to guarantee the bonds of a university, under a statute permitting the formation of corporations for any lawful enterprise, business, pursuit, or occupation.[43] A corporation organized entirely for educational purposes is not authorized by a statute enabling corporations to be organized "for pecuniary profit," by reason of the fact that fees are to be charged for tuition.[44] A corporation created by a

31. *In re* Pittsburgh Stock Exch., 26 Pittsb. Leg. J. N. S. 308. That real estate or land improvement corporations must in California be formed under Cal. Civ. Code, pt. 4, tit. 1, and not under pt. 4, tit. 16, § 639, see Vercoutere *v.* Golden State Land Co., 116 Cal. 410, 48 Pac. 375.

32. Bristol Bank, etc., Co. *v.* Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228.

33. People *v.* Troy House Co., 44 Barb. (N. Y.) 625.

34. Within the meaning of U. S. Rev. Stat. (1872), § 1889. Wells *v.* Northern Pac. R. Co., 23 Fed. 469, 10 Sawy. 441.

35. Tex. Rev. Stat. art. 566, subs. 27.

36. Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101 [*criticizing* Texas, etc., Canal, etc., Co. *v.* Galveston County Ct., 45 Tex. 272].

37. Minn. Stat. (1866), c. 34, § 45, as amended by Minn. Laws (1873), c. 13.

38. Brown *v.* Corbin, 40 Minn. 508, 42 N. W. 481. A corporation formed to carry on a manufacturing or other mechanical business and to purchase the stock of an insolvent corporation may support its existence under such a statute, although its organization purports to have been made under another. State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

39. Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287.

40. Cross *v.* Pinckneyville Mill Co., 17 Ill. 54.

41. La. Rev. Stat. § 683.

42. Glen *v.* Breard, 35 La. Ann. 875.

43. Maxwell *v.* Akin, 89 Fed. 178, holding that a clause in articles of incorporation whereby the corporation takes to itself the power to engage in the business of guaranteeing the bonds of a university, "and, to that end, to acquire, hold, plat, mortgage, and convey, both real and personal estate," is not a limitation on the powers of the corporation.

44. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776.

special act of the legislature for the purpose of constructing and maintaining a pipe line for the conveyance of petroleum is valid under a constitutional provision prohibiting incorporation under special acts for any other purpose except, among other things, "the construction of some work of internal improvement."[45]

7. Purposes For Which Corporations Cannot Be Formed Under Various Statutes. Under a statute authorizing incorporation for the manufacture of sugar, syrup, starch, and glucose, and which, among other things, authorizes the formation of corporations for the transaction of manufacturing, mechanical, and mercantile business, a corporation cannot be formed for the manufacture of matches and woodenware.[46] Under a statute authorizing the formation of corporations for any lawful purpose, except, among other things, insurance,[47] a corporation cannot be formed, the purpose of which is to guarantee the fidelity of persons holding public or private places of trust, the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind, since these things are insurance, and this notwithstanding the fact that at the time of the passage of the act the guaranteeing of the obligations just mentioned was not carried on as a business.[48] The organization of a corporation for the purpose of carrying on the business of buying and selling bonds is not authorized by a statute,[49] authorizing the formation of corporations for the purpose of buying and selling merchandise and conducting mercantile operations.[50]

F. Who May Be Corporators or Members of Corporations[51] — **1. Alien Friends.** The shares of joint-stock corporations being personal property, although the capital of the corporation may be invested in land, and alien friends, whether domiciled within the United States or in foreign countries, being permitted without question to own personal property, to make, take, and enforce contracts with respect to it, and to own land except where the state interferes to escheat it, it seems conclusively to follow that they may become corporators in joint-stock corporations organized for pecuniary gain, the actual (although possibly not the theoretical) *situs* of which is known in this country.[52]

2. Alien Enemies. Alien enemies manifestly cannot become original organizers of corporations, because the original con-association is founded in contract, and under a principle of public law no contract between parties situated on opposite sides of the lines of belligerent occupation can be valid.[53]

3. Infants. Executory contracts cannot be enforced against infants, unless ratified by the infant after becoming of age. There seems to be no propriety in

45. West Virginia Transp. Co. *v.* Volcanic Oil, etc., Co., 5 W. Va. 382.

Construction of a statute referring to corporations as "loan, mortgage, security, guaranty or indemnity company, . . . having the power and receiving money on deposit," and requiring reports from them to the superintendent of the banking department of the state, with the conclusion that a corporation formed to establish a public exchange for receiving deposits and transferring earnest moneys, stocks, bonds, and other securities, procuring and making loans thereon, and guaranteeing the payment of bonds and other obligations, is such a corporation. People *v.* Mutual Trust Co., 96 N. Y. 10.

46. Parkinson Sugar Co. *v.* Ft. Scott Bank, 60 Kan. 474, 57 Pac. 126.

47. Ill. Act April 18, 1872; Ill. Rev. Stat. (1899), c. 32, § 1.

48. People *v.* Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124.

49. Burns Rev. Stat. Ind. (1894), § 4583.

50. Indiana Bond Co. *v.* Ogle, 22 Ind. App. 593, 54 N. E. 407. 72 Am. St. Rep. 326.

51. Partnerships or corporations as shareholders see *supra*, I, A, 8.

Who may become shareholders see *infra*, VI, G.

52. That a ship may have a British register, although some of the members of the company which own it are aliens, see Reg. *v.* Arnaud, 9 Q. B. 806, 16 L. J. Q. B. 50, 58 E. C. L. 806. See also Aliens, 2 Cyc. 89, note 32 *et seq.*

53. As to this principle of public law see Lamar *v.* Browne, 92 U. S. 187, 23 L. ed. 650; The Flying Scud *v.* U. S., 6 Wall. (U. S.) 263, 18 L. ed. 755; The Peterhoff *v.* U. S., 5 Wall. (U. S.) 28, 18 L. ed. 564; U. S. *v.* Alexander, 2 Wall. (U. S.) 404, 17 L. ed. 915; Jecker *v.* Montgomery, 18 How. (U. S.) 110, 15 L. ed. 311; Hourjet *v.* Morris, 3 Campb. 303; Willison *v.* Patteson, 1 Moore C. P. 133, 7 Taunt. 439, 18 Rev. Rep. 525, 2 E. C. L. 436; Bell *v.* Reid, 1 M. & S. 726, 14 Rev. Rep. 557; Potts *v.* Bell, 8 T. R. 548, 5 Rev. Rep. 452; Albretcht *v.* Sussmann, 2 Ves. & B. 323, 13 Rev. Rep. 110; *Ex p.* Boussmaker, 13 Ves. Jr. 71, 9 Rev. Rep. 142.

the view taken by one court[54] that an infant can be a corporator.[55] He may become a shareholder in a joint-stock corporation, subject to his right to repudiate the relation within a reasonable time after becoming of age,[56] but subject to the obligation to pay calls, notwithstanding his infancy, so long as he holds on to the shares.[57] And while the directors have the power to refuse to allow him to become a shareholder,[58] yet if they fail so to do, a transfer of shares to him will not be void, but voidable merely.[59]

4. MARRIED WOMEN. Whether a married woman can be a corporator must depend upon the answer to the question whether, according to the law of the state in which the corporation is organized, she rests under the disabilities under which married women rest at common law. By that law a married woman had no power of contracting except in a few cases, which do not include the case under consideration. Under that law she cannot therefore become a party to an original subscription for shares.[60] Thus while she rested, in Pennsylvania, under the disabilities of the common law, she could not be one of the five subscribers required by the statute to the organization of a corporation;[61] but after those disabilities were removed by statute[62] she was not disqualified from becoming a corporator in a proposed corporation;[63] and in that state a charter has been granted by a judicial court to a corporation organized for benevolent purposes, all of whose corporators were married women.[64] Even where the common-law disabilities upon married women remained, the courts of equity interfered in her behalf and established the principle that she might make contracts in writing, as if she were sole, so as to bind her separate estate, provided that was the intent of the parties, which contracts were enforceable by a proceeding in equity.[65] Statutes have also interfered, establishing the dominion of married women over their separate estates, which statutory separate estate is regarded as a legal estate. Here, unless the statute provides otherwise, she can contract generally and her contract will bind her estate; and she may consequently become a shareholder in a corporation,[66] and consequently, it is supposed, an original member.

5. NUMBER OF CORPORATORS. General statutes under which corporations may

54. Chicago Mut. L. Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

55. See to this effect Matter of Globe Mut. Ben. Assoc., 63 Hun (N. Y.) 263, 17 N. Y. Suppl. 852, 43 N. Y. St. 756.

But, under the English Companies Act of 1862, where one of the number of members necessary to the registration, that is, to the organization, of the company, was an infant, that fact did not prevent it from having a *de facto* existence so as to be entitled to be wound up as a company. *In re* Nassau Phosphate Co., 2 Ch. D. 610, 45 L. J. Ch. 584, 24 Wkly. Rep. 692, per Hall, V. C. See also *In re* Laxon, [1892] 3 Ch. 555, 61 L. J. Ch. 667, 67 L. T. Rep. N. S. 85, 40 Wkly. Rep. 621, per Vaughan Willis, J. [*distinguishing In re* National Debenture, etc., Corp., [1891] 2 Ch. 505, 60 L. J. Ch. 533, 64 L. T. Rep. N. S. 512, 39 Wkly. Rep. 707].

56. Dublin, etc., R. Co. *v.* Black, 8 Exch. 181, 22 L. J. Exch. 94, 7 R. & Can. Cas. 434; Northwestern R. Co. *v.* McMichael, 5 Exch. 114, 15 Jur. 132, 20 L. J. Exch. 97; Newry, etc., R. Co. *v.* Coombe, 3 Exch. 565, 18 L. J. Exch. 325, 5 R. & Can. Cas. 633; Coke Litt. 380*b*; Lindley Comp. L. (5th ed.) 39.

57. Cork, etc., R. Co. *v.* Cazenove, 10 Q. B. 935, 11 Jur. 802, 59 E. C. L. 935; Leeds, etc., R. Co. *v.* Fearnley, 7 D. & L. 68, 4 Exch. 26, 18 L. J. Exch. 330, 5 R. & Can. Cas. 644; Northwestern R. Co. *v.* McMichael, 5 Exch. 114, 15 Jur. 132, 20 L. J. Exch. 97; Lindley Comp. L. (5th ed.) 39.

58. *In re* Asiatic Banking Corp., L. R. 5 Ch. 298, 39 L. J. Ch. 461, 22 L. T. Rep. N. S. 217, 18 Wkly. Rep. 366.

59. *In re* Blakely Ordnance Co., L. R. 4 Ch. 31, 17 Wkly. Rep. 65.

60. Witters *v.* Sowles, 38 Fed. 700; Lindley Comp. L. (5th ed.) 41.

61. *In re* Application for Charter, 27 Wkly. Notes Cas. (Pa.) 399.

62. Pa. Married Women's Act 1893.

63. *In re* Married Persons' Property Act, 5 Pa. Dist. 742, 18 Pa. Co. Ct. 492, per McCormick, Atty.-Gen.

64. *In re* Bloomfield First Independent Ladies' Aid Soc., 1 Pa. Dist. 754.

65. Martin *v.* Colburn, 88 Mo. 229; Boatmen's Sav. Bank *v.* Collins, 75 Mo. 280; Davis *v.* Smith, 75 Mo. 219; Sharpe *v.* McPike, 62 Mo. 300; Lincoln *v.* Rowe, 51 Mo. 575; Whitesides *v.* Cannon, 23 Mo. 457.

66. Witters *v.* Sowles, 38 Fed. 700.

Under the English Married Woman's Property Act of 1882 see *In re* Leeds Banking Co., L. R. 3 Eq. 781, 36 L. J. Ch. 90, 15 L. T. Rep. N. S. 266, 15 Wkly. Rep. 146; Reg. *v.* Carnatic R. Co., L. R. 8 Q. B. 299, 42 L. J. Q. B. 169, 28 L. T. Rep. N. S. 413,

be organized fix in all cases, it is believed, the minimum number of persons who may unite to form a corporation. A frequent practice is for an individual desiring to turn his business into a corporation having a limited liability to get a sufficient number of dummies — persons who are under his control and who have no individual responsibility — to unite with him and thus to furnish the requisite number of signatures to the instrument of con-association. It seems that such a concern is to be regarded as a corporation *de facto*, and that a man may thus turn himself into a corporation, by committing a plain fraud on the law, so as to defeat his unsecured creditors.[67]

G. National Corporations — Power of Congress to Create — 1. General Nature of Power. Congress may create corporations, as an appropriate means of executing any of the powers conferred by the constitution upon the general government.[68] Congress may therefore, in virtue of its power to regulate commerce between the states, create a corporation to build a bridge across a navigable river separating two states, as for example the North River Bridge Company, incorporated under an act of congress with power to construct a bridge across the Hudson river between the states of New York and New Jersey.[69] Moreover, where such a corporation is organized for a public purpose, congress may undoubtedly confer the right of eminent domain upon it, without the consent of the states within which its works are to be established and carried on.[70] Under this principle congress may create corporations (1) within the territories, under its constitutional power "to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States";[71] (2) within the District of Columbia, under the grant of power "to exercise exclusive legislation in all cases whatsoever over such District";[72] (3) and within the states (and also within the territories and the District of Columbia), for the purpose of carrying into effect any of the other powers granted by congress, whether in express language or by necessary implication.[73] (4) Quasi-municipal corporations have been created by congress within state limits upon Indian reservations, and the power of congress so to do is understood to stand unquestioned.[74] (5) The

21 Wkly. Rep. 621; *In re* London, etc., Bank, 18 Ch. D. 581, 50 L. J. Ch. 557, 45 L. T. Rep. N. S. 166, 30 Wkly. Rep. 118.

67. Salomon *v.* Salomon, [1897] A. C. 22, 66 L. J. Ch. 35, 75 L. T. Rep. N. S. 426, 4 Manson 89, 45 Wkly. Rep. 193; Broderip *v.* Salomon, [1895] 2 Ch. 323, 72 L. T. Rep. N. S. 261. To a similar effect see Louisville Banking Co. *v.* Eisenman, 94 Ky. 83, 21 S. W. 531, 1049, 14 Ky. L. Rep. 705, 42 Am. St. Rep. 335, 19 L. R. A. 684; Munkittrick *v.* Perryman, 74 L. T. Rep. N. S. 149.

68. Luxton *v.* North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. ed. 808; California *v.* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150; Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319; *In re* Legal Tender Cases, 110 U. S. 421, 4 S. Ct. 122, 28 L. ed. 204; Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

69. Luxton *v.* North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. ed. 808.

70. Luxton *v.* North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. ed. 808; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295; U. S. *v.* Great Falls Mfg. Co., 112 U. S. 645, 5 S. Ct. 306, 28 L. ed. 846; U. S. *v.* Jones, 109 U. S. 513, 3 S. Ct. 346, 27 L. ed. 1015; U. S. *v.* Fox, 94 U. S. 315, 24 L. ed. 192; Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; Stockton *v.* Baltimore, etc., R. Co., 32 Fed. 9.

An historical sketch of corporations which have been created by congress will be found in 1 Thompson Corp. §§ 665–669.

71. U. S. Const. art. 4, § 3, cl. 2.

72. U. S. Const. art. 1, § 8.

73. *In re* Legal Tender Cases, 110 U. S. 421, 4 S. Ct. 122, 28 L. ed. 204; Farmers, etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

74. U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; Utah, etc., R. Co. *v.* Fisher, 116 U. S. 28, 6 S. Ct. 246, 29 L. ed. 542; *Ex p.* Kan-gi-shun-ca, 109 U. S. 556, 3 S. Ct. 396, 27 L. ed. 1030; Kansas Indians *v.* Johnson County, 5 Wall. (U. S.) 737, 18 L. ed. 667; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; History of the Creek and Cherokee Controversy, 1 Van Holst Const. Hist. U. S. (Am. ed.) 433. See as to Ute Reservation in the state of Colorado created in the territory of Colorado by treaty of March 2, 1868 (15 U. S. Stat. at L. 619), U. S. *v.* McBratney, 11 Fed. 96 note.

power of congress to regulate commerce among the several states granted by the so-called commerce clause of the federal constitution,[75] is construed as totally excluding the power of the states over that subject, so that in the absence of a regulation made by congress the constitutional provision is tantamount to a mandate that interstate commerce shall be free.[76] Intercommunication is commerce; telegraph lines are instruments of commerce; and when they cross the boundaries of states they are instruments of interstate commerce.[77] Congress has conferred very important franchises upon such companies.[78] There is no doubt of the power of congress to enact such statutes[79] under its power to regulate commerce,[80] and the power of congress to confer important franchises upon corporations under state laws necessarily implies a power to create such corporations by direct legislation in the first instance. (6) Congress also possesses the power, under the constitution, "to establish post-offices and post-roads."[81] By an act of congress "all railroads or parts of railroads which are now or hereafter may be in operation" are established as post-roads of the United States.[82] The acts of congress just referred to may also be ascribed to this power. Some of them use the word "post-roads," and others, such as the one giving congress the power to purchase existing telegraph lines, employ the words "for postal, military, or other purposes." Post-roads are roads which have been declared such under the constitutional power by an act of congress, and it seems that they embrace ordinary highways and city streets.[83] As just seen they embrace railroads, and it seems that an elevated railroad in a city is a post-road in the sense that it cannot exclude a telegraph company operating under the franchises conferred by congress in the acts of congress already cited, from the privilege of suspending its wires along its elevated structure.[84] (7) Congress unquestionably may confer franchises upon corporations created by or under the laws of states of the Union, whenever it is necessary to give effect to the powers expressly granted to the general government by the federal constitution. The legislation relating to telegraph companies just referred to may be cited as an instance of the valid exercise of this power.[85] (8) There is no doubt that for the purpose of effectuating any of the express powers conferred upon the general government that government may exercise the power of eminent domain within the states,

75. U. S. Const. art. 1, § 8.

76. Corson *v.* Maryland, 120 U. S. 502, 7 S. Ct. 655, 30 L. ed. 699; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 S. Ct. 635, 29 L. ed. 785; Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691; Brown *v.* Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158; Hall *v.* De Cuir, 95 U. S. 485, 24 L. ed. 547; Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146; Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96; Cooley *v.* Philadelphia, 12 How. (U. S.) 299, 13 L. ed. 996.

77. Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 5 Nev. 102; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. ed. 229; Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 S. Ct. 1126, 30 L. ed. 1187; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. ed. 1067; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708.

78. U. S. Rev. Stat. (1872), §§ 5263–5269.

79. Pensacola Tel. Co. *v.* Western Union Tel. Co., 19 Fed. Cas. No. 10,960, 2 Woods 643 [*affirmed* in 96 U. S. 1, 24 L. ed. 708].

80. Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 5 Nev. 102.

81. U. S. Const. art. 1, § 8.

82. U. S. Rev. Stat. (1872), § 3964.

83. As to what congress has declared to be post-roads see 1 Thompson Corp. p. 526; U. S. Rev. Stat. (1872), § 3964; 23 U. S. Stat. at L. 3; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. ed. 1067; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708.

84. Western Union Tel. Co. *v.* New York City, 38 Fed. 552, 3 L. R. A. 449.

85. See for example an act to protect telegraph lines owned or occupied by the United States, June 23, 1874 (18 U. S. Stat. at L. 250). Western Union Tel. Co. *v.* Seay, 132 U. S. 472, 10 S. Ct. 161, 33 L. ed. 409; Leloup *v.* Mobile, 127 U. S. 640, 8 S. Ct. 1380, 32 L. ed. 311 [*reversing* 76 Ala. 401]; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. ed. 229; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790; Western

and consequently may confer the power upon corporations, whether created by it, or already in existence.[86] In one railway charter granted by congress, it was provided that the assent of the state should be obtained to the condemnation of land; and it seems that this provision was complied with by obtaining the consent of the state after the road had been constructed.[87] (9) Congress has undoubtedly the power to confer exclusive jurisdiction upon the federal courts, of all suits by or against national corporations, and to provide for removing suits brought against them in the state courts to the federal courts.[88] The creation of a corporation by congress is held by implication to make any controversy to which such corporation may be a party a controversy "arising under . . . the laws of the United States," within the meaning of the federal constitution.[89] And it seems that congress has power to make the jurisdiction of the federal courts over all controversies to which that jurisdiction is made to extend under the constitution and acts of congress exclusive.[90]

2. Within the Territories. In the exercise of its plenary power over this subject, already referred to,[91] congress has provided for the formation of corporations within the territories, by general statutes enacted by the territorial legislatures, but has forbidden the granting of private charters or of special privileges to corporations.[92] The power of congress itself to create corporations within the territories is of course unrestricted, and this power has been repeatedly exercised.[93] A corporation of a territory cannot sue or be sued in a court of the United States as a national corporation.[94] When a territory becomes admitted into the Union as a state the corporations lawfully created and existing therein become, to all intents and purposes, state corporations.[95]

3. Within the District of Columbia. The general and exclusive legislative power over the District of Columbia, conferred upon congress by the clause of the constitution of the United States already referred to, of course carries with it the power to create corporations within that district.[96] Corporations created by congress within the District of Columbia, other than those which are created for the purpose of giving effect to the general powers of the government of the United States, are created in virtue of the power of congress as the local

Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 S. Ct. 1126, 30 L. ed. 1187.

86. U. S. *v.* Jones, 109 U. S. 513, 3 S. Ct. 346, 27 L. ed. 1015; Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449.

The charter of one national railway corporation provides for the condemnation of private property within the states, according to the law of the state in which the property is situated. 16 U. S. Stat. at L. p. 576, § 10.

87. Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319.

88. Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

89. U. S. Const. art. 3, § 2; Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319.

90. Claflin *v.* Houseman, 93 U. S. 130, 23 L. ed. 833; Gaines *v.* Fuentes, 92 U. S. 10, 23 L. ed. 524; The Moses Taylor *v.* Hammons, 4 Wall. (U. S.) 411, 18 L. ed. 397. These cases by implication overrule Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667. A quo warranto suit by a state against a corporation originally chartered by such state, to test the validity of the merger of such corporation, is a suit arising under the laws of the United States. Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

91. See *supra*, I, G, 1.

Plenary power of congress over the territories see Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103; Church of Jesus Christ, etc. *v.* U. S., 136 U. S. 1, 34 L. ed. 478 [*affirming* 5 Utah 362, 15 Pac. 473].

92. U. S. Rev. Stat. (1872), § 1889.

As to the power of a territorial legislature, under an enabling act of congress, to charter a corporation see Vincennes University *v.* Indiana, 14 How. (U. S.) 268, 14 L. ed. 416.

93. See for example 24 U. S. Stat. at L. 107.

94. Adams Express Co. *v.* Denver, etc., R. Co., 16 Fed. 712, 4 McCrary 77.

95. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Vance *v.* Farmers', etc., Bank, 1 Blackf. (Ind.) 80; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794.

96. For cases in which the existence of this power has been recognized see Daly *v.* U. S. National L. Ins. Co., 64 Ind. 1; Williams *v.* Creswell, 51 Miss. 817; Hadley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 122; Huntington *v.* District of Columbia Nat. Sav. Bank, 96 U. S. 388, 24 L. ed. 777.

legislature for that district. Congress can and has made the District of Columbia substantially a municipal corporation. It has been said that congress can confer upon the District of Columbia only municipal powers. But there seems to be no such restraint imposed upon congress by the constitution. Corporations created by the District of Columbia, when acting in any of the states of the Union, are deemed to be foreign corporations in the same sense in which a corporation created by another state is so deemed.[97]

4. NATIONAL BANKS. Congress has the power to create national banks for the purpose of furnishing a means of marketing the bonds of the United States, and of giving effect to the fiscal powers of the government; and this power, although not expressly granted, belongs to that numerous class of powers which, even when arising by judicial implication merely, may be referred to the express power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."[98]

H. Interstate Corporations Created by Concurrent Action of Two States. It has been found necessary, at least in the case of railroad corporations maintaining interstate railroads, to procure charters from two or more states. These charters have been couched in similar language, have conferred substantially similar franchises and privileges, and under them one organization has taken place, and the railroad properties created thereunder have been managed by one governing body, forming substantially one corporation. That there is no constitutional objection to this seems to be clear and settled.[99] But under an old and somewhat musty doctrine that a corporation can have but one domicile and must dwell in the place of its creation,[1] judicial casuistry, after struggling painfully with the question, came to the conclusion that such concurrent legislation did not operate to create a single corporation, but operated to create a separate corporation within each state, although possessing the same powers and franchises, and being managed by the same governing body.[2] This casuistry, however, was not suited to the practical needs of a business people; and consequently the court which first propounded it was compelled in a subsequent decision to abandon the doctrine and to adopt the better view that the question whether there is a unity in the corporation and in the proprietorship of the corporate property is in such case one of legislative intent and not of legislative power. Accordingly the doctrine of the court now is that several states may by competent legislation unite in creating the same corporation or in combining several preëxisting corporations into a single one; that one state may make a corporation of another state, as thus organized and conducted, a corporation of its own, as to any property within its territorial jurisdiction; and that a state may by an enabling act authorize a corporation created in another state to build and use a railroad within its own limits without creating a new corporation.[3] Illustrations of these conclusions are

97. Daly *v.* U. S. National L. Ins. Co., 64 Ind. 1; Williams *v.* Creswell, 51 Miss. 817; Hadley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 122.

98. U. S. Const. art. 1, § 8, last clause. That congress had the constitutional power to create the former national bank was held in McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579. That it had the power to create the existing national banks was held in Van Allen *v.* Assessors, 3 Wall. (U. S.) 573.

99. Bishop *v.* Brainerd, 28 Conn. 289.

1. Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

2. Newport, etc., Bridge Co. *v.* Woolley, 78 Ky. 523 (holding that the legal status of two corporations thus created is that of agents for each other); Allegheny County *v.* Cleveland, etc., R. Co., 51 Pa. St. 228, 88 Am. Dec. 579; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130.

3. Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354 [*followed* in Copeland *v.* Memphis, etc., R. Co., 6 Fed. Cas. No. 3,209, 3 Woods 651]. But in another federal court it was held that where the charter of a corporation in one state is duplicated in another state, and the legislature assumes to create a home corporation, the effect is to consolidate the two; but for purposes of jurisdiction it is a separate corporation within the state of its adoption. In such a case a separate organization is not neces-

now seen every day in the passage by states of enactments making foreign corporations doing business within the domestic jurisdictions domestic corporations, and amenable in all respects to the domestic laws and police regulations, notwithstanding the provisions of their foreign charters.[4] But it remains equally true that for many purposes of legal procedure and practical convenience in the administration of justice each one of the bodies so created remains a domestic corporation within the state under whose legislature it has been called into existence.[5] Clearly such a corporation is a domestic corporation within each of the states whose legislation has created it, for the purpose of local jurisdiction to the application of local police regulations.[6] Such a corporation is a resident of each of such states, for the purpose of the ordinary jurisdiction of its courts, and consequently may be subjected to garnishment in any one of them, provided the *situs* of the debt is there, although its principal office or place of business be not there.[7] Being a domestic corporation, such a corporation is not subject to foreign attachment.[8] For the same reason, when such a corporation is sued in either of the states by whose legislation it has been created, it is not entitled to remove the cause to the circuit court of the United States, unless all the plaintiffs are "citizens" of some other state, where the ground under which the removal is sought is diverse state citizenship.[9] Such a corporation is a domestic corporation within each state by whose legislation it has been created, for the purpose of suing and

sary. Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525.

4. See, generally, FOREIGN CORPORATIONS.

5. Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354. *Compare In re* St. Paul, etc., R. Co., 36 Minn. 85, 30 N. W. 432 (holding that it is a domestic corporation for the purpose of the service of process); Baltimore, etc., R. Co. *v.* Marshall County, 3 W. Va. 319; Goshorn *v.* Ohio County, 1 W. Va. 308; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518; Indianapolis, etc., R. Co. *v.* Vance, 96 U. S. 450, 24 L. ed. 752; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571. See also *infra*, III, B.

Cannot plead non-residence.—From the premise that a corporation created by the legislation of two states is a domestic corporation in each of such states, and has a legal existence or residence in each of them, it cannot, when sued in either of them, plead its non-residence, on the ground of being a resident of the other. Mobile, etc., R. Co. *v.* Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518. The fact that a railroad corporation, existing under a charter granted by the state of Tennessee and performing its corporate functions in that state, had been previously incorporated under earlier charters obtained from Alabama and Mississippi, under which charters it had effected an organization in those states, and under which it was still operating in those states, did not render it any the less a domestic corporation and a resident of the state of Tennessee. Georgia, etc., R. Co. *v.* Stollenwerck, 122 Ala. 539, 25 So. 258.

6. Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130. See also Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572, for a consideration of the status of such corporation.

The ultra vires acts of a foreign corporation, which is a creature of the laws of two different states, are not made valid by a confirmatory statute enacted by the legislature in one only of such states. Fisk *v.* Chicago, etc., R. Co., 4 Abb. Pr. N. S. (N. Y.) 378.

There is also a theory to the effect that such a corporation is at once a domestic and a foreign corporation within each of the states creating it — a domestic corporation to the extent of its action under the government of the domestic state, and a foreign corporation as regards the other sources of its existence. State *v.* Northern Cent. R. Co., 18 Md. 193.

7. Smith *v.* Boston, etc., R. Co., 33 N. H. 337; Mahany *v.* Kephart, 15 W. Va. 609; Drake Attach. (5th ed.) § 479. See also Bolton *v.* Pennsylvania Co., 88 Pa. St. 261.

8. Sprague *v.* Hartford, etc., R. Co., 5 R. I. 233.

9. Horne *v.* Boston etc., R. Co., 62 N. H. 454; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518; Paul *v.* Baltimore, etc., R. Co., 44 Fed. 513; Cohn *v.* Louisville, etc., R. Co., 39 Fed. 227.

Opposed to the above is a questionable decision reversing a decision of the United States circuit court of appeals (three justices of the supreme court dissenting), to the effect that such a corporation may be regarded as a foreign corporation for the purpose of suing a domestic citizen or corporation of either of the states by which it is created. Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363. But how a corporation can be a foreign corporation in the very state by whose legislation it has been created for any purpose except to enlarge federal jurisdiction on fictitious grounds cannot be made to appear.

being sued there,[10] although upon a cause of action arising in the other state;[11] and the courts of one of the states by whose legislation it has been chartered may restrain it from expending its corporate funds for any other than corporate purposes, whether in that state or anywhere else.[12]

I. Constitutional Restraints Upon Creation of Corporations and Granting of Corporate Privileges — 1. Index to Provisions. Many of the states have embodied provisions in their constitutions restraining the power of their legislatures in the creation of corporations, in the granting of corporate franchises and privileges, in the extension of charters, and in remitting forfeitures of charters, in the particulars named below. Down to a recent date these provisions will be found collected and set out in full in a modern work on the law of private corporations.[13] Others have been collected bringing the record down to a late date. These constitutional provisions, together with others which have been established since the publication of that work, are so numerous and extensive that it will not be practicable in the present article to do more than briefly index them.[14]

10. Guinault *v.* Louisville, etc., R. Co., 41 La. Ann. 571, 6 So. 850.

11. Mississippi, etc., R. Co. *v.* Ayres, 16 Lea (Tenn.) 725.

12. State *v.* Northern Cent. R. Co., 18 Md. 193.

13. 1 Thompson Corp. §§ 538–568.

14. Corporations not to be created, etc., by special laws. 1 Thompson Corp. § 539.

Arkansas.— Const. (1874), art. 12, § 2.

California.— Const. (1879), art. 4, § 25, div. 19.

Colorado.— Const. (1876), art. 5, § 25; art. 15, § 2.

Idaho.— Const. (1889), art. 3, § 19.

Illinois.— Const. (1870), art. 4, § 22; art. 11, § 1.

Kansas.— Const. (1859), art. 12, § 1.

Louisiana.— Const. (1898), arts. 48, 262, no local or special law creating, or amending, renewing, extending, or explaining any charter thereof.

Missouri.— Const. (1875), art. 4, § 53; art. 12, § 2.

Montana.— Const. (1889), art. 5, § 26; art. 15, § 2.

Nebraska.— Const. (1875), art. 3, § 15.

Pennsylvania.— Const. (1873), art. 3, § 7.

Washington.— Const. (1889–1890), art. 2, § 28.

Shall not be created by special acts, but only under general laws.— 1 Thompson Corp. § 540.

Alabama.— Const. (1875), art. 13, § 1.

Arkansas.— Const. (1874), art. 12, § 6, in part.

California.— Const. (1879), art. 12, § 1, in part.

Delaware.— Const. (1831), art. 2, Addendum of § 17.

Florida.— Const. (1868), art. 5, § 22.

Georgia.— Const. (1877), art. 3, § 7, par. 18, that all corporate powers and privileges to banking, insurance, railroad, canal, navigation, express, and telegraph companies shall be issued and granted by the secretary of state, in such manner as shall be prescribed by law.

Idaho.— Const. (1899), art. 11, § 2.

Indiana.— Const. (1851), art. 11, § 13.

Iowa.— Const. (1857), art. 8, § 1.

Louisiana.— Const. (1898), art. 275, may pass general laws for creation of corporations and protection of shareholders thereof.

Maine.— Const. (1820), art. 4, § 14, Amendm. 1876.

Maryland.— Const. (1867), art. 3, § 48.

Michigan.— Const. (1850), art. 15, § 1, Amendm. 1862.

Minnesota.— Const. (1857), art. 10, § 2.

Mississippi.— Const. (1890), § 178.

Nebraska.— Const. (1875), art. 11, § 1.

Nevada.— Const. (1864), art. 8, § 1.

New Jersey.— Const. Amendm. (1875), art. 4, § 7.

New York.— Const. Amendm. (1874), art. 2, § 18 (in part); Const. (1894), art. 8, § 1 (not to be created except under general laws, except where, in the judgment of the legislature, objects of, cannot be otherwise attained, etc.).

North Carolina.— Const. Amendm. (1876), art. 8, § 1; Const. (1901), art. 8, § 1.

North Dakota.— Const. (1889), § 131.

Oregon.— Const. (1857), art. 11, § 2.

South Carolina.— Const. (1868), art. 12, § 1; Const. (1894), art. 12, § 1.

South Dakota.— Const. (1889), art. 17, § 1.

Tennessee.— Const. (1870), art. 11, § 8.

Texas.— Const. (1876), art. 3, § 56; art. 12, §§ 1, 2.

Utah.— Const. (1895), art. 12, § 1.

West Virginia.— Const. (1872), art. 11, § 1.

Wisconsin.— Const. (1848), art. 11, § 1; Const. Amendm. (1871), art. 4, § 31.

Wyoming.— Const. (1889), art. 10, § 1, under general laws only.

Special acts shall not be passed for the benefit of corporations. La. Const. (1898), art. 48 (legislature forbidden to pass any special law granting any special or exclusive privilege or immunity to corporations); Miss. Const. (1890), § 87 (no special act may be passed for the benefit of corporations); Miss. Const. (1890), § 90*u* (grants of lands to corporations by special acts of legislation

2. Object and Policy of Restraints. The policy of the constitutional provisions just indexed and catalogued, which prohibit the legislatures from passing special or local acts creating corporations, conferring corporate powers, extending

prohibited); N. Y. Const. (1894), art. 8, § 4 (legislature prohibited from enacting special charters for banking associations).

Stock of corporations not to be increased except by general laws and with consent of majority of shareholders, etc.

Idaho.— Const. (1899), art. 11, § 9, and all fictitious increase of stock or indebtedness declared void.

Louisiana.— Const. (1898), art. 267.

North Dakota.— Const. (1889), § 138, majority of shareholders at a meeting to be held after sixty days.

South Dakota.— Const. (1889), art. 17, § 8, same provision.

Utah.— Const. (1895), art. 12, § 5, after notice given as prescribed by law.

Which general laws or special acts are subject to alteration, amendment, or repeal. 1 Thompson Corp. § 541.

Alabama.— Const. (1875), art. 13, § 1, in part.

Arkansas.— Const. (1874), art. 12, § 6.

California.— Const. (1879), art. 12, § 1.

Idaho.— Const. (1889), art. 11, §§ 2, 3.

Iowa.— Const. (1857), art. 8, § 12.

Kentucky.— Const. (1891), § 205, general assembly empowered to provide for revocation of charters of corporations when guilty of abuse or misuse of corporate powers.

Maryland.— Const. (1867), art. 3, § 48.

South Dakota.—Const. (1889), art. 17, § 9, whenever deemed injurious to citizens of the state, but must be done so that no injustice be done to incorporators.

Utah.— Const. (1895), art. 12, § 1.

Washington.— Const. (1889–1890), art. 12, § 1.

Wyoming.— Const. (1889), art. 10, § 2, police power of state over corporations declared to be supreme, and legislature may forfeit their franchises for neglect of duty or abuse of power.

Legislature not to extend charters or remit forfeitures of them. 1 Thompson Corp. § 542; Cal. Const. (1879), art. 12, § 7; Mo. Const. (1875), art. 12, § 3; Wash. Const. (1889–1890), art. 12, § 3.

Corporations not to have remission of forfeiture of charters or any beneficial legislation except on condition of submission to constitutional provisions. 1 Thompson Corp. § 543.

Alabama.— Const. (1875), art. 13, § 3.

Arkansas.— Const. (1874), art. 17, § 8.

Georgia.— Const. (1877), art. 4, § 2, par. 1.

Idaho.— Const. (1889), art. 11, § 7.

Mississippi.— Const. (1890), § 179.

North Dakota.— Const. (1889), § 133.

Pennsylvania.— Const. (1873), art. 16, § 2.

South Dakota.— Const. (1889), art. 17, § 3.

Utah.— Const. (1895), art. 12, § 2.

Legislature may alter, revoke, or annul existing charters.— 1 Thompson Corp. § 544; Ala. Const. (1875), art. 13, § 10 (in part); Colo. Const. (1876), art. 15, § 3; Mont. Const. (1889), art. 15, § 3; Pa. Const. (1873), art. 16, § 10.

The legislature shall enact no law creating, extending or renewing the charter of more than one corporation. 1 Thompson Corp. § 545; Ala. Const. (1875), art. 13, § 10; Pa. Const. (1873), art. 16, § 10; S. D. Const. (1889), art. 17, § 9.

Existing charters, special privileges, etc., annulled where no bona fide organization has taken place under them. 1 Thompson Corp. § 546.

Alabama.—Const. (1875), art. 13, § 2, with the word "ratification" instead of "adoption."

Arkansas.— Const. (1874), art. 12, § 1.

Colorado.— Const. (1876), art. 15, § 1, in substance.

Idaho.— Const. (1889), art. 11, § 1, in substance.

Illinois.— Const. (1870), art. 11, § 2.

Mississippi.— Const. (1890), § 180.

Missouri.— Const. (1875), art. 12, § 1.

Montana.— Const. (1889), art. 15, § 1, in substance.

Nebraska.— Const. (1875), art. 11, § 6.

North Dakota.— Const. (1889), § 132.

Pennsylvania.— Const. (1873), art. 16, § 1.

South Dakota.— Const. (1889), art. 17, § 2.

Washington.— Const. (1889–1890), art. 12, § 2, in substance.

West Virginia.—Const. (1872), art. 11, § 3.

Wyoming.— Const. (1889), art. 10, § 3.

Other provisions requiring acceptance of new constitutions see Ky. Const. (1891), § 190 (constitution must be accepted by corporations); Wyo. Const. (1889), art. 10, §§ 5, 6 (existing corporations must accept and file acceptance of this constitution).

The state shall not become a shareholder in or loan its credit to, or in any manner grant pecuniary aid to any corporation — provisions in a great variety of language. 1 Thompson Corp. § 547.

Arkansas.— Const. (1874), art. 12, § 7.

California.— Const. (1879), art. 12, § 13; art. 4, § 22.

Florida.— Const. (1868), art. 12, § 8; Const. (1887), art. 9, § 10.

Idaho.— Const. (1889), art. 8, § 2.

Indiana.— Const. (1851), art. 11, § 12.

Iowa.— Const. (1857), art. 8, § 3; art. 7, § 1.

Kentucky.— Const. (1850), art. 2, § 33.

Maryland.— Const. (1867), art. 3, § 34.

Michigan.— Const. (1850), art. 14, §§ 6, 8.

Mississippi.— Const. (1868), art. 12, § 5.

Missouri.— Const. (1875), art. 4, §§ 45, 46, 49.

Nevada.— Const. (1864), art. 8, § 9.

New York.— Const. Amendm. (1874), art. 8, § 10; Const. (1894), art. 8, § 9 (credit or money of state not to be given or loaned in aid of).

corporate charters, or remitting forfeitures thereof, has been said to be "to inaugurate the policy of placing all corporations of the same kind upon a perfect

North Carolina.— Const. Amendm. (1876), art. 5, § 4.
Ohio.— Const. (1851), art. 8, § 4.
Oregon.— Const. (1857), art. 11, § 6.
Pennsylvania.— Const. (1873), art. 3, § 18; art. 9, § 6.
Tennessee.— Const. (1870), art. 2, §§ 31, 33.
Texas.— Const. (1876), art. 3, §§ 50, 51.
Virginia.— Const. (1870), art. 10, §§ 12, 14.
Washington.— Const. (1889–1890), art. 8, § 5; art. 12, § 9.
West Virginia.— Const. (1872), art. 10, § 6.
Wisconsin.— Const. (1848), art. 7, § 3.
Wyoming.— Const. (1889), art. 10, § 5, state, counties, townships, school-districts, and municipal corporations, forbidden to give or loan their credit or make donations to railroads or to telegraph companies, but this provision not to apply to obligations contracted before adoption of constitution.

Debts due by corporations to the state or to municipalities shall not be released or commuted, corporate debts assumed, or liens upon railways released or extinguished except upon full payment — variety of provisions. 1 Thompson Corp. § 548.
Arkansas.— Const. (1874), art. 12, § 12.
California.— Const. (1879), art. 4, § 25, div. 16.
Idaho.— Const. (1889), art. 3, § 19.
Illinois.— Const. (1870), art. 4, § 23.
Missouri.— Const. (1875), art. 4, §§ 50, 51.
Montana.— Const. (1889), art. 5, § 39.
Texas.— Const. (1876), art. 3, § 54.
Virginia.— Const. (1870), art. 10, § 21.

No municipal aid whatever by counties, cities, towns, townships, etc., in whatever form, etc., shall be granted to private corporations. 1 Thompson Corp. § 549.
Arkansas.— Const. (1874), art. 12, § 5.
Idaho.— Const. (1889), art. 8, § 4.
Iowa.— Const. (1858), art. 8, § 4.
Louisiana.— Const. (1898), art. 270, but municipal aid to railroads permitted.
Mississippi.— Const. (1890), § 183, state forbidden to become shareholder in.
Missouri.— Const. (1875), art. 4, § 47.
Nebraska.— Const. (1875), art. 11, § 1.
New Hampshire.— Const. Amendm. (1877), pt. 2, § 5, proviso.
New Jersey.— Const. Amendm. (1875), art. 1, par. 19.
New York.— Const. (1894), art. 8, § 10, counties, cities, and towns, not to give or loan money or credit in aid of.
Ohio.— Const. (1851), art. 8, § 6.
Oregon.— Const. (1857), art. 11, § 9.
Pennsylvania.— Const. (1873), art. 9, § 7.
Texas.— Const. (1876), art. 3, § 52; art. 11, § 3.

No such aid shall be granted except upon certain prescribed conditions.— 1 Thompson Corp. § 550.
Georgia.— Const. (1868), art. 3, § 6, No. 4.
Maryland.— Const. (1867), art. 3, § 54.
Mississippi.— Const. (1868), art. 12, § 14.
Montana.— Const. (1889), art. 5, § 38.
Nevada.— Const. (1864), art. 8, § 10.
Tennessee.— Const. (1870), art. 2, § 29.

Neither state nor municipal aid nor loan of public credit shall ever be granted to corporations. 1 Thompson Corp. § 551; Cal. Const. (1879), art. 4, § 31; Fla. Const. (1868), art. 3, Addendum § 7; Ind. Const. (1851), art. 10, § 6; N. J. Const. Amendm. (1875), art. 1, par. 20.

Provisions of the constitution of Minnesota as to state aid to corporations and as to the "Minnesota Railroad Bonds." 1 Thompson Corp. § 552; Const. (1857), art. 9, § 10; Const. Amendm. (1858), art. 9, § 10; Const. Amendm. (1860), art. 9, § 10; Const. Amendm. (1871), art. 4, § 32 (a); Const. Amendm. (1872), art. 9, § 15.

The power to levy taxes shall not be delegated to private corporations or associations. 1 Thompson Corp. § 553; Ala. Const. (1875), art. 10, § 2; Cal. Const. (1879), art. 11, § 13; Mont. Const. (1889), art. 5, § 36 (with slight verbal variations); Pa. Const. (1873), art. 3, § 20.

Taxing power shall not be relinquished or suspended in favor of private corporations.
Georgia.—Const. (1877), art. 7, § 2, par. 5.
Idaho.— Const. (1899), art. 7, § 8.
Kentucky.— Const. (1891), § 174, corporate property to be taxed the same as individual property.
Louisiana.— Const. (1898), art. 230, permitting exemption from taxation of corporations engaged in certain manufacturing operations and of railroads completed prior to Jan. 1, 1904, with certain restrictions.
Mississippi.— Const. (1890), § 181 (property of private corporations for pecuniary gain, taxed the same as individuals); § 182 (permitting the legislature to exempt manufacturing corporations from taxation for five years); § 192 (permitting cities and towns to exempt from taxation for ten years, manufactures, waterworks, gas-works, and other public utilities, except railroads).
South Carolina.— Const. (1894), art. 12, § 2, property of corporations subject to taxation except where exempted by the constitution.

The legislature shall not pass any law permitting the leasing or alienation of any corporate franchise so as to relieve the franchises or properties held thereunder from the liabilities of the lessor or grantor. 1 Thompson Corp. § 554.
California.— Const. (1879), art. 12, § 10.
Idaho.— Const. (1889), art. 11, § 15.
Kentucky.— Const. (1891), § 203.
Montana.— Const. (1889), art. 15, § 17.
Utah.— Const. (1895), art. 12, § 7.
Washington.— Const. (1889–1890), art. 12, § 8.

Corporations shall not employ Chinese or

equality as to all future grants of power; of making such laws applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation; and finally, of making all judicial constructions of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class." [15]

3. Provisions Not Retroactive. Such constitutional provisions are not retroactive unless declared so in express terms; and if by their terms retroactive they would be unconstitutional in so far as they impose additional burdens upon existing corporations,[16] except those imposed by virtue of those reserved and inalienable powers of government, the police power [17] and the power of eminent

Mongolian labor. 1 Thompson Corp. § 555; Cal. Const. (1879), art. 19, § 2.

Existing rights shall be saved as though the particular constitution had not been adopted. 1 Thompson Corp. § 556; Conn. Const. (1818), art. 10, § 3; Nev. Const. (1864), art. 8, § 4; Tex. Const. (1876), art. 12, § 7.

No retrospective law for the benefit of a corporation shall be passed. 1 Thompson Corp. § 557; Colo. Const. (1876), art. 15, § 12; Ida. Const. (1899), art. 11, § 12; Mo. Const. (1875), art. 12, § 19; Mont. Const. (1889), art. 15, § 13.

The legislature shall not grant charters for banking purposes or renew those in existence, except upon condition that shareholders shall be liable to the amount of their respective shares of stock for all its debts and liabilities upon note, bill, or otherwise. S. C. Const. (1894), art. 12, § 6.

The legislature shall not extend or validate franchises.— Utah Const. (1895), art. 12, § 3.

The legislature shall not grant privileges to corporations, etc. Ga. Const. (1877), art. 3, § 7, par. 18.

Provision as to banking corporations.— N. D. Const. (1889), § 145, general banking law shall provide for registry and countersigning by state officers of bills for circulation, and security for full amount required to be deposited with state treasurer for their redemption.

Certain legislation with respect to corporations shall not take place except by a two-thirds vote of each house. 1 Thompson Corp. § 558; Del. Const. (1831), art. 2, § 17; Ga. Const. (1868), art. 3, § 6, No. 2; Mich. Const. (1850), art. 15, § 8.

Duration of corporations hereafter created shall be limited to a stated number of years. 1 Thompson Corp. § 559; Del. Const. (1831), art. 2, § 17; Mich. Const. (1850), art. 15, § 10 (construed in Atty.-Gen. *v.* Perkins, 73 Mich. 303, 41 N. W. 426); Miss. Const. (1890), § 178 (life of charters to corporations for pecuniary gain limited to ninety-nine years).

Special provision of the constitution of Georgia restricting the power of the legislature as to granting corporate franchises and devolving it upon the courts. 1 Thompson Corp. § 560; Ga. Const. (1868), art. 3, § 6, No. 5. Provision of the constitution of the same state saving corporate privileges and immunities which became vested during the Civil war. 1 Thompson Corp. § 561; Ga. Const. (1868), art. 11, No. 5.

Provisions specially relating to religious corporations.— 1 Thompson Corp. § 562; Kan. Const. (1859), art. 12, § 3; Va. Const. (1870), art. 5, § 17; W. Va. Const. (1872), art. 6, § 47.

The police power of the state over corporations shall never be abridged.—1 Thompson Corp. § 563; Mo. Const. (1875), art. 12, § 5.

Bills introduced in the legislature creating corporations, other than certain kinds, shall not be passed at the same session, but shall stand over until the next session. 1 Thompson Corp. § 564; R. I. Const. (1842), art. 4, § 17.

Laws shall be passed protecting laborers employed by corporations. 1 Thompson Corp. § 565; Tex. Const. (1876), art. 61, § 35.

A certain bonus or organization tax shall be paid to the state upon the creation of certain corporations. 1 Thompson Corp. § 566; Mo. Const. (1875), art. 10, § 21.

Consent of local authorities to certain grants.— The legislature shall not grant the right to construct and operate railroad, telegraph, etc., companies within the limits of municipal corporations, without the consent of the local authorities.

Georgia.— Const. (1877), art. 3, § 7, par. 20, street railways.

Idaho.— Const. (1899), art. 11, § 11, street and other railways.

North Dakota.— Const. (1889), § 139, street railroads, telegraphs, telephones, or electric light plants.

South Dakota.— Const. (1889), art. 17, § 10, street railroad.

Utah.— Const. (1895), art. 12, § 8, street railways, telegraphs, telephones, or electric light plants.

The legislature shall not authorize the investment of trust funds held by executors, administrators, or trustees in the bonds or stock of any corporation. 1 Thompson Corp. § 568; Mont. Const. (1889), art. 5, § 37.

15. Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21, 35 [*quoted* with approval in San Francisco *v.* Spring Valley Water Works, 48 Cal. 493, 518]. See also Van Riper *v.* Parsons, 40 N. J. L. 1.

16. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

17. Brown, J., in Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838.

domain,[18] although they do not operate to revoke special charters which have been granted prior to the establishment of the constitutional provision, which charters have been accepted and acted upon in good faith.[19] But the effect of the subsequent constitutional ordinance will not extend so far as to prevent the legislature from amending former special acts of incorporation so as to make them less onerous to the public, provided the amendment does not make it more onerous to the corporation.[20] If prior to the establishment of such a constitutional ordinance, the legislature has passed an act clothing the county courts with power to grant aid to a railroad company, and the power remains unexecuted at the time when the constitutional provisions come into operation, the ordinance will not operate to prevent the execution of the power conferred by the statute, for the reason that the benefit accruing to the corporation from the exercise of this power is in the nature of a franchise or privilege conferred upon it.[21] Most of the constitutional provisions contain saving clauses preserving acts of incorporation for municipal purposes in force until such time as the legislature should in its discretion repeal or modify the same.[22] When therefore a city had the power under a former constitution of the state to subscribe to stock in chartered companies for making roads and other internal improvements, these powers remained unimpaired under the

Extent to which police power may be exerted.— The following among other cases show to what extent and to what purposes the police power may be exerted:

Colorado.— Platte, etc., Canal Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68, holding that corporations may occupy with relation to the police power the same position as individuals.

Iowa.— Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297, 20 Am. Rep. 592, holding that a statute making railroad companies liable for damages caused by fire is not unconstitutional as to railroads in existence when the act was passed.

Mississippi.— Moore *v.* State, 48 Miss. 147, 12 Am. Rep. 367.

Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

United States.— Douglas *v.* Kentucky, 168 U. S. 488, 18 S. Ct. 199, 42 L. ed. 553 (lotteries not protected by doctrine of Dartmouth College case); Eagle Ins. Co. *v.* Ohio, 153 U. S. 446, 14 S. Ct. 868, 38 L. ed. 778; Lawton *v.* Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. ed. 385; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018; Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. ed. 1051; New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079; Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. ed. 1036 [*affirming* 70 Ill. 634]; Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. 36, 21 L. ed. 394.

Illustrations.—For example a constitutional prohibition against the passage of local or special laws granting to corporations special or exclusive rights, privileges, or immunities (Cal. Const. (1879), art. 4, § 25, div. 19) does not disable the legislature from regulating the practice of medicine in the promotion of the public act, by conferring upon certain existing medical societies the power of appointing boards of examiners to examine candidates for authority to practise medicine, and prohibiting the same power to other corporations (*Ex p.* Fraser, 54 Cal. 94). Under a constitutional provision that corporations "shall not be created by special act, except for municipal purposes" it was not competent for the legislature to pass a special act conferring upon existing municipal corporations the power to subscribe to the shares of a corporation created for commercial purposes, such as a steam navigation company. Consequently, a statute authorizing a municipal corporation, in the face of such a constitutional prohibition, to lend its credit "to any improvement," was restrained so as to mean any improvement which was the proper subject of police and municipal control, such as gas, water, almshouses, hospitals, and the like. Low *v.* Marysville, 5 Cal. 214, 216.

18. Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474; Boston Water Power Co. *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 360; Greenwood *v.* Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961; Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 12 L. ed. 535. *Compare* Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463.

19. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663.

20. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663. *Compare* Quincy, etc., R. Co. *v.* Morris, 84 Ill. 410.

21. Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; State *v.* Union Tp., 8 Ohio St. 394.

22. Ind. Const. (1850), Schedule Specification 4. See also Demarest *v.* New York, 74 N. Y. 161; New Town Cut *v.* Seabrook, 3 Strobh. (S. C.) 380.

new constitution.[23] The provision of another state constitution[24] that all existing charters or grants of special or exclusive privileges under which organization shall not have taken place, or which shall not have been in operation within ten days of the time of the taking effect of the new constitution, shall thereafter have no validity, was held to refer only to corporations which were then unorganized, or which were then not in operation, and was not so interpreted as to take in special or exclusive privileges to corporations organized and in operation.[25] But a corporation created under a special act of legislation could not, after the establishment of such a constitutional prohibition, accept its charter and reorganize so as to create a valid corporation; but it was regarded as a naked assumption whose existence might be assailed by way of defense to a promissory note given for shares therein.[26]

4. INVALIDITY OF GENERAL LAWS PERPETUATING PRIVILEGES BY PREVIOUS SPECIAL CHARTERS. Where special charters are granted conferring peculiar privileges, at a time when there is no constitutional inhibition against the creation of corporations by special acts, and subsequently such a constitutional inhibition is established, the result will be that the peculiar privileges granted by such special statutes will expire by the terms of limitation therein prescribed. After the establishment of such a constitutional inhibition, it will not be competent for the legislature to enact a general law of such a nature that, by reorganizing under it the corporation so specially chartered, the corporators can perpetuate their peculiar privileges indefinitely.[27]

5. EFFECT OF PROHIBITIONS AGAINST SPECIAL ACTS OF LEGISLATION CONFERRING CORPORATE POWERS. Some state constitutions provide that "the general assembly shall pass no special act conferring corporate powers."[28] This means what it says, which is, that the legislature is by it disabled from either creating a corporation or conferring powers upon an existing corporation by a special act of legislation.[29]

6. PROHIBITION AGAINST INCORPORATION CARRIES PROHIBITION AGAINST AMENDING. A prohibition against creating corporations by special statutes manifestly carries with it a prohibition against amending by special statutes charters already in existence; otherwise the power of amendment might, by legislative ingenuity or by extensive amendment, extend to recreating a corporation.[30]

23. Aurora *v.* West, 9 Ind. 74.

24. Ill. Const. (1870), art. 11, §§ 1, 2.

25. Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730.

26. Gillespie *v.* Ft. Wayne, etc., R. Co., 17 Ind. 243. See also Harriman *v.* Southam, 16 Ind. 190.

27. When therefore a bridge company was chartered by a special act, there being no constitutional inhibition, for the period of twenty-one years with the franchise of taking tolls, and it attempted to organize under such a general law enacted after the establishment of such a constitutional inhibition, it was held that it could not by thus organizing perpetuate its franchise of taking tolls, but that its bridge thereafter became a public highway, and it would be ousted of the franchise of taking tolls by an information in the nature of a quo warranto. State *v.* Lawrence Bridge Co., 22 Kan. 438.

28. Ohio Const. (1851), art. 13, § 1.

29. Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21, where, with this prohibition in force, a railroad company which by its charter did not have the power to sell its franchise of being a corporation, mortgaged its properties and these properties were sold under the mortgage; and the purchasers thereafter procured a special act of the legislature, which undertook to give effect to the sale, by authorizing them to reorganize and form a corporation, to create a new stock, and to elect a new board of directors. It was held that this in substance and legal effect was an attempt to create a corporation and to confer corporate power by a special act, and that it was in conflict with the constitutional prohibition above quoted. *Compare* Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895.

30. *Ex p.* Pritz, 9 Iowa 30. To the same effect see State *v.* Barbee, 3 Ind. 258; McGregor *v.* Baylies, 19 Iowa 43; Baker *v.* The Steamboat Milwaukee, 14 Iowa 214; Davis *v.* Woolnough, 9 Iowa 104.

A contrary view was taken by a federal circuit judge who, in an ingenious course of reasoning, held that an act of the legislature of a state which merely granted to an existing railroad corporation authority to change the line of its road was not an act creating a corporation, in whole or in part, within the meaning of the provision of the constitution of California prohibiting the legislature from creating corporations by special acts ex-

7. PROVISIONS RESTRAINING AMENDMENTS TO CHARTERS BY SPECIAL ACTS WHICH ENLARGE EXISTING POWERS. While constitutional provisions restraining the legislature from creating corporations or granting corporate privileges by special laws are unquestionably to be construed as disabling the legislature from amending existing special charters so as to enlarge the powers or privileges existing under them, they do not prohibit the legislature from passing special acts regulating existing corporations in the exercise of powers already conferred upon them by special laws, assuming that the legislature otherwise has the power to enact such special laws. They do not for example disable the legislature (having the power to pass special laws) from passing a special act with reference to an elevated railroad in a city providing for changes of structure and in the manner of occupying the streets, which changes tend rather to restrain than to enlarge the powers of the corporation under these special statutes.[31] But with such a restraint imposed upon it the legislature cannot by a special act amend the charter of an existing corporation empowered to transport freight and passengers through a pneumatic tube so as to enable it to construct the ordinary railway for that purpose, with any motive power which it might see fit to use, not emitting smoke, cinders, etc.; since this would be to make a new grant of rights by a private act.[32]

8. INVALIDITY OF SPECIAL ACTS CONFERRING PRIVILEGES ON CORPORATIONS TO BE THEREAFTER CREATED UNDER GENERAL LAWS. A constitutional prohibition against creating corporations by special laws cannot be evaded by the passage of a special act conferring corporate privileges upon a body of associates to be thereafter incorporated under a general law. An act which grants to individuals and to their assigns certain powers and privileges, and then provides that the act shall not take effect unless the persons to whom the grant is made shall within a certain time organize themselves into a corporation under existing laws is a grant not to the individuals as persons but to the corporation when formed. Such an act is an attempt on the part of the legislature to confer powers and privileges upon a corporation by a special act in the face of the constitutional prohibition. When such persons organize themselves into a corporation under the general law, the corporation possesses no power or privileges except such as are conferred by such law.[33]

9. DISTINCTIONS AS TO WHAT ARE AND WHAT ARE NOT CORPORATE PRIVILEGES. It has been suggested that constitutional provisions of this kind do not restrain the legislature from passing special laws conferring upon existing corporations powers which are not essentially corporate powers, but which might be conferred upon individuals.[34] On the other hand it has been held that such a constitutional provision disables the legislature from passing an act granting to an existing water-

cept for municipal purposes, as it did not involve the creation of any new corporate powers. Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 22 Fed. Cas. No. 13,188*a*, 6 Sawy. 157, where the court declined to follow the decision in San Francisco *v.* Spring Valley Water Works, 48 Cal. 493, for reasons already stated.

31. Gilbert El. R. Co. *v.* Handerson, 70 N. Y. 361.

32. Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 22 N. Y. St. 1, 2 L. R. A. 789.

33. San Francisco *v.* Spring Valley Water Works, 48 Cal. 493 [*overruling* California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398]. *Compare* Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

The privilege with which it was attempted to endow, by a patent piece of legislative fraud and manipulation, a corporation to be hereafter created was the privilege of laying down water-pipes in the city of San Francisco. Rhodes, C. J., dissented on the ground that this was not a corporate power. San Francisco *v.* Spring Valley Water Works, 48 Cal. 493. In view of the supposed conflict between this and a previous decision of the same court a circuit court of the United States (Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 22 Fed. Cas. No. 13,188*a*, 6 Sawy. 157), regarding the question as unsettled by the state tribunal, adopted the view of the supreme court of California, as laid down in California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398, and declined to follow that subsequently adopted by the court in San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

34. See reasoning of Sawyer, J., in Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 22 Fed. Cas. No. 13,188*a*, 6 Sawy. 157.

supply corporation, by special act, a conditional easement to lay its water mains in the public streets, since its chief franchise consists of such an easement.[35]

10. Special Statutes Permitted Where General Statutes Cannot Be Made Applicable. Some of the constitutional provisions annex to the prohibition against the passage of local or special laws creating corporations or granting corporate powers or privileges, the qualifications that such local or special laws shall not be passed where general laws can be made applicable.[36] Although there is a division of opinion on the question, the weight of judicial authority tends to the conclusion that the legislature is the exclusive judge of the question whether a general law can be made applicable under particular circumstances.[37] Some of the constitutional provisions expressly commit the question whether a general law can be enacted to the decision of the legislature. Where such a provision exists the question whether a general law can be made applicable or not rests fully in the judgment and discretion of the legislature, which is not subject to judicial review.[38] But whether the limitation on the prohibition considered in the next preceding paragraph exists or not, an act which purports on its face to be, and is in fact a special act, cannot be converted into a general act by a declaration of the legislature in another act which shall be considered a general act;[39] otherwise the legislature might lift itself above the constitutional prohibition by merely declaring that what it was doing was not within the prohibition.[40]

11. General Enabling Acts Applicable to All Existing Corporations Not Restrained. Constitutional provisions of this kind do not restrain the passage of general enabling acts, applicable to all existing corporations, although created under special statutes, such as acts authorizing such corporations to change their names.[41]

12. Validity of Curative Acts Healing Defects in Organization of Particular Corporations. Curative acts of legislation which operate merely to cure defects in the organization of particular corporations — defects which the state has the power to waive — and which do not operate to create substantially new corporations, to enlarge, or to extend the franchises of existing corporations, are generally held to be constitutional and valid.[42] Thus it is competent for the

35. San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

36. See for example Ind. Const. (1850), art. 4, § 22.

37. *Colorado.*— Darrow *v.* People, 8 Colo. 426, 8 Pac. 924; Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828; Brown *v.* Denver, 7 Colo. 305, 3 Pac. 455.

Indiana.— It was at first held to be a judicial question (Thomas *v.* Clay County, 5 Ind. 4), but this decision was subsequently overruled, and it is now held to be a question for the exclusive decision of the legislature (State *v.* Tucker, 46 Ind. 355; Longworth *v.* Evansville, 32 Ind. 322; Gentile *v.* State, 29 Ind. 409).

Kansas.— Knowles *v.* Board of Education, 33 Kan. 692, 7 Pac. 561; Harvey *v.* Rush County, 32 Kan. 159, 4 Pac. 153; Norton County *v.* Shoemaker, 27 Kan. 77; Francis *v.* Atchison, etc., R. Co., 19 Kan. 303; Beach *v.* Leahy, 11 Kan. 23; State *v.* Hitchcock, 1 Kan. 178, 81 Am. Dec. 503.

Missouri.— The rule was formerly applied (Board of Com'rs, etc. *v.* Shields, 62 Mo. 247; Hall *v.* Bray, 51 Mo. 288; State *v.* New Madrid County Ct., 51 Mo. 82; State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415; Murdock *v.* Woodson, 17 Fed. Cas. No. 9,942, 2 Dill. 188, but under the present constitution the question cannot arise, for the exception has been eliminated.

Nevada.— Evans *v.* Joh, 8 Nev. 322.

In Iowa the early Indiana doctrine (since overruled) was followed. Von Phul *v.* Hammer, 29 Iowa 222; *Ex p.* Pritz, 9 Iowa 30.

In New Jersey the question has been held not a question for the exclusive determination of the legislature. State *v.* Newark, 40 N. J. L. 71.

38. Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202; People *v.* Bowen, 21 N. Y. 517 [*reversing* 30 Barb. (N. Y.) 24]; Mosier *v.* Hilton, 15 Barb. (N. Y.) 657.

39. Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589.

40. San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

41. Hazelett *v.* Butler University, 84 Ind. 230.

42. *Alabama.*— Lockhart *v.* Troy, 48 Ala. 579.

Indiana.— Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1.

Massachusetts.— Foster *v.* Essex Bank, 16 Mass. 245, 8 Am. Dec. 135.

New York.— Syracuse City Bank *v.* Davis, 16 Barb. 188; Butler *v.* Palmer, 1 Hill 324; Cochran *v.* Van Surlay, 20 Wend. 365, 32 Am. Dec. 570.

legislature by a curative act to render valid the organization of a corporation which might otherwise have been invalid by reason of the non-performance of something which the law required to be done as a condition precedent to the corporate existence. In other words where the state prescribes certain conditions as essential to the organization of a corporation it is competent for the state to waive or dispense with such conditions; and the state waives such conditions by enacting a subsequent statute recognizing the existence of the association as a corporate body, and approving or ratifying its organization and amending its charter.[43] So in New York the conclusion has been reached that notwithstanding a constitutional probibition against the passage of special charters creating banking corporations it is competent for the legislature by a special curative act to give validity to the corporate organization of a banking company which had been informally organized by reason of the insufficiency of its instrument of incorporation, and the acknowledgment and recording thereof.[44] The test by which to determine the validity of an act curing the defective organization of a corporation is to consider whether the legislature had the power to create the corporation in the first instance, since it will not be denied that it has the same power to cure defects in the organization of an informally and irregularly organized corporation as it has to bring into existence a new one.[45] Numerous curative acts have been passed with reference to municipal corporations, only one class of which seems to deserve notice here: Acts validating municipal subscriptions to the stock of private corporations, which statutes have been held valid,[46] but on extremely doubtful grounds.

13. What Are "Local," as Distinguished from "General," Laws. In the constitutions of some of the states, as already seen,[47] prohibitions will be found against the passage of local or special laws relating to many subjects, among them the subject of corporations. Some of them in terms prohibit the passage of "local" acts where there is a general law embracing the same subject-matter. A local act therefore concerning corporate elections in a particular county to determine whether municipal bonds should be issued was void, where there was a general statute in force on the same subject;[48] and so was a statute granting to a particular railroad corporation the right to lay down railway tracks in a particular place or granting to it any exclusive privilege, immunity, or franchise whatsoever.[49] On the other hand statutes which are general and uniform in their operation upon all persons coming within the class to which they apply are not obnoxious to constitutional provisions against special legislation. Accordingly a statute which embraces all persons who are or may come into certain situations and circumstances, and which is "general and uniform, not because it operates upon every person in the state, for it does not, but because every person who is brought within the relations and circumstances provided for is affected by the

Pennsylvania.— Hepburn *v.* Curts, 7 Watts 300, 32 Am. Dec. 760.

But it is not within the power of the legislature to pass an act obliging the courts to construe and apply a previous law, in reference to past transactions, according to the legislative judgment; the power of interpreting and applying the law lies wholly with the courts. Lincoln Bldg., etc., Assoc. *v.* Graham, 7 Nebr. 173.

43. Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120.

44. People *v.* Newburgh, etc., Plank Road Co., 86 N. Y. 1; Syracuse City Bank *v.* Davis, 16 Barb. (N. Y.) 188.

45. Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621.

46. Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475; Winn *v.* Macon, 21 Ga. 275; New Orleans First Municipality *v.* Orleans Theater Co., 2 Rob. (La.) 209.

47. See *supra*, I, I, 1.

48. Dougherty County *v.* Boyt, 71 Ga. 484.

49. Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 22 N. Y. St. 1, 2 L. R. A. 789. Another court held that "An act to incorporate the Yellow River Improvement Company," which besides creating the corporation with ordinary corporate powers authorized it to improve the Yellow river within two specified counties for the purpose of facilitating the running of logs, etc., and after expending a certain sum of money for that purpose to collect toll on logs, etc., floated down the river, was a local act within a meaning of the constitutional provision touching the entitling of laws; but whether it was a special or private law the court did

law," is not within such prohibition. Thus legislation which classifies railroads and imposes restrictions in respect to tariffs is valid if it bears uniformly upon each class.[50] But this again is subject to the qualification that the classification adopted by the legislature has some reasonable foundation in the nature of things, such as will in some reasonable degree at least account for or justify the restriction of the legislation; and this renders void legislation which is controlled in its operation as to locality by some arbitrary distinction, having no affinity to or connection with the subject-matter of the legislation, which legislation falls within the constitutional interdiction, and is hence invalid.[51] This principle has operated to overthrow statutes relating to corporations which by their terms were operative only in cities, towns, or villages having a stated population.[52] But this principle of constitutional interpretation does not operate to prohibit the formation of a corporation to carry on operations in a specific locality, which from their nature could not be carried on elsewhere in the state; as for instance a corporation for the promotion of slack-water navigation in certain counties; since these are natural and not arbitrary conditions and classifications.[53] Omitting from consideration the very great number of cases dealing with this question which relate to the validity of acts of legislation relating to municipal corporations and dealing only with such as relate to private corporations, we find that the principle under consideration has operated to condemn a statute purporting to authorize the establishment of a single ferry at a designated point on a particular river, in the face of a constitutional provision against licensing ferries by local or special laws;[54] a statute limiting the right to use boats and carry freight and passengers to "such railroad companies as own the landing for such water-craft," in the face of a constitutional prohibition against the passage of special laws granting special or exclusive privileges to corporations;[55] a statute providing for the incorporation of street railways in cities of the second and third class, in the face of a constitutional provision against the passage of local and special laws, the court taking the view that the act was local because confined to cities of the second and third class, and special because it related to a certain class of street railway corporations only.[56] Confining our examination again to statutes relating to private corporations organized for pecuniary gain, we find the following instances of statutes which have been held not to be obnoxious to constitutional prohibitions against the passage of local or special laws: An act making it punishable for railroad employees to burn, mutilate, haul off, or bury stock killed by trains;[57] appropriating five thousand dollars to aid the Farmers' Protective Association of Iowa, a corporation organized to provide the farmers of

not determine. Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 221, 49 N. W. 971.

50. *Arkansas.*—Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297; Little Rock, etc., R. Co. *v.* Hanniford, 49 Ark. 291, 5 S. W. 294.

Iowa.—Iowa R. Land Co. *v.* Soper, 39 Iowa 112; McAunich *v.* Mississippi, etc., R. Co., 20 Iowa 338.

Missouri.— Humes *v.* Missouri Pac. R. Co., 82 Mo. 221, 52 Am. Rep. 369.

Tennessee.— Davis *v.* State, 3 Lea 376.

United States.— Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94; Thomas *v.* Wabash, etc., R. Co., 40 Fed. 126, 7 L. R. A. 145.

51. Atlantic City Water-Works Co. *v.* Consumers' Water Co., 44 N. J. Eq. 427, 15 Atl. 581.

52. *Indiana.*— Lafayette *v.* Jenners, 10 Ind. 70.

Iowa.— Von Phul *v.* Hammer, 29 Iowa 222.

Minnesota.— St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278; Tierney *v.* Dodge, 9 Minn. 166.

Nevada.— Virginia City *v.* Chollar Potosi Gold, etc., Min. Co., 2 Nev. 86.

Ohio.— Welker *v.* Potter, 18 Ohio St. 85.

Pennsylvania.— McCarthy *v.* Com., 110 Pa. St. 243, 2 Atl. 423.

Wisconsin.— Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295; Kimball *v.* Rosendale, 42 Wis. 407, 24 Am. Rep. 421; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

53. Atty.-Gen. *v.* McArthur, 38 Mich. 204, opinion by Graves, J.

54. Frye *v.* Partridge, 82 Ill. 267.

55. Thomas *v.* Wabash, etc., R. Co., 40 Fed. 126, 7 L. R. A. 145.

56. Weinman *v.* Wilkinsburg, etc., R. Co., 118 Pa. St. 192, 12 Atl. 288. But see as opposed to this conclusion cases cited in the next succeeding notes.

57. Bannon *v.* State, 49 Ark. 167, 4 S. W. 665.

that state with barbed wire at the actual cost of manufacture, and to defend suits for the alleged infringement of patents;[58] providing that foreign corporations created for the purpose of making and guaranteeing bonds may be accepted as sureties by the courts, etc., the court holding this not unconstitutional as a special law regulating the practice of the courts;[59] regulating rates of charges for the carriage of passengers by railroad companies, imposing a penalty for overcharges, and including in such penalty a reasonable attorney's fee;[60] authorizing the organization of annuity, safe deposit, and trust companies, and granting to such corporations the power to act as guardians of the estates of insane persons, such a statute being a general law for the organization of corporations for certain purposes and defining their powers;[61] exempting seaside railroads from the receivership imposed by the body of the act on railroads which fail to run trains for a given time, this not being a special law conferring corporate privileges;[62] providing for the organization of loan associations, and enacting that no premiums, fines, or interest on such premiums that may accrue under the act shall be deemed usurious, this not being a local or special law regulating the rate of interest on money;[63] requiring all electric wires, in any city having a population of five hundred thousand or more, to be placed under the surface of the streets, and providing for a board of commissioners of electric subways, etc.;[64] enabling a particular foreign corporation to be sued within the state, the same not being a private or local bill within the same constitutional provision;[65] authorizing a plank-road company to mortgage its road, the same not being "a private or special law" providing for the sale or conveyance of any real estate belonging to any persons, but merely an amendment of a charter;[66] fixing the rate of compensation to be paid by a boom company to the surveyor-general of logs, for surveying logs coming within its boom, at a rate less than that fixed by the general law, the statute affecting equally the rights and interests of all owners of logs within the designated territory, this not being partial or unequal legislation;[67] amending the charter and enlarging the powers of a corporation previously existing;[68] authorizing an existing railroad corporation to purchase the railroad and franchises of another preëxisting corporation, and after so doing to change its own name to a name stated in the statute, this not being a grant of new corporate powers or franchises within the prohibition of the statute against the creation of corporations by special act, except for municipal purposes.[69]

14. Restraints as to Titles of Statutes Creating Corporations or Enlarging Corporate Powers — a. Nature of Provisions. The constitutions of some of the states contain provisions like the following, taken from the constitution of Missouri: "No bill . . . shall contain more than one subject, which shall be clearly expressed in its title."[70] Others contain similar provisions restricted to private or local bills like the following, which is found in the constitution of

58. Merchants' Union Barb Wire Co. *v.* Brown, 64 Iowa 275, 20 N. W. 434, construing Iowa Laws (1884), c. 202.

59. Cramer *v.* Tittel, 72 Cal. 12, 12 Pac. 869.

60. Dow *v.* Beidelman, 49 Ark. 455, 5 S. W. 718.

61. Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

62. Delaware Bay, etc., R. Co. *v.* Markley, 45 N. J. Eq. 139, 16 Atl. 436.

63. Winget *v.* Quincy Bldg., etc., Assoc., 128 Ill. 67, 21 N. E. 12.

64. Western Union Tel. Co. *v.* New York City, 38 Fed. 552.

65. Fall Brook Coal Co. *v.* Lynch, 47 How. Pr. (N. Y.) 520.

66. Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

67. Merritt *v.* Knife Falls Boom Corp., 34 Minn. 245, 25 N. W. 403. See also Augusta, etc., R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674.

68. State *v.* Clark, 23 Minn. 422.

69. Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895.

Trust companies in New York.— Under the constitution of New York it was competent for the legislature to create corporations other than banks by special charter. N. Y. Const. art. 8, § 1. The United States Trust Company of New York was held not to be a "bank" within the meaning of this provision, and hence to have been chartered by the legislature in the valid exercise of its powers. U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119.

70. Mo. Const. (1875), art. 4, § 28.

New York: "No private or local bill which may be passed by the legislature shall embrace more than one subject and that shall be expressed in the title."[71] It is perceived that these provisions require two things, each relating to a different part of the bill: (1) It must be single in respect of its subject-matter; (2) that single subject-matter must be expressed in its title. If therefore the statute embraces more than one subject it is void, whether or not the subject is expressed in its title. Moreover although a statute may embrace but one subject, it is still void if that subject be not expressed in its title.[72]

b. Object and Design of Restraints. The object and design of such restraints, which may be collected from a great number of judicial decisions, was to prevent frauds upon legislation by securing a separate consideration for every distinct subject presented for legislative action and a conspicuous declaration of that subject. Judicial expressions found in some of these decisions have been collected in a recent work on the law of corporations,[73] quoting from the opinions of the court in the cases noted below.[74]

c. Provisions Mandatory but Construed Liberally in Support of Legislation. Such constitutional provisions are mandatory, and not merely directory to the legislature; the courts and not the legislature are the final judges as to whether they have been complied with; and if a statute is passed in violation of such provision the courts will set it aside in whole or in part according to its nature. The legislature cannot evade a constitutional provision that no private or local law shall be passed embracing more than one subject, and that expressed in the title, by declaring that such an act is a public law.[75] Notwithstanding this fact the courts construe such statutes liberally in support of legislation, and in their effort to uphold legislation which infringes upon this species of constitutional restraint they have in many cases no doubt upheld statutes which were in reality frauds upon the constitutional provisions and upon honest legislation.[76] In short it is not the purpose of these constitutional provisions to require details and particu-

71. N. Y. Const. art. 3, § 16.

72. In some of the state constitutions the word "object" is used instead of "subject," the prohibition being against the enactment of statutes which contain more than one object. Where the word "object" is used, distinctions have been made turning upon the use of that word, but their propriety seems doubtful. People *v.* Lawrence, 36 Barb. (N. Y.) 177; Stone *v.* Brown, 54 Tex. 330; Tadlock *v.* Eccles, 20 Tex. 782, 73 Am. Dec. 213 (opinion by Wheeler, J.).

73. 1 Thompson Corp. § 609.

74. Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413 (opinion by Brickell, C. J.); People *v.* Mahaney, 13 Mich. 481 (opinion by Cooley, J.); Rader *v.* Union Tp. 39 N. J. L. 509; Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 22 N. Y. St. 1, 2 L. R. A. 789 (per Earl, J.); Sun Mut. Ins. Co. *v.* New York, 8 N. Y. 241; Conner *v.* New York, 5 N. Y. 285. See also People *v.* New York Tax, etc., Com'rs, 47 N. Y. 501; Brewster *v.* Syracuse, 19 N. Y. 116; People *v.* Lawrence, 36 Barb. (N. Y.) 177.

75. Weaver *v.* Lapsley, 43 Ala. 224; People *v.* Fleming, 7 Colo. 230, 3 Pac. 70; State *v.* Miller, 45 Mo. 495; Cannon *v.* Hemphill, 7 Tex. 184.

To this statement exceptions exist in California and Ohio, where the provision is held to be merely directory to the legislature, which is tantamount to frittering it away entirely. Pierpont *v.* Crouch, 10 Cal. 315; Washington *v.* Page, 4 Cal. 388; Pim *v.* Nicholson, 6 Ohio St. 176.

76. As illustrating the tendency of the courts to sustain, rather than to overthrow, statutes which have been thus enacted see the following among other cases:

Alabama.— Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413 (opinion by Brickell, J.); *Ex p.* Upshaw, 45 Ala. 234; Gunter *v.* Dale County, 44 Ala. 639; *Ex p.* Pollard, 40 Ala. 77 (opinion by Walker, C. J.).

Georgia.— Hope *v.* Gainesville, 72 Ga. 246, opinion by Blandford, J.

Illinois.— Mix *v.* Illinois Cent. R. Co., 116 Ill. 502, 6 N. E. 42; Blake *v.* People, 109 Ill. 504; Fuller *v.* People, 92 Ill. 182, 185 [*quoting* with approval Cooley Const. Lim. (4th ed.), p. 144, § 2]; Binz *v.* Weber, 81 Ill. 288; Ottawa *v.* People, 48 Ill. 233; O'Leary *v.* Cook County, 28 Ill. 534; Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589 (opinion by Caton, J.).

Kentucky.— McReynolds *v.* Smallhouse, 8 Bush 447; Phillips *v.* Covington, etc., Bridge Co., 2 Metc. 219. See also Louisville, etc., Turnpike Road Co. *v.* Ballard, 2 Metc. 165.

Louisiana.— Mississippi, etc., R. Co. *v.* Wooten, 36 La. Ann. 441, opinion by Bermudez, C. J.

Maryland.— Maryland Agricultural College *v.* Keating, 58 Md. 580; Baltimore *v.* Reitz, 50 Md. 574; Dorchester County *v.* Meekins, 50 Md. 28.

lars to be specified in the titles of statutes, or the means by which the purposes of the act are to accomplished, or to require the title to furnish an index of the subject-matter of the statute; but it is their purpose to prevent the uniting of different or incongruous subjects in one act, and to require the single subject embraced in each act of the legislature to be fairly and reasonably indicated by its title.[77] Such a constitutional inhibition does not imply that no act shall have any operation beyond what is expressed in the title;[78] but in general if the title is not misleading or the subject disguised or concealed thereby it is sufficient.[79]

New York.— Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 22 N. Y. St. 1, 2 L. R. A. 789 (by Earl, J.); *In re* Mayer, 50 N. Y. 504 (opinion by Church, C. J.); Brewster *v.* Syracuse, 19 N. Y. 116; Sun Mut. Ins. Co. *v.* New York, 8 N. Y. 240 (opinion by Gardner, J.); Harris *v.* Niagara County, 33 Hun 279.

Pennsylvania.— Rogers *v.* Manufacturers' Imp. Co., 109 Pa. St. 109, 1 Atl. 344; *In re* Phœnixville Road, 109 Pa. St. 44; Beckert *v.* Allegheny, 85 Pa. St. 191; Allegheny County Home's Case, 77 Pa. St. 77; Dorsey's Appeal, 72 Pa. St. 192; Com. *v.* Green, 58 Pa. St. 226; Blood *v.* Mercelliott, 53 Pa. St. 391. *Compare* with the last case Rogers *v.* Manufacturers' Imp. Co., 109 Pa. St. 109, 1 Atl. 344; *In re* Phœnixville Road, 109 Pa. St. 44.

Texas.— Stone *v.* Brown, 54 Tex. 330 (opinion by Bonner, J.); Giddings *v.* San Antonio, 47 Tex. 548, 26 Am. Rep. 321; Austin *v.* Gulf, etc., R. Co., 45 Tex. 234.

United States.— Mahomet *v.* Quackenbush, 117 U. S. 508, 6 S. Ct. 858, 29 L. ed. 982; Ackley School Dist. *v.* Hall, 113 U. S. 135, 5 S. Ct. 371, 28 L. ed. 954; Otoe County *v.* Baldwin, 111 U. S. 1, 4 S. Ct. 265, 28 L. ed. 331; Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431 (opinion by Harlan, J.).

77. *Alabama.*— Lockhart *v.* Troy, 48 Ala. 579.

California.— People *v.* Henshaw, 76 Cal. 436, 18 Pac. 413.

Florida.— State *v.* Palmes, 23 Fla. 620, 3 So. 171; State *v.* Duval County, 23 Fla. 483, 3 So. 193.

Georgia.— Atlanta *v.* Gate City St. R. Co., 80 Ga. 276, 4 S. E. 269; Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306; Green *v.* Savannah, R. M. Charlt. 368.

Illinois.— Dolese *v.* Pierce, 124 Ill. 140, 16 N. E. 218; Blake *v.* People, 109 Ill. 504; Fuller *v.* People, 92 Ill. 182; Guild *v.* Chicago, 82 Ill. 472; People *v.* Brislin, 80 Ill. 423; People *v.* Wright, 70 Ill. 388; Neifing *v.* Pontiac, 56 Ill. 172; Fireman's Benev. Assoc. *v.* Lounsbury, 21 Ill. 511, 74 Am. Dec. 115.

Indiana.— Jarrard *v.* State, 116 Ind. 98, 17 N. E. 912; Indianapolis *v.* Huegele, 115 Ind. 581, 18 N. E. 172.

Iowa.— State *v.* Davis County Judge, 2 Iowa 280; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Kentucky.— Graham *v.* Conger, 85 Ky. 582, 4 S. W. 327, 9 Ky. L. Rep. 133; Johnson *v.* Higgins, 3 Metc. 566.

Louisiana.— Edwards *v.* Police Jury, 39 La. Ann. 855, 2 So. 804; State *v.* Dubois, 39 La. Ann. 676, 2 So. 558; State *v.* Daniel, 28 La. Ann. 38; Lanzetti's Succession, 9 La. Ann. 329; Walker *v.* Caldwell, 4 La. Ann. 291.

Maryland.— Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

Michigan.—Gillett *v.* McLaughlin, 69 Mich. 547, 37 N. W. 551; Sanilac County *v.* Auditor-Gen., 68 Mich. 659, 36 N. W. 794; People *v.* Kirsch, 67 Mich. 539, 35 N. W. 157; People *v.* Gobles, 67 Mich. 475, 35 N. W. 91; Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815; Wilcox *v.* Paddock, 65 Mich. 23, 31 N. W. 609.

Minnesota.— Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777. *Compare* State *v.* Kinsella, 14 Minn. 524.

New Jersey.— Rader *v.* Union Tp., 39 N. J. L. 509. *Compare* State *v.* Union, 33 N. J. L. 350.

New York.— *In re* Knaust, 101 N. Y. 188, 4 N. E. 338; People *v.* Whitlock, 92 N. Y. 191; *In re* Department Public Parks, 86 N. Y. 437; Sweet *v.* Buffalo, etc., R. Co., 79 N. Y. 293; *In re* New York, etc., Bridge, 72 N. Y. 527; Nuendorff *v.* Duryea, 69 N. Y. 557, 25 Am. Rep. 235; People *v.* Briggs, 50 N. Y. 553; *In re* Mayer, 50 N. Y. 504; People *v.* Lawrence, 41 N. Y. 123; Brewster *v.* Syracuse, 19 N. Y. 116; New York *v.* Colgate, 12 N. Y. 140; Freeman *v.* Panama R. Co., 7 Hun 122; Central Crosstown R. Co. *v.* Twenty-third St. R. Co., 54 How. Pr. 168.

Oregon.— David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174.

Pennsylvania.— Carothers *v.* Philadelphia Co., 118 Pa. St. 468, 12 Atl. 314; Union Pass. R. Co.'s Appeal, 81* Pa. St. 91; Allegheny County Home's Case, 77 Pa. St. 77; Blood *v.* Marcelliott, 53 Pa. St. 391; Shoemaker *v.* Harrisburg, 4 Pa. Co. Ct. 86.

Texas.— San Antonio *v.* Gould, 34 Tex. 49; Battle *v.* Howard, 13 Tex. 345.

Washington.— Baker *v.* Prewett, 3 Wash. Terr. 474, 19 Pac. 149.

Wisconsin.— Phillips *v.* Albany, 28 Wis. 340.

United States.— Carter County *v.* Sinton, 120 U. S. 517, 7 S. Ct. 650, 30 L. ed. 701; Jonesboro *v.* Cairo, etc., R. Co., 110 U. S. 192, 4 S. Ct. 67, 28 L. ed. 116.

78. State *v.* Wands, 23 Mich. 385. *Compare* Washington County *v.* Franklin R. Co., 34 Md. 159.

79. Fredericks *v.* Pennsylvania Canal Co., 109 Pa. St. 50, 2 Atl. 48.

d. Acts Creating Corporations Need Not Enumerate All Powers Conferred — (I) *In General.* An application of this principle of liberal construction in support of legislation is found in the view that an act creating a corporation or amending the charter of an existing corporation need not, in order to be valid, enumerate in its title all the powers conferred.[80] Thus a penalty for running a toll-gate without paying toll may be included in an act under the title, "An act authorizing the construction of plank, macadamized, and gravel roads"; and so may provisions for appointment of, and reports by, inspectors of turnpikes.[81] So the fact that the limit of the taxing power of the state over a railroad company is not expressed or indicated in the title of the act of incorporation does not render the provision of the charter unconstitutional.[82] So an act "to establish a charter for the city of Troy" need not enumerate in its title all the powers intended to be conferred upon the corporation.[83] So an act creating a railroad corporation is not void because it confers upon the corporation the power to construct branch roads, to purchase lands, to mine for coal, to purchase or lease ferry franchises, etc., without expressing these powers in the title.[84] So of an act the title of which was to incorporate a certain railroad company which stated in its body, among other subjects of the incorporation, that of "purchasing and navigating such steam or sailing vessels as may be proper and convenient to be used in connection with said road."[85] An act the title of which is, "An act to incorporate the Montgomery Mutual Building and Loan Association," is not void under this constitutional principle, because it sets out in its body the entire constitution of the company, defining the rights and liabilities of its members, providing specially for the management, loan, and investment of its funds, and prescribing the number, duties, and powers of these officers, etc.[86]

(II) *Providing For Municipal Aid in Acts Incorporating, or Amending Charters of, Railway Companies.* The doctrine of the preceding paragraph is illustrated by a collection of cases embracing the decided weight of authority which hold that an act which by its title simply incorporates a railway company

80. Lockhart *v.* Troy, 48 Ala. 579; Goldsmith *v.* Rome R. Co., 62 Ga. 473.

81. Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213.

82. Goldsmith *v.* Georgia R. Co., 62 Ga. 485. *Compare* Goldsmith *v.* Rome R. Co., 62 Ga. 473.

83. Lockhart *v.* Troy, 48 Ala. 579.

84. Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589, opinion by Caton, J. So held as to branch road in Mississippi, etc., R. Co. *v.* Wooten, 36 La. Ann. 441, and as to extensions which do not constitute a part of the main line, in Ross *v.* Chicago, etc., R. Co., 77 Ill. 127. See also Ottawa *v.* People, 48 Ill. 233. Again "An act for the relief" of a certain railroad company has been held sufficiently broad as to title to include a provision authorizing an extension of the road of such company. Houston, etc., R. Co. *v.* Odum, 53 Tex. 343.

85. Freeman *v.* Panama R. Co., 7 Hun (N. Y.) 122, 125.

86. Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413.

Other illustrative cases.— The following cases will also illustrate the doctrine of the text and show the liberality with which the courts have construed and applied these constitutional provisions, the particular question ruled in each of the cases cited being detailed with frequent quotations from the different judicial opinions, in 1 Thompson Corp. §§ 612, 618.

Colorado.— Golden Canal Co. *v.* Bright, 8 Colo. 144, 6 Pac. 142.

Georgia.— Davis *v.* Fulton Bank, 31 Ga. 69.

Illinois.— Sykes *v.* People, 127 Ill. 117, 19 N. E. 705, 2 L. R. A. 461; O'Leary *v.* Cook County, 28 Ill. 534; Firemen's Benev. Assoc. *v.* Lounsbury, 21 Ill. 511, 74 Am. Dec. 115.

Indiana.— Hunt *v.* Lake Shore, etc., R. Co., 112 Ind. 69, 13 N. E. 263; Wishmeier *v.* State, 97 Ind. 160; Ross *v.* Davis, 97 Ind. 79; Miami County *v.* Bearss, 25 Ind. 110; Coffman *v.* Keightley, 24 Ind. 509; Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217.

Iowa.— Porter *v.* Thomson, 22 Iowa 391.

Kansas.— Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793.

Kentucky.— McReynolds *v.* Smallhouse, 8 Bush 447; Louisville, etc., Turnpike Road Co. *v.* Ballard, 2 Metc. 165; Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406.

Louisiana.— Bridgeford *v.* Hall, 18 La. Ann. 211.

Maryland.—Maryland Agricultural College *v.* Keating, 58 Md. 580.

Michigan.— Tolford *v.* Church, 66 Mich. 431, 33 N. W. 913; Atty.-Gen. *v.* Joy, 55 Mich. 94, 20 N. W. 806; Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

or amends a charter of an existing railway company may properly embrace in its body a provision authorizing municipal corporations to subscribe for its stock and to issue its bonds therefor;[87] although there is some authority to the effect that such a statute, in so far as it embraces such a provision for municipal aid, is void, and that the bonds issued in pursuance of it are void.[88] Accordingly it has been held that an act empowering a railroad corporation to extend its road through a certain county and the county to subscribe for its capital stock embraces only one object.[89] So it has been held that a statute legalizing elections held in a county, on a question of issuing county bonds to aid certain railroad companies, and authorizing townships lying on or near a certain railroad to subscribe for its stock and issue bonds therefor, does not conflict with such constitutional provision.[90] So an act "in relation to" a particular railroad company may embrace provisions validating town bonds previously but irregularly issued to such company.[91]

e. Statutes Void Because Embracing More Than One Subject. Confining ourselves to private corporations, the following instances may be given of statutes which were held void because embracing more than one subject: A statute incorporating three distinct corporations or reviving by name three distinct charters which had become obsolete;[92] an act providing for the expenditure of the non-resident highway taxes, for the improvement of two state roads, and for the construction and improvement of another state road, the latter object not being expressed in the title;[93] an act releasing the interest of the state in certain real estate to certain named persons, and for other purposes;[94] an act "relating to the Mississippi Boom Corporation" imposing additional duties upon another and separate corporation;[95] an act "to provide for the incorporation of merchants' mutual insurance companies, and to regulate the business of insurance by merchants' and manufacturers' mutual insurance companies," nor could the

Missouri.— State *v.* State Bank, 45 Mo. 528; State *v.* Miller, 45 Mo. 495.

New York.— People *v.* New York Tax, etc., Com'rs, 47 N. Y. 501; People *v.* Lawrence, 41 N. Y. 123; People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642; Conner *v.* New York, 5 N. Y. 285; Astor *v.* New Arcade R. Co., 48 Hun 562, 1 N. Y. Suppl. 174, 16 N. Y. St. 141; Mosier *v.* Hilton, 15 Barb. 657; Wilson *v.* New York, etc., R. Co., 2 N. Y. Suppl. 65.

Pennsylvania.— *In re* Phœnixville Road, 109 Pa. St. 44.

Wisconsin.— Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971; Phillips *v.* Albany, 28 Wis. 340.

United States.— Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 8 S. Ct. 643, 31 L. ed. 543; Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730 (opinion by Harlan, J.).

87. *Georgia.*— Hope *v.* Gainesville, 72 Ga. 246.

Illinois.— Abbington *v.* Cabeen, 106 Ill. 200; Schuyler County *v.* People, 25 Ill. 181 [*overruled* in People *v.* Hamill, (1888) 17 N. E. 799].

Kansas.— Marion County *v.* Harvey County, 26 Kan. 181.

Kentucky.— Phillips *v.* Covington, 2 Metc. 219.

South Carolina.— Whitesides *v.* Neely, 30 S. C. 31, 8 S. E. 27; Floyd *v.* Perrin, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242.

Wisconsin.— Phillips *v.* Albany, 28 Wis. 340.

United States.— Mahomet *v.* Quackenbush, 117 U. S. 508, 6 S. Ct. 858, 29 L. ed. 982.

88. People *v.* Hamill, (Ill. 1888) 17 N. E. 799; Peck *v.* San Antonio, 51 Tex. 490 [*disapproving* San Antonio *v.* Lane, 32 Tex. 405; San Antonio *v.* Mehaffy, 96 U. S. 312, 24 L. ed. 816]; Giddings *v.* San Antonio, 47 Tex. 548, 26 Am. Rep. 321.

In conformity with the weight of authority as above shown it has been held that "An act to amend the charter of" a bridge company is not invalid, although it authorizes it to increase its capital stock, and empowers a particular city to subscribe therefor, and to issue its bonds in payment therefor. Phillips *v.* Covington, etc., Bridge Co., 2 Metc. (Ky.) 219, 221.

89. Baltimore, etc., R. Co. *v.* Jefferson County, 29 Fed. 305.

90. Unity *v.* Burrage, 103 U. S. 447, 26 L. ed. 405.

91. Hardenbergh *v.* Van Keuren, 4 Abb. N. Cas. (N. Y.) 43. Some fluctuation on this subject in the decisions of the supreme court of Illinois will be discovered by a perusal of the following cases: Welch *v.* Post, 99 Ill. 471; Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562; Lockport *v.* Gaylord, 61 Ill. 276. *Compare* Mahomet *v.* Quackenbush, 117 U. S. 508, 6 S. Ct. 858, 29 L. ed. 982, where the authority of Welch *v.* Post, 99 Ill. 471, is questioned.

92. *Ex p.* Conner, 51 Ga. 571.

93. People *v.* Denahy, 20 Mich. 350.

94. Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753, 11 N. Y. St. 436.

95. Mississippi, etc., Boom Co. *v.* Prince, 34 Minn. 79, 24 N. W. 361.

act be maintained as to one of its objects and rejected as to the other;[96] an act "to release the Fishkill and Beekman Plank Road Company from the construction of part of their road, and for other purposes";[97] and an act to authorize a certain railroad company "to declare dividends quarterly and to lay additional tracks of railway."[98] So it was held that an act entitled, "An act to tax and regulate" certain named foreign corporations, could not, under such a constitutional inhibition, contain any provision in relation to other foreign corporations.[99] It was held by the supreme court of California that an act "to promote drainage," which provided for the control of *débris* from mining operations which raised the natural bed of rivers and caused them to overflow the surrounding country, was void as containing more than one subject.[1]

f. Statutes Void Because Containing Subjects Not Embraced in Titles. Confining ourselves again to statutes relating to private corporations, we find the following instances of statutes which were held void under these constitutional provisions, because containing subjects not embraced in their titles: "An Act relating to the Ridge Avenue Passenger Railway Company," ratifying the consolidation of the company with another company and repealing the provisions in the charters of the two companies so as to release them from the control of the city.[2] So of "An act to facilitate the carriage and transfer of passengers and property by railroad companies" which authorized all railroad companies having a terminus on any navigable river bordering on the state to own, for their own use, any water-craft necessary in carrying across such river any property or passengers transferred on their lines, and which provided "that no right shall exist under this act to condemn any real estate for landing for such water-craft, or for any other purpose," and that the act should apply only to "such railroad companies as own the landing for such water-craft," where the title was held misleading and not sufficiently broad to include the proviso.[3] So of "An act authorizing the acquisition of turnpikes, roads, or highways, heretofore or hereafter constructed, near or through any borough or township in this commonwealth, upon which tolls are charged the traveling public;" because (1) its title excludes turnpikes in cities, and the body of the act includes them; (2) it is confined to such turnpikes as lie wholly within the bounds of single counties; and (3) the title of the act does not indicate that counties are in any way affected.[4] So of "An act for the incorporation of insurance companies, defining their powers and prescribing their duties," in respect of a section which regulates the agencies of foreign insurance companies doing business within the state.[5] So also as to "An act to regulate the manner of voting in Bourbon county on questions of tax for subscriptions to railroad companies" containing a clause providing that no tax should be imposed for such purpose upon the property of those residing outside the limits of a certain city, unless the votes of a majority of the voters residing outside such limits should be cast in favor of such subscription.[6] So of "An act to incorporate" a certain railroad company, in so far as it conferred upon the company the power to construct and lease its road, and authorized other railroad companies to accept such lease.[7] So of an act expressing in its title that its object was to provide a means for the collection of claims for cattle and other stock, etc., destroyed by

96. Skinner *v.* Wilhelm, 63 Mich. 568, 571, 30 N. W. 311.

97. Fishkill *v.* Fishkill, etc., Plank Road Co., 22 Barb. (N. Y.) 634, 642, where the first section of the act, which did not relate to "other purposes," was held valid.

98. West Philadelphia Pass. R. Co. *v.* Union Pass. R. Co., 9 Phila. (Pa.) 495, 29 Leg. Int. (Pa.) 196.

99. Oregon, etc., Trust Invest. Co. *v.* Rathburn, 18 Fed. Cas. No. 10,555, 5 Sawy. 32.

1. People *v.* Parks, 58 Cal. 624; Doane *v.* Weil, 58 Cal. 334 (Myrick and Sharpenstein, JJ., dissenting).

2. Philadelphia *v.* Ridge Ave. Pass. R. Co., 6 Pa. Co. Ct. 283.

3. Thomas *v.* Wabash, etc., R. Co., 40 Fed. 126, 7 L. R. A. 145.

4. *In re* Carbondale, etc., Turnpike, etc., Road, (Pa. 1888) 13 Atl. 913.

5. Grubbs *v.* State, 24 Ind. 295.

6. Kentucky, etc., R. Co. *v.* Bourbon, 85 Ky. 98, 2 S. W. 687, 8 Ky. L. Rep. 881.

7. Camden, etc., R. Co. *v.* May's Landing, etc., R. Co., 48 N. J. L. 530, 7 Atl. 523.

railroads, with the conclusion that it could not embrace in its body a provision creating an absolute liability on the part of railroad companies for the killing of cattle, which liability did not exist prior to its passage,[8] a decision which does not seem to be sound. So of "An act relating to the Mississippi Boom Corporation," in so far as it contained a provision imposing additional duties upon another corporation, in effect amending its charter.[9] So of a special act of incorporation, the title of which was "An Act to incorporate the Manufacturers' Improvement Company," the body of which expressed the object of incorporation to be to clear out, improve, and render navigable a certain stream and its tributaries. Here the title expressed in no sense the principal purpose of the act, since the word "manufacturer" gave no clue to it. The whole act was therefore void.[10]

g. What May Be Embodied Under General Titles of Enabling Acts Authorizing Formation of Corporations. A statute in the nature of an enabling act which embodies a general scheme of incorporation may embrace the greatest variety of subjects germane to corporations, under a title couched in the most general form of words, such as an act concerning private corporations. In treating of railroad corporations it may confer upon them the power to condemn land for right of way and to receive subscriptions of municipalities to their stock, and all this without coming within such a constitutional inhibition.[11] An act "to revise the laws providing for the incorporation of railroad companies" does not violate such a constitutional provision, by including the substantial provisions of a former law which imposes a liability upon railroad companies for injuries resulting from neglecting to fence their tracks.[12] "An act to authorize the organization of annuity, safe-deposit, and trust companies," may properly embrace a provision granting to such corporations the power to act as guardians of the estates of insane persons.[13]

h. Titles of Acts Which Purport to Amend Former Acts. It may be stated as a general proposition that an act which by its title merely purports to amend a former act, which it recites by its title, is unconstitutional and void, under the provisions which we are considering, if it introduces a subject not germane to the title of the former act. The test by which to determine whether a subject can be embraced within a title "An act to amend" a former act is to consider whether the subject could have been embraced within the original act under its title.[14] To

8. Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

9. Mississippi, etc., Boom Co. *v.* Prince, 34 Minn. 79, 24 N. W. 361.

10. Rogers *v.* Manufacturers' Imp. Co., 109 Pa. St. 109, 1 Atl. 344.

11. Marion County *v.* Harvey County, 26 Kan. 181.

12. Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167.

13. Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

14. Brandon *v.* State, 16 Ind. 197; Morford *v.* Unger, 8 Iowa 82; Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971 (opinion by Taylor, J.).

Amendatory acts void under foregoing principle.— By a special act a corporation had been created whose business was the transmission of letters, packages, and merchandise through pneumatic tubes under the streets of New York and Brooklyn. A supplementary act expressing in its title the same purpose, contained in its body provisions, which in effect authorized the purposes of the corporation to be changed to the construction and maintenance of an underground steam or horse railroad. It was held that this was so wide a departure from the purpose of the act expressed in its original title and in the title of the amendatory act as to render it void. Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 22 N. Y. St. 1, 2 L. R. A. 789. In another case the title of an act of incorporation of a passenger railway company authorized them to lay their tracks in a number of designated streets. Subsequently an act was passed entitled "a supplement" (to the first-named act) authorizing the company to declare dividends quarterly and to lay additional tracks of railway. It was held that this latter clause did not warrant a provision in the body of the amendatory act authorizing the company to extend its railway into new territory not hitherto authorized to be used. Union Pass. R. Co.'s Appeal, 81 Pa. St. 91. So where a title of the original act was "An act for the incorporation of manufacturing companies," and the title of the amendatory act was "An act to amend section one, of an act entitled 'An act for the incorporation of manufacturing companies,'" etc., and this amendatory act contained a provision for the incorporation of companies to carry on a mercantile business, it was held that it was void. Eaton

illustrate this principle it has been held that where the title to the original act was an act to incorporate the Yellow River Improvement Company, an amendatory act whose title merely purported to amend the former act might embrace a provision empowering the company to run logs and lumber on the river after the same had been improved by it and to take tolls therefor. This was not so disconnected with and foreign to the business of improving the river as to form a new subject which could not be legitimately connected with the business of the improvement company created by the original act, and which might not therefore have been embraced under its title.[15] An act is not necessarily invalid because, being amendatory of a previous act, the title does not expressly so state.[16]

i. Void as to Matter Not Embraced in Title, Although Valid as to Rest. On a principle hereafter more fully explained[17] an act creating corporations or conferring corporate privileges may be held void as to the matter not embraced in its title, although valid as to the rest, provided the incongruous matter is not so interwoven with the good matter as to be unseverable.[18]

15. Restraints as to Mode of Passing Laws — a. Requiring Assent of Two Thirds of Each House. A constitutional provision that "the legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house," prevents the legislature from passing a single act creating more than one corporation.[19]

b. Whether Provisions Mandatory or Directory. The weight of authority

v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

Amendatory acts valid under foregoing principle.— An act to "amend the charter" of a railroad company may embrace a provision that "actions for injuries to stock and other property on said road by the company or its agents must be brought within six months after such injury," the court saying: "This act relates to but one subject, and that is clearly expressed in the title, and the legislation under it is in reference to the subject-matter of the title, and has a direct connection with it." O'Bannon *v.* Louisville, etc., R. Co., 8 Bush (Ky.) 348, 352. An act to amend a certain chapter of the general statutes entitled, "An act to provide for the formation of corporations," has been held sufficiently specific to embrace a provision requiring the payment of a fee to the secretary of state of a corporation filing its certificate of organization. Edwards *v.* Denver, etc., R. Co., 13 Colo. 59, 21 Pac. 1011. "An act to amend the charter" of a certain turnpike company provided that "the charter of the [said] turnpike company be and the same is hereby repealed as follows, to wit," providing that the company should be relieved from the provisions of a general statute relating to the election of officers and prescribing the manner in which the stock owned by the society should be voted. It was held that the subject of this act was sufficiently expressed in the title, the word "repealed" having been used instead of "amended" by an obvious mistake. It was an amendment according to legislative intent. Cassell *v.* Lexington, etc., Turnpike Co., (Ky. 1888) 9 S. W. 502, 503.

15. Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971.

16. Timm *v.* Harrison, 109 Ill. 509.

17. See *infra*, I, I, 18.

18. Mississippi, etc., Boom Co. *v.* Prince, 34 Minn. 79, 24 N. W. 361; Dewhurst *v.* Allegheny, 95 Pa. St. 437.

19. **The Michigan Banking Law of 1837** was held to be unconstitutional after many banks had been organized under it and after many rights had thereby become vested, on the ground that it had been enacted in violation of a constitutional provision of that state th t "the legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house." Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457; Green *v.* Graves, 1 Dougl. (Mich.) 351. Mr. Justice McLean at circuit twice held the same statute to be valid, once in his very elaborate judgment in Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195; and again in White *v.* How, 29 Fed. Cas. No. 17,548, 3 McLean 111. But the supreme court of Michigan finally declared it unconstitutional and the federal court being bound by the state decision in respect of the interpretation of its own constitution, Mr. Justice McLean subsequently, in Nessmith *v.* Shelden, 18 Fed. Cas. No. 10,125, 4 McLean 375, declared the act unconstitutional, and his decision was *affirmed* on error in 7 How. (U. S.) 812, 12 L. ed. 925.

Such a provision existed in the constitution of New York. It was at first held that it did not apply to public corporations, but that it applied only to private corporations, such as banking institutions, etc. (People *v.* Morris, 13 Wend. (N. Y.) 325), but this doctrine was denied and overruled in subsequent cases (Purdy *v.* People, 4 Hill (N. Y.) 384 [*reversing* 2 Hill (N. Y.) 31, and *overruling* People *v.* Morris, 13 Wend. N. Y. 325]. See also De Bow *v.* People, 1 Den. (N. Y.) 9 [*overruled* in Gifford *v.* Livingston, 2 Den. (N. Y.) 380]). In another case two mem-

unquestionably is that such provisions are mandatory, and that it is obligatory upon the judicial courts to refuse to give effect to statutes not passed in conformity with them;[20] although one decision is found to the effect that constitutional provisions as to the mode of passing such acts are directory merely.[21]

c. **Whether Courts Will Go Behind Enrolment of Bill.** According to one view, the presumption which springs from the fact of the bill being signed and enrolled by the proper legislative officers is conclusive, and the courts will not look either to the journals of the houses of the legislature or hear any evidence for the purpose of overthrowing that presumption.[22] The other view is that it is competent for the courts to go behind the official enrolment or publication and to look to the journals of the two houses of the legislature for the purpose of ascertaining whether the statute was passed in conformity with the requirements of the constitution, and that they are at liberty to declare it to be no law if they find that it was not so passed.[23] The question whether the presumption in favor of the conclusion that a statute was regularly passed and became a law in conformity with the constitution, which is created by its publication in a public volume of statutes, is a *prima facie* presumption or a conclusive presumption which cannot be overthrown by references to the journals of the houses or by extrinsic facts, takes us into the domain of constitutional law, and will not be further specially pursued.[24]

bers of the court of errors of New York advanced the opinion that this constitutional provision did not apply to private corporations such as banks, provided they were created under general laws which authorized everybody to form corporations. Warner *v.* Beers, 23 Wend. (N. Y.) 103. But this view was thought to be opposed to the subsequent decisions of the court of errors. Purdy *v.* People, 4 Hill (N. Y.) 384. See the observations of Bronson, C. J., in De Bow *v.* People, 1 Den. (N. Y.) 9. The struggle finally ended with the decision of the court of errors, by a vote of fifteen members against seven, in which it was resolved, on the authority of Warner *v.* Beers, 23 Wend. (N. Y.) 103, that the statute was enacted in conformity with the constitution, although it may not have received the assent of two thirds of the members elected to each branch of the legislature, and that the decision in that case was conclusive. Gifford *v.* Livingston, 2 Den. (N. Y.) 380. See also Palmer *v.* Lawrence, 5 N. Y. 389; Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309; Watertown Bank *v.* Watertown, 25 Wend. (N. Y.) 686; Hunt *v.* Van Alstyne, 25 Wend. (N. Y.) 605; Thomas *v.* Dakin, 22 Wend. (N. Y.) 9.

20. See *supra*, I, I, 14, c. See a learned note on this question by W. W. Thornton, Esq., in 26 Am. L. Reg. N. S. 304 note, also a learned note in 85 Am. Dec. 356, discussing the subject at length with an exhaustive list of authorities.

21. McClinch *v.* Sturgis, 72 Me. 288.

22. *Alabama.*— Jones *v.* Hutchinson, 43 Ala. 721.

Georgia.— Danielly *v.* Cabaniss, 52 Ga. 211.

Illinois.— Ryan *v.* Lynch, 68 Ill. 160.

Indiana.— Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283; Evans *v.* Browne, 30 Ind. 514, 95 Am. Dec. 710.

Kentucky.— Com. *v.* Jackson, 5 Bush 680.

Louisiana.— Whited *v.* Lewis, 25 La. Ann. 568.

Mississippi.— *Ex p.* Wren, 63 Miss. 512, 56 Am. Rep. 825 [*overruling* Brady *v.* West, 50 Miss. 68].

New York.— People *v.* Highway Com'rs, 54 N. Y. 276, 13 Am. Rep. 581.

North Carolina.— Brodnax *v.* Groom, 64 N. C. 244, private act.

Texas.— Usener *v.* State, 8 Tex. App. 177 [*overruled* by Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233].

Utah.— People *v.* Clayton, 5 Utah 598, 18 Pac. 628.

Compare Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

23. *Arkansas.*— Smithee *v.* Garth, 33 Ark. 17.

Florida.— State *v.* Brown, 20 Fla. 407.

Illinois.— Ryan *v.* Lynch, 68 Ill. 160.

Maryland.— Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69.

Nebraska.— State *v.* Robinson, 20 Nebr. 96, 29 N. W. 246, journals made competent evidence by statute.

Texas.— Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233 [*disapproving* Blessing *v.* Galveston, 42 Tex. 641, and *overruling* Usener *v.* State, 8 Tex. App. 177].

West Virginia.—Osburn *v.* Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wyoming.— Brown *v.* Nash, 1 Wyo. 85.

United States.—Amoskeag Nat. Bank *v.* Ottawa, 105 U. S. 667, 26 L. ed. 1204; Gardner *v.* Barney, 6 Wall. 499, 18 L. ed. 890.

24. See as speaking upon this question the following cases:

Arkansas.— Glidewell *v.* Martin, 51 Ark. 559, 11 S. W. 882.

Florida.— State *v.* Brown, 20 Fla. 407.

Illinois.— Hensoldt *v.* Petersburg, 63 Ill. 157.

Minnesota.— State *v.* Sannerud, 38 Minn.

d. Provisions Requiring Amendments of Charters to Be Submitted to Vote of People. A constitutional provision prohibiting the legislature from creating banking corporations without submitting the act to a vote of the people did not according to one decision prevent the legislature from amending a general banking law without submitting the amendment to a popular vote.[25] On the contrary the banking law of Wisconsin, which was held to be in the nature and to have the force and effect of a constitutional provision,[26] could not be amended without a vote of the people.[27]

e. Provisions That No Law Shall Create, Renew, or Extend the Charter of More Than One Corporation. A constitutional provision that no law shall create, renew, or extend the charter of more than one corporation has been held to mean that it shall not make a charter which never existed before, shall not revive and restore one which has expired, and shall not increase the time for the existence of one which would otherwise reach its period of expiration at an earlier time.[28]

16. Objection on Ground of Delegation of Legislative Power. The principle that legislative power cannot be delegated[29] restrains a state legislature from enacting laws creating corporations or enlarging their powers, which are to take

229, 36 N. W. 447; State *v.* Olson, 38 Minn. 150, 36 N. W. 446; State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

Missouri.— State *v.* Reed, 71 Mo. 200.

New York.— People *v.* Chenango, 8 N. Y. 317.

Tennessee.— State *v.* Algood, 87 Tenn. 163, 10 S. W. 310; Williams *v.* State, 6 Lea 549.

Texas.— Day Land, etc., Co. *v.* State, 63 Tex. 526, 4 S. W. 865; Blessing *v.* Galveston, 42 Tex. 641.

United States.— Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730.

Parol evidence will not be admitted to contradict the journals of the houses of the legislature for the purpose of overthrowing a statute. State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829. *Contra*, Fowler *v.* Pierce, 2 Cal. 165. See also Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69.

Parties will not be allowed to stipulate or agree or admit in their pleadings that a statute was not constitutionally passed, unless the informality is shown by the printed journals of the houses or the certificate of the secretary of state. Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203.

Supplying certificate of presiding officer by parol.— That the certificate of the presiding officer of the two houses that three fifths of the members were present at the time of the passage of the bill may be supplied by parol evidence where it is omitted see People *v.* Chenango, 8 N. Y. 317.

That the bill must be signed by the governor or else be regarded as no law see Fowler *v.* Pierce, 2 Cal. 165; State *v.* Glenn, 18 Nev. 34, 1 Pac. 186; Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233. *Compare* Taylor *v.* Wilson, 17 Nebr. 88, 22 N. W. 119. Bill signed by the governor by mistake, immediately notified to speaker of house and read aloud, and bill held no law. People *v.* Hatch, 19 Ill. 283.

25. Smith *v.* Bryan, 34 Ill. 364.

26. State *v.* Hastings, 12 Wis. 47.

27. Van Steenwyck *v.* Sackett, 17 Wis. 645.

28. Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380.

29. See as to this principle the following cases:

Arkansas.— Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6.

California.— Houghton *v.* Austin, 47 Cal. 646.

Delaware.— Rice *v.* Foster, 4 Harr. 479.

Indiana.— Groesch *v.* State, 42 Ind. 547; Meshmeier *v.* State, 11 Ind. 482; Maize *v.* State, 4 Ind. 342.

Iowa.— State *v.* Weir, 33 Iowa 134, 11 Am. Rep. 115; State *v.* Beneke, 9 Iowa 203; State *v.* Geebrick, 5 Iowa 491; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Maryland.— Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83.

Massachusetts.— Com. *v.* Bennett, 108 Mass. 27.

Michigan.— People *v.* Collins, 3 Mich. 343.

Minnesota.— State *v.* Young, 29 Minn. 474, 9 N. W. 737 [*recognized* in State *v.* Chicago, etc., R. Co., 38 Minn. 281, 37 N. W. 782].

Missouri.— State *v.* Pond, 93 Mo. 606, 6 S. W. 469; Lammert *v.* Lidwell, 62 Mo. 188, 21 Am. Rep. 411; State *v.* Wilcox, 45 Mo. 458; State *v.* Weatherby, 45 Mo. 17.

New York.— Clarke *v.* Rochester, 28 N. Y. 605; Starin *v.* Genoa, 23 N. Y. 439; Rome Bank *v.* Rome, 18 N. Y. 38; Barto *v.* Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Bradley *v.* Baxter, 15 Barb. 122; Thorne *v.* Cramer, 15 Barb. 112.

Ohio.— Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77.

Oregon.— Brown *v.* Fleischner, 4 Oreg. 132.

Pennsylvania.— Com. *v.* Locke, 72 Pa. St. 491, 13 Am. Rep. 716 [*overruling* Parker *v.* Com., 6 Pa. St. 507, 47 Am. Dec. 480]; Com. *v.* Judge Quarter Sess., 8 Pa. St. 391.

Rhode Island.— State *v.* Copeland, 3 R. I. 33.

Texas.— State *v.* Swisher, 17 Tex. 441.

Utah.— Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759.

effect only when approved by a vote of the people, unless the constitution so provides.[30] It does not, according to a view now largely prevailing, restrain the legislature from enacting laws subject to approval by a popular vote, which are to take effect within limited districts, such as "local option laws" relating to the sale of intoxicating liquors, prohibiting domestic animals from running at large, or the like.[31] Nor does it operate to prevent the legislature from enacting laws submitting many details which may be regarded either as administrative or as quasi-legislative to local boards or officials, such as the power to grant a license or franchise for the collection of wharfage dues for the use of piers on navigable rivers,[32] or giving the state board of agriculture the power to issue licenses for mining phosphates.[33] This principle does not disable the legislature from enacting a law conferring on the judicial courts the power of creating corporations on applications made to them and good cause shown,[34] or from prescribing by general laws the conditions upon which corporations may be organized by the voluntary action of individuals subject to the superintendence of a ministerial officer of the state.[35]

17. Constitutional Power to Grant Exclusive Privileges — a. In General. In the absence of any constitutional prohibition it is a sound conclusion that the legislature of a state has the power to grant an exclusive privilege to a corporation, in consideration of the performance by it of public services. Such legislation is not unconstitutional from the circumstance that it may create what is ordinarily called a monopoly.[36] In the absence of any constitutional restraint, the legislature may therefore confer upon a private corporation the exclusive privilege of laying down gas-pipes and of manufacturing, distributing, and vending illuminating gas in a city,[37] or the exclusive privilege of erecting and maintaining a system of waterworks and of supplying the city and its inhabitants with water.[38] Such grants are customarily conferred upon corporations concurrently with their creation; but it has been held that in the absence of any constitutional restraint an existing corporation may receive from the legislature a direct grant of special privileges and franchises.[39] Under a constitution which declares that "no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services," it is beyond the power of the legislature to allow a particular corporation, which

Vermont.— State *v.* Parker, 26 Vt. 357.

Wisconsin.— State *v.* O'Neill, 24 Wis. 149.

30. *California.*— *Ex p.* Wall, 48 Cal. 279, 17 Am. Rep. 425.

Iowa.— State *v.* Beneke, 9 Iowa 203; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Michigan.— People *v.* Collins, 3 Mich. 343.

Missouri.— Lammert *v.* Lidwell, 62 Mo. 188, 21 Am. Rep. 411.

New York.— Barto *v.* Himrod, 8 N. Y. 483, 59 Am. Dec. 506.

Rhode Island.— State *v.* Copeland, 3 R. I. 33.

Nor can the legislature submit the question of the repeal of a law to the decision of the people. State *v.* Weir, 33 Iowa 134, 11 Am. Rep. 115; State *v.* Geebrick, 5 Iowa 491.

31. See for example, Louisville, etc., R. Co. *v.* Davidson, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; State *v.* O'Neill, 24 Wis. 149.

32. Farnum *v.* Johnson, 62 Wis. 620, 22 N. W. 751.

33. State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841.

34. Blake *v.* People, 109 Ill. 504.

35. See *infra*, I, L, 3.

Condition requiring consent of third party. — A condition in a legislative grant that the grantee should obtain the consent of a third party before enjoyment is not a delegation of legislative power and will not render the act unconstitutional. Morgan *v.* Monmouth Plank Road Co., 26 N. J. L. 99.

36. California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398; *In re* Philadelphia, etc., R. Co., 6 Whart. (Pa.) 25, 36 Am. Dec. 202; State *v.* Milwaukee Gas Light Co., 29 Wis. 454, 9 Am. Rep. 598. *Contra,* Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19. *Compare* San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

37. Louisville Gas. Co. *v.* Citizens' Gas-Light Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. ed. 510; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516. *Contra,* Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

38. New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. ed. 575.

39. California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398.

renders no public service in return for the grant of its franchise, to charge a greater rate of interest than that allowed by the general statutes of the state to other persons.[40] The cases where the legislature may make the grant of franchises exclusive are those in which the grant contemplates the rendition of public services by the grantees in return for the grant; and consequently the constitutional provision warrants a grant of the exclusive right to keep a ferry, to construct and operate a highway,[41] to take tolls for the use of an artificially improved navigation in consideration of keeping it in repair,[42] or to enjoy the exclusive privilege of occupying the streets of a city with mains and pipes for the distribution of illuminating gas, in consideration of the public services thus rendered.[43] Such a grant of an exclusive privilege, valid when made, is in the nature of a contract and cannot be impaired by subsequent legislation granting the same privileges to a newly created corporation.[44]

b. Such Grants Cannot Be Impaired by Subsequent Grants of Same Privileges Without Compensation. There is nothing in the constitution of the United

40. Gordon *v.* Winchester Bldg., etc., Assoc., 12 Bush (Ky.) 110, 114, 23 Am. Rep. 713.

41. Com. *v.* Whipps, 80 Ky. 269.

42. McReynolds *v.* Smallhouse, 8 Bush (Ky.) 447.

43. Louisville Gas Co. *v.* Citizens' Gas-Light Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. ed. 510 [*reversing* Citizens' Gaslight Co. *v.* Louisville Gas Co., 81 Ky. 263]. See also Com. *v.* Whipps, 80 Ky. 269; Com. *v.* Bacon, 13 Bush (Ky.) 210, 26 Am. Rep. 189; Gordon *v.* Winchester Bldg., etc., Fund Assoc., 12 Bush (Ky.) 110, 23 Am. Rep. 713 (views of Cofer, J.); O'Hara *v.* Lexington, etc., R. Co., 1 Dana (Ky.) 232.

44. Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. ed. 510; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516. One court has held that in the face of a constitutional prohibition that "no title of nobility, hereditary emolument, privilege, or distinction, shall be granted," it is beyond the power of the legislature to grant to a private corporation the exclusive privilege of making and vending gas within the limits of the city. St. Louis Gas Light Co. *v.* St. Louis Gas, etc., Co., 16 Mo. App. 52, 64. But the view seems untenable.

The amendment of 1875 to the former constitution of New York forbade the legislature from passing any special act granting to any corporation the right to lay down railway tracks, or any exclusive privilege, immunity, or franchise. This did not prohibit the legislature from amending the charter of an underground railroad company, by authorizing it to widen its excavation and to change its motive power; since this was not the grant of an exclusive privilege. Astor *v.* New York Arcade R. Co., 48 Hun (N. Y.) 562, 1 N. Y. Suppl. 174, 16 N. Y. St. 141; Bailey *v.* New York Arcade R. Co., 1 N. Y. Suppl. 304, 16 N. Y. St. 1007. *Compare* Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 22 N. Y. St. 1, 2 L. R. A. 789.

A provision of the constitution of Illinois against "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever" has been held to extend only to the passing of special or local laws for such purposes. Accordingly a statute regulating public warehouses and the warehousing and inspection of grain was not in contravention of this constitutional provision. Munn *v.* People, 69 Ill. 80, 85 [*affirmed* in 94 U. S. 113, 24 L. ed. 77].

A provision of the constitution of Tennessee forbidding perpetuities and monopolies left the right to construct waterworks in the city, which involves the privilege of taking up the pavements of the streets, of occupying the streets with water-mains, and of doing such other things as were necessary and proper in completing works for the distribution of water to the inhabitants, exclusively in the city until the legislature took it away and conferred it upon a private corporation, with the conclusion that this was not a monopoly in the sense of the constitutional provision, and that an act of the legislature conferring the right on a private corporation was valid. Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495.

In Louisiana the constitutionality of a statute giving to a private corporation the exclusive right to keep a slaughter-house, and also the exclusive control and supervision over the inspection of all animals slaughtered for market in the city of New Orleans, and at the same time prohibiting any other person from the business of purchasing or slaughtering live stock or selling the meats thereof in the markets of the city, was sustained against the objection that it violated a clause of the constitution of that state which provides that all persons shall enjoy the same civil, political, and public rights and privileges. It was also sustained in the same court, against the objection that it violated the fourteenth amendment to the constitution of the United States, and that it interfered with commerce among the states. State *v.* Fagan, 22 La. Ann. 545. The decision in this latter aspect was affirmed by the supreme court of the United States. Butchers Benev. Assoc. *v.* Crescent City Live-

States which imposes upon the legislatures of the states any restraint against granting monopolies and exclusive privileges; and whether such a grant is valid will depend upon the interpretation put by the highest court of the state making the grant upon its own constitution. The supreme court of errors of Connecticut has held that a grant by the legislature of that state of the exclusive privilege of building and operating a toll-bridge or a railroad within certain prescribed limits does not constitute a monoply in the odious sense of that term; but that such a grant is, when accepted by the corporation, in the nature of a contract, the obligation of which cannot be impaired by granting the same privilege to others.[45] The obligation of the contract is that the state will not authorize a similar structure within the prescribed limits.[46] The grant of exclusive ferry privileges is of this character, and between the points designated in the grant cannot be infringed by the grant of a similar franchise to a rival corporation.[47] If such a grant is made in express terms by the legislature of a state to a corporation or to an individual, and is valid under the constitution of the state, and the grant has been accepted by the grantees, it then becomes a contract between the state and the grantees which cannot be impaired by conferring a like franchise upon another corporation or person without making compensation for the impairment or destruction of the franchise previously granted;[48] although as elsewhere seen the privilege first granted may be appropriated for public use in the exercise of the right of eminent domain.[49] The same constitutional principle protects exclusive grants of the right to occupy the streets of a city for railway purposes, assuming the grant to have been valid in the first instance.[50] So if a corporation be chartered by a state with power to construct and maintain a turnpike, to erect toll-gates, and to collect tolls from travelers, or to improve a navigation and to collect tolls from persons using the navigation so improved, such a franchise is protected by the federal constitution as so interpreted; but always subject to the power of the state or of the United States in case of a navigation to take for public use its franchises and property under the power of eminent domain upon rendering just compensation.[51] The same constitutional principle operates to protect grants of franchises, commonly called "licenses," made by municipal corporations under authority granted by the legislature in their charters or

stock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394.

45. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

46. Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. (U. S.) 51, 18 L. ed. 137; Passaic, etc., Rivers Bridge *v.* Hoboken Land, etc., Co., 1 Wall. (U. S.) 116, 17 L. ed. 571. See also Des Moines St. R. Co. *v.* Des Moines Broad Gauge St. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602.

47. Costar *v.* Brush, 25 Wend. (N. Y.) 628.

48. *California.*— California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398.

Connecticut.—Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1, 10 Atl. 170; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

Maine.— State *v.* Noyes, 47 Me. 189.

Mississippi.— Aberdeen Female Academy *v.* Aberdeen, 13 Sm. & M. 545; Aberdeen *v.* Saunderson, 8 Sm. & M. 663; Townsend *v.* Blewett, 5 How. 503.

New Hampshire.— Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

New Jersey.— Raritan, etc., R. Co. *v.* Delaware, etc., Canal Co., 18 N. J. Eq. 546.

New York.— Benson *v.* New York, 10 Barb. 223; Costar *v.* Brush, 25 Wend. 628; Tyack *v.* Brumley, 1 Barb. Ch. 519 [*modifying* 4 Edw. 258]. *Compare* St. Louis *v.* St. Louis Gas Light Co., 5 Mo. App. 484 [*reversed* on appeal, 70 Mo. 69]; St. Clair County Turnpike Co. *v.* Illinois, 96 U. S. 63, 24 L. ed. 651.

United States.—St. Tammany Water Works Co. *v.* New Orleans Water Works Co., 120 U. S. 64, 7 S. Ct. 405, 30 L. ed. 563 [*affirming* 14 Fed. 194]; Louisville Gas Co. *v.* Citizens' Gas-Light Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. ed. 510; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516; Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. 51, 18 L. ed. 137; Passaic, etc., Rivers Bridge *v.* Hoboken Land, etc., Co., 1 Wall. 116, 17 L. ed. 571.

49. See *infra*, I, I, 22.

50. Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1 [doctrine *recognized* and this case *cited* in Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 663, 16 S. Ct. 705, 40 L. ed. 838].

51. Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463.

governing statutes.[52] Nor is the grant of a franchise any the less protected by the contract clause of the federal constitution because extended to the adventurers who organized the corporation or to the corporation itself by a general enabling statute, the provisions of which they voluntarily accepted by reorganizing a corporation thereunder, or in case of a corporation already organized by acting thereunder, than in the case of a corporation created by, or organized under, a special charter.[53]

c. Grant Not Expressly Declared to Be Exclusive Does Not Prevent Grants of Similar Franchises — (I) *In General.* The settled rule for the interpretation of charters and grants of privileges to corporations that the grant is to be strictly construed in favor of the public and against the grantees[54] has resulted in the conclusion that the grant of a franchise to a corporation is not to be construed as exclusive, unless it is so declared in express language or by necessary implication, so as to disable the legislature from making a similar grant to another corporation, although the second grant will operate to render the first valueless.[55] When therefore the legislature has granted to a corporation the franchise of building and maintaining a toll-bridge across a stream, but has not in terms made the privilege exclusive, it may grant a subsequent franchise to another corporation to build and maintain another bridge across the same stream near the former bridge, although the necessary effect of the second bridge will be to diminish the revenues

52. *Indiana.*— Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

Iowa.— Burlington *v.* Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145.

Louisiana.— East Louisiana R. Co. *v.* New Orleans, 46 La. Ann. 526, 15 So. 157; Conery *v.* New Orleans Water Works Co., 41 La. Ann. 910, 7 So. 8; New Orleans *v.* Great Southern Telephone, etc., Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502.

Missouri.— State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361.

New Jersey.— Hudson Telephone Co. *v.* Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619, designation of places to plant telephone poles in a public street not revocable.

New York.— New York *v.* Second Ave. R. Co., 32 N. Y. 261.

United States.—St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380; Sioux City St. R. Co. *v.* Sioux City, 138 U. S. 98, 11 S. Ct. 226, 34 L. ed. 898; New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. ed. 525; New Orleans Gas Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516; New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501, 5 S. Ct. 1009, 29 L. ed. 244; Greenwood *v.* Union Freight Co., 105 U. S. 13, 26 L. ed. 961; Wright *v.* Nagle, 101 U. S. 791, 25 L. ed. 921; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734; Shields *v.* Ohio, 95 U. S. 319, 24 L. ed. 357; New Jersey *v.* Yard, 95 U. S. 104, 24 L. ed. 352; Chicago *v.* Sheldon, 9 Wall. 50, 19 L. ed. 594; Baltimore Trust, etc., Co. *v.* Baltimore, 64 Fed. 153; Citizens' St. R. Co. *v.* Memphis, 53 Fed. 715; Coast Line R. Co. *v.* Savannah, 30 Fed. 646; Saginaw Gas-Light Co. *v.* Saginaw, 28 Fed. 529.

53. Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94; Miller *v.* New York, 15 Wall. (U. S.) 478, 21 L. ed. 98; Capital City Gaslight Co. *v.* Des Moines, 72 Fed. 829.

54. Chillicothe Bank *v.* Chillicothe, 7 Ohio, Pt. II, 31, 30 Am. Dec. 185; Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665; Richmond, etc., R. Co. *v.* Richmond, 26 Gratt. (Va.) 83; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838; Pennsylvania R. Co. *v.* Miller, 132 U. S. 75, 10 S. Ct. 34, 33 L. ed. 267; Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Washington, etc., Turnpike Co. *v.* Maryland, 3 Wall. (U. S.) 210, 18 L. ed. 180; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938; Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 7 L. ed. 939.

55. *Alabama.*— Dyer *v.* Tuskaloosa Bridge Co., 2 Port. 296, 27 Am. Dec. 655.

Connecticut.— Salem, etc., Turnpike Co. *v.* Lyme, 18 Conn. 451. *Compare* Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28.

Georgia.— Shorter *v.* Smith, 9 Ga. 517.

Illinois.— East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265; Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314.

Indiana.— Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 8 L. R. A. 539; Lafayette Plank-Road Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246; Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464; Bush *v.* Peru Bridge Co., 3 Ind. 21.

Kentucky.—Piatt *v.* Covington, etc., Bridge Co., 8 Bush 31; Richmond, etc., Turnpike Road *v.* Rogers, 1 Duv. 135.

Maryland.—Baltimore, etc., R. Co. *v.* State, 45 Md. 596.

derived from the former.[56] Where in like manner the legislature of a state grants to a corporation the franchise of maintaining a bridge across a stream, but without making the privilege in express terms exclusive, a subsequent grant to another corporation of the privilege of maintaining a ferry is not prohibited by the constitutional provision under consideration.[57] So the grant of a ferry franchise containing no words making it an exclusive privilege does not restrain the legislature from making a subsequent grant to another grantee of the franchise of maintaining a bridge near the ferry.[58] So a grant by the legislature or by a municipal corporation acting under authority derived from the legislature of the franchise of laying a railway track and maintaining a passenger railway upon a street of a city does not preclude the state or the municipal corporation from granting to another company the right to lay another track for the same purpose upon the same street.[59] Such a grant, not being by intendment of law exclusive, the company receiving it cannot have an injunction to restrain another company from laying another track upon the same street; but if the act of the second company amounts to a public nuisance it is for the public and not for the former company to redress the injury.[60] So where the legislature granted a charter to a company to construct a canal through the valley of a stream and to take the profits of it, without any provision against the exercise of the power to charter other rival companies, the legislature was not prohibited from granting a charter to a company to construct a railroad through the same valley, although it might afford the same public accommodation as the canal and impair or annihilate its profits.[61]

(II) *Construction of Conflicting Grants With Reference to This Principle.* The underlying basis of this principle of constitutional law being that nothing is to be taken in a public grant against the public which is not

Mississippi.— Collins *v.* Sherman, 31 Miss. 679.

New Hampshire.— Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

New Jersey.— Delaware River Bridge *v.* Trenton City Bridge Co., 13 N. J. Eq. 46.

New York.— *In re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 62 N. Y. St. 809, 26 L. R. A. 270; Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44; New York, etc., R. Co. *v.* Forty-Second St., etc., R. Co., 50 Barb. 285, 26 How. Pr. 68 [*affirmed* in 50 Barb. 309, 32 How. Pr. 481]; Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. 364; Troy, etc., R. Co. *v.* Northern Turnpike Co., 16 Barb. 100; *In re* Hamilton Ave., 14 Barb. 405; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige 554.

Tennessee.— Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626.

Texas.— Ft. Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169, 4 S. W. 534; Gulf City St. R. Co. *v.* Galveston City R. Co., 65 Tex. 502.

Vermont.— White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

Virginia.— Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 42, 36 Am. Dec. 374.

United States.— Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838; Pennsylvania R. Co. *v.* Miller, 132 U. S. 75, 10 S. Ct. 34, 33 L. ed. 267; Washington, etc., Turnpike Co. *v.* Maryland, 3 Wall. 210, 18 L. ed. 180; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 541, 13 L. ed. 518, 531 [*affirming* 17 Conn. 79]; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. ed. 773, 938; Providence Bank *v.* Billings, 4 Pet. 514, 7 L. ed. 939; Citizens' St. R. Co. *v.* Jones, 34 Fed. 579; Stein *v.* Bienville Water Supply Co., 34 Fed. 145.

England.— Hopkins *v.* Great Northern R. Co., 2 Q. B. D. 224, 46 L. J. Q. B. 265, 36 L. T. Rep. N. S. 898 [*overruling* Reg. *v.* Cambrian R. Co., L. R. 6 Q. B. 422, 40 L. J. Q. B. 169, 25 L. T. Rep. N. S. 84, 19 Wkly. Rep. 1138].

56. Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938 [*affirming* 7 Pick. (Mass.) 344].

57. Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210.

58. Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626.

59. Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 8 L. R. A. 539; New York, etc., R. Co. *v.* Forty-Second St. R. Co., 50 Barb. (N. Y.) 285, 26 How. Pr. (N. Y.) 68; Sixth Ave. R. Co. *v.* Kerr, 45 Barb. (N. Y.) 138; Ft. Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169, 4 S. W. 534; Gulf City St. R. Co. *v.* Galveston City R. Co., 65 Tex. 502; Citizens' St. R. Co. *v.* Jones, 34 Fed. 579.

60. Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. (N. Y.) 364.

61. Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 43, 36 Am. Dec. 374.

expressly granted,[62] it follows that whenever the legislature does grant a privilege in exclusive language and makes a subsequent grant, and the former grantee challenges the subsequent grant as an infringement of its exclusive privilege, the question whether it is an infringement will in every doubtful case be resolved in favor of the public right and consequently in favor of the second grantee.[63] Contrary to early decisions in Connecticut[64] it is now settled, so far as the highest federal judicial authority and the great weight of opinion in the state judicatories can settle it, that a grant by the legislature to a corporation of an exclusive privilege of maintaining a toll-bridge over a given stream between certain defined limits is not impaired by the subsequent grant by the legislature to a corporation of the right to erect a railroad bridge over the same stream near the toll-bridge.[65] So if the charter of a toll-bridge company prohibits the establishment of a ferry within a certain distance from the toll-bridge, the building of a railroad bridge within that distance is no infringement of the chartered rights of the toll-bridge company.[66] So if the legislature has granted an exclusive right to maintain a ferry within certain limits this does not disable it from granting a right to erect and maintain a toll-bridge within the same limits, without compensation to the ferry company, if the *locus in quo* of the ferry company is not taken.[67] So a grant of the exclusive right to supply a city with water from a certain creek is not impaired by a subsequent grant to others of a right to supply water to the city from other sources.[68] So a similar grant with authority to appropriate water from a designated pond, saving the rights of mill-owners, etc., does not give to the grantee company the exclusive right to such waters, and the legislature does not impair the grant by chartering another water company, and authorizing it to supply the same city from the same sources, it not appearing that the water is insufficient for the needs of both companies.[69] On the same principle a statute empowering a railroad company to construct a branch road has been construed as not creating a contract prohibiting a state from authorizing the construction of another railroad between the places connected by the branch road.[70] It is only where the grant of the second franchise is tantamount to a taking of the first that the two are deemed to be conflicting, and not where the use of the second merely diminishes the emoluments derived from the use of the first.[71] So an

62. See *supra*, I, I, 17, c, (I).

63. *Connecticut.*— Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210.

Georgia.— Savannah, etc., R. Co. *v.* Coast-Line R. Co., 49 Ga. 202.

Maryland.— Washington, etc., Turnpike Road Co. *v.* Baltimore, etc., R. Co., 10 Gill & J. 392.

New York.— Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. 364; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige 554; McLaren *v.* Pennington, 1 Paige 102; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. 625.

Vermont.— White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

Virginia.— Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 43, 36 Am. Dec. 374.

United States.— Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. ed. 773, 938 [*affirming* 7 Pick. (Mass.) 344].

64. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556. See also the wretched case of Raritan, etc., R. Co. *v.* Delaware, etc., Canal Co., 18 N. J. Eq. 546.

65. *Massachusetts.*— Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247.

Nevada.— Lake *v.* Virginia, etc., R. Co., 7 Nev. 294.

New Jersey.— Passaic, etc., Rivers Bridge Co. *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 81, 503 [*affirmed* in 1 Wall. (U. S.) 116, 17 L. ed. 571].

New York.— Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. 625.

North Carolina.— McRee *v.* Wilmington, etc., R. Co., 47 N. C. 186.

Vermont.— White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590, in which case the legislative grant did not purport to create an exclusive right.

66. Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554.

67. Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

68. Stein *v.* Bienville Water Supply Co., 34 Fed. 145.

69. Rockland Water Co. *v.* Camden, etc., Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388.

70. Baltimore, etc., R. Co. *v.* State, 45 Md. 596.

71. *In re* Hamilton Ave., 14 Barb. (N. Y.) 405.

exclusive franchise for transporting passengers and freight by railway across the state of New Jersey, between the cities of New York and Philadelphia, was not violated by the incorporation of a railroad company to construct a railroad across the state from Camden to the sea, or by the incorporation of a railroad company to construct a railroad from Raritan bay to Cape island; although these roads might be so connected as to form, with the aid of steamboats, a continuous line which by possibility might be used for the transportation of passengers and merchandise across the state between New York and Philadelphia. The same grant was construed as operating to protect merely the through business between New York and Philadelphia, and not the business between the intermediate places, and through any and every part of the route between those cities.[72] So an exclusive right to light a city with gas for thirty years is not "impaired," in the sense of the constitutional provision under consideration, by a subsequent contract between the city and another company to light the streets of the city with electricity.[73] So an exclusive right granted to a corporation, at a time when the underground cable as a means of propelling railway cars had not been invented, to operate horse railways upon the streets of a city, does not restrain the subsequent grant of a franchise of operating a cable railway.[74] So an exclusive right to construct and operate a horse railway in a city is not impaired by the construction of a railway in the same city to be operated by steam.[75]

18. Statutes Granting Corporate Powers and Privileges May Be Valid in Part and Void in Part. It is a principle of constitutional law that a statute may be valid in part and void in part. If a provision which is not obnoxious to any constitutional objection is found, even in the same section, with another provision which is repugnant to the constitution, the provision which is in itself valid must be sustained, unless the two are so united that it must be presumed that the legislature would not have adopted the one without the other.[76] An appropriate case for the application of this principle arises where the objects of the statute which are held to be unconstitutional and those parts of it which are valid are wholly independent of each other, so that the latter may be carried into effect without reference to the former.[77] When the parts of a statute are so mutually connected and dependent, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all

72. Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 16 N. J. Eq. 321.

73. Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. 529.

74. Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324, holding that the fact that plaintiff's charter prohibited "the running of locomotives or cars propelled by steam," or the running upon plaintiff's railway of the cars of any other railway company, did not have the effect of granting to plaintiff a monopoly of every form of street railway transportation, except that of cars drawn by engines. See also Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 524, 33 N. W. 610, 35 N. W. 602, supplemental opinion.

75. Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673.

76. *Ex p.* Fraser, 54 Cal. 94; People *v.* Nally, 49 Cal. 478; Robinson *v.* Bidwell, 22 Cal. 379; Com. *v.* Hitchings, 5 Gray (Mass.) 482.

77. *Alabama.*—South, etc., Alabama R. Co. *v.* Morris, 65 Ala. 193; Mobile, etc., R. Co. *v.* State, 29 Ala. 573.

California.— *Ex p.* Fraser, 54 Cal. 94; Rood *v.* McCargar, 49 Cal. 117; Mills *v.* Sargent, 36 Cal. 379; French *v.* Teschemaker, 24 Cal. 518; Robinson *v.* Bidwell, 22 Cal. 379; Lathrop *v.* Mills, 19 Cal. 513; People *v.* Hill, 7 Cal. 97.

Colorado.— People *v.* Jobs, 7 Colo. 475, 589, 4 Pac. 798, 1124; Gunnison County Com'rs *v.* Owen, 7 Colo. 467, 4 Pac. 795; Tripp *v.* Overocker, 7 Colo. 72, 1 Pac. 695.

Illinois.— Nelson *v.* People, 33 Ill. 390.

Indiana.— McCulloch *v.* State, 11 Ind. 424.

Iowa.— Santo *v.* State, 2 Iowa 165.

Massachusetts.— Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381.

Mississippi.—Campbell *v.* Mississippi Union Bank, 6 How. 625.

Missouri.— State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471; St. Louis *v.* St. Louis R. Co., 14 Mo. App. 221.

New York.— Harris *v.* Niagara County, 33 Hun 279; Matter of De Vaucene, 31 How. Pr. 289.

Ohio.— State *v.* Perry County, 5 Ohio St. 497; Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1.

Rhode Island.— State *v.* Snow, 3 R. I. 64; State *v.* Copeland, 3 R. I. 33.

could not be carried into effect the legislature would not have passed the residue, independently, if some parts are unconstitutional and void, all the provisions, which are thus dependent, conditional, or connected, must fall with them.[78] It has already been seen that if a part of a statute is not expressed in the title, and such part is severable from the rest, it may be declared void and the rest allowed to stand, under a constitutional provision that an act shall contain but one subject, which shall be expressed in its title.[79] So if we refer to some of the principles discussed in a preceding subdivision in regard to the restraints upon the enacting of laws, we shall find that where it is ascertained from the journals of the two houses of the legislature that a particular amendment to a bill was not passed in conformity with the requirements of the constitution, but that the bill without the amendment was passed, the courts may, it has been held, sever the amendment from the bill and declare the amendment void and the rest of the law valid.[80] A general act authorizing the formation of corporations may, like any other statute, be valid in part although void in part. For instance, although a statute authorizing the creation of rafting or boom companies may be invalid in so far as it gives a corporation the right to take exclusive possession of a navigable stream and bar the rights of all others therein, yet in so far as it merely provides for the formation of corporations with the power to make contracts it is constitutional and valid.[81] By analogy to the rule that a statute may be valid in part and void in part, it has been held that an order of court made in pursuance of such a legislative authorization, organizing a corporation for the purpose provided by a general law, is valid to the extent of the provisions of that law, and void only so far as it confers powers or privileges in excess of those authorized by the statute.[82] As an illustration of the principle it has been held that a portion of a section of a general statute regulating the incorporation of cities, which prescribes the form of judgment to be rendered on appeal, may be judicially stricken out as unconstitutional, without impairing the rest or without impairing the rights of suitors.[83] Applying this principle, it has been held that a statute imposing a tax on telegraphic messages being invalid as to interstate messages the whole statute must fall.[84]

19. Estoppel to Question of Constitutionality of Act Creating Corporation. On the principle elsewhere considered, that a party who contracts with a corporation as such thereby estops himself from thereafter questioning the validity of the existence of the corporation, and that a similar estoppel arises against the corporation itself, preventing it from setting up its own non-existence as a defense to actions to enforce obligations which it has assumed to make in a corporate character, it must follow on the one hand that a party who has borrowed money of a banking corporation cannot, when sued by the corporation to recover it according to the contract, be permitted dishonestly to set up that the act creating the corporation was passed in violation of the constitution of the state.[85]

20. Doctrine That Unconstitutional Law May Operate as Legislative License.

United States.— Hamilton Bank *v.* Dudley, 2 Pet. 492, 7 L. ed. 496; Duer *v.* Small, 7 Fed. Cas. No. 4,116, 4 Blatchf. 263.

78. *California.*— San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

Illinois.— Hinze *v.* People, 92 Ill. 406.

Massachusetts.— Com. *v.* Pomeroy, 5 Gray 486 note; Com. *v.* Hitchings, 5 Gray 482; Com. *v.* Clapp, 5 Gray 97; Warren *v.* Charlestown, 2 Gray 84.

Michigan.— Campau *v.* Detroit, 14 Mich. 276.

Minnesota.— O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458.

Ohio.— State *v.* Pugh, 43 Ohio St. 98, 1 N. E. 439.

West Virginia.— Eckhart *v.* State, 5 W. Va. 515.

Wisconsin.— Slauson *v.* Racine, 13 Wis. 398.

79. 1 Thompson Corp. § 625; People *v.* Hall, 8 Colo. 485, 9 Pac. 34. See also *supra*, I, I, 14, i.

80. Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69.

81. Ames *v.* Port Huron Log Driving, etc., Co., 6 Mich. 266, where the court does not decide that the statute is void even in the particular case.

82. 1 Thompson Corp. § 659.

83. Allen *v.* Silvers, 22 Ind. 491.

84. Western Union Tel. Co. *v.* State, 62 Tex. 630.

85. Snyder *v.* State Bank, 1 Ill. 122. For a case which sanctioned a dishonest violation of this principle see Green *v.* Graves, 1

A decision in favor of a lottery — which decisions in former times were always subject to suspicion — was to the effect that a statute incorporating a lottery company, although passed in violation of the constitution, might operate as legislative license to carry on a lottery, so as to estop the state from punishing the incorporators for carrying it on; that is to say, might operate as a license to violate the constitution.[86]

21. Charters Exempting Corporations From General Laws. A constitutional provision empowering the legislature to grant "such charters of incorporation as they may deem expedient for the public good" has been held not to empower them to grant a charter of incorporation exempting the corporation from the usury laws of the state, by authorizing it to issue its mortgage bonds, bearing a higher rate of interest than that fixed by the general law.[87]

22. Governmental Rights Which Legislature Cannot Bargain Away. There are moreover rights of so high a nature — rights which concern the power of the people to carry on a free and wholesome government, and to provide the means for so doing — that the legislature cannot bargain them away to private corporations or to individuals, so as to preclude future legislatures from regaining them. In this category is the police power, which concerns the right of the legislature to enact wholesome laws to promote the public safety, the public health, and the public morals;[88] the power of eminent domain, which enables the legislature to condemn private property, including the property and franchises of corporations for public uses upon the payment of just compensation;[89] and the taxing power which concerns the very right of the state to exist, the right of the legislature to lay and collect taxes for the purpose of carrying on the government, in pursuance of which the franchises of corporations may be taxed as other property, unless the state has entered into an express stipulation not to tax them.[90]

Dougl. (Mich.) 351. For another like case holding that a foreclosure of a mortgage could not be had to secure an obligation given to a bank which had been incorporated under an unconstitutional statute see Hurlbut *v.* Britain, 2 Dougl. (Mich.) 191. For a case where a circuit court of the United States felt itself obliged to follow this miserable state doctrine see Nessmith *v.* Shelden, 18 Fed. Cas. No. 10,125, 4 McLean 375. This decision was affirmed as to the point that it was the duty of the federal to follow the state court, by the supreme court of the United States, on a certificate of division, *sub nom.* Nesmith *v.* Sheldon, 7 How. (U. S.) 812, 12 L. ed. 925. *Compare* Gifford *v.* Livingston, 2 Den. (N. Y.) 380 (this case differs from the next on the ground that the act was constitutional); De Bow *v.* People, 1 Den. (N. Y.) 9.

86. Brent *v.* State, 43 Ala. 297.

87. McKinney *v.* Memphis Overton Hotel Co., 12 Heisk. (Tenn.) 104.

88. New Orleans Gas Light Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516; Butchers' Union Slaughter-House, etc., Co. *v.* Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. ed. 585.

89. Cooley Const. Lim. (3d ed.) 525; Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 7 N. E. 627.

90. *Alabama.*— Mobile *v.* Stonewall Ins. Co., 53 Ala. 570; Judson *v.* State, Minor 150.

Connecticut.— Coite *v.* Savings Soc., 32 Conn. 173.

Mississippi.— Reed *v.* Beall, 42 Miss. 472 [*citing* Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629].

Missouri.— Washington University *v.* Rowse, 42 Mo. 308.

United States.— West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. ed. 535; Planters' Bank *v.* Sharp, 6 How. 301, 12 L. ed. 447.

Qualifications of doctrine.— The supreme court of the United States at a comparatively early day held that the legislature can relinquish to a corporation the right of levying taxes upon its property, so as to disable future legislatures from exercising the power. Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. (U. S.) 51, 18 L. ed. 137; Jefferson Branch Bank *v.* Skelley, 1 Black (U. S.) 436, 17 L. ed. 173; Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 7 L. ed. 939. But these decisions have been a source of great regret on the part of some of the judges of the same court, and they have been restrained by applying the principle of interpretation that before it can be adjudged that the right of taxation has been surrendered it must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power, and that if a doubt arises as to the intention of the legislature to grant or to reserve the power, that doubt must be resolved in favor of the state. Memphis *v.* Union, etc., Bank, 91 Tenn. 546, 19 S. W. 758; Herrick *v.* Randolph, 13 Vt. 525; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888. Another qual-

J. Creation by Special Charter — 1. Can Be Created Only by Sovereign Power — a. Rule Stated. Corporations can be created only by or under authority of an act of the legislature.[91] They cannot be constituted by a mere agreement of the parties,[92] and companies so constituted, however numerous, are, as respects the rights of third persons, regarded as mere partnerships.[93]

b. Power Cannot Be Delegated. This power cannot be delegated to another corporation or to an individual;[94] but it can be and has been devolved on the judicial courts[95] and upon ministerial officers of the state acting in pursuance of general laws,[96] and has been and constantly is devolved by congress upon the territories, and is constantly exercised as an incident of the general legislative power conferred on the territories in their enabling acts.[97] Nor is this deemed a delegation of legislative power. In like manner, under the statutes of many states, subordinate administrative boards have received from the legislature the power to grant what have been inaptly called franchises, but what are merely licenses, such as a license to a turnpike company to collect tolls.[98]

2. To What Extent Legislative Power of Creating Corporations by Special Acts Is Exempt From Judicial Review. The power of creating corporations, thus pos-

ification of this constitutional doctrine is that the right of a corporation to exemption from taxation is not protected from subsequent legislative abrogation where the charter of the corporation, a constitutional provision, or a general statute of the state operative when the corporation was created, reserves the right to alter, amend, or repeal the charters of corporations, which right has been exercised by abrogating the exemption. Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454, 21 L. ed. 204 [*recognized* in Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838]. See also West Wisconsin R. Co. *v.* Trempealeau County, 93 U. S. 595, 23 L. ed. 814 (where the doctrine is conceded); Tucker *v.* Ferguson, 22 Wall. (U. S.) 527, 22 L. ed. 805. In another decision the same court speaking through Waite, C. J., has said: "No government dependent upon taxation for support can bargain away its whole power of taxation, for that would be substantial abdication. All that has been determined thus far is that, for a consideration, it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular." The doctrine that the legislature of a state has the power to bargain away or to abrogate the taxing power of the state has met with denials in many cases.

Alabama.— *Ex p.* Tate, 39 Ala. 254.

Illinois.— East St. Louis *v.* East St. Louis Gas Light, etc., Co., 98 Ill. 415, 38 Am. Rep. 97 (powerful and scathing separate opinion by Walker, C. J.); People *v.* Soldiers', etc., Union Home, 95 Ill. 561 (dissenting opinion of Walker, C. J.).

Kentucky.— Com. *v.* Farmers' Bank, 97 Ky. 590, 31 S. W. 1013, 17 Ky. L. Rep. 465, per Pryor, J., concurring with the within expression of Miller, J.

Ohio.— Skelly *v.* Jefferson State Branch Bank, 9 Ohio St. 606; Sandusky City Bank *v.* Wilbor, 7 Ohio St. 481; Matheny *v.* Golden, 5 Ohio St. 361; Milan, etc., Plank Road Co. *v.* Husted, 3 Ohio St. 578; Toledo Bank *v.* Toledo, 1 Ohio St. 622; Knoup *v.* Piqua State Branch Bank, 1 Ohio St. 603; Mechanics', etc., State Branch Bank *v.* Debolt, 1 Ohio St. 591; Debolt *v.* Ohio L. Ins., etc., Co., 1 Ohio St. 563.

United States.— New Jersey *v.* Yard, 95 U. S. 104, 24 L. ed. 352, where Miller, J., said: "The writer of this opinion has always believed and believes now, that one Legislature of a State has no power to bargain away the right of any succeeding Legislature to levy taxes in as full a manner as the Constitution will permit."

91. Franklin Bridge Co. *v.* Wood, 14 Ga. 80.

92. Stowe *v.* Flagg, 72 Ill. 397.

93. Wells *v.* Gates, 18 Barb. (N. Y.) 554.

94. Black River, etc., R. Co. *v.* Barnard, 31 Barb. (N. Y.) 258. *Compare* Geneva College Medical Institute *v.* Patterson, 1 Den. (N. Y.) 61.

95. Observations in Franklin Bridge Co. *v.* Wood, 14 Ga. 80.

96. Where the legislature has, by a general law, prescribed the conditions upon which a corporation may be created, it is no objection to the validity of such law that the ministerial duties, such as the issuing of a certificate of incorporation, are left to be performed by some officer, such as the secretary of state, before the incorporation takes effect. Granby Min., etc., Co. *v.* Richards, 95 Mo. 106, 8 S. W. 246. See also *infra*, I, L, 3.

97. Douglas *v.* State Bank, 1 Mo. 20; Riddick *v.* Amelin, 1 Mo. 5. And see *supra*, I, G, 2.

That the power of the legislature of the state to create corporations need not be expressly granted in the constitution of the state, but arises by implication from a general grant of legislative power see State *v.* Simonds, 3 Mo. 414. See also Ruggles *v.* Washington County, 3 Mo. 348.

98. Truckee, etc., Road *v.* Campbell, 44 Cal. 89.

sessed by the legislatures of the states and territories, and, within its constitutional sphere of action, by the congress of the United States, is obviously a power which like any other subject of legislative discretion is not subject to judicial review,[99] except on constitutional grounds. The departments of our national and state governments being independent of each other it necessarily follows that each department must give full faith and credit to the acts of the others, and that it is not competent for a judicial court to investigate the question whether an act creating a corporation has been fraudulently obtained,[1] or obtained in consequence of fraudulent or improper practices on the part of some of the members of the legislature concerned in passing it.[2]

3. Act of Incorporation Need Not Declare Body to Be Such in Express Words. It is not necessary to the conclusion that a body exercising corporate powers is in the rightful exercise of them, that the body should have been declared a corporation by the legislature in express words.[3] As hereafter seen a corporation may exist by legislative recognition;[4] and for stronger reasons where there is a statute conferring on an existing collective body powers which are appropriate to corporations alone, it is a sound conclusion that it makes it a corporation.[5] Thus a grant of lands to individuals by the state, to be possessed and enjoyed by them in a corporate character, in itself confers upon them a capacity to take and hold in that character.[6] But it is essential to the operation of this rule that the legislature should have attributed to the persons named some of the essential powers of a corporation.[7]

4. Special Charters Granted to Certain Individuals Named and "Their Associates." It was customary in former times in special acts of incorporation to describe the grantees of the corporate powers and privileges as certain persons by name and their "associates" or "associates and successors." The word "associates" might refer either to those already associated with the persons named or to those who might come in afterward; and this being a case of ambiguity in the charter, parol or other extrinsic evidence might be heard to show who were meant by the word "associates."[8]

5. Creation by Reference to Another Act. An act creating a corporation and conferring upon it all the rights and advantages which in preceding portions of the same act were conferred upon another corporation named, and further declaring that all of the provisions, sections, and clauses in the charter of the first-named company not inconsistent with the particular provisions of the charter of the second company should be fully extended to the president and directors of the

99. U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119.

1. Clarke *v.* Brooklyn Bank, 1 Edw. (N. Y.) 361.

The charter of a railroad company cannot be attacked collaterally for bad faith in obtaining it. Garrett *v.* Dillsburgh, etc., R. Co., 78 Pa. St. 465.

2. Ferguson *v.* Miners', etc., Bank, 3 Sneed (Tenn.) 609.

3. Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320.

4. See *infra*, I, M, 10.

5. Com. *v.* West Chester R. Co., 3 Grant (Pa.) 200.

6. North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109.

Other illustrations of this doctrine will be found in actions relating to the proprietors of townships in New Hampshire (Atkinson *v.* Bemis, 11 N. H. 44; Coburn *v.* Ellenwood, 4 N. H. 99); and to the case of the sale of state canals to individuals under a statute reciting that they shall have the rights, privileges, and franchises of other grantors (Delaware Division Canal Co. *v.* Com., 50 Pa. St. 399); and in Dean *v.* Davis, 51 Cal. 406 (levee district); Blanchard *v.* Kanll, 44 Cal. 440 (plank-road company, although designated a "joint stock company").

7. Shelton *v.* Banks, 10 Gray (Mass.) 401 (resolution of executive council advising that a company of artillery be established); Neil *v.* Ohio Agricultural, etc., College, 31 Ohio St. 15 (statute creating Agricultural College, with a board of trustees authorized to make contracts and maintain actions for its benefit, and to exercise other powers similar to those conferred on bodies corporate); State *v.* Davis, 23 Ohio St. 434 (statute "regulating the Commercial College of Cincinnati").

8. Lechmere Bank *v.* Boynton, 11 Cush. (Mass.) 369. As to the effect of a grant of land to a person named and "his associates" see Duncan *v.* Beard, 2 Nott & M. (S. C.) 400.

latter corporation, is a sufficient charter for such company, in the absence of constitutional restraints upon this mode of legislative action.[9]

6. Legislative Deviations From Rules of Common Law. Corporations originating according to the rules of the common law must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred; and where one claims its origin from such a source, its rules must be regarded in deciding upon its legal existence. But in the absence of constitutional restraints the legislature has the power to create a corporation, not only without conforming to such rules, but in disregard of them; and where a corporation is thus created, its existence, powers, capacities, and the mode of exercising them must depend upon the law creating it.[10]

7. Acceptance of Charter — a. Necessity of Acceptance. Where a corporation is created by a special act of legislation, two things must concur in order to the creation of the artificial body: (1) The granting of a charter by the legislature. (2) An acceptance of the charter by the corporators.[11]

9. In former times it was not unusual, nor was it deemed objectionable, to grant vast corporate powers in a short act, merely by referring to and adopting the provisions of some other incorporating act, and in terms conferring them on the corporation thus created. Chenango Bridge Co. *v.* Binghampton Bridge Co., 3 Wall. (U. S.) 51, 18 L. ed. 137.

Where the charter of a corporation contains provisions in terms similar to provisions of a general act, and provides that the corporation shall be subject to such provisions of the general act as are applicable, the provisions in the charter will be deemed a substitute for the provisions of the general act. Briggs *v.* Cape Cod Ship Canal Co., 137 Mass. 71.

10. Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656. Character and purposes of an incorporated institution are to be gathered solely from its charter. Nicholson's Succession, 37 La. Ann. 346.

11. *Maine.*— Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34.

Massachusetts.— Wright *v.* Tukey, 3 Cush. 290; Lexington, etc., R. Co. *v.* Chandler, 13 Metc. 311.

North Carolina.— Durham Fertilizer Co. *v.* Clute, 112 N. C. 440, 17 S. E. 419.

South Carolina.— Haslett *v.* Wortherspoon, 1 Strobh. Eq. 209.

United States.— Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629.

England.— London, etc., Tobacco Pipe Makers Co. *v.* Woodroffe, 7 B. & C. 838, 5 D. & R. 530, 4 L. J. K. B. O. S. 301, 14 E. C. L. 374.

That in the case of a strictly private corporation an acceptance is necessary is shown by the obvious proposition that no man can be forced into such a corporation without his consent. Hampshire County *v.* Franklin, 16 Mass. 76; Ellis *v.* Marshall, 2 Mass. 269, 3 Am. Dec. 49; Oliver *v.* Collins, Brownl. & G. Rep. 100 (applying this doctrine even to a town); Rex *v.* Larwood, Comb. 315 (same doctrine applied to a town incorporated by roval charter); Bagg's Case, 1 Rolle 224.

Cannot be accepted in part.— A charter must be accepted or rejected as offered by the state. It cannot be accepted in so far as it is not burdensome. Kenton County Ct. *v.* Bank Lick Turnpike Co., 10 Bush (Ky.) 529; Lyons *v.* Orange, etc., R. Co., 32 Md. 18. And so as to the charter granted by the crown. Rex *v.* Westwood, 4 B. & C. 781. 10 E. C. L. 799, 7 Bing. 1, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267.

Accepted by what body or constituency.— The acceptance of a special act of incorporation, to be binding must obviously be made by the corporators named therein, acting in their constituent capacity; although, unless the language of the grant imports the contrary, the acceptance need not be by all of them, but may be by a majority who thereupon become the corporation. McGinty *v.* Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510. After the charter has been accepted an amendment to it may be accepted by the directors, if the shareholders acquiesce therein. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579; Brown *v.* Fairmount Gold, etc., Min. Co., 10 Phila. (Pa.) 32, 30 Leg. Int. (Pa.) 124; Germantown Mut. F. Ins. Co. *v.* Stokes, 9 Phila. (Pa.) 80, 29 Leg. Int. (Pa.) 100. *Compare* Banks *v.* Judah, 8 Conn. 145; Blatchford *v.* Ross, 54 Barb. (N. Y.) 42, 5 Abb. Pr. N. S. (N. Y.) 434, 37 How. Pr. (N. Y.) 110. See as to acceptance of amendments of charters *infra*, I, K, 2 *et seq.*

Until accepted may be withdrawn.— A grant made by the state to individuals, of a charter or of a corporate franchise of any nature, does not become operative until accepted in some form. State *v.* Dawson, 16 Ind. 40; Little *v.* Bowers, 46 N. J. L. 300. Until then the protection of the constitution of the United States as judicially construed does not extend to it, and it may be modified or withdrawn by the state.

Georgia.— Central R., etc., Co. *v.* State, 54 Ga. 401.

Illinois.— Dissenting opinion of Scofield, J., in Grinnell *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788.

Indiana.— State *v.* Dawson, 16 Ind. 40.

b. How Acceptance Shown. To this it may be added that this acceptance need not be in any express form, unless the statute so provides, but is generally evidenced by user thereunder, and is sufficiently shown by proof that the incorporating act was passed at the request of the designated directors.[12] But it may take place by the concurrent act in general meeting of seven of the corporators named in the incorporating act, although one of them does not attend the meeting.[13] It is not necessary that the acceptance of the charter should be shown by the records of the corporation,[14] unless the charter in terms requires some express act of acceptance on the part of the grantees.[15] It may be inferred from acts of the corporators or of the corporation,[16] such as organizing the corporation and exercising the franchises conferred,[17] expending money in furtherance of the purposes of the charter without proof of formal organization,[18] or by proving a notice of a meeting to organize, signed by the incorporators.[19]

Maine.— Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34.

New Jersey.— State *v.* Blake, 35 N. J. L. 208.

Tennessee.— State *v.* Planters' F. & M. Ins. Co., 95 Tenn. 203, 31 S. W. 992.

Virginia.— Yeaton *v.* Old Dominion Bank, 21 Gratt. 593.

Wisconsin.— Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425 (holding that it was quite competent for the state constitution to have repealed all laws to the contrary which had not ripened into contracts under the rule of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629); Stephens *v.* Marshall, 3 Pinn. 203, 3 Chandl. 222.

United States.— Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

See also for analogy Galveston County *v.* Tankersley, 39 Tex. 651.

An acceptance after a new constitution has gone into effect prohibiting the creation of corporations by special acts of legislation is void. State *v.* Dawson, 16 Ind. 40.

An acceptance by the corporators may be presumed from a variety of circumstances, such as the exercise of the corporate powers conferred (Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Americoggin Bridge *v.* Bragg, 11 N. H. 102; Astor *v.* New York Arcade R. Co., 48 Hun (N. Y.) 562, 1 N. Y. Suppl. 174, 16 N. Y. St. 141); from the mere fact that a charter has been applied for (Atlanta *v.* Gate City Gas-Light Co., 71 Ga. 106); or from user of the franchises or powers conferred (Illinois River R. Co. *v.* Zimmer, 20 Ill. 654 [case of an amendment]; Newton *v.* Carbery, 18 Fed. Cas. No. 10,190, 5 Cranch C. C. 632). In case of a grant to an existent corporation, the principle applies, as in case of individuals, that an acceptance of the grant is presumed where it is beneficial to the grantee. Atty.-Gen. *v.* State Bank, Harr. (Mich.) 315 [*citing* Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629].

Effect of acceptance of charter.—After the charter has been accepted, the duties and liabilities expressed or implied therein attach to the corporators, and they cannot cast them off without consent of the state. Goshen, etc., Turnpike Co. *v.* Sears, 7 Conn. 86; Com. *v.* Worcester Turnpike Corp., 3 Pick. (Mass.) 327; Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35. By accepting the charter they become bound by all its provisions, and are estopped from claiming that some burdensome provision was thrust into it through fraud, and is hence void. Bushwick, etc., Bridge, etc., Co. *v.* Ebbets, 3 Edw. (N. Y.) 353.

Meeting to accept charter — Where held.— Unless the act of incorporation or some other governing statute otherwise provides the meeting of the corporators to accept the charter and organize the corporation thereunder can be held only in the state by whose act of legislation the charter is granted, and any proceeding at such a meeting held outside the state will be void. Miller *v.* Ewer, 27 Me. 509, 46 Am. Dec. 619, opinion by Shepley, J. [*quoted* and *reaffirmed* in Smith *v.* Silver Valley Min. Co., 64 Md. 85, 54 Am. Rep. 760, 20 Atl. 1032]. See also Freeman *v.* Machias Water Power, etc., Co., 38 Me. 343. *Compare* the following cases:

Connecticut.— McCall *v.* Byram Mfg. Co., 6 Conn. 428.

Maine.— Copp *v.* Lamb, 12 Me. 312.

Maryland.— Keene *v.* Van Reuth, 48 Md. 184.

Missouri.— Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 86 Am. Dec. 12.

Vermont.— Arms *v.* Conant, 36 Vt. 744.

The doctrine applies only to constituent acts, and does not apply to acts done or authorized by the directors in their capacity of agents or trustees of the corporation. Smith *v.* Silver Valley Min. Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760.

12. St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

13. McGinty *v.* Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510.

14. Russell *v.* McLellan, 14 Pick. (Mass.) 63.

15. Logan *v.* McAllister, 2 Del. Ch. 176.

16. Taylor *v.* Newberne, 55 N. C. 141, 65 Am. Dec. 566.

17. Logan *v.* McAllister, 2 Del. Ch. 176.

18. McKay *v.* Beard, 20 S. C. 156.

19. Gleaves *v.* Brick Church Turnpike Co., 1 Sneed (Tenn.) 491.

e. Evidence of Non-Acceptance. The presumption of the acceptance of a charter is rebutted by evidence that no proceedings were ever had under it, although seven years had elapsed since its date.[20] A judgment of ouster for non-user of corporate franchises is conclusive evidence not impeachable collaterally that the franchises were not accepted.[21]

d. Whether Acceptance Question of Law or Fact. The question of the acceptance of an act of incorporation is a question of fact for a jury,[22] except where it arises upon the interpretation of a written instrument, as in other cases.[23]

e. Conditions Precedent to Acceptance Must Be Fulfilled. If the charter or other governing statute names certain conditions precedent to be performed by the coadventurers, then, till these conditions are performed, no act or declaration of theirs will amount to a valid acceptance of the charter, for the reason that it cannot be accepted in part and rejected in part.[24]

8. When Charters Take Effect. It is not necessary that a legislative act granting franchises to a corporation or to corporations should in form extend the grant to a person or persons *in esse*. On the contrary the grant may be extended to any members of the public possessing the qualifications prescribed in the grant who will organize the corporation in compliance with the terms of the grant.[25] This is illustrated by the every-day occurrence of the organization of corporations under general laws. Such statutes are merely permissive to the public generally, and are not in the nature of a grant to particular individuals. But when particular individuals avail themselves of the privilege thereby extended to the public, and organize themselves into an association in conformity with the statute, they become a corporation and the statute becomes their charter.[26] Moreover, when a special charter is granted and the corporation is to be brought into existence by some future acts of the corporators, the franchises which the charter grants to the body remain in abeyance until such acts are done; and when the corporation is brought into life the franchises attach.[27] But for the purpose of saving the rights conferred by the special charter and preventing the implication of a repeal by a subsequent constitutional prohibition of such charters, it has been held that where the legislature incorporates a body of adventurers by a special act the corporation springs into existence *ipso facto et eo instanti*.[28]

9. How Legislative Grant Made and Corporation Organized Thereunder. This subject has almost entirely lost its significance with the disuse of the practice of creating corporations by special acts, under constitutional prohibitions elsewhere referred to; but it may be briefly said that the special act generally named commissioners to open books and receive subscriptions to the capital stock; that, when the prescribed amount of capital had been subscribed and the necessary payments made, the shareholders elected directors, who appointed a president and secretary, or, in the case of a bank, a cashier; the performance of which acts completed the organization and called the artificial being into existence.[29] If in the organization of a corporation all the requirements of a charter are observed, although not in the order prescribed, the organization is sufficient. Thus where the charter

20. Newton *v.* Carbery, 18 Fed. Cas. No. 10,190, 5 Cranch C. C. 632.

21. Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625.

22. Hammond *v.* Straus, 53 Md. 1; 1 Thompson Tr. 1114.

23. 1 Thompson Tr. 1065.

24. Lyons *v.* Orange, etc., R. Co., 32 Md. 18.

25. Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195, in substance.

26. O'Brien *v.* Cummings, 13 Mo. App. 197.

27. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

28. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663.

Where the charter declares certain persons named a corporation, this makes it such *ab initio*, and a subsequent charter requirement as to the election of directors is merely directory. Stoops *v.* Greensburgh, etc., Plank-Road Co., 10 Ind. 47. See also Judah *v.* American Live Stock Ins. Co., 4 Ind. 333.

29. Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195.

requires that the directors shall be named in the articles of association it is sufficient compliance with the requirement that the articles are adopted at the time of electing directors, and the requirement is only directory.[30]

K. Amendment of Charters — 1. State Cannot Amend Against Will of Corporators Unless Power Reserved. It is a settled principle of law that a state cannot, by any form of action to which it gives the effect of law, whether by a constitutional ordinance,[31] by an act of legislation,[32] or by a municipal ordinance,[33] amend the charter of a private corporation against the will of its members, unless the state, either in the charter itself[34] or in a general statute[35] or constitutional

30. Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404; Covington, etc., Plank-Road Co. *v.* Moore, 3 Ind. 510.

Where the commissioners refused to act it was held that a minority might proceed with the organization of the corporation. Com. *v.* McKean County Bank, 32 Pa. St. 185. While a mandamus might be granted in a proper case to compel them to act, yet this was not necessary where a majority of them were willing to act. Matter of White River Bank, 23 Vt. 478.

31. St. Louis, etc., R. Co. *v.* Loftin, 30 Ark. 693; Oliver *v.* Memphis, etc., R. Co., 30 Ark. 128; *In re* Gibson, 21 N. Y. 9; Union Bank *v.* State, 9 Yerg. (Tenn.) 490; New Orleans Water-Works *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 8 S. Ct. 741, 31 L. ed. 607; Keith *v.* Clark, 97 U. S. 454, 24 L. ed. 1071; Mississippi, etc., R. Co. *v.* McClure, 10 Wall. (U. S.) 511, 19 L. ed. 997.

32. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

33. *Connecticut.*— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716; Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 27 Am. Dec. 700.

Delaware.— Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. 506.

Georgia.— Young *v.* Harrison, 6 Ga. 130. *Compare* State *v.* Augusta, etc., R. Co., 54 Ga. 401.

Illinois.— Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129; Bruffett *v.* Great Western R. Co., 25 Ill. 353.

Louisiana.—Montpelier Academy *v.* George, 14 La. 395, 33 Am. Dec. 585; Boisdere *v.* Citizens' Bank, 9 La. 506, 29 Am. Dec. 453.

Maine.— New Gloucester School Fund *v.* Bradbury, 11 Me. 118, 26 Am. Dec. 515; Bowdoinham *v.* Richmond, 6 Me. 112, 19 Am. Dec. 197.

Maryland.— State University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

Massachusetts.— Wales *v.* Stetson, 2 Mass. 143, 3 Am. Dec. 39.

Mississippi.— New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517; Commercial Bank *v.* State, 6 Sm. & M. 599.

New Hampshire.— Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

New Jersey.— Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

New York.— People *v.* Manhattan Co., 9 Wend. 351; Livingston *v.* Lynch, 4 Johns. Ch. 573 (unanimous consent of shareholders necessary).

North Carolina.— State Bank *v.* Cape Fear Bank, 35 N. C. 75.

Pennsylvania.— Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431; Second, etc., St. Pass. R. Co. *v.* Green, etc., St. Pass. R. Co., 3 Phila. 430, 16 Leg. Int. 197.

South Carolina.— State *v.* Heyward, 3 Rich. 389.

Tennessee.— Officer *v.* Young, 5 Yerg. 320, 26 Am. Dec. 268; Tate *v.* Bell, 4 Yerg. 202, 26 Am. Dec. 221.

Vermont.— Pingry *v.* Washburn, 1 Aik. 264, 15 Am. Dec. 676.

United States.— Mechanics', etc., Bank *v.* Debolt, 18 How. 380, 15 L. ed. 458; Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401; Piqua Branch Ohio Bank *v.* Knoop, 16 How. 369, 14 L. ed. 977.

34. *Kentucky.*— Owensboro Deposit Bank *v.* Daviess County, 102 Ky. 174, 39 S. W. 1030, 1041, 19 Ky. L. Rep. 248, 44 L. R. A. 825 [*affirmed* in 173 U. S. 663, 19 S. Ct. 875, 43 L. ed. 850].

Michigan.—Atty.-Gen. *v.* Looker, 111 Mich. 498, 69 N. W. 929.

Pennsylvania.—Com. *v.* Fayette County R. Co., 55 Pa. St. 452.

Tennessee.— Ferguson *v.* Miners', etc., Bank, 3 Sneed 609.

Wisconsin.— West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257.

United States.— Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Miller *v.* New York, 15 Wall. 478, 21 L. ed. 98; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629, per Story, J. [*reversing* 1 N. H. 511].

35. *Georgia.*— Winter *v.* Muscogee R. Co., 11 Ga. 438.

Kentucky.— Covington *v.* Covington, etc., Bridge Co., 10 Bush 69; Hamilton *v.* Keith, 5 Bush 458; Fry *v.* Lexington, etc., R. Co., 2 Metc. 314.

Maine.— Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

Mississippi.— New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517.

Missouri.— Watson Seminary *v.* Pike County Ct., 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675.

New Jersey.— State *v.* Person, 32 N. J. L. 134; Montclair *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 18 Atl. 242.

New York.— *In re* Gibson, 21 N. Y. 9;

ordinance[36] operative at the date of the granting of the charter, has reserved the right of amendment; or unless the amendment is made in the exercise of the police power of the state[37] or in the exercise of the right of eminent domain.[38]

Close *v.* Noye, 2 Misc. 226, 23 N. Y. Suppl. 751, 52 N. Y. St. 271.

Pennsylvania.— Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 Penr. & W. 184; Allen *v.* Buchanan, 9 Phila. 283, 30 Leg. Int. 76.

South Carolina.— State *v.* Heyward, 3 Rich. 389.

United States.— Holyoke Water Power Co. *v.* Lyman, 15 Wall. 500, 21 L. ed. 133; Miller *v.* New York, 15 Wall. 478, 21 L. ed. 98; Tomlinson *v.* Branch, 15 Wall. 460, 21 L. ed. 189; Tomlinson *v.* Jessup, 15 Wall. 454, 21 L. ed. 204; Northern Bank *v.* Stone, 88 Fed. 413; Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

36. *Delaware.*— Delaware R. Co. *v.* Tharp, 5 Harr. 454.

Maryland.— Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778; State *v.* Northern Cent. R. Co., 44 Md. 131.

Michigan.— Wellman *v.* Chicago, etc., R. Co., 83 Mich. 592, 47 N. W. 489.

New York.— *In re* Gibson, 21 N. Y. 9.

Wisconsin.— West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257.

United States.— Miller *v.* New York, 15 Wall. 478, 21 L. ed. 98.

Such reservations are embodied in many of the state constitutions.— Md. Const. (1850), art. 3, § 47; Md. Const. (1851), art. 3, § 47; N. Y. Const. (1826), art. 8, § 1. And see Delaware R. Co. *v.* Tharp, 5 Harr. (Del.) 454; Smith *v.* Lake Shore, etc., R. Co., 114 Mich. 460, 72 N. W. 328 [*reversed* in 173 U. S. 684, 19 S. Ct. 565, 43 L. ed. 858].

37. *Connecticut.*— State *v.* New Haven, etc., Co., 43 Conn. 351.

Georgia.— Southwestern R. Co. *v.* Paulk, 24 Ga. 356.

Illinois.— Toledo, etc., R. Co. *v.* Deacon, 63 Ill. 91; Galena, etc., R. Co. *v.* Appleby, 28 Ill. 283; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471.

Indiana.— Indianapolis, etc., R. Co. *v.* Townsend, 10 Ind. 38.

Iowa.— Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297, 20 Am. Rep. 592, imposing liability for railway fires.

Kentucky.— Board of Internal Imp. *v.* Scearce, 2 Duv. 576.

Maine.— Wilder *v.* Maine Cent. R. Co., 65 Me. 332, 20 Am. Rep. 698 (requiring railway companies to fence their tracks); State *v.* Noyes, 47 Me. 189; Veazie *v.* Mayo, 45 Me. 560, 49 Me. 156.

Massachusetts.—Com. *v.* Certain Intoxicating Liquors, 115 Mass. 153; Lyman *v.* Boston, etc., R. Corp., 4 Cush. 288.

Missouri.— Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220. See in supposed illustration of the text State *v.* Greer, 9 Mo. App. 219, changing mode of voting at corporate elections.

Tennessee.— Louisville, etc., R. Co. *v.* Burke, 6 Coldw. 45.

United States.— New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516. *Compare* Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989.

38. *Alabama.*— Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307.

Connecticut.— New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; East Hartford *v.* Hartford Bridge Co., 17 Conn. 79, 16 Conn. 149; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556.

Illinois.— East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506; St. Louis, etc., R. Co. *v.* Sprinfigeld, etc., R. Co., 96 Ill. 274; Metropolitan City R. Co. *v.* Chicago City R. Co., 87 Ill. 317; Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333; Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314.

Indiana.— Crossley *v.* O'Brien, 24 Ind. 325, 87 Am. Dec. 329; Lafayette Plank-Road Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246.

Maine.— State *v.* Noyes, 47 Me. 189; Belfast Academy *v.* Salmond, 11 Me. 109.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Union R. Co., 35 Md. 224, 6 Am. Rep. 397; Bellona Co.'s Case, 3 Bland 442.

Massachusetts.— Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13; Haverhill Bridge Proprietors *v.* Essex County, 103 Mass. 120, 4 Am. Rep. 518; Proprietors Merrimack River Locks, etc. *v.* Lowell, 7 Gray 223; Central Bridge Corp. *v.* Lowell, 4 Gray 474; Boston Water Power Co. *v.* Boston, etc., R. Corp., 23 Pick. 360.

Michigan.— Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875; East Saginaw Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82.

New Hampshire.— Crosby *v.* Hanover, 36 N. H. 404; Northern R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183; Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Pierce *v.* Somersworth, 10 N. H. 369; Barber *v.* Andover, 8 N. H. 398; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

New Jersey.— Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

New York.— New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 63 N. Y. 326; Sixth Ave. R. Co. *v.* Kerr, 45 Barb. 138 [*affirmed* in 72 N. Y. 330]; *In re* Kerr, 42 Barb. 119; Miller *v.* New York, etc., R. Co., 21 Barb. 513.

North Carolina.— North Carolina, etc., R. Co. *v.* Carolina Cent. R. Co., 83 N. C. 489.

Ohio.— Kinsman St. R. Co. *v.* Broadway, etc., St. R. Co., 36 Ohio St. 239.

2. Necessity of Acceptance of Amendment — a. In General. Where the inviolability of a corporate charter is protected under the constitution of the United States, as just explained, an onerous amendment of a charter, in order to be valid, must have the concurrence of all the shareholders or members,[39] unless the concurrence of a smaller number is provided for in the charter itself, in the constitution of the state, or in a statute operative at the time when the charter was granted. Where the power to alter or amend a charter is reserved to the state under these principles the state may make such alterations or amendments as it may see fit,[40] so that it does not amount to a confiscation of the rights of individuals or to a taking of property without due process or law, within the meaning of the fourteenth amendment to the federal constitution,[41] and possibly so that it does not violate what a judge may deem to be the principles of natural justice.[42] Nor does the rule of constitutional law which protects charters from legislative amendment without consent of the members of the corporation apply to strictly public corporations in respect of matters committed to them in their public or governmental capacity.[43]

b. What Amendments Release Non-Assenting Subscribers. The relation between the corporators or subscribers to the shares is founded in contract. It follows that onerous amendments, amendments making material changes in the purposes of the corporation, or amendments not in aid of the original object, imposed upon the corporation by the legislature, release the dissenting corporators, shareholders, or members, provided their dissent is signified before the rights of innocent third persons have supervened; otherwise the amendment to the charter would have the effect of impairing the obligation of a contract and would hence be void,[44] although of course under any theory the assenting shareholders or members are bound.[45] There are also decisions which proceed upon the strict

Oregon.— Oregon Cascade R. Co. *v.* Baily, 3 Oreg. 164.

Pennsylvania.— Philadelphia, etc., Pass. R. Co.'s Appeal, 102 Pa. St. 123; *In re* Towanda Bridge Co., 91 Pa. St. 216; Com. *v.* Pennsylvania Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329.

Tennessee.—Red River Bridge Co. *v.* Clarksville, 1 Sneed 176, 60 Am. Dec. 143.

Vermont.— White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590; West River Bridge Co. *v.* Dix, 16 Vt. 446 [*affirmed* in 6 How. (U. S.) 507, 12 L. ed. 535]; Armington *v.* Barnet, 15 Vt. 745, 40 Am. Dec. 705.

Virginia.—James River, etc., Co. *v.* Thompson, 3 Gratt. 258; Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 43, 36 Am. Dec. 374.

United States.— Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463 (not necessary that such franchises should be taken and appraised like land); Greenwood *v.* Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961; Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. ed. 55.

39. Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573. See also Natusch *v.* Irving, 2 Coop. Ch. 358.

40. *Iowa.*—Miners' Bank *v.* U. S., 1 Greene 553, Morr. 482, 43 Am. Dec. 115.

New York.— Hyatt *v.* McMahon, 25 Barb. 457; Joslyn *v.* Pacific Mail Steamship Co., 12 Abb. Pr. N. S. 329.

Ohio.—State *v.* Granville Alexandrian Soc., 11 Ohio 1.

Pennsylvania.— Com. *v.* Fayette County R. Co., 55 Pa. St. 452.

Rhode Island.— Gardner *v.* Hope Ins. Co., 9 R. I. 194, 11 Am. Rep. 238.

United States.— Close *v.* Glenwood Cemetery, 107 U. S. 466, 2 S. Ct. 267, 27 L. ed. 408; Lothrop *v.* Stedman, 15 Fed. Cas. No. 8,519, 13 Blatchf. 134; Sala *v.* New Orleans, 21 Fed. Cas. No. 12,246, 2 Woods 188.

41. Ferguson *v.* Miners,' etc., Bank, 3 Sneed (Tenn.) 609; West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257.

42. Lothrop *v.* Stedman, 15 Fed. Cas. No. 8,519, 13 Blatchf. 134; Sala *v.* New Orleans, 21 Fed. Cas. No. 12,246, 2 Woods 188.

43. Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642; People *v.* Morris, 13 Wend. (N. Y.) 325; Cole *v.* East Greenwich Fire Engine Co., 12 R. I. 202; Head *v.* Missouri State University, 19 Wall. (U. S.) 526, 22 L. ed. 160.

44. State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405; Martin *v.* Junction R. Co., 12 Ind. 605; Booe *v.* Junction R. Co., 10 Ind. 93; McCray *v.* Junction R. Co., 9 Ind. 358; Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369; Middlesex Turnpike Corp. *v.* Swan, 10 Mass. 384, 6 Am. Dec. 139; Middlesex Turnpike Corp. *v.* Locke, 8 Mass. 268; Proprietors Union Locks, etc., Co. *v.* Towne, 1 N. H. 44, 8 Am. Dec. 32; Angell & A. Corp. § 537.

45. Chesapeake, etc., Canal Co. *v.* Robertson, 5 Fed. Cas. No. 2,652, 4 Cranch C. C. 291.

view that any change made against the will of a shareholder releases him, on the ground that his private reasons for objecting to the change cannot be the subject of inquiry, and that he has the right to say *non hæc in fœdera veni*.[46] But the general view is that an acceptance by the majority of a material, radical, or fundamental change in the charter binds only the assenting parties and discharges the dissenting shareholders from their contract of subscription.[47] Of this nature are amendments to the charters of railway companies which essentially vary the route of the road,[48] which essentially alter its plan or change its terminus,[49] which extend it beyond its original charter limits,[50] or which provide for a consolidation of the corporation with another;[51] authorizing a "life and accident" insurance

46. Central R. Co. *v.* Collins, 40 Ga. 582; Proprietors Union Locks, etc., Co. *v.* Towne, 1 N. H. 44, 8 Am. Dec. 32; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

47. *Georgia.*— Winter *v.* Muscogee R. Co., 11 Ga. 438.

Illinois.— Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

Indiana.— Shelbyville, etc., Turnpike Co. *v.* Barnes, 42 Ind. 498; Booe *v.* Junction R. Co., 10 Ind. 93; McCray *v.* Junction R. Co., 9 Ind. 358.

Kentucky.— Fry *v.* Lexington, etc., R. Co., 2 Metc. 314.

Louisiana.— Hoey *v.* Henderson, 32 La. Ann. 1069; State *v.* State Accommodation Bank, 26 La. Ann. 288.

Maine.— Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.

Massachusetts.— Middlesex Turnpike Corp. *v.* Swan, 10 Mass. 384, 6 Am. Dec. 139; Middlesex Turnpike Corp. *v.* Locke, 8 Mass. 268.

Michigan.— Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247.

Mississippi.— Champion *v.* Memphis, etc., R. Co., 35 Miss. 692; Hester *v.* Memphis, etc., R. Co., 32 Miss. 378; New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517.

New Hampshire.—Proprietors Union Locks, etc. *v.* Towne, 1 N. H. 44, 8 Am. Dec. 32.

New Jersey.— Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455; Kean *v.* Johnson, 9 N. J. Eq. 401.

New York.— Buffalo, etc., R. Co. *v.* Pottle, 23 Barb. 21; Troy, etc., R. Co. *v.* Kerr, 17 Barb. 581; Hartford, etc., R. Co. *v.* Croswell, 5 Hill 383, 40 Am. Dec. 354.

Ohio.— Marietta, etc., R. Co. *v.* Elliott, 10 Ohio St. 57.

Pennsylvania.— Manheim, etc., Turnpike, etc., Co. *v.* Arndt, 31 Pa. St. 317; Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 Penr. & W. 184; Brown *v.* Fairmount Gold, etc., Min. Co., 10 Phila. 32, 30 Leg. Int. 124 (holding that shareholders and not directors must assent).

Vermont.—Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545.

Wisconsin.—Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13.

United States.— American Printing House for Blind *v.* Louisiana Bd. Trustees American Printing House for Blind, 104 U. S. 711, 26 L. ed. 902; Chicago City R. Co. *v.* Allerton, 18 Wall. 233, 21 L. ed. 902; Ferguson *v.* Meredith, 1 Wall. 25, 17 L. ed. 604; Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78; Ashton *v.* Burbank, 2 Fed. Cas. No. 582, 2 Dill. 435.

England.—*In re* Empire Assur. Corp., L. R. 8 Ch. 540, 28 L. T. Rep. N. S. 649, 21 Wkly. Rep. 495; Clinch *v.* Financial Corp., L. R. 4 Ch. 117, 38 L. J. Ch. 1, 19 L. T. Rep. N. S. 334, 17 Wkly. Rep. 84; Simpson *v.* Denison, 10 Hare 51, 16 Jur. 828, 44 Eng. Ch. 50.

Contra, Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463; Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443, which hold that the act of the majority is binding.

48. Winter *v.* Muscogee R. Co., 11 Ga. 438; Champion *v.* Memphis, etc., R. Co., 35 Miss. 692; Hester *v.* Memphis, etc., R. Co., 32 Miss. 378; Buffalo, etc., R. Co. *v.* Pottle, 23 Barb. (N. Y.) 21.

49. Middlesex Turnpike Corp. *v.* Swan, 10 Mass. 384, 6 Am. Dec. 139; Middlesex Turnpike Corp. *v.* Locke, 8 Mass. 268; Thompson *v.* Guion, 58 N. C. 113; Marietta, etc., R. Co. *v.* Elliott, 10 Ohio St. 57; Manheim, etc., Turnpike, etc., Co. *v.* Arndt, 31 Pa. St. 317.

50. Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545.

51. *Indiana.*— Shelbyville, etc., Turnpike Co. *v.* Barnes, 42 Ind. 498; Booe *v.* Junction R. Co., 10 Ind. 93; McCray *v.* Junction R. Co., 9 Ind. 358; Carlisle *v.* Terre Haute, etc., R. Co., 6 Ind. 316.

Michigan.— Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247.

New Jersey.— New Jersey Midland R. Co. *v.* Strait, 35 N. J. L. 322. *Compare* Kean *v.* Johnson, 9 N. J. Eq. 401.

New York.— Troy, etc., R. Co. *v.* Boston, etc., R. Co., 86 N. Y. 107; Abbott *v.* Johnstown, etc., Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572, in these two cases leases, and not consolidation.

Pennsylvania.— Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

United States.— Ferguson *v.* Meredith, 1 Wall. 25, 17 L. ed. 604; Pearce *v.* Madison, etc., R. Co., 21 How. 441, 16 L. ed. 184; Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78. *Compare* Thomas *v.* West R. Co., 101 U. S. 71, 25 L. ed. 950.

Compare Middletown *v.* Boston, etc., Air Line R. Co., 53 Conn. 351, 5 Atl. 706; Macgregor *v.* Dover, etc., R. Co., 18 Q. B. 618, 17 Jur. 21, 22 L. J. Q. B. 69, 7 R. & Can. Cas. 227, 83

company to go into the business of "fire, marine, and inland insurance";[52] authorizing a subdivision of the corporation;[53] authorizing a lease of corporate property to another corporation for nine hundred and ninety-nine years;[54] conferring on a railroad company the privilege of selling the road;[55] reducing the minimum number of subscribed shares, thus rendering a shareholder liable, who otherwise would not be;[56] increasing the capital stock of the corporation;[57] changing the method of voting at corporate elections so as provide for cumulative voting;[58] requiring corporations employing labor to pay their laborers weekly under a penalty;[59] converting a gas and electric lighting company into a street railway company;[60] or an amendment to the charter of a corporation organized to manufacture preserves, syrups, and the like, authorizing it to engage in the sale of liquor.[61]

c. What Amendments Do Not Require Unanimous Consent. On the other hand unanimous consent of the members to an amendment is not required where the change is trifling or immaterial;[62] but changes which merely have the effect of clothing the corporation with additional immunities and privileges in furtherance of the original design will, when adopted according to the method of voting prescribed by the charter or governing statute,[63] bind the whole corporation, and

E. C. L. 618; *In re* Empire Assur. Corp., L. R. 8 Ch. 540, 28 L. T. Rep. N. S. 649, 21 Wkly. Rep. 495; Clinch *v.* Financial Corp., L. R. 4 Ch. 117, 38 L. J. Ch. 1, 19 L. T. Rep. N. S. 334, 17 Wkly. Rep. 84; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 16 Jur. 249, 21 L. J. C. P. 23, 73 E. C. L. 775; Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331, 24 L. J. Ch. 601, 3 Wkly. Rep. 609.

Right of dissenter to appraisement and purchase of shares.—Laws have been enacted in some of the states providing that on the consolidation of two or more corporations a dissenting shareholder may have his shares appraised and purchased by the consolidated company. N. J. Laws (1873), p. 58, § 2; N. J. Laws (1881), p. 222, § 8; N. J. Laws (1883), p. 242, § 2; N. Y. Laws (1884), c. 367. So in England. 25 & 26 Vict. c. 89, §§ 161, 175.

Equity will restrain such a consolidation at the suit of a dissenting shareholder until his interests are secured. Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

52. Ashton *v.* Burbank, 2 Fed. Cas. No. 582, 2 Dill. 435.

53. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338; Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184.

54. Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455, restrained in equity.

55. Kean *v.* Johnson, 9 N. J. Eq. 407.

56. Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.

57. Eidman *v.* Bowman, 58 Ill. 444, 11 Am. Rep. 90; Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902. *Compare* Venner *v.* Atchison, etc., R. Co., 28 Fed. 581; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 27 Fed. 821. But according to one view the shareholder takes his shares subject to the implication that the legislature may authorize the board of directors to make an increase of the capital stock. Pacific R. Co. *v.* Hughes, 22 Mo. 291, 64 Am. Dec. 265; Payson *v.* Withers, 19 Fed. Cas. No. 10,864, 5 Biss. 269. Another view is that the validity of an increase of the capital stock without unanimous consent of the shareholders cannot be raised by a shareholder under a plea of *non assumpsit* in a suit on his contract of subscription, but can only be raised by the state. Pullman *v.* Upton, 96 U. S. 328, 24 L. ed. 818, per Strong, J. Under any view a shareholder who, after an increase of the capital stock, fails to dissent and participates in the profits of the enterprise will be estopped from claiming exemption from liability as a shareholder on this ground. Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894; Bailey *v.* Champlain Min., etc., Co., 77 Wis. 453, 46 N. W. 539; Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Stutz *v.* Handley, 41 Fed. 531 [*reversed* on other grounds in 139 U. S. 417, 35 L. ed. 227]; Payson *v.* Stoever, 19 Fed. Cas. No. 10,863, 2 Dill. 427. But the rule may be different where the increase was wholly unauthorized, and where the question arises between the subscribers and the corporation in an action for calls, the rights of innocent third persons not having supervened. Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523.

Examples of amendments increasing the capital stock which did not have the effect of discharging the dissenting shareholders may be found in Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Schenectady, etc., Plank Road Co. *v.* Thatcher, 11 N. Y. 102.

58. Loewenthal *v.* Rubber Reclaiming Co., 52 N. J. Eq. 440, 28 Atl. 454.

59. Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340.

60. State *v.* Taylor, 55 Ohio St. 61, 44 N. E. 513.

61. *In re* Pennsylvania Bottling, etc., Co., 6 Pa. Dist. 530, 19 Pa. Co. Ct. 593.

62. Milford, etc., Turnpike Co. *v.* Brush, 10 Ohio 111, 36 Am. Dec. 78.

63. Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463.

dissenting shareholders will remain liable on their subscriptions.[64] A more extreme view is that amendments bind the dissenting minority where the general scope and character of the undertaking remain the same, although they work a grave alteration in the organization or in respect of the undertaking which it was originally created to perform.[65] According to this view the will of the majority should govern, unless there is fraud or an entire change in the purpose for which the corporation was created,[66] validating such amendments as an unimportant change in the route of the railroad;[67] an amendment conferring power to build a branch road;[68] extending the road beyond its charter terminus,[69] or even changing its termini,[70] reducing its length,[71] directing material alterations in its terminus, including the abandonment of one depot and the erection of another,[72] changing the name of the corporation,[73] in case of a railroad charter extending the time for the completion of the road,[74] in increasing the number of directors from five to nine,[75] in case of the charter of a turnpike road, changing the location of the

64. *Georgia.*— Wilson *v.* Wills Valley R. Co., 33 Ga. 470.

Iowa.— Peoria, etc., R. Co. *v.* Preston, 35 Iowa 115.

Kentucky.— Fry *v.* Lexington, etc., R. Co., 2 Metc. 314.

Louisiana.— State *v.* State Accommodation Bank, 26 La. Ann. 288.

Maine.— Bucksport, etc., R. Co. *v.* Buck, 68 Me. 81; Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34.

Maryland.— Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760.

Massachusetts.— Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13; Agricultural Branch R. Co. *v.* Winchester, 13 Allen 29; Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221.

Michigan.—Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

New York.— Poughkeepsie, etc., Plank Road Co. *v.* Griffin, 24 N. Y. 150.

Pennsylvania.— Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339; Clark *v.* Monongahela Nav. Co., 10 Watts 364; Irvin *v.* Susquehanna, etc., Turnpike Co., 2 Penr. & W. 466, 23 Am. Dec. 53.

Tennessee.— Greeneville, etc., R. Co. *v.* Johnson, 8 Baxt. 332; Woodfork *v.* Union Bank, 3 Coldw. 488.

65. *Delaware.*— Delaware R. Co. *v.* Tharp, 1 Houst. 149.

Florida.— Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713.

Illinois.— Ross *v.* Chicago, etc., R. Co., 77 Ill. 127; Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237; Rice *v.* Rock Island, etc., R. Co., 21 Ill. 94; Illinois River R. Co. *v.* Zimmer, 20 Ill. 654; Sprague *v.* Illinois River R. Co., 19 Ill. 174; Peoria, etc., R. Co. *v.* Elting, 17 Ill. 429; Banet *v.* Alton, etc., R. Co., 13 Ill. 504.

Missouri.— Pacific R. Co. *v.* Hughes, 22 Mo. 291, 64 Am. Dec. 265; Pacific R. Co. *v.* Renshaw, 18 Mo. 210.

Ohio.— Dayton, etc., R. Co. *v.* Hatch, 1 Disn. 84, 12 Ohio Dec. (Reprint) 501.

Pennsylvania.— Cross *v.* Peach Bottom R. Co., 90 Pa. St. 392; Gray *v.* Monongahela Nav. Co., 2 Watts & S. 156, 37 Am. Dec. 500.

Virginia.— Currie *v.* Mutual Assur. Soc., 4 Hen. & M. 315, 4 Am. Dec. 517.

66. Ross *v.* Chicago, etc., R. Co., 77 Ill. 127; Illinois River R. Co. *v.* Zimmer, 20 Ill. 654; Sprague *v.* Illinois River R. Co., 19 Ill. 174. *Compare* Irvin *v.* Susquehanna, etc., Turnpike Co., 2 Penr. & W. (Pa.) 466, 23 Am. Dec. 53; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040.

67. *Georgia.*— Wilson *v.* Wills Valley R. Co., 33 Ga. 466.

Illinois.— Banet *v.* Alton, etc., R. Co., 13 Ill. 504.

Kentucky.— Fry *v.* Lexington, etc., R. Co., 2 Metc. 314.

Massachusetts.—Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221.

Pennsylvania.— Irvin *v.* Susquehanna, etc., Turnpike Co., 2 Penr. & W. 466, 23 Am. Dec. 53.

68. Peoria, etc., R. Co. *v.* Preston, 35 Iowa 115.

69. Rice *v.* Rock Island R. Co., 21 Ill. 93; Peoria, etc., R. Co. *v.* Elting, 17 Ill. 429; Cross *v.* Peach Bottom R. Co., 90 Pa. St. 392.

70. Sprague *v.* Illinois River R. Co., 19 Ill. 174. See also Ross *v.* Chicago, etc., R. Co., 77 Ill. 127; Illinois River R. Co. *v.* Zimmer, 20 Ill. 654.

71. Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581. *Contra*, Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13.

72. Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103. One court has gone so far as to hold that the subscriber's contract is not impaired unless he is obliged to pay more money on his subscription. Delaware R. Co. *v.* Tharp, 1 Houst. (Del.) 149.

73. Reading *v.* Vedder, 66 Ill. 80; Bucksport, etc., R. Co. *v.* Buck, 68 Me. 81; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Milwaukee, etc., R. Co. *v.* Field, 12 Wis. 340.

74. Agricultural Branch R. Co. *v.* Winchester, 13 Allen (Mass.) 29. Such an amendment, being beneficial, will be presumed to have been made with the consent of the shareholders. San Antonio *v.* Jones, 28 Tex. 19.

75. Mower *v.* Staples, 32 Minn. 284, 20 N. W. 225.

road, where there is no implication or expression to the contrary in the original charter,[76] in case of a navigation company extending its privileges, although its liabilities may be thereby extended,[77] or, in case of a railway company chartered to build a railway "from Dublin to Mullingar, and Athlone," an act of parliament authorizing the company to buy and work a canal from Mullingar to Athlone and to build their road from Dublin to Mullingar only;[78] or, it seems, an amendment changing the denomination of the shares, so long as the proportion of the interests of each member in the corporation is left unchanged;[79] or, in case of a gas-light company, an amendment authorizing it to use both gas and electricity;[80] or, in case of a medical and surgical college, an amendment conferring upon it the power to confer degrees incidental to surgery, and to issue diplomas therefor;[81] or, in case of a banking corporation, an act of legislation increasing the amount of taxation laid upon it beyond that prescribed by its charter.[82]

d. Amendment Authorizing Surrender of Franchises. An amendment to the charter of a strictly private corporation, owing no public duties to the state, authorizing it to surrender its franchises and dissolve, does not impair the obligation of any contract subsisting between the state and the corporation, but merely operates to give the consent of the state to what the corporation can do without its consent.[83]

e. Materiality of Amendment Question of Law For Court. The materiality of the amendment, within the foregoing principles, is a question of law for the court and is not to be submitted to a jury.[84]

3. Effect of Reservation of Power to Alter or Repeal — a. In General. A reservation in the charter, constitutional provision, or a general statute, operative at the date of the granting of the charter, of the power in the legislature to alter or repeal the charter, enters into the grant, qualifies it, and becomes a part of it, so as to make it a mere privilege conferred by the legislature, which may at any future time be withdrawn or modified in compliance with the legislative will.[85]

76. Irvin *v.* Susquehanna, etc., Turnpike Co., 2 Penr. & W. (Pa.) 466, 23 Am. Dec. 53, opinion by Gibson, C. J. [*followed* in Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212]. *Compare* Central Plank Road Co. *v.* Clemens, 16 Mo. 359; Mercer County *v.* Coovert, 6 Watts & S. (Pa.) 70 (where the first of these cases is commented upon).

77. Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500.

78. Midland Great Western R. Co. *v.* Gordon, 11 Jur. 440, 16 L. J. Exch. 166, 16 M. & W. 804, 5 R. & Can. Cas. 76. Many other cases are found tending to establish the same doctrine. Middlesex Turnpike Co. *v.* Locke, 8 Mass. 268; New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517; Hartford, etc., R. Co. *v.* Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; Indiana, etc., Turnpike Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184.

79. Kennebec, etc., R. Co. *v.* Waters, 34 Me. 369; *In re* New Zealand Banking Corp., L. R. 3 Ch. 131, 18 L. T. Rep. N. S. 2, 16 Wkly. Rep. 381; *In re* Financial Corp., L. R. 2 Ch. 714. *Compare In re* International Contract Co., L. R. 7 Ch. 485, 41 L. J. Ch. 564, 26 L. T. Rep. N. S. 487, 20 Wkly. Rep. 430.

80. Picard *v.* Hughey, 58 Ohio St. 577, 51 N. E. 133.

81. *In re* Philadelphia Medico-Chirurgical College, 190 Pa. St. 121, 43 Wkly. Notes Cas. (Pa.) 481, 42 Atl. 524.

82. Owenshoro Deposit Bank *v.* Daviess County, 102 Ky. 174, 39 S. W. 1030, 1041, 19 Ky. L. Rep. 248, 44 L. R. A. 825 [*affirmed* in 173 U. S. 662, 19 S. Ct. 875, 43 L. ed. 850].

83. Houston *v.* Jefferson College, 63 Pa. St. 428.

84. Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463; Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240. For an unsound case where it was held proper to submit to the jury the question of the materiality of the change made by the amendment see Southern Pennsylvania, etc., R. Co. *v.* Stevens, 87 Pa. St. 190.

Yet if the court erroneously submits it to a jury and they decide it rightly their verdict will not be set aside. Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240. That this is an established rule of procedure see Bernstein *v.* Humes, 78 Ala. 134; Jones *v.* Pullen, 66 Ala. 306; Thornburgh *v.* Mastin, 93 N. C. 258; Glenn *v.* Charlotte, etc., R. Co., 63 N. C. 510; Woodbury *v.* Taylor, 48 N. C. 504.

Court decides upon facts found.— That the question, although one of law, is to be decided by the court upon facts found see Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463.

85. Sprigg *v.* Western Tel. Co., 46 Md. 67; Perrin *v.* Oliver, 1 Minn. 202; *In re* New-

One view is that such a reserved power to alter or amend charters extends only to the protection of public rights and public interests, and not to the control of the affairs of the members *inter sese*.[86] Another view is that it extends not only to the power of altering the charter for purposes connected with the public rights and interests, but also to altering it for the mere purpose of changing the rights of the corporators as among themselves.[87] But there must be a limit to this power on the part of the legislature; since there are implied reservations of power upon legislation in free governments,[88] and since as already seen[89] the legislature cannot force a man to become a member of a corporation against his will. If therefore, he having agreed to become a member of one kind of a corporation, it endeavors to force him to become against his will a member of another kind of a corporation, it seems that it subjects his property embarked in the original corporation to a confiscation and takes it without due process of law, in violation of the fourteenth amendment to the federal constitution.[90]

b. Such Reservation in General Law Applies to Future Special Charters. Contrary to the general rule of statutory construction expressed in the maxim *generalia specialibus non derogant*, it is a settled rule that the power reserved to the legislature in a general statute or constitutional provision to alter or repeal the charters of corporations reads itself into the charter of every corporation created while the general statute is in force, and makes such charters subject to legislative alteration or repeal, against the will of the corporators or shareholders, to the extent of the principle already stated.[91] Where the legislature has, in granting a special charter, reserved the power to alter or repeal it, this power may be exer-

ark Library Assoc., 64 N. J. L. 217, 43 Atl. 435; Hyatt *v.* Esmond, 37 Barb. (N. Y.) 601; Hyatt *v.* Whipple, 37 Barb. (N. Y.) 595.

86. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

87. *Illinois.*— Banet *v.* Alton, etc., R. Co., 13 Ill. 504.

Maine.— South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547.

Massachusetts.— Durfee *v.* Old Colony, etc., R. Co., 5 Allen 230.

Missouri.— Pacific R. Co. *v.* Hughes, 22 Mo. 291, 64 Am. Dec. 265; Pacific R. Co. *v.* Renshaw, 18 Mo. 210.

New York.—Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Schenectady, etc., Plank Road Co. *v.* Thatcher, 11 N. Y. 102; White *v.* Syracuse, etc., R. Co., 14 Barb. 559; Northern R. Co. *v.* Miller, 10 Barb. 260.

Proviso that right shall not be exercised to impair vested rights.— Where the power of amendment is reserved in a charter or general statute, but with the proviso that it shall not be exercised so as to impair rights previously vested, the proviso does not disable the state from changing an exemption from taxation contained in the original charter. The proviso is deemed to refer to property rights of the members and to contract rights of the corporation merely. Northern Bank *v.* Stone, 88 Fed. 413.

88. Citizens' Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 665, 22 L. ed. 455.

89. See *supra*, I, J, 7, a, note 11.

90. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970.

A statute requiring an existing railroad company to issue family mileage tickets at reduced rates cannot be upheld as an exercise of a reserved power of amendment, or as an exercise of a power of amendment reserved to the legislature in the charter of the railway company, when it does not purport to be an amendment of the charter, and contains no provision for rendering compensation to the company for the loss of its exclusive right granted by its charter to fix its fares. Pingree *v.* Michigan, etc., R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

Reservation prevents grant from becoming irrevocable contract.— A reservation in a charter of the power to amend or repeal prevents a grant made therein to the corporation, such as a grant limiting the power of taxation of the state with respect to it, from becoming an irrevocable contract; but such taxes may be increased at the pleasure of the state. Owensboro Deposit Bank *v.* Daviess County, 102 Ky. 174, 39 S. W. 1030, 1041, 19 Ky. L. Rep. 248, 44 L. R. A. 825 [*affirmed* in 173 U. S. 662, 19 S. Ct. 875, 43 L. ed. 850].

91. *Connecticut.*— Lothrop *v.* Stedman, 42 Conn. 583.

Kentucky.— Griffin *v.* Kentucky Ins. Co., 3 Bush 592, 96 Am. Dec. 259; Fry *v.* Lexington, etc., R. Co., 2 Metc. 314.

Maine.— State *v.* Maine Central R. Co., 66 Me. 488.

Massachusetts.— Roxbury *v.* Boston, etc., R. Corp., 6 Cush. 424.

New Jersey.— State *v.* Railroad Taxation Commissioner, 37 N. L. L. 228; State *v.* Person, 32 N. J. L. 134 [*affirmed* in 32 N. J. L. 566]; Story *v.* Jersey City, etc., R. Co., 16 N. J. Eq. 13, 84 Am. Dec. 134.

cised by a subsequent general law, such as a subsequent statute requiring all railroad companies to fence their tracks.[92]

4. WHAT BODY MAY GIVE ASSENT TO AMENDMENTS — a. In General. The directors of a corporation are merely its managing agents for the purposes of its business.[93] Unless power thereto has been specially conferred upon them by the legislature, they have no power to make constituent changes in the corporation itself.[94] In the absence of power specially conferred they have therefore no power to sanction amendments of its charter.[95] They cannot for example sanction an increase[96] or reduction[97] of its capital stock. Without the sanction of the shareholders they cannot apply to the legislature for amendments of the charter;[98] but such applications can be made only by or under the authority of the shareholders.[99] Acceptance of the amendment of a charter involving fundamental changes in the corporation can be made, in case of a joint-stock company, only by the share-

New York.— Suydam *v.* Moore, 8 Barb. 358.

Wisconsin.— West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257.

United States.— Holyoke Water Power Co. *v.* Lyman, 15 Wall. 500, 21 L. ed. 433; Miller *v.* New York, 15 Wall. 478, 21 L. ed. 98; Pennsylvania College Cases, 13 Wall. 190, 20 L. ed. 350; Sala *v.* New Orleans, 21 Fed. Cas. No. 12,246, 2 Woods 188.

This does not mean that the hands of a legislature are tied so that it cannot enact in a special charter that which is inconsistent with a prior general law. Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123. Nor does it abrogate the rule that a special provision relating to the particular corporation embodied in its special charter will override a different provision in an existent general statute. Wood *v.* Wellington, 30 N. Y. 218. And although by reason of the reservation in the general law the legislature has the power to alter or repeal a special charter granted while the general law was in force, yet it will not be intended as doing so by reason of subsequent general enactments, which do not have this effect by their terms. State *v.* Macon County Ct., 41 Mo. 453.

92. Durand *v.* New Haven, etc., Co., 42 Conn. 211. *Contra*, and seemingly unsound, Pingree *v.* Michigan, etc., R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

The power of amendment reserved in the general law will be construed as applicable to an existing charter, although the legislature tendered to the corporation an extension of its charter, expressly reserving the power of amendment, which was rejected by the corporation, after which the legislature granted an extension, which was accepted without such an express reservation. Northern Bank *v.* Stone, 88 Fed. 413.

The reservation of the power to amend, alter, or repeal a charter may be exercised by changing the term of office of a director, and by providing for a representation in the board of directors of a minority of the shareholders. Atty.-Gen. *v.* Looker, 111 Mich. 498, 69 N. W. 929.

Where a charter has been granted and extended under successive constitutions, it will become subject to the provisions of the constitution in force when its final extension takes effect. State *v.* Citizens' Bank, 52 La. Ann. 1086, 27 So. 709.

The acceptance by a corporation of an act of the legislature passed for its benefit operates to bring the corporation under the dominion of the constitution of the state in force when its acceptance takes place. State *v.* Citizens' Bank, 52 La. Ann. 1086, 27 So. 709.

93. Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902.

94. Gill *v.* Balis, 72 Mo. 424; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Brown *v.* Fairmount Gold, etc., Min. Co., 10 Phila. (Pa.) 32, 30 Leg. Int. (Pa.) 124; Chicago, etc., R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902.

That directors cannot change essentially the business of the corporation see Cherokee Iron Co. *v.* Jones, 52 Ga. 276; Abbot *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578.

95. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579; Stark *v.* Burke, 9 La. Ann. 341; Boisdere *v.* Citizens' Bank, 9 La. 506, 29 Am. Dec. 453; State *v.* Adams, 44 Mo. 570; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

An exception to this statement of doctrine was made in Illinois, where it was held that the directors of a corporation have power to accept an amended charter. Illinois River R. Co. *v.* Zimmer, 20 Ill. 654 [*citing* Sprague *v.* Illinois River R. Co., 19 Ill. 174; Banet *v.* Alton, etc., R. Co., 13 Ill. 508]. The language above quoted was reaffirmed in Illinois River R. Co. *v.* Beers, 27 Ill. 185.

96. Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347.

97. Hatridge *v.* Rockwell, R. M. Charlt. (Ga.) 260; Percy *v.* Millaudon, 3 La. Ann. 568.

98. Stark *v.* Burke, 9 La. Ann. 341.

99. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579; Boisdere *v.* Citizens' Bank, 9 La. 506, 29 Am. Dec. 453; State *v.* Adams, 44 Mo. 570; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. *Compare* Dayton, etc., R. Co. *v.* Hatch, 1 Disn. (Ohio) 84, 12 Ohio Dec. (Reprint) 501, holding it to be a power of the directors.

holders, unless the legislature has previously provided for an acceptance by the directors or by some other body.[100]

b. Action of Directors Validated by Ratification or Acquiescence of Shareholders. But although the directors may have in strictness no power to accept an amendment of the charter, yet their action in so doing may be validated by the acquiescence of the shareholders, on the principle of ratification or estoppel.[1] This principle applies where the directors have, without authority from the shareholders, taken it upon themselves to procure new legislation respecting the corporation. Here, if the legislation is beneficial to the corporation and is not repudiated by the shareholders by some distinct act, slight evidence of acquiescence will found a presumption of acceptance,[2] such as persisting in the prosecution of an action which could be maintained only under the charter as amended,[3] taking a continuous course of action which could be lawfully maintained only under the amended charter,[4] or, in case of an amendment procured by the directors, changing the voting power of the shares, by a unanimous acceptance and action upon it for twenty years.[5] Nor can a shareholder plead his ignorance of the amendment so as to make it a ground of escaping his liability under his contract of subscription, since it is his duty to know it,[6] especially where, subsequently to the amendment, he has voted at corporate meetings and otherwise acted in a manner consistent only with the conclusion of his being a shareholder.[7]

5. Evidence of Acceptance of Amendment — a. In General. The acceptance of an amendment to a charter need not be proved by formal corporate action, but may be established by evidence of user thereunder, that is to say, of action by the corporation which could not be taken properly but for the amendment;[8] and it may be inferred from such acts or omissions as would raise a presumption of

100. Opinion of Judges, 120 N. C. 623, 28 S. E. 18.

1. *Arkansas.*— *Ex p.* Booker, 18 Ark. 338.
Connecticut.— Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435; Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579.
Florida.— Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713.
Georgia.— Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240.
Indiana.— Hayworth *v.* Junction R. Co., 13 Ind. 348.
New Jersey.— Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171.
Ohio.— Goodin *v.* Evans, 18 Ohio St. 150; Owen *v.* Purdy, 12 Ohio St. 73.
Pennsylvania.— Houston *v.* Jefferson College, 63 Pa. St. 428; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Brown *v.* Fairmount Gold, etc., Min. Co., 10 Phila. 32, 30 Leg. Int. 124; Germantown Mut. F. Ins. Co. *v.* Stokes, 9 Phila. 80, 29 Leg. Int. 100.
Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.
United States.— Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78; Upton *v.* Jackson, 28 Fed. Cas. No. 16,802, 1 Flipp. 413.
Compare Banks *v.* Judah, 8 Conn. 145; Blatchford *v.* Ross, 54 Barb. (N. Y.) 42, 5 Abb. Pr. N. S. (N. Y.) 434, 37 How. Pr. (N. Y.) 110.

2. Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Trott *v.* Warren, 11 Me. 227; Ameriscoggin Bridge Co. *v.* Bragg, 11 N. H. 102; U. S. Bank *v.* Dandridge, 12 Wheat. 64, 71, 6 L. ed. 552; Newling *v.* Francis, 3 T. R. 189, 1 Rev. Rep. 687.

3. Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

4. Rex *v.* Amery, 1 T. R. 575, 2 T. R. 515.

5. Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517.

6. Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33; Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369.

7. Bedford R. Co. *v.* Bowser, 48 Pa. St. 29. But see *contra*, Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.
Circumstances under which an acceptance of enabling statutes by the shareholders is not necessary to authorize the directors to take land for corporate purposes. See Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13.

8. Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778; Cincinnati, etc., R. Co. *v.* Cole, 29 Ohio St. 126, 23 Am. Rep. 729; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488.
Although the board of directors may have no power to procure or to accept an amendment of the charter, yet where a new power is conferred by the amendment and is exercised by the directors without dissent on the part of the shareholders this will be evidence of an acceptance of the amendment by the corporation. Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13 [*citing* Bangor, etc., R. Co. *v.* Smith, 47 Me. 34;

acceptance in the case of a natural person.[9] A presumption of acceptance arises where the grant is beneficial to the corporation or to the shareholders.[10] Such an acceptance may be shown by showing the exercise by the corporation of the powers conferred by the amendment,[11] by showing that the corporation has done particular corporate acts authorized by the amendment, but without which such acts would not have been authorized,[12] by the fact that the officers of the corporation have exercised the powers conferred by it,[13] or in general by any acts or omissions done or had by the corporation which are inconsistent with any hypothesis save that of an acceptance of the amendment.[14]

b. By Shareholders. The doctrine that action under an amendment which could not take place lawfully without an acceptance of the amendment is *prima facie* evidence of its acceptance does not apply as against shareholders who have not lost their rights by acquiescence or laches. The reason is that they have a right to have their dissent heard and discussed in a corporate meeting.[15] Circumstances may of course exist from which the assent of a subscriber to shares of the corporation, to an amendment to the charter procured subsequently to his subscription, may be inferred without direct evidence of such assent.[16] Where there is an attempt upon the part of a shareholder or of his personal representative to escape liability on his contract of subscription, on the ground that the charter was altered subsequently thereto without his consent, it seems that his assent, in the absence of any evidence speaking upon the question, will be presumed, and that his dissent must be affirmatively shown.[17]

Middlesex Husbandmen, etc., Soc. *v.* Davis, 3 Metc. (Mass.) 133; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344].

9. Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

10. "Where the new grant is beneficial in its aspect, it is thought, very little is required to found a presumption of acceptance." Bell, J., in Com. *v.* Cullen, 13 Pa. St. 133, 140, 53 Am. Dec. 450. See also Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

11. Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657; Palfrey *v.* Paulding, 7 La. Ann. 363; Bangor, etc., R. Co. *v.* Smith, 47 Me. 34; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Goodin *v.* Evans, 18 Ohio St. 150.

A general act amounting to an amendment of all railroad charters was deemed to have been accepted by action under it by the officers, who had power to request amendments, no shareholders ever objecting to it. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104. And this rule applies when the powers are conferred by a general law which is declared applicable to any one of a class of corporations that may accept its provisions. Goodin *v.* Evans, 18 Ohio St. 150.

12. Kenton County Ct. *v.* Bank Lick Turnpike Co., 10 Bush (Ky.) 529.

13. Story, J., in U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552.

14. *Alabama.*— Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657.

Kentucky.— Covington *v.* Covington, etc., R. Co., 10 Bush 69.

Louisiana.— Palfrey *v.* Paulding, 7 La. Ann. 363.

Maine.— Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

Massachusetts.— Blandford School Dist. No. 3 *v.* Gibbs, 2 Cush. 39.

Minnesota.— State *v.* Sibley, 25 Minn. 387.

Missouri.— Hope Mut. F. Ins. Co. *v.* Koeller, 47 Mo. 129; Hope Mut. F. Ins. Co. *v.* Beckmann, 47 Mo. 93; Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27.

New York.— People *v.* Law, 34 Barb. 494; Beals *v.* Benjamin, 29 How. Pr. 101.

Ohio.— Goodin *v.* Evans, 18 Ohio St. 150. See 12 Cent. Dig. tit. "Corporations," §§ 125, 126.

The election of corporate officers in pursuance of the terms of the amended charter is presumptive evidence of its acceptance. Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

15. *Maryland.*— Lyons *v.* Orange, etc., R. Co., 32 Md. 18.

Mississippi.— New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517.

Ohio.— Owen *v.* Purdy, 12 Ohio St. 73.

Pennsylvania.— Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

16. Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

17. Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713; Western North Carolina R. Co. *v.* Rollins, 82 N. C. 523; North Carolina, etc., R. Co. *v.* Leach, 49 N. C. 340; Mills *v.* Williams, 33 N. C. 558.

In Ohio it has been reasoned that the burden of showing such assent rests with the party seeking to hold the shareholder liable. Ireland *v.* Palestine, etc., Turnpike Co., 19 Ohio St. 369. It is obvious that this conclusion may be varied either way by the state of the pleadings and the form of the issues. Bery *v.* Marietta, etc., R. Co., 26 Ohio St. 673.

6. Estoppel to Deny Acceptance of Amendment — a. Of Shareholders. Although there may have been a fundamental change wrought by an amendment to the charter or act of incorporation, such as might release a shareholder seasonably dissenting therefrom in the proper mode, yet unless he does so dissent and make a fair attempt to procure a rescission of his contract of subscription on that ground, or to prevent the corporation from acting in conformity with the amendment, he will become estopped from subsequently claiming that he has been released from his contract of subscription by reason of the amendment.[18] This is merely a branch of the general doctrine under which a shareholder when sued upon his contract of subscription to the shares of the corporation becomes estopped by his conduct in various ways from denying the regularity or the legality of the organization of the corporation.[19] Judicial opinion upon this question has gone so far as to hold that the shareholder must challenge the validity of the amendment by a proceeding in the nature of quo warranto, and cannot be heard in an action to enforce his contract of subscription to set it up in a collateral way.[20]

b. Of Third Parties. As hereafter seen,[21] one who contracts with a corporation by its corporate name, becomes thereby estopped to deny its corporate existence when sued upon the contract. So one who contracts with a corporation, acting under an amended charter and by its amended name, will not be heard to complain that the amendment has not been properly accepted by the corporation.[22] Persons who have entered into contracts with the corporation have no standing to object to acts of legislation concurred in by the corporation changing, repealing, or surrendering its charter, provided their contracts are left intact and their legal remedies preserved.[23]

c. Of Corporation. On the same principle, where the corporation itself exercises the powers conferred by the amendment, it becomes estopped from denying that it has formally accepted the amendment by filing the evidence of acceptance required by the governing statute.[24]

One case is found where it was held that it was a question for the jury whether a combination to change the fundamental purpose of the corporation as established by its original act of incorporation was not a fraud upon a shareholder so as to release him from his contract of subscription. Southern Pennsylvania Iron, etc., Co. *v.* Stevens, 87 Pa. St. 190.

18. Doane *v.* Pickaway, Wright (Ohio) 752.

19. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Connecticut.— Lane *v.* Brainerd, 30 Conn. 565.

Illinois.— Tarbell *v.* Page, 24 Ill. 46; Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93.

Kansas.— McCune Min. Co. *v.* Adams, 35 Kan. 193, 10 Pac. 468.

Kentucky.— Ferguson *v.* Landram, 5 Bush 230, 96 Am. Dec. 350.

Massachusetts.— Holyoke Bank *v.* Goodman Paper Mfg. Co., 9 Cush. 576; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Michigan.— Parker *v.* Northern Cent. Michigan R. Co., 33 Mich. 23.

New York.— Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Eaton *v.* Aspinwall, 19 N. Y. 119; Abbott *v.* Aspinwall, 26 Barb. 202; Mead *v.* Keeler, 24 Barb. 20.

Ohio.— Owen *v.* Purdy, 12 Ohio St. 73.

Pennsylvania.— McHose *v.* Wheeler, 45 Pa. St. 32.

Tennessee.— Greenville, etc., R. Co. *v.* Johnson, 8 Baxt. 332.

United States.— Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, 307.

The principle that a minority of shareholders may, by laches, lose the right to object to a reorganization, seems to have been first decided in Connecticut in 1830. Banks *v.* Judah, 8 Conn. 145.

20. Hope Mut. F. Ins. Co. *v.* Beckmann, 47 Mo. 93. For a similar expression see Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523.

21. See *infra*, I, N, 1.

22. Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33.

23. Houston *v.* Jefferson College, 63 Pa. St. 428.

24. Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488. *Compare* Lanesborough Cong. Soc. *v.* Curtis, 22 Pick. (Mass.) 320.

That a formal acceptance of an amendment which releases all demands of the corporation against the state will be operative as a contract between the corporation and the state, and cannot be set aside on the ground that it was executed by the governing body of the corporation in ignorance of its real nature and effect see St. John's College *v.* Purnell, 23 Md. 629.

7. Amendment by Substitution of New Charter. The alteration of a charter may be as lawfully made by the substitution of a new charter as by an amendment of the old, provided such substituted charter be germane and necessary to the objects and purposes for which the company was organized.[25] It has been held that a statute which in form is a new charter of an existing corporation, which does not purport to be an amendment of the old charter, but which contains precisely the same title, and which embodies most of the provisions of the old charter with the addition of certain new provisions, is to be treated merely as an amendment of the old charter, the court, upon an examination of the terms of the new act, being of the opinion that such was the legislative intent.[26]

8. Injunction to Restrain Corporation From Petitioning Legislature For Amendment of Charter. In England, where corporations are created and where their charters are amended by special acts of legislation, the protection of minority shareholders is secured by bills in equity restraining the majority of the shareholders or the directors from using the funds of the corporation in promoting applications to parliament for the passage of amendatory legislation changing the fundamental purposes for which the corporation was originally created, and consequently altering the contracts into which the complainants entered in becoming members of it.[27] In America it has been held that an attempt by injunction to restrain the directors of a corporation from applying to the legislature for an amendment of the charter, where they do not use the corporate fund to promote the application, would be opposed to the spirit of our institutions, and would involve an impertinent interference by the judicial branch of the government with the right of the legislature to have full information from its constituents upon subjects of legislation, and with the right of the people to petition the legis-

25. Sprigg *v.* Western Tel. Co., 46 Md. 67.

26. Hope Mut. F. Ins. Co. *v.* Beckmann, 47 Mo. 93.

27. Stevens *v.* South Devon R. Co., 13 Beav. 48; Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1, 15 Jur. 26, 20 L. J. Ch. 169; Great Western R. Co. *v.* Rushout, 5 De G. & Sm. 290, 16 Jur. 238, 10 Eng. L. & Eq. 72; Simpson *v.* Denison, 10 Hare 51, 16 Jur. 828, 44 Eng. Ch. 50; Bagshawe *v.* Eastern Union R. Co., 7 Hare 114, 13 Jur. 602, 18 L. J. Ch. 193, 6 R. & Can. Cas. 152, 27 Eng. Ch. 114; Lancaster, etc., R. Co. *v.* Northwestern R. Co., 2 Kay & J. 293, 25 L. J. Ch. 223, 4 Wkly. Rep. 220; Atty.-Gen. *v.* Norwich, 16 Sim. 225, 39 Eng. Ch. 225. In Stevens *v.* South Devon R. Co., 13 Beav. 48, it was held that the funds of a railroad company could not be used to promote an act of parliament changing the rights of two classes of shareholders in the company. In Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1, 15 Jur. 26, 20 L. J. Ch. 169, a railway company was enjoined from using its funds to promote an act of parliament designed to improve the navigation of a river on which the terminus of its railway was situated. See also Stockton, etc., R. Co. *v.* Leeds, etc., R. Co., 12 Jur. 735, 2 Phil. 666, 5 R. & Can. Cas. 695; Ware *v.* Grand Junction Water Works Co., 2 Russ. & M. 470, 11 Eng. Ch. 470 (where the nature of the jurisdiction is stated by Lord Cottenham). Such injunctions are not regarded as attempts to restrain the proceedings of parliament.

This practice of restraining by injunction applications to parliament appears to be of recent origin in England, and there are not many reported cases in which it has been exercised. Such an injunction was granted by Vice-Chancellor Shadwell, in 1831, in Cunliff *v.* Manchester, etc., Canal Co., 2 Russ. & M. 481, note *a*, 11 Eng. Ch. 481, note *a*; and in Ware *v.* Grand Junction Water Works Co., 2 Russ. & M. 470, 11 Eng. Ch. 470. The former case was compromised on appeal, and the latter was reversed on appeal by the lord chancellor. In Stockton, etc., R. Co. *v.* Leeds, etc., R. Co., 12 Jur. 735, 2 Phil. 666, 5 R. & Can. Cas. 695, Anno. 1848, an injunction was granted by Vice-Chancellor Shadwell to restrain a railroad company from opposing a bill brought before parliament by another railroad company for the amalgamation of the two companies; but on appeal the injunction was dissolved on the merits by Lord Cottenham, although the jurisdiction of the court was maintained by him. In Heathcote *v.* North Staffordshire R. Co., 2 Hall & T. 382, 14 Jur. 859, 2 Macn. & G. 100, 6 R. & Can. Cas. 358, 48 Eng. Ch. 78, Anno. 1850, an injunction was granted by the vice-chancellor restraining defendants from making an application to parliament for any act to authorize them to abandon certain branch railways or to authorize anything to be done or omitted by the company inconsistent with, or repugnant to, a covenant entered into by them with the complainant. This injunction was also dissolved by Lord Cottenham upon the merits. In no one of these cases was the injunction restraining a party from making application to parliament, either in support of, or in opposition to, a bill finally sustained.

lature for changes in the laws; and this principle is supposed to have special application where, in the constitution of the state or in a general law of the state applicable to all corporations, the right is reserved to the legislature to alter or repeal corporate charters; since in such a case all contracts, express or implied, resulting from the act of incorporation and its acceptance by the shareholders, are deemed to have been entered into by both parties, subject to such constitutional or statutory reservation.[28]

L. Organization Under General Laws — 1. Methods of. Corporations are organized under general enabling statutes in two ways: (1) By procuring a charter from a judicial court — a mode of organization which, so far as the writer knows, exists in a few states only, and which is for the most part confined to ideal corporations, that is to say, to societies organized for ideal, social, religious, or mutually beneficial purposes, and not having a joint stock.[29] (2) By entering into articles of association, by signing and acknowledging them in a prescribed way, and presenting them to some ministerial officer of the state, generally the secretary of state, who examines them and, having ascertained that they comply with the governing statute both as to the purposes named therein for which the corporation is formed, the amount of capital stock, the mode by which it is to be raised, and as to matters of form and detail therein prescribed, grants to the applicants a document usually called a certificate of incorporation; whereupon the document is recorded in the office or offices designated for such recordation by the governing statute, generally in the office of the secretary of state, and also in the office of the recorder or register of deeds of the county which is designated in the articles as the principal place of business of the corporation.[30]

2. Procuring Charters From Judicial Courts — a. Validity of Statutes Devolving Power of Creating Corporations Upon Judicial Courts. In the absence of a provision in the constitution of the state conferring such power on the legislature, it has no power to authorize the judicial courts to grant special charters of incorporation, since it is not competent for the legislature to delegate its powers to another department of the government.[31] The legislature may, however, even in the absence of a direct constitutional authorization, prescribe by general laws the conditions under which, and the purposes for which corporations may be organized, and may devolve upon the judicial department of the government the execution of those laws, by examining the charters and determining whether they are in compliance with law, and if so, passing a decree of incorporation. In all these cases the distinction lies between creating and organizing corporations. In the absence of an explicit constitutional authorization to the contrary, the legislature alone can create corporations; without the aid of such an authorization it may, however, empower the judicial courts to organize them under a general law, provided there is no prohibition in the constitution which disables the legislature from devolving ministerial duties on the judicial courts.[32] The theory is that in such a case the legislature merely uses the courts for the purpose of giving legal form to the corporation, and that the act required by the statute to be done by the courts is not an act involving even judicial discretion, but is a purely ministerial act in such a sense that its performance could be compelled by mandamus.[33]

28. Story *v.* Jersey City, etc., R. Co., 16 N. J. Eq. 13, 84 Am. Dec. 134. *Compare* Durfee *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 230.

29. See *infra*, I, L, 2.

30. See *infra*, I, L, 3.

31. *Ex p.* Chadwell, 3 Baxt. (Tenn.) 98; State *v.* Armstrong, 3 Sneed (Tenn.) 634.

32. *Ex p.* Chadwell, 3 Baxt. (Tenn.) 98; State *v.* Armstrong, 3 Sneed (Tenn.) 634. See the reasoning in Greeneville, etc., R. Co. *v.* Johnson, 8 Baxt. (Tenn.) 332; *Ex p.* Chadwell, 3 Baxt. (Tenn.) 98; *Ex p.* Burns, 1 Tenn. Ch. 83.

33. Franklin Bridge Co. *v.* Wood, 14 Ga. 80. Accordingly it has been held that the legislature may, in the absence of a direct constitutional authorization, provide by law for the creation of village, town, or city corporations, by presenting a petition therefor to the county court, that body having no discretion to refuse the petition when it conforms

b. Purposes For Which Charters May Be Obtained From Courts. In general the purposes for which so-called charters may be obtained from the judicial courts in Pennsylvania relate to ideal corporations merely. But the statute laws of Pennsylvania, conferring the power upon the court of common pleas of that state to grant so-called charters of incorporation, include within the purposes for which corporations may be organized: . . . (4) Mutual savings fund, loan and building associations.[34] . . . (5) Associations for the purpose of insuring horses, cattle, and other live stock, against loss by death from disease or accident, or from being stolen; water, hook and ladder companies, building associations, . . . hotel companies . . . fire companies, fire-insurance companies.[35] (6) Saving-fund associations, or societies for the accumulation of funds and the distribution of the same among their members, without banking or discounting privileges.[36]

c. Proceedings to Obtain Charters Under Such Statutes. Proceedings to obtain charters under such statutes from a judicial court ought to be public, preceded by the advertisement required by the statute, and fulfilling the condition of publicity intended by the legislature.[37]

to the statute, but being required merely to spread it upon its minutes, which done, the corporation becomes *ipso facto* legally organized. Morristown *v.* Shelton, 1 Head (Tenn.) 24. Under the Tennessee act of 1871 authorizing the chancery courts to grant letters of incorporation, it was held that such courts had no power to organize a corporation for any purpose not authorized by general law; since this would be to create corporations, which was an attribute of legislative power, and not merely to organize them. *Ex p.* Chadwell, 3 Baxt. (Tenn.) 98. In other words the action of the court extends no further than to furnish evidence of organization. Greeneville, etc., R. Co. *v.* Johnson, 8 Baxt. (Tenn.) 332.

34. Pa. Act April 12, 1859; Purd. Dig. 129, pl. 1; P. L. 544.

35. Pa. Act March 26, 1867; Purd. Dig. 1456, pl. 3; P. L. 44.

36. Pa. Act April 12, 1867; Purd. Dig. 1456, pl. 4; P. L. 70.

37. *In re* Church of Holy Communion, 14 Phila. (Pa.) 121, 37 Leg. Int. (Pa.) 124.

The requisites of such a charter were catalogued by Paxson, J., in fourteen separate paragraphs in *In re* Philadelphia Artisans' Institute, 8 Phila. (Pa.) 229. As to the requisites of a charter under the Pennsylvania act of 1874, which statute has been held mandatory, see *In re* Stevedores' Beneficial Assoc., 14 Phila. (Pa.) 130, 37 Leg. Int. (Pa.) 262. Under this statute as amended by the acts of April 17, 1876, and June 10, 1893, which authorize the chartering of corporations for the encouragement and protection of trade and commerce, the court of common pleas has no authority to grant a charter for the purpose of promoting and encouraging the business and general welfare of all granite and blue-stone dealers engaged in supplying stone to the city of Philadelphia and vicinity, protecting and increasing the business of buying and selling stone by obtaining and imparting prompt, reliable, just, and valuable information and methods, adjusting all difficulties and differences which may arise between its members, to secure a general use of granite and blue-stone in Philadelphia and vicinity, and to otherwise further and advance the business and trade of dealing in stone by use of such means and methods as may be lawful and proper. *In re* Master Granite, etc., Cutters' Assoc., 9 Pa. Dist. 357, 23 Pa. Co. Ct. 517.

A catalogue of reasons for which such charters have been refused in Pennsylvania will be found in *In re* The Rev. David Mulholland Benev. Soc., 10 Phila. (Pa.) 19, 30 Leg. Int. (Pa.) 85. Charters have been refused which confer upon the corporation an undefined and unlimited power of expelling its members (*In re* Brotherly Unity Beneficial Assoc., 38 Pa. St. 299; *In re* Butchers' Beneficial Assoc. No. 1, 38 Pa. St. 298; *In re* Butchers' Beneficial Assoc., 35 Pa. St. 151; *In re* Philadelphia Journalists Fund, 8 Phila. (Pa.) 272); which undertake to confer upon the corporation powers beyond those granted by the governing statute, since the court cannot confer corporate powers which would be an act of legislation (Medical College's Case, 3 Whart. (Pa.) 445; Com. *v.* Conover, 10 Phila. (Pa.) 55, 30 Leg. Int. (Pa.) 200), such as a provision that each share should be entitled to one vote (Com. *v.* Conover, 10 Phila. (Pa.) 55, 30 Leg. Int. (Pa.) 200. *Compare In re* St. Mary's Church, 7 Serg. & R. (Pa.) 517) or a provision which authorizes the corporation, a medical college, to confer degrees — no such power being given in the governing statute (Medical College's Case, 3 Whart. (Pa.) 445. *Compare In re* Medico-Chirurgical College, 190 Pa. St. 121, 43 Wkly. Notes Cas. (Pa.) 481, 42 Atl. 524); and so of a charter authorizing the intended corporation to confer degrees in medicine or electricity, and for the same reason (*In re* American Electropathic Institute, 14 Phila. (Pa.) 128, 37 Leg. Int. (Pa.) 262). And so of a mutual marriage benefit association, the objects of the association being regarded as against public policy (*In re* Helping-Hand Marriage Assoc., 15 Phila. (Pa.) 644, 38 Leg. Int. (Pa.) 423; Matter of Mutual Aid Assoc. of North America, 15 Phila. (Pa.) 625, 38

d. Referring Application to an Amicus Curiæ. In Missouri some of the courts are in the habit, upon their own motion and without any statutory direction, of

Leg. Int. (Pa.) 423), of a charter which embodies matters which are the proper subject of by-laws merely (*In re* Stevedores' Beneficial Assoc., 14 Phila. (Pa.) 130, 37 Leg. Int. (Pa.) 262), and of a charter the application for which was not written on a single sheet of paper (*In re* Monroe Republican Club, 6 Pa. Dist. 515, 19 Pa. Co. Ct. 568, 3 Lack. Leg. N. (Pa.) 285, 28 Pittsb. Leg. J. N. S. 52 [fastened together with eyelets]; *In re* Society Principesso Montenegro Savoya, 6 Pa. Dist. 486, 28 Pittsb. Leg. J. N. S. 42 [half sheets tacked together, etc.]; *In re* Accountants' Assoc., 5 Pa. Dist. 699, 18 Pa. Co. Ct. 159, 27 Pittsb. Leg. J. N. S. 103 [tied together with tape]; *In re* Stevedores' Beneficial Assoc., 14 Phila. (Pa.) 130, 37 Leg. Int. (Pa.) 262) or was full of erasures and interlineations (*In re* Zion Church Charter, 5 Pa. Dist. 780; *In re* C. Columbus Italian-American Citizens' Assoc., 30 Pittsb. Leg. J. N. S. 47). And so of a charter to aliens, the court presuming alienage from the alien names of the intended corporators (*In re* St. Ladislaus Roman Catholic Sick, etc., Assoc., 19 Pa. Co. Ct. 25); of a charter the applicants for which could not speak and write the English language (*In re* Society Principesso Montenegro Savoya, 6 Pa. Dist. 486, 28 Pittsb. Leg. J. N. S. 42), especially where the intended corporators were natives of a foreign country, organized for the purpose of arming, drilling, and disciplining as a military company (*In re* Russian-American Guards' Charter, 3 Pa. Dist. 673, 13 Pa. Co. Ct. 148); of a charter, the declared objects of which were "the cultivation of German song, and the cultivation and improvement of German manners and customs" (*In re* Germania Sangerbund, 2 Pa. Dist. 73. For another case where a charter was refused to a society of foreigners, although not on the express ground of the alienage of the corporators, see *In re* Lodge Duch Nove Doby, No. 165, 3 Pa. Dist. 215); of a charter requiring the use of the Hungarian and prohibiting the use of the English language (*In re* St. Ladislaus Roman Catholic Sick, etc., Assoc., 19 Pa. Co. Ct. 25); and of a charter of a religious society requiring all services, teachings, and business to be conducted in the German language (German Evangelical Lutheran Church's Petition, 6 Pa. Dist. 412, 20 Pa. Co. Ct. 472). Other defects for which charters of corporations for ideal purposes were refused will be found dealt with at length in 7 Thompson Corp. § 8168 [*citing* and *examining* the following cases: *In re* Americus Club, 6 Pa. Dist. 760, 20 Pa. Co. Ct. 237; *In re* Monroe Republican Club, 6 Pa. Dist. 515, 19 Pa. Co. Ct. 568, 3 Lack. Leg. N. (Pa.) 285, 28 Pittsb. Leg. J. N. S. 52; *In re* McKee Rocks Volunteer Fireman's Relief Assoc., 6 Pa. Dist. 477, 19 Pa. Co. Ct. 537, 28 Pittsb. Leg. J. N. S. 38; *In re* Accountants' Assoc. of Pittsburgh, 5 Pa. Dist. 699, 18 Pa. Co. Ct. 159, 27 Pittsb. Leg. J. N. S. 103; *In re* Gas Companies, 5 Pa. Dist. 396, 18 Pa. Co. Ct. 136; *In re* Permanent Relief Assoc., 3 Pa. Dist. 236; *In re* Skandinaviska, 3 Pa. Dist. 235; *In re* Nether Providence Assoc., 2 Pa. Dist. 702, 12 Pa. Co. Ct. 666; *In re* Ton-a-lu-ka Club, 1 Pa. Dist. 460; *In re* Burger's Military Band Assoc., 19 Pa. Co. Ct. 651; *In re* St. Ladislaus Roman Catholic Sick, etc., Assoc., 19 Pa. Co. Ct. 25; *In re* Pennsylvania State Sportsmen's Assoc., 11 Pa. Co. Ct. 576; *In re* Jacksonian Club, 11 Pa. Co. Ct. 19; *In re* Newton Hamilton Oil, etc., Co., 10 Pa. Co. Ct. 452; *In re* Pittsburgh Stock Exch., 26 Pittsb. Leg. J. N. S. 308].

Requisites of application for charter.— An application for a charter to create a corporation for ideal purposes of the most general and diffuse character should set forth the means intended to be adopted for the accomplishment of those objects, and should provide for the creation of a membership and for the mode of succession (*In re* Right Worthy Grand Ct., 8 Pa. Dist. 127, 22 Pa. Co. Ct. 270), and generally the purposes of a proposed corporation should be expressed in such an application in specific terms, so that it can be seen that those purposes are lawful (Xantha Beneficial, etc., Assoc., 8 Pa. Dist. 142), especially where corporate franchises are not necessary to enable the applicants to carry out the purposes named in their application (*In re* C. Columbus Italian-American Citizens' Assoc., 30 Pittsb. Leg. J. N. S. 47). An application will be refused which is signed by only four instead of five persons, as the statute requires. *In re* C. Columbus Italian-American Citizens' Assoc., 30 Pittsb. Leg. J. N. S. 47.

Defects in applications for charters for business corporations under Pennsylvania statute.— In considering whether a charter ought to be granted or refused, the executive department of Pennsylvania look only to the application itself, and do not refuse a charter for reasons not apparent on the face of it. *In re* Seneca Bridge Co., 1 Pa. Dist. 416, 11 Pa. Co. Ct. 337, 30 Wkly. Notes Cas. (Pa.) 200. It will not on such an application determine disputed questions of fact, but will leave such questions to be determined by the courts. Union Water Co. *v.* Edgeworth Water Co., 1 Pa. Dist. 536, 30 Wkly. Notes Cas. (Pa.) 371; *In re* Seneca Bridge Co., 1 Pa. Dist. 416, 11 Pa. Co. Ct. 337, 30 Wkly. Notes Cas. (Pa.) 200. Thus where a water-supply company applies for a charter under the act of April 29, 1874, covering the identical territory embraced in a previous exclusive charter to a like company, the charter will be refused, although there be testimony that the first company has failed to supply the public with water and has never attempted to acquire the necessary supplies for that purpose. Union Water Co. *v.* Edgeworth Water Co., 1 Pa. Dist. 536, 30 Wkly. Notes Cas. (Pa.) 371. It manifestly follows from this that the application must show on its face a clear

referring any such an application to a member of the bar as *amicus curiæ*, and it has been held in that state that it is competent for the court to allow the *amicus curiæ* a reasonable compensation for his services, to be taxed as costs against the proposed incorporators.[38]

e. No Appeal From Decree Refusing. Under the Tennessee act of 1871, authorizing the chancery courts to grant letters of incorporation, no appeal lay to the supreme court from the refusal of a chancery court to grant such letters.[39]

f. Charters Amended by Judicial Courts. Statutes have existed in Pennsylvania empowering the judicial courts to grant amendments to charters of incorporation enacted by the legislature; but as these enactments seem to refer only to societies not having a joint stock the subject will not be considered here.[40]

3. Procuring Charters From Ministerial Officers — a. Nature of Charter Where Corporation Organized Under General Law — (i) *What Constitutes Charter.* It cannot properly be said that a corporation has no "charter" where it is organized by the voluntary action of its members, with the consent and approval of an officer of the state, under an enabling statute permitting corporations of the particular description to be organized. In such a case the provisions of the articles of association or the articles of incorporation, by whatever name called, constitute the charter of the corporation, in so far as such provisions are authorized by the statute law of the state under which the corporation is formed.[41] An instrument of incorporation which conforms to the provisions of the general enabling statute under which it is made becomes a charter within the protection of that clause of the constitution of the United States which provides that "no State shall pass any law impairing the obligation of contracts";[42] and is hence protected as a contract from subsequent impairment by state action, under the doctrine of the Dartmouth College case[43] in like manner as special charters are so protected.[44]

(ii) *Presumption Where Articles Are Indefinite.* If the articles are indefinite in a given particular — if they go no further than to use the general words employed in the statute, describing the purposes of the incorporation — it will be presumed that the coadventurers intended to create a corporation of the same general nature, and with the same general powers in respect to which incorporation is granted by the statute, rather than that by such words they sought to apply intended special limitations on the powers of the corporation which they created.[45]

(iii) *Effect of Including Illegal Matter in Articles.* If the coadventurers, in drawing their articles of association, incorporate therein a grant of greater powers or privileges than the governing statute allows, this will not necessarily prevent them from becoming incorporate, since the law will reject the

right to the charter; and in order that it may appear whether or not it will conflict with a charter previously granted to another company, if it be a water-supply company, a gas company, or the like, the district which it is proposed to supply must be specifically defined in the application. *In re* New Gas Light Co., 7 Pa. Dist. 151. Thus an application for the charter of a water company which shows only that the company desires to take water from a certain stream between specified townships, without stating where the company is located, or into what town, borough, city, or district it proposes to introduce water, was refused. *In re* Perkiomen Water Storage, etc., Co., 2 Pa. Dist. 466, 32 Wkly. Notes Cas. (Pa.) 280.

38. *In re* St. Louis Christian Science Institute, 27 Mo. App. 633.

39. *Ex p.* Chadwell, 3 Baxt. (Tenn.) 98.

40. *In re* St. Mary's Church, 7 Serg. & R. (Pa.) 517.

As to the body or constituency that may give assent to amendments granted by the judicial court see Matter of Mercantile Library Co., 2 Brewst. (Pa.) 447.

41. O'Brien *v.* Cummings, 13 Mo. App. 197; North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851.

42. U. S. Const. art. 1, § 10.

43. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

44. Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94; Miller *v.* New York, 15 Wall. (U. S.) 478, 21 L. ed. 98; Capital City Gaslight Co. *v.* Des Moines, 72 Fed. 829.

45. Whetstone *v.* Ottawa University, 13 Kan. 320.

excessive powers as surplusage. In such a case all acts done in pursuance of the illegal matter embodied in their articles will be invalid; but the title of the corporation as to all matters authorized by the governing statute will not be subject to collateral impeachment by reason of the illegal matter.[46] Thus where the governing statute provided among other things that the term of existence of corporations formed under it should not exceed twenty years,[47] and the articles of association provided for a term of existence for the corporation of fifty years, it was held in a proceeding by quo warranto that this was no ground of ouster before the expiration of twenty years. It did not prevent the corporation from coming into existence. It could not without renewal live for fifty years, but it might exercise the rights and privileges of a corporation for twenty years.[48] So the articles of association in a plank-road company, under a general law of New York,[49] were not void because they contained a provision authorizing the directors of the company to increase its capital stock without consent of a majority in amount of the shareholders, as required by the statute. It was said that all the acts of the directors pursuant to such a provision would be void; but it was held that the articles being in other respects in accordance with law the existence of such a clause did not prevent the association from becoming incorporate.[50]

b. When Life of Corporation Commences. "The life of a corporation dates from its organization, and not from the time it begins to do business."[51] Where the governing statute points out the manner in which the corporation shall be organized, and the direction of the statute is followed, this brings the corporation into existence, so that it may enter upon the objects of its creation.[52] Thus the corporation is generally deemed to exist from the time when the certificate of incorporation prescribed by the governing statute is executed, acknowledged, and recorded, or filed for record, in accordance with the governing statute; and thereafter the lawfulness of the existence of the corporation cannot be collaterally attacked or denied in controversies between the corporation and private parties, but can be assailed only in an action by the state to vacate its franchises.[53]

c. Necessity of Valid Articles or Certificate of Incorporation — (i) *In General.* Where a collection of persons claim to have organized themselves into a corporation under a general law, their claim will not be good, even when questioned collaterally, provided they file no articles of association at all.[54] The rule is the same where they file articles which are fatally defective, by reason of not conforming to the essential requirements of the governing statute.[55]

46. Albright *v.* Lafayette Bldg., etc., Assoc., 102 Pa. St. 411.

47. Colo. Gen. Stat. § 238.

48. People *v.* Cheeseman, 7 Colo. 376, 2 Pac. 716.

49. N. Y. Laws (1847), c. 210, § 40.

50. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546.

51. Hanna *v.* International Petroleum Co., 23 Ohio St. 622, 625.

52. Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53; People *v.* Bowen, 30 Barb. (N. Y.) 24. When the charter of a railway was deemed to be in operation within the meaning of a clause of the constitution of Illinois abrogating corporate charters not in operation see McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

53. Hunt *v.* Kansas, etc., Bridge Co., 11 Kan. 412; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161; Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179. Thus under the statutes of Pennsylvania, where articles of association have been approved by the attorney-general and the supreme court of the state and duly enrolled, such association becomes a corporation and its articles cannot be collaterally questioned. Society for Visitation, etc. *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139.

54. Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416; Childs *v.* Smith, 55 Barb. (N. Y.) 45.

55. McCallion *v.* Hibernia Sav., etc., Soc., 70 Cal. 163, 12 Pac. 114; Washington City Fifth Baptist Church *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 43; New York Cable Co. *v.* New York, 104 N. Y. 1, 10 N. E. 332.

It was so held where the certificate was not signed by the shareholders, but by the directors only (Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179); where it failed to set forth that a majority of the members voted at the prescribed election (People *v.* Selfridge, 52 Cal. 331); and where it failed to state the date of the election or appointment of the trustees, the length of time for which they were elected or appointed, and was not verified by an affidavit of one of the persons making the certificate (Washington City Fifth Baptist Church *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 43).

(II) *Substantial Compliance With Statute Sufficient and Necessary.* On the other hand a literal compliance with the recitals prescribed by the governing statute to be contained in the certificate of incorporation is not necessary, but a substantial compliance will be deemed sufficient to call the corporation into existence.[56] On the other hand a substantial compliance with the requirements of the governing statute is necessary, or the corporation is not deemed to have been called into existence.[57]

(III) *Failing to Specify Objects of Association.* It has been held that failing to specify the objects of the association, in substantial compliance with the governing statute,[58] or failing to state a purpose for which the statute authorizes corporations to be formed,[59] renders the articles fatally defective.

(IV) *Failing to State Manner of Carrying on Business.* Where the governing statute requires the certificate of incorporation to show "the manner of carrying on the business of said association," a certificate of incorporation which sets forth that "the manner of carrying on the business" shall be such as the association may "from time to time prescribe" is insufficient.[60]

(V) *What Defects in Articles or Certificate Do Not Vitiate.* The following irregularities in articles of association or certificates of incorporation have been held not sufficient to prevent the corporation from acquiring a valid existence: The failure of the notary to certify that those who signed the articles of incorporation were personally known to him;[61] the failure of the affidavit annexed to the articles of association to state that the payment of the ten per cent of the capital stock required by the statute had been made "to the directors," and "in good faith," as both will be implied;[62] omitting to state the residence of the corporators;[63] omitting to refer to the statute under which the corporation is organized;[64] failing to name the directors in the articles of association, where they are drawn up (under a special charter) with the view of being adopted at the first meeting at which the directors are to be elected;[65] antedating the articles of incorporation by the secretary of state at the time of their filing;[66] signing by the initial letter of the christian name instead of using the full prænomen;[67] the use of double comma (,,) following the name of a subscriber, under the name of a certain specified locality, for the purpose of designating the subscriber's resi-

56. People *v.* Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178; Spring Valley Water Works *v.* San Francisco, 22 Cal. 440; *In re* Spring Valley Water Works, 17 Cal. 132; Hughes *v.* Antietam Mfg. Co., 34 Md. 316; Thompson *v.* People, 23 Wend. (N. Y.) 537.

57. Harris *v.* McGregor, 29 Cal. 124; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Bigelow *v.* Gregory, 73 Ill. 197; Unity Ins. Co. *v.* Cram, 43 N. H. 636.

58. O'Reiley *v.* Kankakee Valley Draining Co., 32 Ind. 169; West *v.* Bullskin Prairie Ditching Co., 32 Ind. 138; Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287.

59. Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287.

The purpose and intent of the incorporation must be ascertained solely from the articles, and they cannot be aided, varied, or contradicted by evidence outside the instrument itself. Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287. But see Buffalo, etc., R. Co. *v.* Hatch, 20 N. Y. 157.

For a statute under which it was sufficient to recite that "the objects for which the said company is formed are as follows, namely, the mining of gold, silver and lead, in the territory of Utah," see People *v.* Beach, 19 Hun (N. Y.) 259. For a statute under which it was sufficient to state that the purposes of the incorporation were "to put up, pack and manufacture for market, Detroit River and lake ice and to distribute and sell the same" see Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287, where the articles were held good against proceedings by quo warranto.

60. State *v.* Central Ohio Mut. Relief Assoc., 29 Ohio St. 399.

61. People *v.* Cheeseman, 7 Colo. 376, 2 Pac. 716.

62. Buffalo, etc., R. Co. *v.* Hatch, 20 N. Y. 157.

63. State *v.* Foulkes, 94 Ind. 493; Rogers *v.* Danby Universalist Soc., 19 Vt. 187. See also *infra*, I, L, 3, c, (VI).

64. Rogers *v.* Danby Universalist Soc., 19 Vt. 187.

65. Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404.

66. State *v.* Foulkes, 94 Ind. 493.

67. State *v.* Beck, 81 Ind. 500.

dence;[68] failing to state that the subscribers constitute an existing society with rules and regulations or that the trustees named were chosen in accordance with such rules and regulations;[69] failing to set forth in so many words that more than one thousand dollars per mile have been subscribed, as required by a statute providing for the incorporation of railway companies, where the articles stated that eighty-four thousand one hundred dollars had been in good faith subscribed and ten per cent thereof paid in, and it otherwise appeared that the length of the proposed road was about seventy-five miles;[70] stating in the certificate of incorporation that "said capital stock shall consist of five hundred shares at $100 per share," where the statute requires the certificate to state "the amount of the capital stock," stating the term of existence of the corporation to be "at least forty years," where the statute required the certificate to state "the terms of its existence not to exceed forty years," and failing to state in the name of the company the particular trade which it is intended to carry on;[71] stating in the statutory affidavit annexed to the articles that ten per cent of the stock subscribed "in cash had been actually paid in," omitting the statutory words, "in good faith," where those words appeared in the body of the articles, so as to withstand an action by the state to vacate the franchises of the company;[72] failing to state "the methods and conditions upon which members shall be accepted, discharged or expelled," this clause of the statute[73] not applying to joint-stock corporations.[74]

(VI) *STATING RESIDENCE OF CORPORATORS.* Under some of the enabling statutes permitting the formation of corporations, it is necessary that the articles or certificate should state the residence of the corporators, and that all or a prescribed number of them should be residents of the state. In Texas the residence of the incorporators need not appear, even if it is necessary that two of them should be citizens.[75]

(VII) *STATING PLACE WHERE BUSINESS OF CORPORATION IS TO BE CARRIED ON.* Many of the statutory schemes of incorporation require the articles or certificate to state the place in which the business of the corporation is to be carried on. Under such a statute[76] it is not enough to state in the articles that the office of the corporation shall be in a specified city.[77] Under the New Jersey statute[78] a statement in a certificate of incorporation of the place or places in the state or elsewhere where the business of the corporation is to be conducted does not impose such a limitation on the future action of the shareholders as will prevent the

68. Steinmetz *v.* Versailles, etc., Turnpike Co., 57 Ind. 457.

69. Roman Catholic Orphan Asylum *v.* Abrams, 49 Cal. 455.

70. Buffalo, etc., R. Co. *v.* Hatch, 20 N. Y. 157.

71. Hughes *v.* Antietam Mfg. Co., 34 Md. 316.

72. People *v.* Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178.

73. In this case Wis. Rev. Stat. (1878), § 1772.

74. Edgerton Tobacco Mfg. Co. *v.* Croft, 69 Wis. 256, 34 N. W. 143.

In Iowa articles of incorporation providing that the total indebtedness of the corporation shall at no time exceed three hundred dollars except by a majority vote of the shareholders are in substantial compliance with Iowa Code, § 1061, providing that "such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any time to be subject," and are valid, notwithstanding the articles also provide that a change therein can be made only by a two-thirds vote of the shareholders. Thornton *v.* Balcom, 85 Iowa 198, 200, 52 N. W. 190.

The provisions of Nebr. Comp. Stat. c. 16, that the certificate of organization of a railroad company shall state the names of the termini and the county or counties through which the road will pass, apply only to the main line, and not to branch lines within the state. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

75. Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. 636. See also *supra*, I, L, 3, c, (v). That a certificate of incorporation showing that only one of the directors named therein for the first year is a resident of the state is good under the New York statute see People *v.* McDonough, 28 Misc. (N. Y.) 652, 60 N. Y. Suppl. 45.

76. In this case N. H. Pub. Stat. c. 147, § 2.

77. Kennett *v.* Woodworth-Mason Co., 68 N. H. 432, 39 Atl. 585.

78. N. J. Act April 7, 1875.

corporation from carrying on its business at other places than those specified, by consent of two thirds in interest of the shareholders, under the provision of another section of the statute.[79]

(VIII) *ASSUMING IN ARTICLES FRANCHISES WHICH CONFLICT WITH EXCLUSIVE FRANCHISES ALREADY GRANTED TO OTHERS.* The grant of an exclusive franchise — assuming it to be valid under the constitution of the state — is protected from impairment by a subsequent grant of the same franchise to others, by the contract clause of the constitution of the United States, as construed in the Dartmouth College case,[80] although a grant will not be construed as being exclusive unless the intent of the state to make it so clearly appears.[81] So also if the state has already granted an exclusive franchise to one corporation, and if the grant is valid, a grant of the same franchise to another corporation is merely void.[82] It follows that the officer of the state who is charged with the duty of making grants of corporate charters, or of passing upon the validity of schemes of incorporation which are presented to him, and of issuing certificates of incorporation, ought to refuse to sanction a charter which contains a grant of an exclusive franchise already granted to another corporation.[83] The officer of the executive department of the state to whom the application for the charter is made will not try the question whether the old corporation has forfeited its franchise, or whether, for some other reason which is more or less doubtful, the new charter will impair the privileges of the old company; but that must be first settled in a judicial proceeding.[84] In case of a reasonable doubt as to whether the old corporation has an exclusive right or privilege which would be invalid by the new

79. Meredith *v.* New Jersey Zinc, etc., Co., (N. J. 1899) 44 Atl. 55.

No corporation organized under the constitution and laws of Kentucky is exempt from the obligation of filing with the secretary of state a statement giving the location of its office, the name of its agent on whom process can be served, etc. Johnson *v.* Mason Lodge No. 33, I. O. O. F., 51 S. W. 620, 21 Ky. L. Rep. 493.

Sufficiency of compliance.— That a certificate of incorporation which stated that "the said company is formed for the purpose of carrying on some part of its business outside the state of New York namely, in Big Cottonwood District, Utah, and the name of the place in which the principal part of the business of the said company is to be transacted as in the city and county of New York" was a sufficient compliance with the statute of that state see People *v.* Beach, 19 Hun (N. Y.) 259. But a statute requiring a certificate of incorporation to state the name of the city or town and county in which the principal place of business is to be located is not complied with by a certificate which states that the operations of the corporation are to be carried on in the county of Calaveras, state of California, because this does not state the city or town. Harris *v.* McGregor, 29 Cal. 124.

80. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

81. Warren Gas Light Co. *v.* Pennsylvania Gas Co., 161 Pa. St. 510, 29 Atl. 101 [*affirming* 13 Pa. Co. Ct. 310]; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938; Detroit *v.* Detroit City R. Co., 56 Fed. 867.

82. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 (per Brown, J.); Louisville Gas Co. *v.* Citizens' Gas Light Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. ed. 510; New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. ed. 525; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516.

83. The manner in which the executive department of the state of Pennsylvania acts upon this principle is shown by the following cases: Warren Gas Light Co. *v.* Pennsylvania Gas Co., 161 Pa. St. 510, 29 Atl. 101 [*affirming* 13 Pa. Co. Ct. 310]; Lansdowne Gas Co. *v.* Swarthmore Light Co., 3 Pa. Dist. 492, 14 Pa. Co. Ct. 518; Suburban Gas Co. *v.* Darby Gas Co., 3 Pa. Dist. 491, 14 Pa. Co. Ct. 519; Keystone Fuel Gas Co. *v.* Williamsport Gas Co., 2 Pa. Dist. 85, 12 Pa. Co. Ct. 302, 31 Wkly. Notes Cas. (Pa.) 231; Union Water Co. *v.* Edgeworth Water Co., 1 Pa. Dist. 536, 30 Wkly. Notes Cas. (Pa.) 371: *In re* Levis Water Co., 1 Pa. Dist. 146, 11 Pa. Co. Ct. 178, 29 Wkly. Notes Cas. (Pa.) 409; *In re* Bryn Mawr Water Co., 1 Pa. Dist. 89, 10 Pa. Co. Ct. 670, 29 Wkly. Notes Cas. (Pa.) 156.

84. German Evangelical Soc. *v.* Prospect Hill Cemetery, 2 App. Cas. (D. C.) 310; Union Water Co. *v.* Edgeworth Water Co., 1 Pa. Dist. 536, 30 Wkly. Notes Cas. (Pa.) 371; *In re* Park Incline Plane Co., 1 Pa. Dist. 535, 11 Pa. Co. Ct. 486, 30 Wkly. Notes Cas. (Pa.) 256; Granite Water Co. *v.* Girard Water Co., 1 Pa. Dist. 534, 30 Wkly. Notes Cas. (Pa.) 417; *In re* Seneca Bridge Co., 1 Pa. Dist. 416, 11 Pa. Co. Ct. 337, 30 Wkly. Notes Cas. (Pa.) 200.

charter, the new charter may be granted, and the question of its validity left for judicial determination.[85]

(IX) *Signing and Acknowledging Articles.* This subject is entirely statutory. Some of the statutory schemes of organization contemplate that an election of officers shall precede the filing of the instrument of incorporation, and that the instrument shall be authenticated by the signatures of the officers thus elected.[86] Under others an acknowledgment by the president and directors elected for the first year is not required, and an acknowledgment by all the subscribers was not required, an acknowledgment by five of them being sufficient.[87] Under a statute providing that articles of incorporation must be subscribed by five or more persons and acknowledged by each, it was held that a corporation was not rightfully such, but might be deprived of its charter where, although five of the incorporators signed the articles, they were acknowledged by only four of them.[88] Under a statute requiring the incorporators to "prepare and sign" an act either in authentic or private form, it is not essential that each of the incorporators shall be able to sign his name, but he may make his mark.[89]

(X) *Fatal Defects in Articles Cannot Be Supplied by Parol Evidence.* A defect which is deemed a substantial one under the foregoing principles cannot be healed by parol evidence,[90] as for example an omission to state that a majority of the members of the association were present and voted at the election of directors.[91]

d. Conditions Precedent Must Be Complied With — Conditions Directory Need Not Be — (I) *Rule Stated.* Another distinction under this head is between conditions which the governing statute makes precedent and essential to the existence of the corporation and subsequent conditions, or conditions of such an unimportant character that the courts have concluded to regard them as directory merely. Conditions precedent must be substantially complied with or there is no corporation, and this may be shown collaterally.[92] But if conditions of the latter kind are not complied with, the corporation becomes responsible only to the government, and the government alone can take advantage of the delinquency of its organizers.[93]

(II) *What Statutory Conditions Have Been Deemed Conditions Precedent.* Within the meaning of the foregoing rule, the following have been deemed conditions precedent in various cases: To the organization of a water-supply company, a resolve of the municipal corporation that it is expedient to have waterworks and inexpedient for the municipal corporation to build them;[94] filing the articles of incorporation with the county clerk;[95] recording them in the proper county;[96] obtaining the authorization or certificate of the district attorney

85. Suburban Gas Co. *v.* Lansdowne-Yeadon Gas Co., 3 Pa. Dist. 597, 15 Pa. Co. Ct. 126.

86. Officers chosen at the first meeting of a joint-stock company established by voluntary association under Mass. Stat. c. 133, may sign the certificate required by section 4. The requirement of Mass. Rev. Stat. c. 38, §§ 3, 4, is not applicable thereto. Boston Acid Mfg. Co. *v.* Moring, 15 Gray (Mass.) 211.

87. Hughes *v.* Antietam Mfg. Co., 34 Md. 316.

88. People *v.* Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172.

89. Seventh St. Colored M. E. Church *v.* Campbell, 48 La. Ann. 1543, 21 So. 184.

90. People *v.* Selfridge, 52 Cal. 331; Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 30 Am. Rep. 287; Hallett *v.* Harrower, 33 Barb. (N. Y.) 537.

91. People *v.* Selfridge, 52 Cal. 331.

92. Heinig *v.* Adams, etc., Mfg. Co., 81 Ky. 300; Atty.-Gen. *v.* Hanchett, 42 Mich. 436, 4 N. W. 182; Abbott *v.* Omaha Smelting, etc., Co. 4 Nebr. 416.

93. Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658. The doctrine of this case and of the text is supported by the following among many other cases: Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85; Granby Min., etc., Co. *v.* Richards, 95 Mo. 106, 8 S. W. 246; Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416.

94. Atty.-Gen. *v.* Hanchett, 42 Mich. 436, 4 N. W. 182.

95. Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416.

96. Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

or judge, and having the act of incorporation duly recorded;[97] and publishing the articles and filing a certificate of the purposes of the organization.[98]

(III) *What Statutory Conditions Have Been Deemed Conditions Subsequent.* A proviso in a special charter that the corporation shall commence business within a stated time, where the words of the grant purport a grant of corporate existence to take effect immediately;[99] the failure to elect directors, where the conditions under which the statute predicates the existence of the corporation have been otherwise complied with;[1] the failure to serve notice of the first meeting upon each corporator in compliance with the statute;[2] and, in case of a manufacturing corporation, the failure to take a bond of its treasurer as required by the statute[3] have been deemed conditions subsequent.

e. Filing, Recording, and Publishing the Instrument of Incorporation — (I) *In General.* Where a general law provides that persons may become a body politic and corporate upon complying with the provisions of the law, one of which is that before any such corporation shall commence business its articles of association shall be published in a certain way, and the certificate of the purposes of the organization shall be filed in certain public offices, the performance of these acts is a necessary prerequisite to the existence of such corporation, for the purpose of relieving the corporators from individual liability.[4] Where the other steps required by the statute are complied with, the failure to file with the secretary of state a duplicate or copy of the certificate or articles of incorporation will not vitiate the organization,[5] unless the governing statute imports the con-

97. Field *v.* Cooks, 16 La. Ann. 153.

98. Bigelow *v.* Gregory, 73 Ill. 197.

99. Cheraw, etc., R. Co. *v.* Garland, 14 S. C. 63; Cheraw, etc., R. Co. *v.* White, 14 S. C. 51.

1. Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328.

2. McClinch *v.* Sturgis, 72 Me. 288; Braintree Water-Supply Co. *v.* Braintree, 146 Mass. 482, 16 N. E. 420; Walworth *v.* Brackett, 98 Mass. 98; Newcomb *v.* Reed, 12 Allen (Mass.) 362.

3. Boston Acid Mfg. Co. *v.* Moring, 15 Gray (Mass.) 211.

4. *Arkansas.*— Garnett *v.* Richardson, 35 Ark. 144.

Illinois.— Gent *v.* Manufacturers', etc., Ins. Co., 107 Ill. 652; Diversey *v.* Smith, 103 Ill. 378, 42 Am. Rep. 14; Bigelow *v.* Gregory, 73 Ill. 197 [*overruling*, it seems, Cross *v.* Pinckneyville Mill Co., 17 Ill. 54]; Ricker *v.* Larkin, 27 Ill. App. 625; Cresswell *v.* Oberly, 17 Ill. App. 281.

Indiana.— Indianapolis, etc., Min. Co. *v.* Herkimer, 46 Ind. 142.

Iowa.— Clegg *v.* Hamilton, etc., County Grange Co., 61 Iowa 121, 15 N. W. 865; Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85.

Louisiana.— Field *v.* Cooks, 16 La. Ann. 153.

Missouri.— Hurt *v.* Salisbury, 55 Mo. 310.

West Virginia.— Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

See 12 Cent. Dig. tit. "Corporations," § 62.

By the constitution of Mississippi charters of corporations must be recorded in the office of the clerk of the chancery court in the county in which the principal office or place of business is located. Miss. Const. (1890), § 189.

By the constitution of Utah corporations must file articles of incorporation with the secretary of state. Utah Const. (1895), art. 12, § 9.

Under Wis. Laws (1874), c. 113, § 4, providing that articles of incorporation shall be signed by the persons forming the corporation, and "a copy thereof, verified under oath" by two or more of the persons signing the same as a true copy of the original articles of incorporation, shall be recorded in the office of the register of deeds, the recording of the original articles of incorporation in lieu of a verified copy is not such a compliance with the statute as will enable the incorporators to avoid liability to creditors of the incorporation as copartners. Slocum *v.* Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324.

Delivery to proper officer — How proved.— The delivery of the articles to the officer whose duty it is to put them on file may be proved by evidence other than his indorsement. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280. That this is the proper conception of a "filing" see Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494.

The date of filing is no part of the articles, and therefore may be proved by parol, regardless of the statute provision for the proof of the articles. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280.

Failure of the probate judge, upon request, to make the statutory certificate does not, in Alabama, prevent the corporation from coming into existence, if the proper antecedent steps have been taken. Sparks *v.* Woodstock Iron, etc., Co., 87 Ala. 294, 6 So. 195.

5. *California.*—Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658. *Compare* Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

trary,[6] as where the governing statute provides that the corporate existence shall date from the filing of the articles.[7] Where the instrument of incorporation has been duly filed for record it is plain that the incorporation is not prevented by reason of the fact that the document is, through the mistake of a ministerial officer of the state, recorded in the wrong book, as for instance in the book provided by law for the recording of ordinary deeds.[8] If a certificate of organization is fraudulently and surreptitiously recorded by one of the projectors of the corporation, contrary to the agreement had among themselves, the recording is of no effect, and the corporation is not brought into existence, the reason being that fraud vitiates all engagements.[9] Moreover, if the articles which are filed for record fail in some substantial or material respect to comply with the requirements of the governing statute, the recording of them will be nugatory and the corporation will not come into existence, as where it fails to state the highest amount of indebtedness or liability which the corporation may incur.[10] It seems hardly necessary to do more than suggest that coadventurers cannot acquire corporate powers not granted by the state by merely assuming them in their instruments of incorporation, whether it be an original instrument or an amendment.[11] On somewhat similar grounds the filing in the office of the register of deeds of the certificate of incorporation granted by an officer of the state as prescribed by statute does not cure the filing of a defective "charter" understood to mean the original articles of incorporation, in the office of the secretary of state.[12] So unless the certificate of incorporation complies substantially with the governing statute, there will be no incorporation, as where it fails to state the city,

Illinois.—Cross *v.* Pinckneyville Mill Co., 17 Ill. 54 [*distinguished* in Biglow *v.* Gregory, 73 Ill. 197].

Indiana.— Williamson *v.* Kokomo Bldg., etc., Assoc., 89 Ind. 389; Baker *v.* Neff, 73 Ind. 68.

Iowa.— Davenport First Nat. Bank *v.* Davies, 43 Iowa 424.

Kentucky.— Portland, etc., Turnpike Co. *v.* Bobb, 88 Ky. 226, 10 S. W. 794, 10 Ky. L. Rep. 796.

Minnesota.— *In re* Shakopee Mfg. Co., 37 Minn. 91, 33 N. W. 219.

Texas.— Guadalupe, etc., River Stock Assoc. *v.* West, 70 Tex. 391, 9 S. W. 817.

United States.— Hyde *v.* Doe, 12 Fed. Cas. No. 6,969, 4 Sawy. 133.

See 12 Cent. Dig. tit. "Corporations," § 62.

6. Granby Min., etc., Co. *v.* Richards, 95 Mo. 106, 8 S. W. 246.

7. Hurt *v.* Salisbury, 55 Mo. 310. See also Richardson *v.* Pitts, 71 Mo. 128.

For illustrations of the conflicting doctrine on this subject see 1 Thompson Corp. § 241.

The requirement of Wis. Rev. Stat. § 1460, that the certificate of organization, together with a copy of the constitution of the corporation, shall be filed in the office of the register of deeds is a condition precedent to the coming into existence of the corporation; and the provision is not complied with by the recording of the necessary papers by the register of deeds, where it is not the intention of the corporators to leave the papers with him, and they are in fact withdrawn after being recorded. Bergeron *v.* Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85.

8. Walton *v.* Riley, 85 Ky. 413, 3 S. W. 605, 9 Ky. L. Rep. 29.

Filing original in lieu of verified copy.— There is a seemingly strange holding to the effect that if the governing statute (Wis. Laws (1874), c. 113, § 4), prescribing that a verified copy of the original articles shall be recorded in the office of the register of deeds, the recording of the original articles will not satisfy the statute and will not bring the corporation into existence, but the shareholders will be liable to creditors as partners. Slocum *v.* Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324. See as tending to the contrary conclusion Carolina Iron Co. *v.* Abernathy, 95 N. C. 545.

9. Ricker *v.* Larkin, 27 Ill. App. 625.

As to the effect of a ratification in giving vitality to a deed fraudulently and surreptitiously put upon record see Illinois Cent. R. Co. *v.* McCullough, 59 Ill. 166; Hadlock *v.* Hadlock, 22 Ill. 384.

10. Heuer *v.* Carmichael, 82 Iowa 288, 47 N. W. 1034; Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85 (instrument not acknowledged by the statutory number of subscribers). *Compare* Humphreys *v.* Mooney, 5 Colo. 282, a decision which does not seem to be tenable. See also *supra*, I, L, 3, c.

For what was deemed a sufficient compliance with such a statute see Thornton *v.* Balcom, 85 Iowa 198, 52 N. W. 190; Sweney *v.* Talcott, 85 Iowa 103, 52 N. W. 106.

11. People *v.* Green, 116 Mich. 505, 74 N. W. 714.

12. Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85.

town, or county in which the principal business of the corporation is to be located.[13]

(II) *Failing to Publish Articles.* Considering specially the question of the failure to publish the instrument of incorporation in compliance with the governing statute, it may be said that these statutes generally provide that publication of the instrument of incorporation shall be made in a certain way before the corporation shall commence business, and the prevailing view is that such a publication is not a condition precedent to the coming into existence of the corporation.[14] There are, however, statutes which require the publication of a notice of the fact of the incorporation to be made in a certain way, before immunity from personal liability for the debts of the corporation shall attach to the shareholders.[15]

f. Requirement That Given Percentage of Capital Stock Be Subscribed. Neither a subscription of the entire amount of the potential capital stock, nor of any proportion or percentage thereof, is a condition precedent to the coming into existence of a corporation, unless it is made such by the governing statute.[16] There are, however, statutes which make it a prerequisite to the valid organization of a corporation that shares to a certain amount shall be subscribed.[17] In order to satisfy such a statute, the subscriptions must have been made in good faith by persons having a reasonable expectation of being able to pay, otherwise

13. Harris *v.* McGregor, 29 Cal. 124. That incorporation will not be prevented through the failure of some one in the office of the secretary of state to state the term of the existence of the corporation see Bendall *v.* Jackson, 11 Pa. Co. Ct. 183.

14. Holmes *v.* Gilliland, 41 Barb. (N. Y.) 568.

15. Davenport First Nat. Bank *v.* Davies, 43 Iowa 424.

Interpreting the Iowa statute, the supreme court of that state first held that a failure to file the articles of incorporation in the office of the secretary of state did not prevent the character of a corporation from attaching to the organization or render the shareholders liable to creditors. Davenport First Nat. Bank *v.* Davies, 43 Iowa 424 [*followed* in Eisfeld *v.* Kenworth, 50 Iowa 389; Stokes *v.* Findlay, 23 Fed. Cas. No. 13,478, 4 McCrary 205]. This case did not really decide anything more than that the corporation in question was a railway company, and hence excepted by the statute. They next held that a failure to publish such a notice as required by the statute, or a failure to publish any notice whatever, prevented an immunity from personal liability for the debts of the corporation from attaching to the shareholders. Clegg *v.* Hamilton, etc., County Grange Co., 61 Iowa 121, 15 N. W. 865; Marshall *v.* Harris, 55 Iowa 182, 7 N. W. 509. Where the articles of incorporation do not contain all the statements which the statute requires the published notice to contain, the publication of the articles in lieu of such notice was not a compliance with the statute, but the shareholders remained liable to creditors of the corporation. Heuer *v.* Carmichael, 82 Iowa 288, 47 N. W. 1034. It was so held where the articles failed to fix the limit of indebtedness which the corporation might incur. Clegg *v.* Hamilton, etc., County Grange Co., 61 Iowa 121, 15 N. W. 865. But where the articles of incorporation contain all that is required by the statute requiring the publication of the notice of the fact of the incorporation, then the publication of the articles will be a substantial compliance with so much of the statute as relates to the publication of the notice. Heuer *v.* Carmichael, 82 Iowa 288, 47 N. W. 1034. It was so held where the paper that was published was a synopsis or abstract of the article, but contained all that the statute relating to the publication required. Thornton *v.* Balcom, 85 Iowa 198, 52 N. W. 190. Where the publication had been commenced, although not completed, within the ninety days prescribed by the statute, it was held that corporate liability had attached and that the shareholders were not personally liable to the creditors of the company. Thornton *v.* Balcom, 85 Iowa 198, 52 N. W. 190.

16. *Iowa.*— Johnson *v.* Kessler, 76 Iowa 411, 41 N. W. 57.

Kansas.— Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Maryland.— Lafiin, etc., Powder Co. *v.* Sinsheimer, 46 Md. 315, 24 Am. Rep. 522.

Massachusetts.— Salem First Nat. Bank *v.* Almy, 117 Mass. 476; Boston Acid Mfg. Co. *v.* Moring, 15 Gray 211.

New York.— Schenectady, etc., Plank Road Co. *v.* Thatcher, 11 N. Y. 102; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. 157.

Texas.— Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101; Hamilton *v.* James A. Cushman Mfg. Co., 15 Tex. Civ. App. 338, 39 S. W. 641.

United States.— Minor *v.* Mechanics Bank, 1 Pet. 46, 7 L. ed. 47.

England.— Waterford, etc., R. Co. *v.* Dalbiac, 6 Exch. 443, 20 L. J. Exch. 227, 6 R. & Can. Cas. 753, 4 Eng. L. & Eq. 455.

See 12 Cent. Dig. tit. "Corporations," § 23.

17. Such for example is a statute of Nebraska, construed in Livesey *v.* Omaha Hotel

the corporation will not withstand a proceeding by information in the nature of a quo warranto. But it seems that this rule operates only where the validity of the organization of the corporation is challenged in a direct proceeding; in a collateral proceeding it is not admissible to show the insolvency of subscribers to the shares of the corporation,[18] as for example in an action by the corporation upon an unconditional subscription to its shares.[19] It must be kept in mind that there is an important distinction between the question whether the filling up of the whole or of a statutory proportion or percentage of the capital stock is necessary to call the corporation into existence, and the question whether the corporation, being in existence, can maintain an action against a subscriber to its shares to collect his proportion of a call or assessment made upon the shares. This again depends upon the proper construction of the applicatory provision of the governing statute. There are decisions to the effect that an assessment against a subscriber to the shares of a corporation cannot be enforced by the corporation until the minimum amount of shares required by the governing statutes has been subscribed, by persons apparently able to pay, not counting the subscriptions of insolvents and of persons incapable of contracting, in arriving at such minimum amount.[20] It is enough to say, with reference to this question, that if the terms of the governing statute require the filling up of the subscription list as a condition precedent to the right of a corporation to make and enforce calls upon the subscribers to its shares, then, until all the shares are subscribed for, the corporation cannot maintain an action upon any single share subscription.[21]

g. Requirement That Certain Percentage of Capital Stock Be Paid in. Many of the statutory schemes of incorporation provide that a certain percentage of the capital stock named in the instrument of incorporation must be paid in before the instrument is filed. According to a view already considered,[22] the payment of this amount is not a condition precedent to the coming into existence of a corporation, at least where the question is raised in a collateral proceeding.[23] This principle applies where something is required to be done by the governing statute within a stated period, and the corporation enters upon its business and continues therein as a corporation for a long time thereafter, in which case it will be presumed, where the question is raised in a collateral proceeding, that the thing required by the statute to be done was done.[24] If the thing required to be done is the payment into the treasury of the corporation of a stated percentage of its capital stock in gold or silver, within a stated period after receiving its charter,

Co., 5 Nebr. 50. *Compare* New Haven, etc., R. Co. *v.* Chapman, 38 Conn. 56.

18. Holman *v.* State, 105 Ind. 569, 5 N. E. 702.

19. Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51.

20. Phillips *v.* Covington, etc., Bridge Co., 2 Metc. (Ky.) 219; Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236.

21. Central Turnpike Corp. *v.* Valentine, 10 Pick. (Mass.) 142; Salem Mill-Dam Corp. *v.* Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363, 6 Pick. (Mass.) 23; Norwich, etc., Nav. Co. *v.* Theobald, M. & M. 151, 22 E. C. L. 491.

This branch of legal doctrine does not relate to the question whether the corporation has come into existence, but relates to the question whether it can collect its share subscriptions. It will therefore not be discussed here, but will be reserved for consideration in its proper place. See *infra*, VI, N, 2.

A bank incorporated with the privilege of creating a stock of not less than a given amount, nor greater than another given amount, may commence business with the smaller capital and afterward increase it to the larger. Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

22. See *supra*, I, L, 3, d.

23. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161.

A clause in a charter that the commissioners appointed to organize the corporation should receive no subscriptions to the stock unless five per cent thereof in cash should be paid to them at the time of subscribing, and that if they should receive subscriptions without such payments they should be personally liable to pay the same to the corporation when organized, was held not to make the payment of such percentage a condition precedent to the coming into existence of the corporation, but merely to fix a personal liability on the commissioners. Blair *v.* Rutherford, 31 Tex. 465.

24. Agricultural Bank *v.* Burr, 24 Me. 256.

the certificate of the proper officer of the state that it has been done will be evidence of that fact;[25] and, as we shall see, the certificate of the proper officer of the state that the corporation has been duly created will be conclusive against everyone except the state itself.[26] It is enough that the percentage of the capital stock required to be paid in by the governing statute is paid in in substantial conformity thereto, and it is not material by whom it is paid in.[27] The payment may be made in a gross sum, if the sum equals the required percentage of the capital stock.[28] If the governing statute requires the payment to be made in cash, and by a connivance with the directors a subscriber executes his promissory notes to the corporation therefor, he will not be permitted to set up as a defense to an action on those notes that the corporation had no power to accept them, but a court of chancery will enforce them.[29] Where the governing statute requires, as a condition precedent to incorporation, that a certain percentage of the capital stock shall be subscribed therefor and that ten per cent thereof shall be paid in, in good faith, in cash, this is complied with by the delivery of a check drawn against sufficient funds in the hands of a solvent banker, which check would be paid on presentation.[30] This is especially true where the practice prevails of certifying checks, and where the banker certifies the check as good.[31] But a simulated payment by a check drawn upon a banker with whom the subscriber has no funds, where the check is never presented for payment, but is long afterward surrendered to the drawer on a settlement of accounts between him and the corporation, is not a payment in cash such as satisfies a statute of this kind.[32] The same was held of a simulated payment where the subscriber handed over the statutory amount to the treasurer of the corporation and immediately received it back again.[33]

h. Failing to Fill up Requisite Capital Stock. The failure of those who pretend to organize an insurance company to create the capital stock required by the governing statute and to cause the amount to be paid in which the statute requires entitles the state to a judgment of ouster against them.[34] In other words a provision of the charter of a corporation authorizing it to do business if a certain amount of its capital stock shall be subscribed and paid in within a specified time makes such subscription and payment within such time conditions precedent to the legal organization of the company; and a failure in this particular will justify a proceeding by the attorney-general to forfeit the company's charter.[35] The principle has been carried further. In a contest between individuals, it has been held that where persons attempt to organize a corporation, but go no further than to file articles of incorporation in the office of the secretary of state, and then, without raising the capital stock which the law requires, incur debts in the name of the corporation, the persons so proceeding are answerable for such debts as partners.[36] A better view would seem to be that an inchoate subscription is a

25. Agricultural Bank *v.* Burr, 24 Me. 256.
26. See *infra*, I, M, 7.
27. Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451.
28. Spartanburg, etc., R. Co. *v.* Ezell, 14 S. C. 281.
29. McLaren *v.* Pennington, 1 Paige (N. Y.) 102.
30. People *v.* Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178.
31. *In re* Staten Island Rapid Transit R. Co., 37 Hun (N. Y.) 422. *Compare* Thorp *v.* Woodhull, 1 Sandf. Ch. (N. Y.) 411, where the check does not appear to have been certified.
32. People *v.* Chambers, 42 Cal. 201; Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. See also Excelsior Grain Binding Co. *v.* Stayner, 25 Hun (N. Y.) 91, 61 How. Pr. (N. Y.) 456.
33. State *v.* Jefferson Turnpike Co., 3 Humphr. (Tenn.) 305.
34. State *v.* Webb, 97 Ala. 111, 12 So. 377, 38 Am. St. Rep. 151.
35. Dominion Salvage, etc., Co. *v.* Atty.-Gen., 21 Can. Supreme Ct. 72. See also Eastern Archipelago Co. *v.* Reg., 2 C. L. R. 145, 2 E. & B. 856, 18 Jur. 481, 23 L. J. Q. B. 82, 2 Wkly. Rep. 77, 75 E. C. L. 856; Niagara Falls Road Co. *v.* Benson, 8 U. C. Q. B. 307.
36. Walton *v.* Oliver, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355. In Ohio, where the state is a party to the controversy, and the question relates to the existence *de jure* of a corporation, it is not sufficient, in pleading that a certain corporation has been or-

proposal which the corporation can accept when it comes into existence, so as to make a binding contract.[37] One court has held that in the absence of any requirement in the charter of a corporation or in the general law that a joint stock shall be raised before the corporation can enter upon the work which it was created to perform, it can, on this ground, plead its non-existence as a corporation when sued as such by a private individual.[38] Decisions are not wanting, however, which overlook this defect in a collateral proceeding, especially where it was necessary to hold that the body was a corporation in order to preserve the rights of innocent creditors.[39]

i. Compliance With Statute as to Manner of Making Payment For Shares. A provision in a statute that the "charter" shall set forth "the time when and the manner in which the stock shall be paid for," is satisfied by a charter which requires that the stock shall be paid for in cash, and that no certificate of stock shall issue until this payment is made.[40] So where, under the same law, the charter declared "that the stock shall be paid in cash, at such times and in such amounts, and with such notices to the subscribers, as the managers and directors . . . shall deem for the best of all parties in interest," this was held a substantial compliance with the law.[41]

j. Amendments of Applications For Charters, of Articles of Association, and of Certificates of Incorporation. If the governing statute prescribe a method for amending such an instrument, by whatever name called, the statute must of course be followed; but if the statute is silent upon the subject, then it seems that amended articles must be drawn up, signed, acknowledged, and filed as required by the statute in the case of original articles,[42] in which case the existence of the corporation will date from the filing of the amended document and not from the date of the filing of the original and abortive instrument.[43] This, it seems, applies only in cases where the defects in the original instrument which require amendment are radical in their character. The rule would not prohibit amendments of the original document, which were merely intended to supply omissions not of an essential or radical character from taking effect by relation. One reason for the distinction is that an amendment which materially alters the original instrument of incorporation may require unanimous consent, or the release of dissenting subscribers or shareholders.[44] So after a company has become incorporated it cannot

ganized, merely to allege that "articles of incorporation have been made, and filed and recorded in the office of the Secretary of State," since "articles of incorporation do not make an incorporated company; they are simply authority to do so." Such a pleading is defective in not averring that officers or directors have been chosen, that any of the stock has been subscribed, or that any organization whatever has been perfected. State *v.* Insurance Co., 49 Ohio St. 440, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611.

In an action by an alleged corporation to recover from a subscriber to its shares the amount of his subscription, the same having been made after articles of association were filed but prior to the organization of the company, it has been held that there can be no recovery because there is no corporation, unless the statutory amount is subscribed after the filing of the articles of incorporation. Fairview R. Co. *v.* Spillman, 23 Oreg. 587, 32 Pac. 688. *Compare* Guckert *v.* Hacke, 159 Pa. St. 303, 34 Wkly. Notes Cas. (Pa.) 41, 28 Atl. 249, opinion of the court by Sterrett, J. [*citing* Smith *v.* Warden, 86 Mo. 382; Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416; Childs *v.* Smith, 55 Barb. (N. Y.) 45].

37. 1 Thompson Corp. § 1170; Greenbrier Industrial Exposition *v.* Rodes, 37 W. Va. 738, 17 S. E. 305.

38. McGinty *v.* Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510.

39. Fargason *v.* Oxford Mercantile Co., 78 Miss. 65, 27 So. 877.

40. New Orleans, etc., R. Co. *v.* Frank, 39 La. Ann. 707, 2 So. 310.

41. Baltimore, etc., Tel. Co. *v.* Morgan's Louisiana, etc., Steamship Co., 37 La. Ann. 883.

42. Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 38 N. W. 113; Altoona Gas Co. *v.* Altoona Gas Co., 17 Pa. Co. Ct. 662. *Compare In re* Waverly Ladies of Red Cross, 1 Pa. Dist. 605, 30 Wkly. Notes Cas. (Pa.) 257, where a court in Pennsylvania allowed just such an amendment.

43. *In re* New York Cable R. Co., 109 N. Y. 32, 15 N. E. 882, 14 N. Y. St. 51.

44. Burrows *v.* Smith, 10 N. Y. 550. See also *supra*, I, K, 2, b. For example a building association whose articles do not author-

have its certificate of incorporation amended so as to change the original purpose for which the corporation has been formed; as for instance where it has been incorporated to manufacture preserves, syrups, etc., so as to enable it to engage in the wholesale selling of intoxicating liquors; but it must reincorporate.[45] As in case of an original incorporation, so in case of an amendment to an instrument of incorporation, an amendment by which the incorporators assume to take to themselves a franchise not warranted by the governing statute, as for example by extending the period of their corporate existence from thirty to fifty years, where there is no statute allowing such a duration of corporate existence the amendment will be void; but not if made after the passage of an act of the legislature authorizing such amendment.[46] The directors or trustees of a corporation have no power, unless clothed with such power by express law, to alter the fundamental character of the corporation itself;[47] and this is especially true of directors who are not such *de jure* but only *de facto*. In dealing with this subject, it must be kept constantly in mind that the manner in which instruments of incorporation may be amended is provided for in detail in the legislation of most of the states, and that the subject is one of local legislation. The tendency of this legislation has no doubt been to apply to the subject the principle of the rule of the majority, or of a stated majority, and to prevent one or two recalcitrant members from balking, until they can be bought off, a scheme of amendment deemed necessary by most of the others. Some of these statutes, and the rulings of the courts thereupon, are referred to in the marginal note.[48]

ize the corporation to wind up and close its existence short of a period of eight years, unless all its stock is redeemed at its value, cannot dissolve itself by a resolution passed at a corporate meeting without the consent of all its shareholders; since this would be to amend its charter without unanimous consent and in a material particular, and to execute the amendment at the same time. Barton *v.* Enterprise Loan, etc., Assoc., 114 Ind. 226, 16 N. E. 286, 5 Am. St. Rep. 608. See Endlich Bldg. Assoc. § 479.

45. *In re* Pennsylvania Bottling, etc., Co., 6 Pa. Dist. 530, 19 Pa. Co. Ct. 593.

46. People *v.* Green, 116 Mich. 505, 74 N. W. 714.

47. State *v.* Oftedal, 72 Minn. 498, 75 N. W. 692.

48. In Michigan an incorporated chamber of commerce, created under one statute (Howell Anno. Stat. Mich. c. 108), may amend its articles so as to increase its capital stock, under the provisions of another statute (Howell Anno. Stat. Mich. § 4866) applicable to all corporations, where the statute law has made no special provision applicable to the case. Detroit Chamber of Commerce *v.* State Secretary, 109 Mich. 691, 67 N. W. 897.

In New York, under N. Y. Laws (1892), c. 867, a corporation may file an amended certificate of incorporation to cure an informality or defect, or to strike out unauthorized matter in its original certificate; but this does not entitle a railroad company to change the route of its road under the pretense of making such an amendment. Matter of Riverhead, etc., R. Co., 36 N. Y. App. Div. 514, 55 N. Y. Suppl. 938.

In Pennsylvania, according to departmental rulings, a radical amendment to an application for a charter will not be permitted, but the applicants must begin over again. Such an application cannot be amended by altering the title and readvertising, so that the proceedings will relate to the date of the filing of the original application and retain all rights of priority (*In re* Amendment of Applications for Charter, 5 Pa. Dist. 299); but an amendment of an application must be treated as a new application and must conform to all the requirements of an original proceeding (Altoona Gas Co. *v.* Altoona Gas Co., 17 Pa. Co. Ct. 662. *Contra*, that an application for a charter of a gas company may be amended after its refusal, by leaving out territory claimed as exclusive by a rival corporation. Suburban Gas Co. *v.* Lansdowne-Yeadon Gas Co., 3 Pa. Dist. 597, 15 Pa. Co. Ct. 126). An application for a charter to the "Altoona Gas Company" cannot be amended to make the name "The Consumers' Gas Company of Altoona." Altoona Gas Co. *v.* Altoona Gas Co., 17 Pa. Co. Ct. 662. Rehearing of an application for a charter in Pennsylvania, after it has been refused by the secretary of state, not granted, but applicant left to the courts. *In re* Bradley Fertilizer Co., 6 Pa. Dist. 423, 19 Pa. Co. Ct. 271.

Amendment increasing capital stock.—For state of the statute law under which it was held that an amendment increasing capital stock is inoperative until the certificate of amendment is left for record with the register of deeds of the proper county see Wood *v.* Union Gospel Church Bldg. Assoc., 63 Wis. 9, 22 N. W. 756. Amendment of articles of incorporation so as to provide for an increase of capital stock, authorized under Minn. Gen. Stat. (1878), c. 33. Palmer *v.* Zumbrota Bank, 72 Minn. 266, 75 N. W. 380.

k. Evading Constitutional Requirements as to Payment of Organization Tax. Where the constitution of the state imposes a specific tax upon the granting of certificates of incorporation for corporations of a certain class and relieves from the payment of the tax corporations of another class, such for example as those formed for benevolent, religious, scientific, or educational purposes, the payment of the tax cannot be evaded by incorporating under a statute by which the legislature undertakes to classify a corporation formed for pecuniary objects, such as a building and loan association, under the description of benevolent societies. "Such legislative legerdemain is to be condemned, not approved."[49] Hence a statute[50] which provides for the incorporation of pleasure clubs without requiring them to pay the tax prescribed by the constitution upon their capital stock is void in so far as it undertakes to allow the creation of corporations other than those formed for benevolent, religious, scientific, or educational purposes.[51]

M. Evidence of Corporate Existence — 1. In General. Corporate existence is ordinarily proved by the production of a charter granted by the state or by showing a valid organization under a general enabling statute, and in either case by proof of user of the corporate powers and privileges thereby conferred and acquired. Stated otherwise, the existence of a corporation is proved by showing a valid instrument of incorporation and of user thereunder.[52] The instrument of incorporation may consist of a special charter, that is to say, of a special act of the legislature incorporating the particular company,[53] or of a certificate or articles of incorporation, by whatever name designated, executed and filed in some public office in pursuance of a general statute.[54]

2. Judicial Notice of Charters. The charter, if a special act of the legislature, under the ancient and strict rule, is not judicially noticed by the courts, unless the charter itself[55] or some general statute[56] requires that it shall be so noticed.

3. Mode of Proving Charters When Not Noticed Judicially. Where this strict rule prevails it is supposed to be necessary to prove such a charter by an exemplified copy of the special act duly certified by the secretary of state. But it is believed that in most jurisdictions, whether in pursuance of the statute law,[57] or of the common sense of the courts, such a statute, like any other, may be proved, *prima facie* at least, by producing the book of public statutes in which it is printed.[58]

4. Presumption of Ancient Charter. Under the principles of the common law, where a body of men have been for a long time in the exercise of corporate powers, a presumption arises of an ancient charter, granted to their predecessors,

49. State *v.* McGrath, 95 Mo. 193, 197, 8 S. W. 425.

50. Mo. Rev. Stat. (1889), § 2834.

51. State *v.* Le Sueur, 99 Mo. 552, 13 S. W. 237, 7 L. R. A. 734.

52. See *supra*, I, J, 7, b.

53. Creation by special charter see *supra*, I, J.

54. Organization under general law see *supra*, I, L.

55. Eel River Draining Assoc. *v.* Topp, 16 Ind. 242; Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63; Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478. As where the charter contains a clause declaring it to be a public act (White Water Valley Canal Co. *v.* Boden, 8 Blackf. (Ind.) 130; Brookville Ins. Co. *v.* Records, 5 Blackf. (Ind.) 170), or where the statute law provides that acts of incorporation of a certain description shall be deemed public acts and shall be noticed judicially without being proved in the ordinary mode (Delawter *v.* Sand Creek Ditching Co., 26 Ind. 407; Ewing *v.* Robeson, 15 Ind. 26; Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Dutchess Cotton Manufacturing Co. *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459). The rule is the same with reference to a charter of a private corporation, which has been recognized by the constitution of the state. It thereby acquires the character of a public statute of which the courts are bound to take judicial notice. Vance *v.* Farmers', etc., Bank, 1 Blackf. (Ind.) 80.

56. Haven *v.* State Asylum, 13 N. H. 532, 38 Am. Dec. 512.

Such a statute is Mass. Rev. Stat. (1836), c. 2, § 3.

57. Terry *v.* Merchants', etc., Bank, 66 Ga. 177; Davis *v.* Fulton Bank, 31 Ga. 69.

58. U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314; Chenango Bank *v.* Noyes [*cited* in Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194, 205]; U. S. *v.* Johns, 4 Dall. (U. S.) 412, 1 L. ed. 888.

making the exercise of such powers by them lawful and rightful.[59] This principle is no doubt operative in the United States with respect to corporations whose existence has come down from colonial times; but with respect to modern corporations there is no room for its operation, because such corporations are either created by special acts of legislation which are easily accessible or by organization under general enabling statutes, which organization can take place only by matter of record.[60]

5. Modes of Proving Acceptance of Grants of Corporate Powers and Privileges. The distinction must be kept in mind between judicial notice of a charter and judicial notice of a corporation. Except in the case of municipal corporations, where charters are imposed upon the inhabitants by the legislature and need not be accepted by them, something more is required to create a corporation than a mere charter: There must have been an acceptance[61] of the charter by the corporators named therein; and as we have seen a user of the powers and privileges thereby conferred upon them and upon their associates and successors. Until the grant has been accepted, it remains inchoate and is not deemed to be a contract between the state and the coadventurers within the rule of the Dartmouth College case, but may be modified or withdrawn by the legislature at pleasure.[62] But this distinction is of no great importance, since, as in the case of other grants which on their face are beneficial to the grantees, an acceptance is presumed[63] or is provable by slight evidence. Outside of this presumption of acceptance the general rule remains that, while a court will take judicial notice of the statute under which the corporation is created, it will not take judicial notice of the fact that the incorporators have accepted the privileges thereby conferred.[64] An exception to this rule has been admitted by some courts with reference to the supposed case where a corporation is unconditionally created by an act of the legislature, the statute declaring the persons named therein to be a corporation without anything to be done on their part as a condition precedent to their becoming such;[65] in which case, if the incorporating statute is a public act, the court will take judicial notice of its existence, and a plea *nul tiel corporation* founded on the assumption that the statute of incorporation has not been proved

59. Angell & A. Corp. c. 1, § 70; Shrewsbury *v.* Hart, 1 C. & P. 113, 12 E. C. L. 76.

60. Douthitt *v.* Stinson, 63 Mo. 268.

Operation of presumption so as to protect titles of proprietors of common lands in New England who are able to show record of their incorporation under an enabling statute forty or fifty years prior to the controversy see Brackett *v.* Persons Unknown, 53 Me. 228; Dolloff *v.* Hardy, 26 Me. 545; Copp *v.* Lamb, 12 Me. 312; Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239.

61. St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581. *Compare supra*, I, J, 7, a.

62. *Georgia.*—Central R., etc., Co. *v.* State, 54 Ga. 401.

Illinois.— Grinnell *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, in the dissenting opinion of Scholfield, J.

Indiana.— State *v.* Dawson, 16 Ind. 40.

Maine.— Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34.

New Jersey.— State *v.* Blake, 35 N. J. L. 208.

Tennessee.— State *v.* Planters' F. & M. Ins. Co., 95 Tenn. 203, 31 S. W. 992.

Virginia.— Yeaton *v.* Old Dominion Bank, 21 Gratt. 593.

Wisconsin.— Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425, holding that it was quite competent for the state constitution to have repealed all laws to the contrary which had not ripened into contracts under the rule of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

See also Galveston County *v.* Tankersley, 39 Tex. 651, grant of land for school purposes.

63. Atty.-Gen. *v.* State Bank, Harr. (Mich.) 315 [*citing* Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629].

64. Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204.

65. *Arkansas.*— Mahoney *v.* State Bank, 4 Ark. 620.

Georgia.— Wood *v.* Coosa, etc., R. Co., 32 Ga. 273.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457; Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. 457.

New York.— Brouwer *v.* Appleby, 1 Sandf. 158; Southhold *v.* Horton, 6 Hill 501; New York Fire Dept. *v.* Kip, 10 Wend. 266.

Vermont.— Vermont Cent. R. Co. *v.* Clayes, 21 Vt. 30.

United States.— U. S. *v.* Johns, 4 Dall. 412, 1 L. ed. 888.

will be bad on demurrer.[66] But this principle can have no just application except with reference to public corporations, where the assent of the persons incorporated is not required. As we have seen,[67] a man cannot be forced to enter into a contract against his will, unless he has agreed so to do. Neither can he be forced to become a member of a private corporation against his will. Therefore a court cannot take judicial notice of the existence of a private corporation; but there must be evidence of the consent of the persons named in the incorporating act to become incorporated; and the fact of this consent must be established by proof, when properly controverted, like any other fact in issue.[68]

6. Modes of Proving User of Corporate Powers and Privileges. The acceptance of a charter or other grant of corporate powers and privileges may like any other fact be proved by circumstances; and the ordinary mode of proving such an acceptance is to prove a user by the incorporators, their associates or successors, of the franchises of the corporation and of the other powers and privileges granted in the act of incorporation. This proof of user may be made in any appropriate way, as by producing the books and records of the corporation, which are primary evidence of the fact of its organization and existence as an artificial body,[69] or by producing instruments of writing executed by the corporation under its corporate name.[70] The book of entries of the corporation containing its articles of association, signed by all the associates, and containing the other records of its proceedings, is properly admitted in evidence to prove the fact of its organization as a corporation;[71] and the fact may be proved by producing the minutes of the corporation, without producing a list of the subscribers to its shares.[72] Thus in the case of a corporation created to build and operate a railroad an acceptance of the grant is shown by proving that the act was passed at the request of the direct-

66. Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204; McKiel *v.* Real Estate Bank, 4 Ark. 592.

67. See *supra*, I, J, 7, a, note 11.

68. Dutton *v.* Kendrick, 12 Me. 381; Towson *v.* Havre-de-Grace Bank, 6 Harr. & J. (Md.) 47, 14 Am. Dec. 254; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91.

69. *Indiana.*— Vawter *v.* Franklin College, 53 Ind. 88.

Massachusetts.— Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. 282.

New York.— McFarlan *v.* Triton Ins. Co., 4 Den. 392; Wood *v.* Jefferson County Bank, 9 Cow. 194; Bill *v.* Fourth Great Western Turnpike Co., 14 Johns. 416; Highland Turnpike Co. *v.* McKean, 10 Johns. 154, 6 Am. Dec. 324.

North Carolina.— Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306.

Vermont.— Reynolds *v.* Myers, 51 Vt. 444.

Virginia.— Crump *v.* U. S. Mining Co., 7 Gratt. 352, 56 Am. Dec. 116; Gray *v.* Lynchburg, etc., Turnpike Co., 4 Rand. 578.

But see Lucas *v.* Georgia Bank, 2 Stew. (Ala.) 147.

See 12 Cent. Dig. tit. "Corporations," § 118.

70. In an action by a corporation on a promissory note purporting to be executed in favor of the corporation in its corporate name, where defendant pleaded *nul tiel corporation*, it was aptly held that the existence of the corporation was proved by reading its charter in evidence, since the taking of the note in its corporate name was evidence of user under its charter. Ramsey *v.* Peoria Mar., etc., Ins. Co., 55 Ill. 311. It should be added that the giving of the note to the corporation in its corporate name created an estoppel against the maker of the note from denying the corporate character of the payee, under a principle about to be considered. See *infra*, I, N, 1.

For other illustrations of the principle of the text see Provident Sav. Inst. *v.* Burnham, 128 Mass. 458; Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

71. Foster *v.* White Cloud City Co., 32 Mo. 505; Reynolds *v.* Myers, 51 Vt. 444.

72. Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

So the books of the commissioners appointed under a charter to receive subscriptions to the stock of a projected railway are competent evidence to establish the facts recorded therein which relate to the performance of their duty. Wood *v.* Coosa, etc., R. Co., 32 Ga. 273. But these books are not the only evidence. No express vote of the corporators to accept the charter need be shown; but the grant being presumably beneficial to them a presumption of acceptance arises from a continued exercise of the granted powers; and where the powers have been exercised for a considerable length of time this assumption becomes irresistible. Whitmore *v.* Plymouth Fourth Cong. Soc., 2 Gray (Mass.) 306; Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. (Mass.) 282; Middlesex Husbandmen, etc., Soc. *v.* Davis, 3 Metc. (Mass.) 133; Stone *v.* East Berkshire Cong. Soc., 14 Vt. 86; Manchester Bank *v.* Allen, 11 Vt. 302.

ors designated therein, or by proving the fact of the construction and use by the company of a part of the railroad which it was created to build.[73] So, after a notice to produce the books of a corporation containing the records of its organization, and a refusal of the agent of the corporation to do so, the party giving the notice may prove the *de facto* existence of the corporation by witnesses, and may show that the certificate of incorporation was filed with the proper officers of the state as required by law.[74] With regard to proof of the acceptance of a grant of corporate privileges by proof of user of the powers conferred in the grant, it has been reasoned that where it is sought to make this proof by proving acts *in pais*, if such acts and proceedings might be performed by individuals without an incorporating act or a grant of corporate franchises, then the existence of a corporation cannot be inferred therefrom.[75] The acts or admissions of a party to the action, such as that he has served as president of the corporation or has given a note to it in its corporate name, constitute as against him *prima facie* evidence of user of the corporate franchises under a rule which will be hereafter considered.[76] Statutes have been enacted which still further simplify the mode of proof of corporate existence by allowing it to be proved by showing that the body whose corporate existence is questioned acted or did business as a corporation.[77] One of the usual modes of proving user under a charter is to prove that the company subsequently to the passage of the act of incorporation had an office at a particular place and there carried on the business for which it was incorporated, its affairs being managed by directors chosen for that purpose from time to time.[78] So in case of a turnpike company it was sufficient proof of user to prove the completion of the road of the company, the acceptance of it, as required by its charter, the erection of toll-gates, etc.[79] In general proof of user may consist of evidence of the acts of the corporation showing that they are doing business under their charter; for example, keeping an open office, or having officers acting in the name and as the agents of the company.[80] It may be made by showing acts *in pais*; it is not necessary that it should be made by the introduction of matter of record. Accordingly where, in a suit by a mutual insurance company upon a premium note, evidence in proof of user was offered that they had received, under their charter, applications for policies, and that policies had been issued by them from the year 1838 to the time of the trial, it was held that this was not error.[81] In like manner, where a corporation purports to derive its franchises from a general law, proof of its existence, for the purposes of ordinary litigation, is sufficiently made by showing the existence of a general law under which it might exist, and by showing the exercise on its part of the franchises which it might properly have acquired by a due organization

73. St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

74. Dooley *v.* Cheshire Glass Co., 15 Gray (Mass.) 494.

75. Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 414 [*citing* Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58].

76. Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539. See also *infra*, I, N, 1.

Supposed distinction between user under a special charter and compliance with conditions under a general law, with the conclusion that in cases against individuals who claim exemption from personal liability on the ground of having become incorporated under a general statute, a stricter measure of compliance with statutory requirements ought to be required. Bigelow *v.* Gregory, 73 Ill. 197.

77. Proof under Cal. Civ. Code, § 358, by showing that the body has been acting as a corporation. Lakeside Ditch Co. *v.* Crane, 80 Cal. 181, 22 Pac. 76. See also Pacific Bank *v.* De Ro, 37 Cal. 538; Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 354; People *v.* Frank, 28 Cal. 507; Dannebroge Gold Quartz Min. Co. *v.* Allment, 26 Cal. 286.

Proof under Mich. Laws of 1871 to 1876, by showing that the company has been doing business under a particular name. Lake Superior Bldg. Co. *v.* Thompson, 32 Mich. 293.

That the Texas act of 1845, regulating evidence in regard to corporations, is only applicable to cases in which the corporation or the assignee of the corporation is plaintiff see Reynolds *v.* Skelton, 2 Tex. 516.

78. Utica Ins. Co. *v.* Tilman, 1 Wend. (N. Y.) 555.

79. Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315.

80. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

81. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

under such general law.[82] On the other hand carrying on business in a corporate name is not evidence which can be considered for the purpose of establishing the existence of a corporation, where there is no law authorizing the members to file articles of association or to become incorporated.[83] Another way of stating the same principle and reaching the same result is to say that proof of user, under a charter or general enabling statute, is a sufficient mode of proving the existence of a corporation *de facto*, although it may not exist *de jure*; in other words, of proving the existence in fact of a corporation which might have lawfully existed under the charter or governing statute.[84] Very slight evidence is generally held sufficient to establish the user necessary to show the existence of a *de facto* corporation. In some jurisdictions it is only necessary to show that the corporation assumed to act as such,[85] or in other words to show a continued user of the franchises of an incorporated and organized company by persons assuming to act as its directors, this being not only competent evidence of its continued corporate existence, but also evidence that such persons were its legal directors.[86] Doing business as a bank;[87] choosing directors and officers;[88] adopting by-laws, buying a piece of ground, and erecting and leasing a building upon it;[89] and entering an appearance to an action in the name by which it is sued and filing an answer[90] have been held to furnish sufficient evidence of user for the purpose of proving the existence of a corporation and organization in good faith, in substantial or colorable compliance with some statute under which a corporation might lawfully exist, and as much as can be demanded in a litigation between private parties, where questions of the rightfulness of the existence of the corporation arises collaterally, and where the state suffers the assumed corporation to exist without interference,[91] although there may have been irregularities or omissions in perfecting the organization.[92]

7. Proof of Incorporation by Proving Letters Patent, Articles of Association, Certificates of Incorporation, Etc. If the corporation purports to be organized under a general law of the state of the forum, it will usually be sufficient to prove the making and filing of the certificate of incorporation, the articles of association, or other instrument of incorporation, by whatever name called, which is required by the applicatory statute, and to prove acts of user thereunder.[93] But it is no doubt competent for the legislature to declare what shall be evidence *prima facie* of the formation of a corporation;[94] and many of the statutes provide that a duly certified copy of the articles of incorporation shall be *prima facie* evidence of the fact of incorporation.[95] If, as is usually the case, the gov-

82. Finnegan *v.* Noerenherg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778; Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077; Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416.

83. Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

84. Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315. See to this effect, generally, Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239; Benesch *v.* John Hancock Mut. L. Ins. Co., 11 N. Y. Suppl. 348, 32 N. Y. St. 73; Manchester Bank *v.* Allen, 11 Vt. 302.

85. Reynolds *v.* Myers, 51 Vt. 444.

86. St. Paul F. & M. Ins. Co. *v.* Allis, 24 Minn. 75.

87. Farmers', etc., Bank *v.* Williamson, 61 Mo. 259.

88. Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75.

89. Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

90. Derrenbacher *v.* Lehigh Valley R. Co., 21 Hun (N. Y.) 612, 59 How. Pr. (N. Y.) 283. *Compare* Stoddard *v.* Onondaga Annual Conference, 12 Barb. (N. Y.) 573.

91. Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778; Welch *v.* Old Dominion Min., etc., Co., 10 N. Y. Suppl. 174, 31 N. Y. St. 916.

92. Marsh *v.* Astoria Lodge No. 112, I. O. O. F., 27 Ill. 421.

93. Leonardsville Bank *v.* Willard, 25 N. Y. 574; Toledo Bank *v.* International Bank, 21 N. Y. 542; Spokane, etc., Lumber Co. *v.* Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119 (under a statute, and although a copy of the certificate of incorporation had not been filed with the secretary of state as provided by the statute).

94. Holmes *v.* Gilliland, 41 Barb. (N. Y.) 568, per Leonard, J.

95. See for example Wash. Gen. Stat. § 1499; Knapp *v.* Strand, 4 Wash. 686, 30 Pac. 1063.

erning statute requires the articles or certificate of incorporation to be recorded in the office of the register of deeds of the county wherein the principal place of business of the corporation is established, then the usual proof of incorporation is to introduce in evidence a copy of the instrument of incorporation, filed in the office of the secretary of state, and also a transcript of it from the record in the office of the register of deeds.[96] Some of them call for a duly certified copy of the articles, and also require that an affidavit of stated facts shall be annexed thereto. The effect of a compliance with such a statutory requirement is to make *prima facie* proof of the existence of the corporation and to cast the burden of disproving the validity of its organization upon the party assailing it.[97] It may be stated as a general rule that instruments of incorporation under general laws, such as letters patent issued by the governor of Pennsylvania,[98] articles of incorporation, sometimes called certificates of incorporation, filed in the public office or offices of the state,[99] the certificate of the proper public officer, generally the secretary of state,[1] in the case of national banks the certificate of the comptroller of the currency,[2] furnish at least *prima facie* evidence of the fact of due incorporation in connection with evidence of user of the franchises conferred by the statute and assumed by the coadventurers. But this assumes that the instrument so appealed to as evidence of a legal incorporation is not defective on its face for want of a compliance with the essential provisions of the governing statute.[3] Unless the governing statute empowers the particular officer of the state to determine that the provisions of the law have been complied with, his certificate to that effect is not evidence of the fact, but it must otherwise appear.[4] But clearly the certificate of the officer of the state or of the government of the United States, to whom is committed the duty of passing upon the document filed by the coadventurers and of issuing to them an instrument showing their incorporation, is *prima facie* evidence of that fact, and if sufficient upon its face constitutes them a corporation as against everyone except the state itself or the government. It enables them to act as a corporation and to acquire rights and incur liabilities as such, which will be enforced in the judicial courts.[5] The law

96. As was done with approval in Brown *v.* Corbin, 40 Minn. 508, 42 N. W. 481.

97. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546.

For statutes under which articles of incorporation were of themselves proof that they were signed and executed until the person by whom they purported to be signed and executed denied the signatures and execution under oath see Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36.

Assent of the prescribed majority may be proved by indirect acts of acquiescence, and need not be proved by matter of record. Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53.

98. Dorsey Harvester Revolving Rake Co. *v.* Marsh, 7 Fed. Cas. No. 4,014, 6 Fish. Pat. Cas. 387. That the validity of such letters patent cannot be questioned collaterally see Cochran *v.* Arnold, 58 Pa. St. 399.

99. *California.*— Fresno Canal, etc., Co. *v.* Warner, 72 Cal. 379, 14 Pac. 37; Dannebroge Gold Quartz Min. Co. *v.* Allment, 26 Cal. 286.

Colorado.— Bates *v.* Wilson, 14 Colo. 140, 24 Pac. 99.

Illinois.— McCoy *v.* World's Columbian Exposition, 87 Ill. App. 605 [*affirmed* in 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288], articles of incorporation certified by secretary of state *prima facie* evidence that stock was fully subscribed.

Nebraska.— Equitable Bldg., etc., Assoc. *v.* Baird, 60 Nebr. 173, 82 N. W. 385; Equitable Bldg., etc., Assoc. *v.* Bidwell, 60 Nebr. 169, 82 N. W. 384.

New Jersey.— Vanneman *v.* Young, 52 N. J. L. 403, 20 Atl. 53.

Washington.— Knapp *v.* Strand, 4 Wash. 686, 3 Pac. 1063.

1. See *supra*, I, L, 3.

2. Mix *v.* Bloomington Nat. Bank, 91 Ill. 20, 33 Am. Rep. 44; Rock Island First Nat. Bank *v.* Loyned, 28 Minn. 396, 10 N. W. 421; Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234; Merchants' Exch. Nat. Bank *v.* Cardozo, 35 N. Y. Super. Ct. 162; Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, 307.

3. McCallion *v.* Hibernia Sav., etc., Soc., 70 Cal. 163, 12 Pac. 114; Bates *v.* Wilson, 14 Colo. 140, 24 Pac. 99.

4. Boyce *v.* Towsontown Station M. E. Church, 46 Md. 359. Where there was a statute prohibiting corporations, doing business as such in good faith, from being overthrown in collateral proceedings, it was held that a certificate of incorporation was admissible in a private action to show the fact of incorporation, although not acknowledged by all of the corporators. Dannebroge Gold Quartz Min. Co. *v.* Allment, 26 Cal. 286.

5. Cochran *v.* Arnold, 58 Pa. St. 399 [*overruling* Paterson *v.* Arnold, 45 Pa. St. 410].

goes further than this: Where commissioners have been appointed to superintend the organization of intended corporations under statutory powers of attorney, and the statute empowers them to certify the fact of the organization of the corporation, their certificate is conclusive evidence of that fact for every purpose of collateral attack;[6] and their acts can be reviewed only in a proceeding brought by the state directly against the corporators to inquire into the validity of their incorporation.[7] The general rule is that where the statute appoints an official or body of officials of the government to pass upon an application for the grant of corporate powers, and to determine whether the conditions precedent required by the statute have been complied with, and they make such determination and grant a certificate of incorporation, that certificate is not merely *prima facie* evidence of the rightful creation of the corporation but is conclusive evidence of it.[8] Nor will it make any difference that such officer has made a provable mistake, as where he has miscounted the shares and found that the statutory number have been subscribed, when the fact is otherwise.[9] The reason is that where, by reason of such a certificate, a corporation is held out to the world as ready to undertake business, most disastrous consequences would follow to commercial undertakings if any person was allowed to go back and enter into an examination of the circumstances attending the original incorporation.[10]

8. Proving the Filing of Articles of Incorporation and Election of Corporate Officers. The filing of an instrument of incorporation, such as complies with the governing statute, in the proper offices designated by such statute, followed by an election of corporate officers, furnishes sufficient proof of the grant and assumption of corporate powers and privileges and of a user of such powers and privileges, creating at least a corporation *de facto*, although the percentage of capital prescribed by the governing statute may not in fact have been paid in.[11]

9. Proof of Corporate Existence by Reputation. Closely allied to the foregoing are holdings to the effect that the existence of a corporation may be proved by reputation, and by its actual use for a length of time of the powers and privileges of a corporation;[12] and this, we shall see, is the mode of proof in criminal cases.[13] And it seems that in any case where a body professing to be a corporation is sued, proof of its corporate existence by reputation is sufficient, although the better theory is that on grounds of public policy defendant is in such a case estopped from denying its corporate existence.[14]

10. Proof of Corporate Existence by Legislative Recognition. It has been said that corporate powers cannot be created by implication or extended by construc-

6. Litchfield Bank *v.* Church, 29 Conn. 137; Tar River Nav. Co. *v.* Neal, 10 N. C. 520; Pilbrow *v.* Pilbrow's Atmospheric R., etc., Propulsion Co., 5 C. B. 440, 5 D. & L. 551, 17 L. J. C. P. 166, 5 R. & Can. Cas. 89, 57 E. C. L. 440.

As to the powers of such commissioners and the conclusiveness of their acts see Napier *v.* Poe, 12 Ga. 170. And *compare* Mitchell *v.* Rome R. Co., 17 Ga. 574.

7. Tar River Nav. Co. *v.* Neal, 10 N. C. 520. See as apparently opposed to this Bill *v.* Fourth Great Western Turnpike Co., 14 Johns. (N. Y.) 416.

That the original articles are competent evidence although the statute prescribes the copy see Carolina Iron Co. *v.* Abernathy, 94 N. C. 545.

8. Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, 307 (comptroller of the currency with respect to national banks); *Re* Canada Cent. Bank, 25 Can. L. J. 238; Lake Superior Nav. Co. *v.* Morrison, 22 U. C. C. P. 217 (conclusive evidence of letters patent incorporating a company in Canada).

9. Bird's Case, 1 Sim. N. S. 47, 40 Eng. Ch. 47.

10. *In re* Barned's Banking Co., L. R. 2 Ch. 674, 36 L. J. Ch. 757, 16 L. T. Rep. N. S. 780, 15 Wkly. Rep. 1100; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808.

11. Eaton *v.* Aspinwall, 19 N. Y. 119; Abbott *v.* Aspinwall, 26 Barb. (N. Y.) 202. See also Wood *v.* Coosa, etc., R. Co., 32 Ga. 273. *Compare* Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

12. Stockbridge *v.* West Stockbridge, 12 Mass. 399; Dillingham *v.* Snow, 5 Mass. 547.

13. See *infra*, I, M, 11.

14. See the reasoning of Shaw, C. J., in Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. (Mass.) 282.

tion.[15] It is also said in an earlier case that individuals acting together for the benefit of a society are not to be considered as a corporation unless they expressly show their title to act as such.[16] But this was before the doctrine which upholds the acts of *de facto* corporations and declines to contest in a private proceeding the validity of the existence of a corporation which had become established. A doctrine now frequently admitted by American courts is that where a body of persons act as a corporation, and the legislature passes an act which distinctly recognizes their corporate character, they may be deemed to be rightfully a corporation in consequence of such legislative recognition. It has been frequently ruled that defects in the organization of corporations which have been organized under a general law may be cured by subsequent legislative recognition of the corporation.[17] The rule is that, although the organization of a corporation may be irregular in such a sense that it could be overthrown in a direct proceeding by the state, yet where its corporate existence has been recognized by the legislature this will make it a good corporation for the purposes of collateral proceedings.[18] Under the operation of this principle the defects in the organization of corporations have been deemed to be waived by subsequent legislative acts which have the effect of recognizing the existence of the corporation as a valid and properly constituted body.[19] Such an operation has been ascribed to a special act of the legislature changing the name of a corporation,[20] recognizing it by name and extending and continuing its corporate rights and privileges;[21] and in case of a municipal corporation authorizing its president and trustees to subscribe for shares in a railway company, and also in a plank-road company, and to issue the bonds of the corporation therefor.[22] As the state alone can question the rightfulness of the existence of a corporation irregularly organized, so it can heal the irregularity by a curative act of legislation. A special act of the legislature, passed within the purview of the constitution, recognizing a corporation as a valid existing one and authorizing it to exercise corporate rights, cures all charter defects in its original certificate of organization.[23]

11. Proof of Corporate Existence in Criminal Proceedings. In criminal prosecutions, when the question arises whether a company is incorporated, for instance, in the case of a prosecution for a larceny of the property of an alleged corporation or for a forgery of the bills of an alleged banking corporation, it is only necessary to show that the corporation exists *de facto*,[24] and this may be proved by general reputation;[25] in other words, by proving by oral testimony that it is a corporation *de facto*, doing business as such. In such a proceeding proof of the existence of the corporation may indeed be demanded,[26] but it seems that it is never necessary to produce the charter;[27] and in a criminal prosecution for a trespass upon the property of an alleged corporation it has been reasoned that it is enough that the body described as a corporation is in the possession of

15. Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9.

16. Ernst *v.* Bartle, 1 Johns. Cas. (N. Y.) 319.

17. People *v.* Ferrin, 56 Cal. 345; Basshor *v.* Dressel, 34 Md. 503; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228.

18. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; Black River, etc., R. Co. *v.* Barnard, 31 Barb. (N. Y.) 258.

19. Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120; Black River, etc., R. Co. *v.* Barnard, 31 Barb. (N. Y.) 258.

20. White *v.* Ross, 4 Abb. Dec. (N. Y.) 589.

21. Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391.

22. Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304.

23. Koch *v.* North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377.

24. People *v.* Frank, 28 Cal. 507; Smith *v.* State, 28 Ind. 321; People *v.* Caryl, 12 Wend. (N. Y.) 547.

25. State *v.* Thompson, 23 Kan. 338, 33 Am. Rep. 165; Reed *v.* State, 15 Ohio 217. See also People *v.* Barric, 49 Cal. 342; Johnson *v.* People, 4 Den. (N. Y.) 364; People *v.* Davis, 21 Wend. (N. Y.) 309; People *v.* Chadwick, 2 Park. Crim. (N. Y.) 163; Sasser *v.* State, 13 Ohio 453. And so by statute in Missouri.

26. U. S. *v.* Johns, 4 Dall. (U. S.) 412, 1 L. ed. 888.

27. Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315, per Phelps, J.

the land described in the indictment, under its corporate name, and was so in possession long before the commission of the trespass.[28] Statutes exist, like that in Missouri, under which in a criminal proceeding the existence of a corporation may be proved by parol.[29] Some of the decisions go further and hold that where the validity of the existence of a corporation is drawn in question in a criminal case, it is enough that it exists as a corporation *de facto*, and that if the state permits it to exist and to exercise corporate functions, defendant in the criminal proceeding is estopped from questioning its existence.[30]

12. **Proof of Existence of Foreign Corporation.** Foreign corporations are not allowed to sue in domestic tribunals except upon allegation and proof of the fact that they are corporations, unless the defendant has, in some manner hereafter pointed out, estopped himself from denying the fact of their existence.[31] Courts do not take judicial notice of foreign laws, in which statement is included the laws of other states of the American Union; but it is necessary to prove them as facts.[32] In order to prove the existence of a foreign corporation, it is therefore necessary to do something more than to prove the papers and proceedings of incorporation, but it is also necessary to make proof of the statute authorizing the incorporation.[33] In the absence of a local statute providing for the manner of authenticating a copy of the certificate of incorporation of a corporation organized under the laws of another state, a certificate by the original custodian of the document in the state of its origin, under the laws thereof, under his seal of office, is a sufficient authentication. Therefore a certificate of incorporation under the laws of another state, duly acknowledged before a notary public, and authenticated by the certificate of the secretary of state and by a certificate of a commissioner of the state of the forum, was held a good authentication.[34] In the case of a corporation created in a foreign country, the introduction of an examined copy of its charter, as found in the office where such charters are usually kept in the foreign country, is, it seems, sufficient.[35] But a court which would require evidence of user under a charter in the case of domestic corporations will clearly require the same proof of foreign corporations.[36] Where a foreign corporation has entered the domestic state to do business there, and under the domestic statute has filed and caused to be recorded a certified copy of its

28. White *v.* State, 69 Ind. 273.

29. State *v.* Cheek, 63 Mo. 364.

30. State *v.* Fuller, 96 Mo. 165, 9 S. W. 583. *Compare* Fredericktown *v.* Fox, 84 Mo. 59; Catholic Church *v.* Tobbein, 82 Mo. 418.

Proof of a statute creating a corporation under a particular name, and of the subsequent public exercise of the privileges thereby granted, for many years, by an association under that name, satisfies the above principle and warrants a finding of the actual existence of the corporation and of the fact that it is in the management and ownership of the property which it employs in exercising its franchises, for the purposes of the criminal proceeding. Com. *v.* Bakeman, 105 Mass. 53.

There is a holding, seemingly untenable, to the effect that in a criminal prosecution for uttering a forged order of a certain corporation it is necessary to prove not only a charter but an organization under it. State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

31. Savage *v.* Russell, 84 Ala. 103, 4 So. 235; Michigan Bank *v.* Williams, 5 Wend. (N. Y.) 478.

32. 1 Thompson Tr. § 1054.

33. Savage *v.* Russell, 84 Ala. 103, 4 So. 325.

34. Hammer *v.* Garfield Min., etc., Co., 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964.

35. Thus in a suit by a foreign banking corporation in England, plaintiff claimed to have been incorporated by the king of Spain. The proof was as follows: A witness produced a copy of a charter of the king of Spain incorporating this bank. The witness stated that he had procured this copy from the office of the Council of Castile, which was the proper place for charters of this kind to be kept, and that he had examined this copy with the original charter. A translation of the charter was proved and put in evidence. St. Charles Nat. Bank *v.* De Bernales, 1 C. & P. 569, 12 E. C. L. 325. See also Society for Propagating Gospel *v.* Young, 2 N. H. 310. In an early Maryland case, a bank charter granted by the governor of a sister state, reciting his authority, under the laws of that state, to make such grants, and authenticated by the seal of the state, was held to be *prima facie* evidence of the legal existence of the bank. Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478.

36. Gaines *v.* Mississippi Bank, 12 Ark. 769.

charter, articles of association, or other constating instrument, in the office of the secretary of state, in pursuance of the domestic statute, a copy of such instrument and of the instrument appointing its local agent, certified by the secretary of the domestic state as being of record in his office, is *prima facie* evidence of the existence of such corporation, and of its right to transact business in the state.[37] If the statute of incorporation is a special law of a foreign state, the mode of proving it will usually be by an exemplified copy, certified by the secretary of state, or otherwise authenticated as provided by the act of congress. If the corporation is organized under a general law of another state of the Union, it will usually be sufficient, under the rules of evidence in most states — statutory or resting in adjudged cases — to prove it by the production of a book of the statutes of such other state, which purports on its face to be published by the authority of such state.[38] If the charter is the act of the legislature of another state of the Union, then the act of congress of May 26, 1790, which provides for the manner in which the official acts of one state shall be authenticated in order to have full faith and credit in another state, governs; and this statute provides that "the acts of the legislatures of the several states shall be authenticated by having the seals of their respective states affixed thereto."[39] Under such circumstances it is therefore not necessary that there should be the certificate of a secretary of state, or other official authentication; but the seal of the state affixed thereto is a sufficient authentication.[40]

13. Proof of Incorporation by Acts or Admissions of Party Challenging Fact. A familiar mode of proving the existence of a corporation (or possibly of dispensing with such proof) is to show acts or admissions of the party challenging its rightful existence, such as necessarily admit the fact of its incorporation; as for example by proving that such party has executed to the body which assumes to act as a corporation the instrument sued on, in its corporate name, has taken an instrument from it executed in its corporate name,[41] or has acted with respect to it in such a manner as necessarily admits the rightfulness of its existence as a corporation,[42] as by suffering himself to be elected and to act as its president, and to sign the note which is the subject of the action as such president.[43] It may be added that neither a corporation nor the persons claiming under it can object that a copy of the certificate filed by its incorporators, pursuant to the governing statute, to procure their incorporation, is not sufficient in form and contents,[44] on the principle that those who assert the powers of a corporation will not be heard to deny that they are such.[45] This brings us to another important subdivision of this subject.

N. Corporations by Estoppel — 1. When Private Persons Estopped to Deny Corporate Existence — a. General Statement of Doctrine. Although, as against the state, a corporation cannot be created by the mere agreement, admission, assent, or other act or omission of private persons, yet, as between themselves and for the purposes of their own private litigations and contestations, they may, by their agreements, their admissions, or their conduct, estop themselves from denying the fact of the existence of the corporation; so that for the purpose of such private litigations the body claiming to be a corporation and having a colorable

37. Knapp *v.* Strand, 4 Wash. 686, 30 Pac. 1063.

38. Harryman *v.* Roberts, 52 Md. 64; Pacific Pneumatic Gas Co. *v.* Wheelock, 80 N. Y. 278; Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271; U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

39. U. S. Rev. Stat. (1872), § 905.

40. State *v.* Carr, 5 N. H. 367. To same effect see U. S. *v.* Johns, 4 Dall. (U. S.) 412, 1 L. ed. 888, 26 Fed. Cas. No. 15,481, 1 Wash. 363.

41. Bon Aqua Imp. Co. *v.* Standard F. Ins. Co., 34 W. Va. 764, 12 S. E. 771. See also *infra*, I, N, 1.

42. Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539.

43. Haynes *v.* Brown, 36 N. H. 545.

44. Evans *v.* Lee, 11 Nev. 194.

45. Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. (Mass.) 282.

existence as such becomes such to all intents and purposes as much as though it were a corporation *de jure*.[46]

b. Persons Contracting or Dealing With Corporation as Such Estopped to Deny Its Corporate Existence. A leading branch of the doctrine is that whenever a private person enters into a contract with a body purporting to be a corporation, in which contract the body is described by the corporate name which it has assumed, such private person solemnly admits the existence of the corporation for the purposes of the suit brought to enforce the obligation, and in such an action will not be permitted to plead *nul tiel corporation* or otherwise to deny the corporate existence of plaintiff.[47]

46. See *infra*, I, N, 1, b *et seq.*

47. *Alabama.*— Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764 (city contracting by ordinance with water company to pay rent for certain hydrants); Snider *v.* Troy, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515; Montgomery R. Co. *v.* Hurst, 9 Ala. 513.

Arkansas.— Searcy *v.* Yarnell, 47 Ark. 269, 1 S. W. 319; Gaines *v.* Mississippi Bank, 12 Ark. 769.

California.—Fresno Canal, etc., Co. *v.* Warner, 72 Cal. 379, 14 Pac. 37; Pacific Bank *v.* De Ro, 37 Cal. 538.

Colorado.—Cripple Creek First Cong. Church *v.* Grand Rapids School-Furniture Co., 15 Colo. App. 46, 60 Pac. 948, executing note to corporation.

Connecticut.— West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66; Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435.

Dakota.— School Dist. No. 61 *v.* Alderson, 6 Dak. 145, 41 N. W. 466.

Georgia.— Torras *v.* Raeburn, 108 Ga. 345, 33 S. E. 989; Wood *v.* Coosa, etc., R. Co., 32 Ga. 273; Mitchell *v.* Rome R. Co., 17 Ga. 574.

Illinois.— Ramsey *v.* Peoria Mar., etc., Ins. Co., 55 Ill. 311; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Tarbell *v.* Page, 24 Ill. 46; Hamilton *v.* Carthage, 24 Ill. 22; Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93; Mendota *v.* Thompson, 20 Ill. 197; Hargrave *v.* State Bank, 1 Ill. 122; Forest Glen Brick, etc., Co. *v.* Gade, 55 Ill. App. 181.

Indiana.— Bradford *v.* Frankfort, etc., R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819; Brickley *v.* Edwards, 131 Ind. 3, 30 N. E. 708; Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298; Smelser *v.* Wayne, etc., Turnpike Co., 82 Ind. 417; Jones *v.* Kokomo Bldg. Assoc., 77 Ind. 340; Baker *v.* Neff, 73 Ind. 68; Mullen *v.* Beech Grove Driving Park, 64 Ind. 202; Ransom *v.* Priam Lodge, 51 Ind. 60; McBroom *v.* Lebanon, 31 Ind. 268; Williams *v.* Franklin Tp. Academical Assoc., 26 Ind. 310; Bartholomew County *v.* Bright, 18 Ind. 93; Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Meikel *v.* German Sav. Fund Soc., 16 Ind. 181; Hubbard *v.* Chappel, 14 Ind. 601; Blake *v.* Holley, 14 Ind. 383; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89; Ft. Wayne, etc., Turnpike Co. *v.* Deam, 10 Ind. 563; Ensey *v.* Cleveland, etc., R. Co., 10 Ind. 178; Brookville, etc., Turnpike Co. *v.* McCarty, 8 Ind. 392, 65 Am. Dec. 768; Ryan *v.* Vanlandingham, 7 Ind. 416; Judah *v.* American Live Stock Ins. Co., 4 Ind. 333; John *v.* Farmers', etc., Bank, 2 Blackf. 367, 20 Am. Dec. 119.

Iowa.— Franklin *v.* Twogood, 18 Iowa 515.

Kentucky.— Henderson, etc., R. Co. *v.* Leavell, 16 B. Mon. 358; Jones *v.* Tennessee Bank, 8 B. Mon. 122, 46 Am. Dec. 540; Gallipolis Bank *v.* Trimble, 6 B. Mon. 599; Woodson *v.* Gallipolis Bank, 4 B. Mon. 203; Hughes *v.* Somerset Bank, 5 Litt. 45.

Maryland.— Boyce *v.* Methodist Episcopal Church, 46 Md. 359.

Massachusetts.— Butchers', etc., Bank *v.* McDonald, 130 Mass. 264; Topping *v.* Bickford, 4 Allen 120; Worcester Medical Inst. *v.* Harding, 11 Cush. 285; Case *v.* Benedict, 9 Cush. 540; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Michigan.— Kalamazoo *v.* Kalamazoo Heat, etc., Co., 124 Mich. 74, 82 N. W. 811; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Owen *v.* Farmers' Bank, 2 Dougl. 134 note; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

Minnesota.— Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022.

Missouri.— Ragan *v.* McElroy, 98 Mo. 349, 7 S. W. 735; Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101; Board of Com'rs, etc. *v.* Shields, 62 Mo. 247; National Ins. Co. *v.* Bowman, 60 Mo. 252; Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17; Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 26, 86 Am. Dec. 128; Kayser *v.* Bremer, 16 Mo. 88; Hamtramck *v.* Edwardsville Bank, 2 Mo. 169; St. Louis Gas Light Co. *v.* St. Louis, 11 Mo. App. 55; Real Estate Sav. Inst. *v.* Fisher, 9 Mo. App. 593; German Bank *v.* Stumpf, 6 Mo. App. 17; Owens, etc., Mach. Co. *v.* Pierce, 5 Mo. App. 576.

Nebraska.— Platte Valley Bank *v.* Harding, 1 Nebr. 461.

New Hampshire.— Low *v.* Connecticut, etc., R. Co., 45 N. H. 370, 378; Troy Cong. Soc. *v.* Perry, 6 N. H. 164, 25 Am. Dec. 455; State *v.* Carr, 5 N. H. 367.

New Jersey.— Vanneman *v.* Young, 52 N. J. L. 403, 20 Atl. 53; Stout *v.* Zulick, 48 N. J. L. 599, 7 Atl. 362; Den *v.* Van Houten, 10 N. J. L. 270.

New York.— Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Toledo Bank *v.*

c. Theory and Scope of Rule. One theory of the rule is that by entering into a contract with the assumed corporation as such the contracting party admits its existence and will not thereafter be permitted to change front and deny it.[48] Another theory is that the contract with the corporation into which the litigant has entered is *prima facie* evidence of the valid existence of the corporation so far as he is concerned,[49] or of the existence of a charter and user thereunder.[50] Therefore in a private litigation with an assumed corporation its legal existence may be proved for the purpose of the litigation by showing that the objecting party has dealt with it generally as a corporation.[51] Nor will a person so dealing with a corporation be afterward heard to assert that by reason of some irregularity in its organization it is a mere nnincorporated voluntary association.[52] One statement of the rule is that the person contracting with an association assuming to be, and believed by the person to be, incorporated, and acting in a corporate capacity, cannot, after having received the benefit of the contract, set up as a defense to an action brought by the company or its assignee that the company was not legally incorporated.[53] Similarly it has been held that a person who has

International Bank, 21 N. Y. 542; Rockland, etc., F. Ins. Co. *v.* Bussey, 48 N. Y. App. Div. 359, 63 N. Y. Suppl. 86 (policyholder in insurance company sued for an assessment, estopped to question regularity of organization of company); Eagle Sav., etc., Co. *v.* Samuels, 43 N. Y. App. Div. 386, 60 N. Y. Suppl. 91 (mortgagor estopped in foreclosure proceedings from setting up that the plaintiff was not a corporation at the time when he gave the mortgage); Loaners' Bank *v.* Jacoby, 10 Hun 143; Kennedy *v.* Cotton, 28 Barb. 59; East River Bank *v.* Rogers, 7 Bosw. 493; Eaton *v.* Aspinwall, 6 Duer 176 [*affirmed* in 19 N. Y. 119]; All Saints Church *v.* Lovett, 1 Hall 191; Connecticut Bank *v.* Smith, 17 How. Pr. 487; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459. The doctrine was denied in a forcible opinion by Nelson, J., of the supreme court of New York, in Welland Canal Co. *v.* Hathaway, 8 Wend. 480, 24 Am. Dec. 51. The case was that of a Canadian corporation, and there are indications here and there in the opinion of that celebrated jurist that he did not take kindly to the assertion of rights or privileges in the courts of this country on behalf of British corporations or British subjects. Although his opinion is still regarded as authority on the general law of estoppel, it has been generally overruled in respect to this particular question. See also U. S. Bank *v.* Stearns, 15 Wend. 314; Williams *v.* Michigan Bank, 7 Wend. 539 [*affirming* 5 Wend. 478]. Nevertheless this doctrine has been followed to some extent in subsequent cases in the same state and elsewhere. Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Loaners' Bank *v.* Jacoby, 10 Hun 143; De Witt *v.* Hastings, 40 N. Y. Super. Ct. 463; Caryl *v.* McElrath, 3 Sandf. 176; First Baptist Soc. *v.* Rapalee, 16 Wend. 605.

North Carolina.— Tar River Nav. Co. *v.* Neal, 10 N. C. 520.

Pennsylvania.— Hooven Mercantile Co. *v.* Evans Min. Co., 193 Pa. St. 28, 44 Atl. 277 (creditor in winding-up proceeding cannot impeach title to corporation for irregularities in organization); Cochran *v.* Arnold, 58 Pa. St. 399.

Tennessee.— Tennessee Automatic Lighting Co. *v.* Massey, (Ch. App. 1899) 56 S. W. 35.

Texas.— Holloway *v.* Memphis, etc., R. Co., 23 Tex. 465, 76 Am. Dec. 68; Alabama State Bank *v.* Simonton, 2 Tex. 531.

Utah.— Jackson *v.* Crown Point Min. Co., 21 Utah 1, 59 Pac. 238, 81 Am. St. Rep. 651; McCord, etc., Mercantile Co. *v.* Glen, 6 Utah 139, 21 Pac. 500.

West Virginia.— Bon Aqua Imp. Co. *v.* Standard F. Ins. Co., 34 W. Va. 764, 12 S. E. 771; Singer Mfg. Co. *v.* Bennett, 28 W. Va. 16.

Wisconsin.— Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

United States.— Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Douglas County *v.* Bolles, 94 U. S. 104, 24 L. ed. 46; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220; Venner *v.* Farmers' L. & T. Co., 90 Fed. 348, 33 C. C. A. 95; Automatic Phonograph Exhibition Co. *v.* North American Phonograph Co., 45 Fed. 1.

See 12 Cent. Dig. tit. "Corporations," § 84.

48. Southern Bank *v.* Williams, 25 Ga. 534; Franz *v.* Teutonia Bldg. Assoc. No. 2, 24 Md. 259.

49. Brown *v.* Scottish American Mortg. Co., 110 Ill. 235.

50. Montgomery R. Co. *v.* Hurst, 9 Ala. 513.

51. Circleville Bank *v.* Renick, 15 Ohio 322; Spahr *v.* Farmers' Bank, 94 Pa. St. 429. *Compare* Freeland *v.* Pennsylvania Cent. Ins. Co., 94 Pa. St. 504.

52. Lehman *v.* Warner, 61 Ala. 455 [*restated* in Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695]; Tarbell *v.* Page, 24 Ill. 46.

One court has reduced the doctrine to the statement that a third person dealing with an assumed corporation is estopped by that fact to deny its corporate existence, except where there are no facts which make it legally unjust to forbid such denial. Estey Mfg. Co. *v.* Runnels, 55 Mich. 130, 20 N. W. 823.

53. Booske *v.* Gulf Ice Co., 24 Fla. 550, 5 So. 247.

made a promissory note to a body claiming or purporting to be a corporation cannot, in an action thereon, avoid the estoppel resulting from such admission of the existence of the corporation at the time, by an answer alleging that when he made the note he believed the payee was a corporation, but afterward discovered that it was not.[54]

d. Necessity of Colorable Organization. It must be constantly kept in mind that corporations cannot be created by mere private admissions and estoppels, but there must be at least a colorable organization.[55] Some of the cases merely state the fact, as shown by the evidence, of the *de facto* existence of the corporation under a colorable organization, to strengthen the rule which raises the estoppel,[56] without implying that even a *de facto* organization is necessary to the rule. Others distinctly imply that proof of a *de facto* organization is also necessary, such as evidence of the proceedings in professed compliance with a law authorizing the organization of the corporation and slight evidence of subsequent user.[57] "The distinction," says one court, "is between an entire absence of authority in the organic law itself, and a failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions. In the one case, there is a want of power to act; in the other, only an abuse of power conferred."[58] The rule has been said to be that one who contracts with a corporation which has a *de facto* existence, that is to say, the reputation of being a legal corporation, and which actually exercises, in the face of the state, the franchises attributable to such corporations, is estopped from denying its existence as such when sued upon the contract.[59]

e. Necessity of Law Under Which Corporation Might Exist. On a principle already explained, this estoppel cannot operate to create a corporation, even for the purpose of a private litigation, where there is no law under which such a corporation could have been organized or, what is the same thing, where the law under which it has been organized is unconstitutional and void — in other words no law at all.[60]

f. Whether Fact That It Is a Corporation Should Be Stated in Contract. Some courts have taken the view that in order to raise this estoppel by contracting with the assumed corporation, the fact of its incorporation must be stated in the contract.[61] But the contrary and more general statement of the rule is that

54. Ransom *v.* Priam Lodge, 51 Ind. 60.

55. Winget *v.* Quincy Bldg., etc., Assoc., 128 Ill. 67, 21 N. E. 12; Butchers', etc., Bank *v.* McDonald, 130 Mass. 264; White *v.* Ross, 4 Abb. Dec. (N. Y.) 589.

56. Providence F. & M. Ins. Co. *v.* Murphy, 8 R. I. 131; National Mut. F. Ins. Co. *v.* Yeomans, 8 R. I. 25, 86 Am. Dec. 610; Douglas County *v.* Bolles, 94 U. S. 104, 24 L. ed. 46.

57. Merriman *v.* Magiveny, 12 Heisk. (Tenn.) 494.

58. Sherwood *v.* Alvis, 83 Ala. 115, 118, 3 So. 307, 3 Am. St. Rep. 695, opinion by Stone, C. J.

59. Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120.

60. Snyder *v.* Studebaker, 19 Ind. 462, 81 Am. Dec. 415 [*overruling* upon this point Harriman *v.* Southam, 16 Ind. 190]; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Brown *v.* Killian, 11 Ind. 449; Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102 (holding that even a *de facto* corporation cannot be created by estoppel where there is no law under which a corporation with the powers which it has assumed might lawfully be created); Merchants', etc., Bank *v.* Stone, 38 Mich. 779 (dissenting opinion of Marston, J.).

In Texas, after the statute permitting the organization of mercantile corporations had been repealed, it was held that no rule of comity required the state to permit foreign corporations of that character to do business therein, and consequently that a domestic creditor who dealt with such a body as a corporation did not thereby become estopped from denying its corporate capacity, but might hold its members liable as partners. Empire Mills *v.* Alston Grocery Co., (Tex. App. 1891) 15 S. W. 505, 12 L. R. A. 366 [*affirming* 15 S. W. 200].

61. Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539; Holloway *v.* Memphis, etc., R. Co., 23 Tex. 465, 76 Am. Dec. 68.

Thus the mere fact of indorsing a bill of exchange does not, it has been held, admit that the bank which has drawn it is a corporation. Hargrave *v.* State Bank, 1 Ill. 122.

So the mere fact of mentioning a particular bank as the place of payment of a note

one who executes a written obligation to an obligee, by a name which imports that it is a corporation, is by that fact estopped in an action thereon to deny the corporate existence of the payee.[62]

g. Estoppel to Set up Fraudulent Organization. Creditors of a corporation who have dealt with it knowing that it was fraudulently constituted, and shareholders who have accepted the charter and assisted in putting it in operation, cannot show in a suit by or against a corporation that the charter was obtained by fraud.[63] And generally one who has entered into a contract with a corporation is estopped by his contract from setting up the fraudulent organization of the corporation in defense to a suit brought by it against him.[64]

h. Estoppel to Set up Organization For Illegal Purpose. The rule of estoppel under consideration extends so far as to prevent a party when sued by an assumed corporation from setting up the evidence that plaintiff was illegally organized and for an illegal purpose.[65]

i. Estoppel to Set up That Contract Sued on Was Ultra Vires. A person contracting with an ostensible corporation to do an act which is not prohibited by law becomes estopped in an action by the corporation to enforce the contract, either to deny the existence of the corporation, or its power to enter into such a contract.[66]

j. Cases to Which Rule of Estoppel Does Not Apply. This principle of estoppel does not cut off the right of a creditor, where those who have professedly organized a corporation have not filled up the joint stock or fund on the basis of which the law authorizes them to commence business; but where an innocent person extends credit to them on the faith of their having complied with the law and in ignorance of the fact that they have not, there is no sound principle that will estop him from proceeding against the members of the pretended corporation as joint undertakers or partners.[67] Nor does such an estoppel arise where the recognition of the existence of the corporation is fraudulently procured for the purpose of entrapping the party into an action upon which the recognition is based.[68] Estoppels *in pais* can only take place upon knowledge and a full under-

does not preclude the maker of the note from disputing the corporate existence of the bank. Hungerford Nat. Bank *v.* Van Nostrand, 106 Mass. 559.

That a traffic agreement between two street railway companies by which one is restrained from competing with the other does not estop the latter to question the corporate existence of the former — such question not arising out of the contract — see Wilmington City R. Co. *v.* Wilmington, etc., St. R. Co. (Del. 1900) 46 Atl. 12.

62. U. S. Express Co. *v.* Bedbury, 34 Ill. 459; Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101; Barbaro *v.* Occidental Grove No. 16, 4 Mo. App. 429. So held where a note was made payable to the order of "the Missouri City Savings Bank." Much less can it be reasoned that where the payee does, by the name by which it is described in the note, bring a suit thereon and recover a judgment, the judgment is void and not a lien upon real estate. Stoutimore *v.* Clark, 70 Mo. 471.

63. Bear-Camp-River-Co. *v.* Woodman, 2 Me. 404; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344; Smith *v.* Heidecker, 39 Mo. 157; Cochran *v.* Arnold, 58 Pa. St. 399.

64. *Indiana.*— Bartholomew County *v.* Bright, 18 Ind. 93; Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Meikel *v.* German Sav. Fund Soc., 16 Ind. 181; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Hubbard *v.* Chappel, 14 Ind. 601; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89; John *v.* Farmers', etc., Bank, 2 Blackf. 367, 20 Am. Dec. 119.

Iowa.— Washington College *v.* Duke, 14 Iowa 14.

Missouri.— Camp *v.* Byrne, 41 Mo. 525; Hamtramck *v.* Edwardsville Bank, 2 Mo. 169.

New Hampshire.—Troy Cong. Soc. *v.* Perry, 6 N. H. 164, 25 Am. Dec. 455.

New York.—All Saints Church *v.* Lovett, 1 Hall 191.

Pennsylvania.— Cochran *v.* Arnold, 58 Pa. St. 399.

65. Lincoln Bldg. Assoc. *v.* Graham, 7 Nebr. 173.

66. Searcy *v.* Yarnell, 47 Ark. 269, 1 S. W. 319; Oregonian R. Co. *v.* Oregon R., etc., Co., 23 Fed. 232, 10 Sawy. 464.

67. Guckert *v.* Hacke, 159 Pa. St. 303, 28 Atl. 249, 34 Wkly. Notes Cas. (Pa.) 41, holding that this is especially so where the name which they have assumed does not necessarily import that they are a corporation, such as the name Hughes & Gawthorp Co., and that the acceptance of a note from such a concern does not create an estoppel against a creditor from showing that it is not a corporation.

68. Doyle *v.* Mizner, 40 Mich. 160, 42 Mich. 332, 3 N. W. 968.

standing of the facts. Silence without knowledge will not work an estoppel, except where the circumstances are such that negligent ignorance is in law tantamount to actual knowledge.[69]

k. Operation of Rule as Against Shareholders and Members. Within the operation of this principle, one who has subscribed for shares in a corporation by its corporate name, is, when sued to enforce his subscription, estopped from setting up as a defense that plaintiff has no corporate existence.[70] As we shall see, estoppel also operates to prevent one who has participated in the organization of a corporation from denying the validity of its corporate existence, or his relation to it as a member or shareholder,[71] and this estoppel extends equally to its members in any proceeding instituted to charge them with liability in respect of their membership.[72] If beyond this it appears that the subscriber to the stock participated in the organization of the corporation, as by attending and voting at an election of directors,[73] by serving as a trustee himself, or otherwise repeatedly recognizing it as a corporation *de facto*,[74] he will be estopped from disputing the validity of its organization on grounds which we shall not turn aside to discuss now, but which will be more fully considered hereafter.[75]

2. When Corporation Estopped to Deny Its Own Existence. The rule of estoppel works both ways. A body which has held itself out as a corporation and which has incurred obligations in a corporate name and character is, when proceeded against by the obligee, estopped to deny the regularity of its organization[76] or otherwise to deny the validity of its corporate existence,[77] or to set up against

69. Frederick *v.* Missouri River, etc., R. Co., 82 Mo. 402; Spurlock *v.* Sproule, 72 Mo. 503; Evans *v.* Snyder, 64 Mo. 516. See for an illustration of this Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

Total denial of principle.— The principle that a party can be estopped by his conduct from showing that a pretended corporation is not such *de jure* was denied *in toto* in Boyce *v.* Methodist Episcopal Church, 46 Md. 359.

70. *Illinois.*— The Joliet *v.* Frances, 85 Ill. App. 243.

Indiana.— Ft. Wayne, etc., Turnpike Co. *v.* Deam, 10 Ind. 563; Ensey *v.* Cleveland, etc., R. Co., 10 Ind. 178; Stoops *v.* Greensburgh, etc., Plank Road Co., 10 Ind. 47.

Massachusetts.— Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Missouri.— Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 86 Am. Dec. 128.

New York.— Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459.

71. Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295.

72. Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295. See also *infra*, VI, P, 6, a, (I), (D).

73. Henderson, etc., R. Co. *v.* Leavell, 16 B. Mon. (Ky.) 358.

74. Hunt *v.* Kansas, etc., Bridge Co., 11 Kan. 412; Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294.

75. See *infra*, VI, P, 6, e.

76. Southern Bank *v.* Williams, 25 Ga. 534; Dooley *v.* Cheshire Glass Co., 15 Gray (Mass.) 494.

77. *Alabama.*— McCullough *v.* Talladega Ins. Co., 46 Ala. 376.

Delaware.— Brady *v.* Delaware Mut. L. Ins. Co., 2 Pennew. 237, 45 Atl. 345.

Illinois.— U. S. Express Co. *v.* Bedhury, 34 Ill. 459.

Indiana.— Adams Express Co. *v.* Hill, 43 Ind. 157; Ewing *v.* Robeson, 15 Ind. 26.

Michigan.— Ten Eyck *v.* Pontiac, etc., R. Co., 74 Mich. 226, 41 N. W. 905, 16 Am. St. Rep. 633, 3 L. R. A. 378.

Minnesota.—Scheufler *v.* Grand Lodge A. O. U. W., 45 Minn. 256, 47 N. W. 799; Jewell *v.* Grand Lodge A. O. U. W., 41 Minn. 405, 43 N. W. 88.

Missouri.— Knapp, etc., Co. *v.* Joy, 9 Mo. App. 575.

New York.— Abbott *v.* Aspinwall, 26 Barb. 202; De Witt *v.* Hastings, 40 N. Y. Super. Ct. 463.

North Carolina.— Rush *v.* Halcyon Steamboat Co., 84 N. C. 702.

Ohio.— Callender *v.* Painesville, etc., R. Co., 11 Ohio St. 516.

Utah.— Liter *v.* Ozokerite Min. Co., 7 Utah 487, 27 Pac. 690.

Vermont.— Stone *v.* East Berkshire Cong. Soc., 14 Vt. 86.

See 12 Cent. Dig. tit. "Corporations," § 94.

That the execution of an obligation in a corporate name is such an admission of incorporation as dispenses with the necessity of proving the fact on the part of the obligee see Real Estate Sav. Inst. *v.* Fisher, 9 Mo. App. 593.

Untenable view that the fact that a body has held itself out as a corporation and treated with plaintiff as such does not estop it, as against him, from denying its liability as a corporation, where there is a statute which expressly prescribes certain acts to be done in order to constitute a corporation, and those acts had not been done see Boyce *v.* Methodist Episcopal Church, 46 Md. 359.

itself some fact which might warrant a judicial decree forfeiting its charter.[78] So a corporation may be, for the purposes of a particular action in which it is impleaded, estopped from denying the corporate name and character in which it is sued, by appearing and pleading to the merits in any form [79] or by executing in that name an appeal-bond.[80]

3. EXCEPTION WHERE CORPORATION HAS EXPIRED BY LAPSE OF TIME. There is much judicial authority for the proposition that where a corporation is brought to an end by lapse of time, that is, by the expiration of the distinct limitation of its life in its charter, any further exercise of its corporate powers may be questioned collaterally.[81] The governing principle here is that upon the expiration of the term limited by the charter for the existence of the corporation its dissolution is complete. "The dissolution in such a case," it has been said, "is declared by the act of the Legislature itself. The limited time of existence has expired and no judicial determination of that fact is requisite. The corporation is *de facto* dead." [82] In line with this view it is held that the estoppel already spoken of does not extend so far as to preclude a party from showing that since the contract with the corporation was entered into it has ceased to exist.[83] As hereafter more fully shown,[84] when a corporation expires by limitation of time or is judicially dissolved it can no longer prosecute or defend an action, in the absence of some saving provision in its governing statute. An action can no more be prosecuted against a dead corporation than against a dead man.[85] In such a case the opposing party suggests the death of the corporation, and upon the fact being admitted or proved the suit abates,[86] just as an action for an injury to the person abates on suggestion of the death of defendant, unless there is a saving statute allowing it to be revived against his legal representative.[87] The estoppel already spoken of relates therefore only to the time of entering into the contract with the corporation, and does not involve an admission at the date of the action that there cannot be or has not been a dissolution of it.[88] Carrying this view still further, it has been held that if the corporate existence has been terminated by an act of forfeiture or otherwise before the commencement of the suit, the facts producing this result may be specially set forth by plea,[89] in order that the court may judge whether

78. Hughes *v.* Somerset Bank, 5 Litt. (Ky.) 45. See also Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315.

79. See *infra*, XXII, D, 2, e.

80. East Tennessee, etc., R. Co. *v.* Evans, 6 Heisk. (Tenn.) 607.

81. Wilson *v.* Tesson, 12 Ind. 285 (per Perkins, J.); Morgan *v.* Lawrenceburg Ins. Co., 3 Ind. 285 (per Blackford, J.); Grand Rapids Bridge Co. *v.* Prange, 35 Mich. 400, 24 Am. Rep. 585; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351 (per Southerland, J.); Dobson *v.* Simonton, 86 N. C. 492.

82. Sturges *v.* Vanderbilt, 73 N. Y. 384, 390, per Rapallo, J. See also U. S. Bank *v.* McLaughlin, 2 Fed. Cas. No. 928, 2 Cranch C. C. 20.

83. Ft. Wayne, etc., Turnpike Co. *v.* Deam, 10 Ind. 563; Ensey *v.* Cleveland, etc., R. Co., 10 Ind. 178.

84. See *infra*, VIII, P, 3, a *et seq.*

85. Pomeroy *v.* Indiana Bank, 1 Wall. (U. S.) 23, 17 L. ed. 500; Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945 (opinion by Story, J.).

86. Terry *v.* Bank of Americus, 77 Ga. 528, 7 S. E. 154.

87. See Galliopolis Bank *v.* Trimble, 6 B. Mon. (Ky.) 599. See also ABATEMENT AND REVIVAL, 1 Cyc. 47.

88. Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429.

89. Jones *v.* Tennessee Bank, 8 B. Mon. (Ky.) 122, 46 Am. Dec. 540.

Applying this doctrine, we find a ruling to the effect that a shareholder who, after the expiration of the charter of a corporation, has sold land belonging to it, as if recognizing its continued existence, is not thereby estopped to set up such expiration in defense of an action for the proceeds, brought in the name of the corporation. Krutz *v.* Paola Town Co., 20 Kan. 397.

On the other hand it has been ruled in Missouri that the question whether the charter of a corporation has expired by limitation of time can be adjudicated only in a direct proceeding by the state, that such a defense cannot be set up collaterally in an action by the corporation. St. Louis Gas Light Co. *v.* St. Louis, 84 Mo. 202 [*affirming* 11 Mo. App. 55]. And in West Virginia a private business corporation, duly organized under the laws of that state, which failed to wind up its business when its charter expired, but continued in its charter name to carry on its corporate business, might be sued in its corporate name for a tort committed by it after its charter had expired. Miller *v.* Newburg Orrel Coal Co., 31 W. Va.

they have this effect. But this question of pleading is reserved for future consideration.[90]

O. Irregular and De Facto Corporations — 1. Presumption of Rightfulness of Corporate Existence From Fact of Exercising Corporate Powers — a. Statement of Doctrine. Where the question arises merely between the body which assumes to be and to act as a corporation and a third person; in other words, when it arises collaterally, and not when it arises between the state and the assumed corporation or the persons composing it, the rightfulness of the existence of the corporation is supported by the general presumption of right-acting, under the operation of which, where persons come publicly as officers of a corporation possessing given powers, they are presumed to be rightfully in office, and it is assumed that all steps necessary to enable the corporation to act as an artificial body and to exercise such powers have been taken.[91] The sovereign alone has the right to complain; for, if it is an usurpation it is upon his rights alone, and not upon the rights of particular individuals; and his acquiescence is consequently evidence that all necessary conditions precedent to the lawful exercise of those rights have been performed.[92] Under this rule, as has been seen,[93] the existence of a charter will be presumed from the long existence of the body acting in the character of a corporation, and from the long continued user of privileges which apply exclusively to corporations, acquiesced in by the state.[94] Even the state may be precluded by lapse of time from questioning the validity of the organization of a corporation.[95] The rule acquires greater force where private rights have been acquired on the good faith of the body being rightfully a corporation, which rights would be disturbed by declaring it to be otherwise.[96] It is in conformity with, and for the purpose of satisfying, the principle that a corporation may exist by prescription, although those in the exercise of the corporate powers cannot produce a charter, but, assuming that they have been long in the exclusive, continued, and unchanged possession of those powers, the rightfulness of their exercise of them is supported by the presumption of a grant.[97] In such a case the law presumes that all merely formal requisites to the due creation of the body as a corporation have been complied with.[98]

836, 8 S. E. 600, 13 Am. St. Rep. 903. If the fact that the expiration of the charter is not suggested by the opposing party, the suggestion may be made by the attorney who has represented the corporation in the litigation. Foster *v.* Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Greeley *v.* Smith, 10 Fed. Cas. No. 5,748, 3 Story 657. There is authority to the effect that the fact that the corporation has ceased to exist prior to the commencement of the suit may be pleaded in abatement, although not in bar. Meikel *v.* German Sav. Fund Soc., 16 Ind. 181; Dental Vulcanite Co. *v.* Wetherbee, 7 Fed. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87.

90. See *infra*, XXII, D, 2, e.

91. Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

92. Atlantic, etc., R. Co. *v.* Johnston, 70 N. C. 348; Wilmington, etc., R. Co. *v.* Saunders, 48 N. C. 126; Elizabeth City Academy *v.* Lindsey, 28 N. C. 476, 45 Am. Dec. 500; Tar River Nav. Co. *v.* Neal, 10 N. C. 520.

93. See *supra*, I, M, 4.

94. Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58.

95. State *v.* Bailey, 19 Ind. 452 (judgment of ouster refused against a railroad company on account of defective organization after a lapse of eight or nine years); West Manayunk Gas Light Co. *v.* New Gas Light Co., 21 Pa. Co. Ct. 369 (charter not declared void in a collateral proceeding after a lapse of twenty years because of defects and irregularities in the application for the charter, to which no objection was made at the time).

The rule was applied where the trustees of a church corporation had acted in their assumed corporate name and character for nearly twenty-five years. White *v.* State, 69 Ind. 273.

96. Hager's-Town Turnpike Co. *v.* Creeger, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495. *Compare* Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58.

97. Blackston *v.* Martin, Latch. 112.

98. All Saints Church *v.* Lovett, 1 Hall (N. Y.) 191.

Manner of pleading the prescriptive right to be a corporation at common law see Rex *v.* Beardwell, 2 Keb. 52.

Due incorporation presumed.— Where it was proved that, although no record of the organization of a school-district could be produced, yet that the trustees of the district and their predecessors, by the same name and title, had exercised their corporate functions during forty years without objection, the due

b. Illustration of Doctrine. The usual presumption in favor of right-acting, which attends official action, operates with the same force where the validity of the organization of the corporation is questioned collaterally so as to lead to the conclusion that the corporation was legally organized, where there is no allegation to the contrary, and where it affirmatively appears that two of the three persons named in the certificate of incorporation as trustees for the first year were shareholders, and it does not appear that the third was not.[99] But it has been held that the mere fact that a company has a president, secretary, or treasurer does not raise a presumption of its incorporation, because voluntary associations may, and constantly do, act through the agency of such officers.[1] Proof by any appropriate mode that the corporation has commenced business, coupled with the production of a duly authenticated copy of its charter, is sufficient, *prima facie* at least, to show that the conditions on which the charter was to become operative have been performed.[2]

2. Distinction Between Corporation De Jure and Corporation De Facto — a. General Statement of Doctrine. A corporation *de jure* is said to be one whose right to exercise a corporate function would prove invulnerable if assailed by the state in a quo warranto proceeding.[3] An intended corporation cannot become such *de jure* where an essential step required by statute to be taken as a prerequisite to incorporation is omitted entirely, as a failure to file articles of incorporation,[4] or filing them in the wrong county.[5] The definition given by Selden, J., of a corporation *de facto* was this: "1. The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and 2. A user by the party to the suit, of the rights claimed to be conferred by such charter or law."[6] It is perceived that under this statement of doctrine if a collection of men assume merely to use corporate powers, which they might have acquired by complying with the law, that is, assume merely to call themselves a corporation and to act as such, this makes them such as to all persons save the state. It has been pointed out that this statement is defective in that it leaves out of view any attempt to organize a corporation under a charter or an enabling statute.[7] We must, then, reform the above definition so as to make it

incorporation and organization of the district were presumed. Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319.

The effect of prescriptive proof of the existence of a corporation of a particular kind is to establish the conclusion that the body possesses all the powers usually given by law to such corporations. Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319. But in general, in order to give rise to this presumption, the acts appealed to must be such as only a corporation could rightfully perform. Kirkpatrick *v.* Keota United Presb. Church, 63 Iowa 372, 19 N. W. 272. See for example Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58, Quaker community.

No presumption of incorporation arises from the fact that the business was transacted by a body having a president and secretary. Clark *v.* Jones, 87 Ala. 474, 6 So. 362.

An unincorporated bank exclusively owned by one person is not a corporation de facto, although the business was conducted by a president and cashier. Longfellow *v.* Barnard, 59 Nebr. 455, 81 N. W. 307 [*affirming* 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117].

99. Welch *v.* Importers', etc., Nat. Bank, 122 N. Y. 177, 25 N. E. 269, 33 N. Y. St. 452.

1. Cunyus *v.* Guenther, 96 Ala. 564, 11 So. 649; Clark *v.* Jones, 87 Ala. 474, 6 So. 362.

2. Lucas *v.* Georgia Bank, 2 Stew. (Ala.) 147; Judah *v.* American Live Stock Ins. Co., 4 Ind. 333; Dunning *v.* New Albany, etc., R. Co., 2 Ind. 437; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; All Saints Church *v.* Lovett, 1 Hall (N. Y.) 191.

3. Capps *v.* Hastings Prospecting Co., 40 Nebr. 470, 58 N. W. 956, 42 Am. St. Rep. 677, 24 L. R. A. 259.

4. Capps *v.* Hastings Prospecting Co., 40 Nebr. 470, 58 N. W. 956, 42 Am. St. Rep. 677, 24 L. R. A. 259.

5. Martin *v.* Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151.

6. Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482, 485 [*criticized* in Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778]. *Compare* East Norway Lake Church *v.* Froslie, 37 Minn. 447, 35 N. W. 260 (where the New York definition is seemingly adopted); Gibbs' Estate, 157 Pa. St. 59, 27 Atl. 383, 33 Wkly. Notes Cas. (Pa.) 120, 22 L. R. A. 276.

7. Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

It has been held that if there has been no

say that a corporation *de facto* exists when there is: (1) A charter or statute under which a corporation with the powers assumed might have been organized.[8] (2) A *bona fide* attempt to organize a corporation under such a charter or statute. (3) An actual user of the corporate powers or some of them which might have been rightfully used by such an organization.[9] Such being the proper conception of a corporation *de facto* it follows that a substantial compliance with the law in effecting a corporate organization is not necessary to constitute the body and corporation *de facto*, because that makes it a corporation *de jure*.[10]

b. Expressions and Explanations of Doctrine. It is frequently said that in controversies between citizens generally and a corporation, the existence of the latter, when put in issue, is established by showing a corporation *de facto*.[11] By this it is not to be understood that evidence of user alone will be conclusive of the question of corporate existence. Otherwise, as just suggested, corporations might spring into existence without any warrant of law. "The least proof which has been held sufficient," said Savage, C. J., "is the production of an exemplification of the act incorporating the plaintiffs, and evidence of user, under their charter."[12] It has been said by an eminent writer, in explanation of this principle, that if it appear to be acting under color of law, and is recognized by the state as such, such a question should be raised by the state itself, by quo warranto or other direct proceeding. And the rule would not be different if the constitution itself prescribed the manner of incorporation. Even in such a case proof that the corporation was acting as such under legislative sanction would be sufficient evidence of right, except as against the state; and private parties could not enter upon any question of irregularity.[13] This doctrine has met with frequent judicial approval.[14] Subject to the above principles the rule under consideration validates

attempt to organize, under some law before the parties assume to act as a corporation, the concern is not even a *de facto* corporation, but a sham and fraud, and all connected with it will be held liable as copartners, and not as members of a corporation. Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. (N. Y.) 172, 23 N. Y. Suppl. 675, 53 N. Y. St. 214 [*reversing* 1 Misc. (N. Y.) 512, 21 N. Y. Suppl. 472, 49 N. Y. St. 924]. On the contrary, the doctrine that mere user of corporate powers makes the usurping body a corporation *de facto* was thus expressed by Mr. U. S. Circuit Judge Taft: "When persons assume to act as a body, and are permitted by acquiescence of the public and the state to act, as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by general law, such body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so." Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642, 650. This inaccurate definition was not called for, because the parties making the objection were estopped from making it, by reason of having dealt with the corporation as such. See 1 Thompson Corp. § 518; 6 Thompson Corp. §§ 7647, 7658.

8. That there can be no de facto corporations in the absence of a statute authorizing the organization of a *de jure* corporation see Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; Hanstein *v.* Johnson, 112 N. C. 253, 17 S. E. 155; Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841. *Compare* Bain *v.* Clinton Loan Assoc., 112 N. C. 248, 17 S. E. 154. That no corporation *de facto* can be effected by an attempted consolidation where there is no law permitting a consolidation see American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153. For the same doctrine applied to a public office see Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178.

9. This definition, in the author's language, is in substance the definition given in Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778; and in Gibbs' Estate, 157 Pa. St. 59, 27 Atl. 383, 33 Wkly. Notes Cas. (Pa.) 120, 22 L. R. A. 276.

10. Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

11. McAuley *v.* Columbia, etc., R. Co., 83 Ill. 348; Reisner *v.* Strong, 24 Kan. 410; Wilcox *v.* Toledo, etc., R. Co., 43 Mich. 584, 5 N. W. 1003; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

12. U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314, 315. See also Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315.

13. Cooley Const. Lim. 254.

14. Board of Com'rs, etc. *v.* Shields, 62 Mo. 247.

The rule applies to religious societies as

irregularities in the organization of corporations except when questioned by the state in a proceeding in the nature of a quo warranto.[15]

c. **Exceptions to, and Qualifications of, Doctrine.** Further possible exceptions exist in cases where the particular thing which the associates have failed to do is made by the governing statute a condition precedent to the coming into existence of the corporation;[16] or where a pretending corporate body are suing to secure rights which can inhere in them only provided they are a corporation, as in a case where such a body attempts to enforce the right to take tolls,[17] or to assess the owners of land for work undertaken by an assumed gravel-road company;[18] or in case of a railroad company which occupied the streets of a town with its tracks;[19] or to condemn land for private uses.[20] Always keeping in mind the principle that the corporation was one which might lawfully exist if it had been regularly organized,[21] it makes a *bona fide* attempt to organize and a compliance with the governing statute all that is necessary to establish the rightful existence of a corporation as between the corporation and all persons other than the state under whose laws it assumes to be incorporated.[22]

well as to others. Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429.

Rule under civil code of California.— The rule is substantially the same under the civil code of California which declares that "the due incorporation of a company claiming in good faith to be a corporation" and doing business as such, shall not be inquired into collaterally, in any private suit to which such *de facto* corporation may be a party. See Pacific Bank *v.* De Ro, 37 Cal. 538.

15. *Illinois.*— Baker *v.* Backus, 32 Ill. 79; Tarbell *v.* Page, 24 Ill. 46.

Maryland.— Lord *v.* Essex Bldg. Assoc. No. 4, 37 Md. 320.

Minnesota.— East Norway Lake Church *v.* Froislie, 37 Minn. 447, 35 N. W. 260.

New Hampshire.— Ossipee Mfg. Co. *v.* Canney, 54 N. H. 295.

New York.— Childs *v.* Smith, 46 N. Y. 34.

16. Boyce *v.* Methodist Episcopal Church, 46 Md. 359; Lord *v.* Essex Bldg. Assoc. No. 4, 37 Md. 320.

17. Grand Rapids Bridge Co. *v.* Prange, 35 Mich. 400, 24 Am. Rep. 585.

18. Piper *v.* Rhodes, 30 Ind. 309.

19. New York Cable Co. *v.* New York, 104 N. Y. 1, 10 N. E. 332.

20. Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

21. *Alabama.*— Bibb *v.* Hall, 101 Ala. 79, 14 So. 98; Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120.

California.— Rondell *v.* Fay, 32 Cal. 354.

Illinois.— Cincinnati, etc., R. Co. *v.* Danville, etc., R. Co., 75 Ill. 113; Thompson *v.* Candor, 60 Ill. 244; Baker *v.* Backus, 32 Ill. 79; Tarbell *v.* Page, 24 Ill. 46; The Joliet *v.* Frances, 85 Ill. App. 243 (final certificate not recorded, but associates do business as a corporation for more than five years); Edwards *v.* Cleveland Dryer Co., 83 Ill. App. 643 (honest attempt to organize; had transacted business for years — not liable as partners).

Indiana.— Doty *v.* Patterson, 155 Ind. 60, 56 N. E. 668; Williams *v.* Citizens' R. Co., 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64; Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365; Williamson *v.* Kokomo Bldg., etc., Assoc., 89 Ind. 389 (and cases cited); Baker *v.* Neff, 73 Ind. 68.

Michigan.— Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

Minnesota.— Johnson *v.* Okerstrom, 70 Minn. 303, 73 N. W. 147; Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

New York.— Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; De Witt *v.* Hastings, 40 N. Y. Super. Ct. 463 (irregularity of filing certificate of incorporation).

Tennessee.— Tennessee Automatic Lighting Co. *v.* Massey, (Ch. App. 1899) 56 S. W. 35.

Utah.— Marsh *v.* Mathias, 19 Utah 350, 56 Pac. 1074.

Wisconsin.— Franke *v.* Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856 (articles of incorporation not properly acknowledged, corporation nevertheless capable of suing to prevent certain members from perverting the use of its property); Slocum *v.* Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324 (although original articles of incorporation recorded in lieu of a verified copy thereof as required by the governing statute). *Compare* Bergeron *v.* Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85.

It validates for instance such irregularities as failure to file a duplicate of the certificate of incorporation in the county where the operations of the company are to be carried on. Humphreys *v.* Mooney, 5 Colo. 282.

It cures the mistake of failing to adopt articles of incorporation until after all the shares have been subscribed and the business of the corporation begun. Heald *v.* Owen, 79 Iowa 23, 44 N. W. 210.

22. Spring Valley Water Works *v.* San Francisco, 22 Cal. 434; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Marsh *v.* Astoria Lodge No. 112, I. O. O. F., 27 Ill. 421; Baker *v.* Neff, 73 Ind. 68; Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482.

d. Necessity of Law Under Which Corporation Might Rightfully Exist. As stated in the next preceding paragraph, the rule of law which militates against *de facto* corporations when their existence is assailed collaterally extends only to those cases where there is a law under which the corporation might exist. If there is no law under which it might exist, its non-existence may be set up even in a collateral proceeding,[23] and the rule is the same where there is only an

Whether failure to perform conditions precedent can be shown collaterally.— There is some early and discredited authority to the effect that, where under the charter or governing statute the body does not acquire corporate powers until certain acts have been performed which the statute makes conditions precedent to the coming into existence of the corporation, the failure to perform those acts may be shown even in a collateral proceeding. Lucas *v.* Georgia Bank, 2 Stew. (Ala.) 147; Mokelumne Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Southhold *v.* Horton, 6 Hill (N. Y.) 501; U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314; New York Fire Dept. *v.* Kip, 10 Wend. (N. Y.) 266; Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296; Utica Ins. Co. *v.* Tilman, 1 Wend. (N. Y.) 555; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194; Auburn Bank *v.* Aikin, 18 Johns. (N. Y.) 137; Guckert *v.* Hacke, 159 Pa. St. 303, 28 Atl. 249, 34 Wkly. Notes Cas. (Pa.) 41 [*citing* Smith *v.* Warden, 86 Mo. 382; Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416; Childs *v.* Smith, 55 Barb. (N. Y.) 45], in which last case it is said to have been uniformly held in Pennsylvania that the requirements as to filing charters are imperative, and where Sterrett, J., in giving the opinion of the court, undertook to epitomize the law of that state upon the subject. So in West Virginia, if the statutory provision requiring the preliminary agreement for the formation of a corporation to be acknowledged before the certificate of incorporation is issued be not satisfied, the body does not acquire a corporate existence and subscriptions are not binding. W. Va. Code, c. 54, § 6; Greenbrier Industrial Exposition *v.* Rodes, 37 W. Va. 738, 17 S. E. 305. Moreover a fundamental variance between the certificate of incorporation and such preliminary agreement relieves from their contract those who have subscribed for their shares on the faith of the preliminary agreement. Greenbrier Industrial Exposition *v.* Rodes, 37 W. Va. 738, 17 S. E. 305 On the same principle a failure to record the certificate of incorporation "in the office for the recording of deeds, in and for the county where the chief operations are to be carried on," in compliance with the statute of Pennsylvania, will render the incorporators liable to persons who deal with the body without knowledge of the attempted incorporation. Guckert *v.* Hacke, 159 Pa. St. 303, 306, 28 Atl. 249, 34 Wkly. Notes Cas. (Pa.) 41. Long-continued user, however, has great weight in support of the presumption that such conditions precedent have been performed. Dunning *v.* New Albany, etc., R. Co., 2 Ind. 437; All Saints Church *v.* Lovett, 1 Hall (N. Y.) 191. In pursuing this inquiry the courts usually hold that it is unnecessary to prove that the body have complied with those statutory requisitions, which are not in terms, or by necessary or reasonable implication, made conditions precedent to their existence or capacity to do particular acts. Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. (Mass.) 282; Eaton *v.* Aspinwall, 19 N. Y. 119; Manchester Bank *v.* Allen, 11 Vt. 302; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552. The decided cases afford no statutory test of what are to be deemed conditions precedent within this rule — if it be a rule; but above all is the paramount rule that the validity of the organization of a corporation cannot be contested except as between the corporation and the state where there has been a *bona fide* attempt to organize under a statute authorizing the creation of the corporation. Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; McFarlan *v.* Triton Ins. Co., 4 Den. (N. Y.) 392. See also Rose Hill, etc., R. Co. *v.* People, 115 Ill. 133, 3 N. E. 725, provision requiring the filing of a copy of the by-laws, a list of the shareholders, and the amount of stock subscribed, directory merely.

For illustrations of de facto corporations see also the following cases:

Colorado.—Duggan *v.* Colorado Mortg., etc., Co., 11 Colo. 113, 17 Pac. 105, private litigant not permitted to show that the articles of incorporation had not been duly acknowledged.

Illinois.— Baker *v.* Backus, 32 Ill. 79, omission to file certificate of incorporation in the office of the secretary of state.

Maine.—Bear-Camp-River-Co. *v.* Woodman, 2 Me. 404, private litigant could not show that the corporation had not done an act, the failure to do which within one year rendered its incorporation void according to its charter.

Missouri.— Catholic Church *v.* Tobbein, 82 Mo. 418 (corporation suing to establish a will containing a bequest to it); Franklin Ave. German Sav. Inst. *v.* Board of Education, 75 Mo. 408.

New York.— Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75 (defect in the statutory affidavit required to be annexed to the articles of association); Eaton *v.* Aspinwall, 19 N. Y. 119.

23. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Krutz *v.* Paola Town Co., 20 Kan. 397; Eaton *v.* Walker, 76 Mich. 579, 43 N. E. 638, 6 L. R. A. 102.

unconstitutional law.[24] "To be a corporation *de facto*, it must be possible to be a corporation *de jure*, and acts done in the former case must be legally authorized to be done in the latter, or they are not protected or sanctioned by the law. Such acts must have an apparent right."[25] It is an easy step from this view to the general rule that to establish the existence of a *de facto* corporation a charter or law authorizing the existence of the corporation must be shown, and user under such authority.[26]

P. Collateral Attack Upon Rightfulness of Corporate Existence — 1. Doctrine That Validity of Existence Cannot Be Litigated Collaterally. This brings us to a doctrine, founded in public policy and convenience and supported by an almost unanimous consensus of judicial opinion, which is that the rightfulness of the existence of a body claiming to act, and in fact acting, in the face of the state, as a corporation, cannot be litigated in actions between private individuals or between private individuals and the assumed corporation, but that the rightfulness of the existence of the corporation can be questioned only by the state; in other words that the question of the rightful existence of the corporation cannot be raised in a collateral proceeding.[27] 10-1087-16-1276

24. Snyder *v.* Studebaker, 19 Ind. 462, 81 Am. Dec. 415 [*overruling* on this point Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395]; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Harriman *v.* Southam, 16 Ind. 190; Brown *v.* Killian, 11 Ind. 449; Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; State *v.* How, 1 Mich. 512; Hurlbut *v.* Britain, 2 Dougl. (Mich.) 191; Green *v.* Graves, 1 Dougl. (Mich.) 351.

25. Evenson *v.* Ellingson, 67 Wis. 634, 646, 31 N. W. 342, opinion by Orton, J.

The mere acting as a corporation for any length of time is not sufficient to establish the existence of a corporation *de facto*. A charter or law which of itself creates, upon its acceptance, a corporation is necessary; or if the law provides that a corporation may be formed upon a subsequent compliance with prescribed regulations and forms some of those regulations and forms must have been observed, although others have been omitted. De Witt *v.* Hastings, 40 N. Y. Super. Ct. 463.

26. Miami Powder Co. *v.* Hotchkiss, 17 Ill. App. 622; Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416. See also Mahoney *v.* State Bank, 4 Ark. 620, where it was held that *nul tiel corporation* may be pleaded in an action by a corporation where the incorporating act does not unconditionally create the corporation.

This principle was applied to the early banking corporations of Michigan, organized under a statute subsequently declared to be unconstitutional, with the conclusion that they were not corporations *de facto* in such a sense as to enable their receivers to maintain an action to collect debts due them (Green *v.* Graves, 1 Dougl. (Mich.) 351), as to enable them to foreclose mortgages given to secure such debts (Hurlbut *v.* Britain, 2 Dougl. (Mich.) 191) or to render their shareholders liable as partners to their creditors (State *v.* How, 1 Mich. 512), although it was held that if these corporations had not been organized for an unlawful purpose the receivers of their assets might demand in equity an accounting for the debts purporting to be secured by mortgages made to them (Burton *v.* Schildbach, 45 Mich. 504, 8 N. W. 497 [*citing* Medill *v.* Collier, 16 Ohio St. 599]). These early Michigan decisions exhibit an amazing amount of judicial stupidity. The mischief done by recognizing banking corporations under an unconstitutional law should have been minimized by judicial administration so as to allow the receivers appointed to wind up the unlawful concerns to foreclose mortgages made to them, and otherwise to gather in their assets for the benefit of their creditors; and on principles hereafter considered (see *infra*, VIII, C), their shareholders should be held liable as partners for the benefit of their creditors. See the observations of Cooley, J., in Burton *v.* Schildbach, 45 Mich. 504, 8 N. W. 497; and the following cases:

Connecticut.— Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Allen, 28 Conn. 97.

Illinois.—Parmelee *v.* Lawrence, 48 Ill. 331.

Minnesota.— Thompson *v.* Morgan, 6 Minn. 292.

Ohio.— Lewis *v.* McElvain, 16 Ohio 347.

Virginia.— Danville *v.* Pace, 25 Gratt. 1, 18 Am. Rep. 663.

A simple rule, and one that should apply to all cases, is that where the obligations of a pretended corporation are neither inequitable nor immoral the judicial courts should enforce them against the corporators as partners. Hill *v.* Beach, 12 N. J. Eq. 31.

27. *Alabama.*— Snider's Sons' Co. *v.* Troy, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515; Georgia Importing, etc., Co. *v.* Locke, 50 Ala. 332; Hudgins *v.* State, 46 Ala. 208; Harris *v.* Nesbit, 24 Ala. 398; Duke *v.* Cahawba Nav. Co., 16 Ala. 372; Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Arkansas.— Searcy *v.* Yarnell, 47 Ark. 269, 1 S. W. 319; West *v.* Carolina L. Ins. Co., 31 Ark. 476; Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204.

California.— People *v.* Linda Vista Irr.

2. Circumstances Under Which Principle Has Been Applied. This rule has been applied so as to prevent the rightfulness of the exercise of a corporate franchise from being questioned in an action to enforce a penalty imposed by

Dist., 128 Cal. 477, 61 Pac. 86 (irrigation company is a quasi-public corporation, the validity of whose organization cannot be collaterally attacked); Los Angeles Holiness Bank *v.* Spires, 126 Cal. 541, 58 Pac. 1049; People *v.* Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172; San José First Baptist Church *v.* Branham, 90 Cal. 22, 27 Pac. 60; Golden Gate Mill, etc., Co. *v.* Joshua Hendy Mach. Works, 82 Cal. 184, 23 Pac. 45; People *v.* La Rue, 67 Cal. 526, 8 Pac. 84; Bakersfield Town Hall Assoc. *v.* Chester, 55 Cal. 98; Stockton, etc., Road Co. *v.* Stockton, etc., R. Co., 45 Cal. 680; Rondell *v.* Fay, 32 Cal. 354; Spring Valley Water Works *v.* San Francisco, 22 Cal. 434; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

Colorado.— Grand River Bridge Co. *v.* Rollins, 13 Colo. 4, 21 Pac. 896; Duggan *v.* Colorado Mortg., etc., Co., 11 Colo. 113, 17 Pac. 105; Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531.

Connecticut.— Pearce *v.* Olney, 20 Conn. 544; Kellogg *v.* Union Co., 12 Conn. 7; Spencer *v.* Champion, 9 Conn. 536.

Georgia.— Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106; Wood *v.* Coosa, etc., R. Co., 32 Ga. 273; Union Branch R. Co. *v.* East Tennessee, etc., R. Co., 14 Ga. 327; Young *v.* Harrison, 6 Ga. 130.

Idaho.— Boise City Canal Co. *v.* Pinkham, 1 Ida. 790.

Illinois.— Dubs *v.* Egli, 167 Ill. 514, 14 N. E. 766; Smith *v.* Mayfield, 163 Ill. 447, 45 N. E. 157; Baker *v.* Backus, 32 Ill. 79; Williams *v.* State Bank, 6 Ill. 667; The Joliet *v.* Frances, 85 Ill. App. 243; Singer, etc., Stone Co. *v.* Hutchison, 72 Ill. App. 366.

Indiana.—Brookville, etc., Turnpike Co. *v.* McCarty, 8 Ind. 392, 65 Am. Dec. 768; John *v.* Farmers', etc., Bank, 2 Blackf. 367, 20 Am. Dec. 119.

Kansas.— Walton *v.* Oliver, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355; Matter of Short, 47 Kan. 250, 27 Pac. 1005; Chicago, etc., R. Co. *v.* Stafford County, 36 Kan. 121, 12 Pac. 593.

Kentucky.— Walton *v.* Riley, 85 Ky. 413, 3 S. W. 605, 9 Ky. L. Rep. 29; Galliopolis Bank *v.* Trimble, 6 B. Mon. 599.

Louisiana.— State *v.* Fagan, 22 La. Ann. 545; Atchafalaya Bank *v.* Dawson, 13 La. 497.

Maine.— Taylor *v.* Portsmouth, etc., St. R. Co., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216, that a private person cannot claim charter void for constitutional reasons. *Compare* Day *v.* Stetson, 8 Me. 365.

Maryland.— Keene *v.* Van Reuth, 48 Md. 184; Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Planters' Bank *v.* Alexandria Bank, 10 Gill & J. 346; State University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1; Hamilton *v.* Annapolis, etc., R. Co., 1 Md. Ch. 107.

Massachusetts.— Chase's Patent Elevator Co. *v.* Boston Tow-Boat Co., 155 Mass. 211, 29 N. E. 470, 9 L. R. A. 339; Boston Glass Manufactory *v.* Langdon, 24 Pick. 49, 35 Am. Dec. 292; Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128; Com. *v.* Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50.

Michigan.— Wyandotte Electric Light Co. *v.* Wyandotte, 124 Mich. 43, 82 N. W. 821; Toledo, etc., R. Co. *v.* Johnson, 49 Mich. 148, 13 N. W. 492; Montgomery *v.* Merrill, 18 Mich. 338.

Minnesota.— East Norway Lake Church *v.* Froislie, 37 Minn. 447, 35 N. W. 260.

Mississippi.— Bohannon *v.* Binns, 31 Miss. 355; Grand Gulf Bank *v.* Archer, 8 Sm. & M. 151; Bayless *v.* Orne, Freem. 161.

Missouri.—Finch *v.* Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383; Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196, 10 S. W. 32; Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481; State Bank *v.* Snelling, 35 Mo. 190; State Bank *v.* Merchants' Bank, 10 Mo. 123; Cayuga County Nat. Bank *v.* Dunklin, 29 Mo. App. 442; Staunton Copper Min. Co. *v.* Thurmond, 7 Mo. App. 587.

New Hampshire.— Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171; State *v.* Fourth New Hampshire Turnpike Road, 15 N. H. 162, 41 Am. Dec. 690; Peirce *v.* Somersworth, 10 N. H. 369; State *v.* Carr, 5 N. H. 367.

New Jersey.— Mueller *v.* Egg Harbor, 55 N. J. L. 245, 26 Atl. 89; New Jersey, etc., R. Co. *v.* Long Branch, 39 N. J. L. 28; Jersey City Gas Light Co. *v.* Consumers' Gas Co., 40 N. J. Eq. 427, 2 Atl. 922; Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548.

New York.— Matter of Cutchogue Cong. Church, 131 N. Y. 1, 30 N. E. 43, 42 N. Y. St. 701; Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765; Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Eaton *v.* Aspinwall, 19 N. Y. 119; People *v.* Ulster, etc., R. Co., 58 Hun 266, 12 N. Y. Suppl. 303, 34 N. Y. St. 983 [*affirmed* in 128 N. Y. 240, 28 N. E. 635, 40 N. Y. St. 280]; Ormsby *v.* Vermont Copper Min. Co., 65 Barb. 360; Mechanics' Bldg. Assoc. *v.* Stevens, 5 Duer 676; All Saints Church *v.* Lovett, 1 Hall 191; Demarest *v.* Flack, 16 Daly 337, 11 N. Y. Suppl. 83, 32 N. Y. St. 675 [*affirmed* in 128 N. Y. 205, 28 N. E. 645, 40 N. Y. St. 383, 13 L. R. A. 854]; Welch *v.* Old Dominion Min., etc., Co., 10 N. Y. Suppl. 174, 31 N. Y. St. 916; Matter of Arden, 4 N. Y. Suppl. 177, 1 Connoly Surr. 159; People *v.* Manhattan Co., 9 Wend. 351; Vernon Soc. *v.* Hills, 6 Cow. 23, 16 Am. Dec. 429; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. 625.

North Carolina.— Tar River Nav. Co. *v.* Neal, 10 N. C. 520.

Ohio.— Johnson *v.* Bentley, 16 Ohio 97;

statute for passing a toll-gate without paying toll;[28] so as to make a transfer of property by or to a *de facto* corporation valid and binding as against all parties except the state;[29] so as to prevent plaintiff's title, derived from a deed of a *de facto* corporation, from being called in question in an action for a trespass;[30] so as to prevent the failure of a railway company to comply with a statutory requirement that its charter must be registered in any county other than that of its principal office, where it may establish an agency, from being made a ground for questioning the validity of its corporate existence in a private litigation;[31] so as to prevent the raising of the question of irregularities in organizing a corporation in any private litigation by or against it;[32] so as to prevent a body assum-

Circleville Bank *v.* Renick, 15 Ohio 322; Webb *v.* Moler, 8 Ohio 548.

Pennsylvania.— Olyphant Sewage Drainage Co. *v.* Olyphant, 196 Pa. St. 553, 46 Atl. 896; Monongahela Bridge Co. *v.* Pittsburgh, etc., Traction Co., 196 Pa. St. 25, 46 Atl. 99, 79 Am. St. Rep. 685 (holding that in an action of assumpsit by a bridge company against a street railway company to enforce a written contract, defendant cannot plead, as a defense, the fact that the city had purchased the entire stock of plaintiff, and had continued its corporate existence without authority of law); Hinchman *v.* Philadelphia, etc., Turnpike Road, 160 Pa. St. 150, 28 Atl. 652, 34 Wkly. Notes Cas. 129; Com. *v.* Allegheny Bridge Co., 20 Pa. St. 185; Com. *v.* Burrell, 7 Pa. St. 34; Com. *v.* Farmers' Bank, 2 Grant 392; Irvine *v.* Lumbermen's Bank, 2 Watts & S. 190; Lehigh River Bridge *v.* Lehigh Coal, etc., Co., 4 Rawle 9, 26 Am. Dec. 11; Centre, etc., Turnpike Road Co. *v.* McConaby, 16 Serg. & R. 140 [*affirmed* in 1 Penr. & W. 426]; Goodbread *v.* Philadelphia, etc., Turnpike Co., 13 Pa. Super. Ct. 82; *In re* New Gas Light Co., 7 Pa. Dist. 151; Travaglini *v.* Societa Italiane, 5 Pa. Dist. 441 (holding that a charter cannot be attacked by a private party on the ground of having been obtained by fraud); German Ins. Co. *v.* Strahl, 13 Phila. 512, 35 Leg. Int. 333.

Tennessee.— Carpenter *v.* Frazier, 102 Tenn. 462, 52 S. W. 858 (holding that the validity of a corporation's existence cannot be attacked on the ground that the certificate of registration given by the secretary of state was not registered in the register's office of the county in which the principal place of business of the corporation was situated, with the facsimile of the great seal of the state, as required by law [Shannon Code Tenn. §§ 2026, 2542], where it appears that the certificate was registered, but the fac-simile of the seal not accurately drawn); La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. 420; Tennessee Automatic Lighting Co. *v.* Massey, (Ch. App. 1899) 56 S. W. 35 (holding that the fact that one of the purposes of incorporation set forth in a charter is unauthorized by the statute under which the incorporation is effected does not impair the validity of the rest of the charter; that an objection that the validity of a charter of incorporation cannot be attacked in a collateral proceeding may, in pleading, be made by answer; that a bill attacking the validity of a charter on the ground that "said charter is not properly executed, acknowledged, and proved," without pointing out the specific defects relied on, is insufficient; and that in the absence of fraud the validity of articles of incorporation cannot be attacked on the ground that they are not properly executed and acknowledged).

Texas.— San Antonio *v.* Jones, 28 Tex. 19; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117 (action for damages against hotel company for personal injuries, not a good objection that two of the incorporators did not live in the state as required by the governing statute).

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

Virginia.— Crump *v.* U. S. Mining Co., 7 Gratt. 352, 56 Am. Dec. 116; Gray *v.* Lynchburg, etc., Turnpike Co., 4 Rand. 578; Commonwealth Bank *v.* Poitiaux, 3 Rand. 136, 15 Am. Dec. 706.

West Virginia.— Greenbrier Lumber Co. *v.* Ward, 30 W. Va. 43, 3 S. E. 227; Moore *v.* Schoppert, 22 W. Va. 282; Baltimore, etc., R. Co. *v.* Marshall County, 3 W. Va. 319.

United States.— Mackall *v.* Chesapeake, etc., Canal Co., 94 U. S. 308, 24 L. ed. 161; Andrews *v.* National Foundry, etc., Works, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153 [*denying rehearing* in 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139].

England.— Colchester *v.* Seaber, 3 Burr. 1866, 1 W. Bl. 591; Smith's Case, 4 Mod. 53; Rex *v.* Amery, 1 T. R. 575, 2 T. R. 515.

See 12 Cent. Dig. tit. "Corporations," § 78.

28. Canal St. Gravel Road Co. *v.* Paas, 95 Mich. 372, 54 N. W. 907. See also Pontiac, etc., Plank Road Co. *v.* Hilton, 69 Mich. 115, 36 N. W. 739.

29. Finch *v.* Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383.

30. Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077.

31. Anderson *v.* Middle, etc., Cent. R. Co., 91 Tenn. 44, 17 S. W. 803.

32. Doyle *v.* Peerless Petroleum Co., 44 Barb. (N. Y.) 239; Persse, etc., Paper-Works *v.* Willett, 19 Abb. Pr. (N. Y.) 416; Frost *v.* Frostburg Coal Co., 24 How. (U. S.) 278, 16 L. ed. 637; U. S. *v.* Williams, 28 Fed. Cas. No. 16,713, 5 Cranch C. C. 62; Vermont *v.* Society for Propagation, etc., 28 Fed. Cas. No. 16,919, 1 Paine 652.

ing to exercise corporate functions from denying its corporate existence in a proceeding by mandamus to reinstate a member whom it has expelled;[33] so as to prevent the question of corporate existence from being litigated in an action by a corporation on a contract under which it claims as equitable assignee,[34] in a suit in equity to enjoin it from constructing its works, or by way of defense to its proceedings to acquire land,[35] or on a bill filed by shareholders for mismanagement;[36] so as to prevent a stranger to contracts made with shareholders of a company which has not completed its organization as a corporation, but which has assumed to act as such, from objecting to the validity of contracts made in its corporate character, on the ground that it has not been organized as a corporation;[37] so as to prevent defendant in an action on a promissory note given to aid in the building of a railroad from setting up the defense that the railroad company had not complied with the statute under which it was organized by having its road completed and in full operation within seven years from its organization, since this might involve disputed questions of fact which could not be determined in a collateral proceeding;[38] so as to invalidate evidence, in an action by a corporation, that it had not performed its corporate duties as to the payment in of the cash capital required by its governing statute;[39] so as to render unavailing, in a criminal prosecution by the state for selling liquor within a prescribed distance from an academy contrary to the terms of the statute, that the academy had done acts whereby its charter had become forfeited, no adjudication of such forfeiture having taken place;[40] so as to prevent third persons, in an action to restrain them from interfering with the franchises of a corporation, from showing that the corporation has forfeited its franchises by reason of not completing its works within the time prescribed by its governing statute;[41] so as to render unavailing an answer in an action by a corporation setting up that it has forfeited its charter by non-user, but not averring a judicial declaration of forfeiture;[42] and so as to prevent the question whether a corporation has forfeited its charter and lost its legal existence from being raised in a proceeding to contest a will in which the corporation is a legatee, except by direct proceedings against it for the purpose of declaring the forfeiture.[43]

3. FURTHER EXPLANATIONS OF DOCTRINE. So, although in every action brought by a corporation, the corporate existence of plaintiff must be averred and proved, yet, where its incorporation has been *prima facie* proved in any of the modes elsewhere considered,[44] its corporate existence cannot be contested by defendant, by any evidence short of that which is properly admissible as showing that it has been judicially dissolved,[45] and as already seen[46] this rule applies in actions brought by corporations against subscribers to their shares to recover assessments laid thereon;[47] and it equally applies in actions brought by corporations to recover

33. Meurer *v.* Detroit Musicians' Benev., etc., Assoc., 95 Mich. 451, 54 N. W. 954.

34. Toledo, etc., R. Co. *v.* Johnson, 55 Mich. 456.

35. Aurora, etc., R. Co. *v.* Miller, 56 Ind. 88; Aurora, etc., R. Co. *v.* Lawrenceburgh, 56 Ind. 80.

36. Merchants', etc., Line *v.* Waganer, 71 Ala. 581.

37. New Haven Wire Co. Cases, 57 Conn. 352, 16 Atl. 393, 18 Atl. 266, 5 L. R. A. 300.

38. Toledo, etc., R. Co. *v.* Johnson, 49 Mich. 148, 13 N. W. 492.

39. Staunton Copper Min. Co. *v.* Thurmond, 7 Mo. App. 587.

40. Hudgins *v.* State, 46 Ala. 208.

41. State *v.* Fagan, 22 La. Ann. 545.

42. West *v.* Carolina L. Ins. Co., 31 Ark. 476.

43. Matter of Arden, 4 N. Y. Suppl. 177, 1 Connoly Surr. (N. Y.) 159.

44. See *supra*, I, M.

45. *Idaho.*— Boise City Canal Co. *v.* Pinkham, 1 Ida. 790.

Indiana.— John *v.* Farmers', etc., Bank, 2 Blackf. 367, 20 Am. Dec. 119.

Maine.— Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

Mississippi.— Grand Gulf Bank *v.* Archer, 8 Sm. & M. 151.

New York.— Vernon Soc. *v.* Hills, 6 Cow. 23, 16 Am. Dec. 429.

Pennsylvania.— Coil *v.* Pittsburgh Female College, 40 Pa. St. 439.

46. See *supra*, I, N, 1, k.

47. *Alabama.*— Duke *v.* Cahawba Nav. Co., 16 Ala. 372.

debts due to them from individuals,[48] and in an action brought by a building association to foreclose a mortgage given for a building loan.[49] Nor does the fact that a corporation has forfeited its charter, unless the forfeiture has been judicially adjudged, afford any defense to an indictment against it for the neglect of a public duty.[50] So one who has granted lands to a corporation cannot maintain an action to recover them, on the ground that, by reason of the neglect to elect trustees and the acquisition of all the stock in the company by one person, the corporation has been dissolved and the land has reverted. It must be regarded as having a legal existence until a judgment of forfeiture has been had in a direct proceeding.[51] So under a statute providing that if the annual license-tax of a corporation is not paid before a certain date the corporation shall forfeit its charter, and making it the duty of the auditor of the state to publish a list of such corporations,[52] the publication does not of itself work a forfeiture of a charter, but the discretionary power to bring an action for such forfeiture still resides in the state.[53]

4. LIMITATIONS OF DOCTRINE. As already seen, the state alone can create corporations[54] and endow natural individuals with corporate capacities and franchises.[55] Hence a collection of men cannot make themselves a corporation by merely calling themselves such. There must have been at least a colorable attempt to form themselves into a corporation under a statute permitting them to become such; and then the question whether they have rightfully become such will not, on grounds of public convenience, be litigated in private proceedings, so long as the state is willing that they shall exist as a corporation and exercise corporate powers.[56]

Connecticut.— Pearce *v.* Olney, 20 Conn. 544.

Georgia.— Young *v.* Harrison, 6 Ga. 130.

Illinois.— Baker *v.* Backus, 32 Ill. 79; Wilmans *v.* State Bank, 6 Ill. 667.

Indiana.— Stoops *v.* Greensburgh, etc., Plank Road Co., 10 Ind. 47; Brookville, etc., Turnpike Co. *v.* McCarty, 8 Ind. 392, 65 Am. Dec. 768; John *v.* Farmers', etc., Bank, 2 Blackf. 367, 20 Am. Dec. 119.

Kentucky.— Galliopolis Bank *v.* Trimble, 6 B. Mon. 599.

Maryland.— Planters' Bank *v.* Alexandria Bank, 10 Gill & J. 346; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1; Hamilton *v.* Annapolis, etc., R. Co., 1 Md. Ch. 107.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

Mississippi.— Bayless *v.* Orne, Freem. 161.

Missouri.— State Bank *v.* Merchants' Bank, 10 Mo. 123.

New Hampshire.— Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171.

New York.— Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Towar *v.* Hale, 46 Barb. 361.

North Carolina.— Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306.

Ohio.— Johnson *v.* Bentley, 16 Ohio 97; Circleville Bank *v.* Renick, 15 Ohio 322; Webb *v.* Moler, 8 Ohio 548.

Pennsylvania.— Dyer *v.* Walker, 40 Pa. St. 157; Irvine *v.* Lumbermen's Bank, 2 Watts & S. 190; McConachy *v.* Centre, etc., Turnpike Co., 1 Penr. & W. 426; Com. *v.* Morris, 1 Phila. 411, 9 Leg. Int. 176.

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

Virginia.— Crump *v.* U. S. Mining Co., 7 Gratt. 352, 56 Am. Dec. 116.

England.— Waterford, etc., R. Co. *v.* Dalbiac, 6 Exch. 443, 20 L. J. Exch. 227, 6 R. & Can. Cas. 753, 4 Eng. L. & Eq. 455.

48. Hughes *v.* Somerset Bank, 5 Litt. (Ky.) 45; Coil *v.* Pittsburgh Female College, 40 Pa. St. 439.

49. Mechanics' Bldg. Assoc. *v.* Stevens, 5 Duer (N. Y.) 676.

50. Com. *v.* Worcester Turnpike Corp., 3 Pick. (Mass.) 327.

51. Bohannon *v.* Binns, 31 Miss. 355.

52. West Va. Acts (1885), c. 20, § 8.

53. Greenbrier Lumber Co. *v.* Ward, 30 W. Va. 43, 3 S. E. 227.

54. Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9. See also *supra*, I, J, 1.

55. Ernst *v.* Bartle, 1 Johns. Cas. (N. Y.) 319.

56. The following cases are to this general effect:

Alabama.— Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120; Lehman *v.* Warner, 61 Ala. 455; Thorington *v.* Gould, 59 Ala. 461.

Georgia.— Pattison *v.* Albany Bldg., etc., Assoc., 63 Ga. 373.

Indiana.— North *v.* State, 107 Ind. 356, 8 N. E. 159.

Missouri.— Clark *v.* Middleton, 19 Mo. 53.

New York.— Eaton *v.* Aspinwall, 19 N. Y. 119.

Pennsylvania.— Cochran *v.* Arnold, 58 Pa. St. 399.

Tennessee.— State *v.* Butler, 15 Lea 104.

United States.— Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 5 S. Ct. 234, 28

5. WHETHER FACT THAT PRETENDED ORGANIZATION WAS FRAUDULENT MAY BE SHOWN IN PRIVATE PROCEEDING. It is said that fraud vitiates all engagements; and there seems to be no good reason why the rule should not be extended to the subject under consideration. If a pretended corporation has been concocted for the purpose of cheating and defrauding a party to a proceeding, the analogies of the law furnish no reason why he should be obliged to turn to the state for redress — to its attorney-general — and receive or be denied redress according to the promptness, the honesty, the dilatoriness, or the corruption of that officer instead of having a direct road to justice in a proceeding by himself. Accordingly it has been held that a party who has not estopped himself by the manner in which he has dealt with the pretended corporation may attack its existence in a private litigation by showing that its organization is a mere fraudulent device; that, although on the face of the proceedings there is a regular and complete incorporation, yet there was no *bona fide* purpose and effort to organize a real corporation with a capital; but the purpose and effort were to put forward a sham corporation without capital or assets to cover a real partnership, and to avoid the liability incident to a real partnership.[57] So in Pennsylvania, where a so-called charter of a corporation granted by a public officer of the state is on its face conclusive evidence of its own validity, yet that fact does not cover any frauds perpetrated by the coadventurers in procuring it; but creditors of the pretended corporation may show such frauds, in order to charge the shareholders as partners.[58] Other courts hold that the validity of the corporate charter or organization cannot be attacked by a private litigant on the ground of having been concocted by fraud.[59] It is hardly necessary to add that this rule will for stronger reasons work against the corporation to prevent it from pleading fraud in its own organization.[60]

6. FORFEITURE FOR MISUSER OR NON-USER NOT PLEADABLE COLLATERALLY. In the absence of an express statute otherwise providing, the question whether the charter of a corporation has been forfeited for misuser or non-user of its franchises, or for any other cause save the efflux of time, cannot be determined in a collateral proceeding, but can be determined only in a direct proceeding instituted by the state.[61] Although a statute expressly declares that upon the happen-

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L. ed. 764; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. ed. 733; Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; St. Louis Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Smith *v.* Sheeley, 12 Wall. 358, 20 L. ed. 430; Upton *v.* Hansbrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417.

57. Christian, etc., Grocery Co. *v.* Fruitdale Lumber Co., 121 Ala. 340, 25 So. 566.

58. Paterson *v.* Arnold, 45 Pa. St. 410. Substantially to the same effect see Chesapeake, etc., R. Co. *v.* Howard, 14 App. Cas. (D. C.) 262, 27 Wash. L. Rep. 146; Montgomery *v.* Forbes, 148 Mass. 249, 19 N. E. 342; Lehigh Min., etc., Co. *v.* Kelly, 160 U. S. 327, 16 S. Ct. 307, 40 L. ed. 444.

59. Travaglini *v.* Societa Italiane, 5 Pa. Dist. 441.

60. Southern Bank *v.* Williams, 25 Ga. 534. *Compare* Mitchel *v.* Rome R. Co., 17 Ga. 574; Napier *v.* Poe, 12 Ga. 170.

61. *Arkansas.*— Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204.

Connecticut.— Pahquioque Bank *v.* Bethel Bank, 36 Conn. 325, 4 Am. Rep. 80.

Georgia.—Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106.

Illinois.— Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93; Williams *v.* State Bank, 6 Ill. 667.

Indiana.— Barren Creek Ditching Co. *v.* Beck, 99 Ind. 247; Logan *v.* Vernon, etc., R. Co., 90 Ind. 552; John *v.* Farmers', etc., Bank, 2 Blackf. 367, 20 Am. Dec. 119.

Kentucky.— Galliopolis Bank *v.* Trimble, 6 B. Mon. 599; Hughes *v.* Somerset Bank, 5 Litt. 45.

Maryland.— Planters' Bank *v.* Alexandria Bank, 10 Gill & J. 346.

Missouri.— Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 86 Am. Dec. 128; Farmers' Bank *v.* Garten, 34 Mo. 119; State Bank *v.* Bredow, 31 Mo. 523.

New York.— Merrick *v.* Van Santvoord, 34 N. Y. 208; All Saints Church *v.* Lovett, 1 Hall 191; McFarlan *v.* Triton Ins. Co., 4 Den. 392; Vernon Soc. *v.* Hills, 6 Cow. 23, 16 Am. Dec. 429; Slee *v.* Bloom, 5 Johns. Ch. 366; Barclay *v.* Talman, 4 Edw. 123.

North Carolina.—Asheville Div. No. 15, S. of T. *v.* Aston, 92 N. C. 578; Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306.

Ohio.— Circleville Bank *v.* Renick, 15 Ohio 322.

Pennsylvania.— Lehigh River Bridge *v.* Le-

ing of certain events the corporation "shall be deemed to have surrendered the rights, privileges, and franchises granted by any act of incorporation, or acquired under the laws of this State, and shall be adjudged to be dissolved," [62] and it further appears that the conditions upon which such dissolution may be declared have been fulfilled, the corporation nevertheless remains *in esse*, and may be sued by its creditors unless restrained by injunction, until the surrender of its franchises has been judicially declared in a direct proceeding.[63] So it is no defense to a suit brought by a corporation for goods sold, etc., that, for a failure to pay a license-tax to the state, the secretary of state by publication had declared the corporate charter forfeited.[64] But when the forfeiture has been judicially declared, the corporation is dead, and upon that fact being admitted or shown, the suit abates, unless there is a saving statute permitting it to go on.[65]

Q. Promoters — 1. Meaning of Word "Promoter." A promoter is one who takes it upon himself to organize a corporation: To procure the necessary legislation, where that is necessary; to procure the necessary subscribers to the articles of incorporation, where the corporation is organized under general laws; to see that the necessary document is presented to the proper officer of the state to be recorded and the certificate of incorporation issued; and generally to "float the company." [66]

2. Promoters Not Agents of Future Corporation. Those who undertake to organize a corporation are not in any sense its agents before it comes into existence. They cannot affect it by their declarations or representations,[67] or bind it by their engagements made in its behalf;[68] but after coming into existence the

high Coal, etc., Co., 4 Rawle 9, 26 Am. Dec. 111.

United States.— Vermont *v.* Society for Propagation, etc., 28 Fed. Cas. No. 16,919, 1 Paine 652.

62. 1 N. Y. Rev. Stat. 463, § 38.

63. Kincaid *v.* Dwinelle, 59 N. Y. 548; Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

64. Greenbrier Lumber Co. *v.* Ward, 30 W. Va. 43, 3 S. E. 227.

65. See cases cited *supra*; and Sutherland *v.* Largo, etc., Plank-Road Co., 19 Ind. 192.

66. The meaning of the word may be collected from Ladywell Min. Co. *v.* Brookes, 35 Ch. D. 400, 56 L. J. Ch. 684, 56 L. T. Rep. N. S. 677, 35 Wkly. Rep. 785; Emma Silver Min. Co. *v.* Lewis, 4 C. P. D. 396, 48 L. J. C. P. 257, 40 L. T. Rep. N. S. 168, 27 Wkly. Rep. 836; opinion of Bramwell, J., in Twycross *v.* Grant, 2 C. P. D. 469, 46 L. J. C. P. 636, 36 L. T. Rep. N. S. 812, 25 Wkly. Rep. 701.

67. U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 38 N. E. 729, 62 N. Y. St. 826; Lynde *v.* Anglo-Italian Hemp Spinning Co., [1896] 1 Ch. 178, 65 L. J. Ch. 96, 73 L. T. Rep. N. S. 502.

68. *Alabama.*— Moore, etc., Hardware Co. *v.* Towers Hardware Co., 87 Ala. 206, 6 So. 41, 13 Am. St. Rep. 23.

California.— San Joaquin Land, etc., Co. *v.* West, 94 Cal. 399, 29 Pac. 785; Hawkins *v.* Mansfield Gold Min. Co., 52 Cal. 513; Morrison *v.* Gold Mountain Gold Min. Co., 52 Cal. 306.

Colorado.— Ruby Chief Min., etc., Co. *v.* Gurley, 17 Colo. 199, 29 Pac. 668.

Illinois.— Western Screw, etc., Co. *v.* Cousley, 72 Ill. 531; Stowe *v.* Flagg, 72 Ill. 397; Rockford, etc., R. Co. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587; Safety Deposit L. Ins. Co. *v.* Smith, 65 Ill. 309.

Indiana.— Smith *v.* Parker, 148 Ind. 127, 45 N. E. 770; Davis, etc., Bldg., etc., Co. *v.* Hillsboro Creamery Co., 10 Ind. App. 42, 37 N. E. 549.

Michigan.— Carmody *v.* Powers, 60 Mich. 26, 26 N. W. 801.

Minnesota.— McArthur *v.* Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653.

Missouri.— Davis *v.* Maysville Creamery Assoc., 63 Mo. App. 477; Joy *v.* Manion, 28 Mo. App. 55.

Nebraska.— Davis *v.* Ravenna Creamery Co., 48 Nebr. 471, 67 N. W. 436.

Nevada.— Paxton *v.* Bacon Mill, etc., Co., 2 Nev. 257.

New Jersey.— Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. L. 363.

New York.— Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 8 N. E. 355; Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. 172, 23 N. Y. Suppl. 675, 53 N. Y. St. 214 [*reversing* 1 Misc. 512, 21 N. Y. Suppl. 472, 49 N. Y. St. 924]; Oaks *v.* Cattaraugus Water Co., 21 N. Y. Suppl. 851, 50 N. Y. St. 922; Hecla Consol. Gold Min. Co. *v.* O'Neill, 19 N. Y. Suppl. 592, 47 N. Y. St. 211 [*affirmed* in 67 Hun 652, 22 N. Y. Suppl. 130, 51 N. Y. St. 436, 23 N. Y. Civ. Proc. 143 (*affirmed* in 148 N. Y. 724)].

Pennsylvania.— Tift *v.* Quaker City Nat. Bank, 141 Pa. St. 550, 21 Atl. 660.

Tennessee.— Pittsburgh, etc., Copper Min. Co. *v.* Quintrell, 91 Tenn. 693, 20 S. W. 248.

Texas.— Weatherford, etc., R. Co. *v.* Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St.

corporation may make their engagements its own by express agreement[69] or by ratification;[70] and this ratification or adoption may be by express corporate action[71] or by any of the other modes by which corporations may ratify or adopt the unauthorized or officious acts of others made in their behalf,[72] as where the corporation voluntarily accepts the benefits accruing to it from the engagement of its promoters, after full knowledge, and having full liberty to decline the same.[73]

3. Engagement With Promoters Is Merely Proposal For Contract to Future Corporation. An engagement made through promoters with a corporation which has not yet been called into existence may have the legal effect of a proposal to the future corporation for a contract.[74] Upon this principle many courts hold that a subscription to the capital stock of an intended corporation, made before it comes into existence, becomes a binding contract when the corporation on coming into existence accepts it, either expressly by issuing to the subscriber his share certificate, or impliedly by otherwise recognizing him as a shareholder and extending to him the rights which pertain to that relation. This is the general doctrine of many cases, variously expressed.[75] But in order to the operation of

Rep. 387 [*reversing* (Civ. App. 1893) 23 S. W. 425].

Wisconsin.— Buffington *v.* Bardon, 80 Wis. 635, 50 N. W. 776.

United States.— Winters *v.* Hub Min. Co., 57 Fed. 287.

See 12 Cent. Dig. tit. "Corporations," § 1789.

Nor have the corporators power to bind the corporation by their contracts unless thereto authorized by the charter or governing statute. Gent *v.* Manufacturers', etc., Ins. Co., 107 Ill. 652 [*affirming* 13 Ill. App. 308]; Joslin *v.* Stokes, 38 N. J. Eq. 31; Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 8 N. E. 355.

69. Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Wood *v.* Whelen, 93 Ill. 153; Rockford, etc., R. Co. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587; Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852; Low *v.* Connecticut, etc., R. Co., 45 N. H. 370; Bell's Gap R. Co. *v.* Christy, 79 Pa. St. 54, 21 Am. Rep. 39 (reasoning of the court).

70. Brunner *v.* Brown, 139 Ind. 600, 38 N. E. 318; Seymour *v.* Spring Forest Cemetery Assoc., 144 N. Y. 333, 63 N. Y. St. 672, 39 N. E. 365, 26 L. R. A. 859; Burden *v.* Burden, 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499; Lexow *v.* Pennsylvania Diamond Drill Co., 5 Pa. Dist. 491.

71. It has been held that where formal action of the board of directors would not be necessary to the making of the agreement by the corporation in the first instance, its adoption, when made for it by its promoters, will not require that formality. Battelle *v.* Northwestern Cement, etc., Co., 37 Minn. 89, 33 N. W. 327.

72. Huron Printing, etc., Co. *v.* Kittelson, 4 S. D. 520, 57 N. W. 233.

When the president has the power to ratify for the corporation see Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 62 N. Y. St. 445, 26 L. R. A. 544.

The requirement of a statute that thirty days' notice must be given to the shareholders of a corporation before its property can be mortgaged does not apply to an equitable mortgage created by a contract with promoters and adopted by the corporation. Bridgeport Electric, etc., Co. *v.* Meader, 72 Fed. 115, 18 C. C. A. 451.

Circumstances under which a corporation may adopt a previous engagement made by its promoters, varying its terms. Davis *v.* Dexter Butter, etc., Co., 52 Kan. 693, 35 Pac. 776.

73. *Colorado.*— Arapahoe Invest. Co. *v.* Platt, 5 Colo. App. 515, 39 Pac. 584.

Illinois.— Rockford, etc., R. Co. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587.

Nebraska.— Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852.

New Hampshire.— Low *v.* Connecticut, etc., R. Co., 45 N. H. 370, leading case.

New York.— Rogers *v.* New York, etc., Land Co., 134 N. Y. 197, 32 N. E. 27, 48 N. Y. St. 263.

Oregon.—Schreyer *v.* Turner Flouring Mills Co., 29 Oreg. 1, 43 Pac. 719.

Pennsylvania.—Bell's Gap R. Co. *v.* Christy, 79 Pa. St. 54, 21 Am. Rep. 39, doctrine recognized.

United States.— Bridgeport Electric, etc., Co. *v.* Meader, 72 Fed. 115, 18 C. C. A. 451.

England.— Edwards *v.* Grand Junction R. Co., 1 Myl. & C. 650, 13 Eng. Ch. 650.

See 12 Cent. Dig. tit. "Corporations," § 1790.

74. Gent *v.* Manufacturers', etc., Ins. Co., 107 Ill. 652 [*affirming* 13 Ill. App. 308].

75. *California.*— Mahan *v.* Wood, 44 Cal. 462.

District of Columbia.— Glenn *v.* Busey, 5 Mackey 233.

Illinois.— Johnston *v.* Ewing Female University, 35 Ill. 518; Tonica, etc., R. Co. *v.* McNeely, 21 Ill. 71; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54.

Indiana.— New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337.

Iowa.— Nulton *v.* Clayton, 54 Iowa 425, 6 N. W. 685, 37 Am. Rep. 213.

Maine.— Penobscot R. Co. *v.* White, 41 Me.

this principle, there must be an acceptance in some form, such as will bind and fix the rights of both parties.[76]

4. WHETHER CORPORATION BOUND FOR SERVICES RENDERED IN CALLING IT INTO EXISTENCE. Unless the charter or statute law otherwise provides, the corporation will not ordinarily be bound to pay for services rendered by the promoters in bringing the corporation into existence.[77] There is some authority for the proposition that the corporation is so liable where a majority of the corporators authorize the rendition of the services;[78] but it is difficult to understand the principle on which this conclusion rests, since when the corporation is in existence it is not bound by contracts or engagements made by a majority of its shareholders,[79] but is only bound by engagements made by its governing body, its board of directors or trustees, acting within the scope of their powers, and by ministerial officers created and empowered to make such engagements.[80] But it has been held that where an association of individuals unite to carry on a certain business, and before becoming incorporated contract debts in the conduct of the business, and afterward become incorporated without taking in any outside person or outside capital, the corporation may become liable in equity for the payment of such debts.[81] But by analogy to the rule with reference to the liability of an incoming partner, and on obvious principles of justice, it is held that the foregoing rule can have no application where the corporation has been created in part with funds or property contributed by new corporators, who had no connection with the previous association. Liens on the property of the association would follow it into the hands of the corporation, and the members of the association would remain personally liable for its debts as partners, as though no corporation had been organized, and their interest in the corporation might be seized and sold upon executions against them personally; but the corporation could not be charged with the debts of the previous voluntary association, composed of a part only of its members.[82] If, however, after the corporation has been created, the promoters render further services necessary to complete the organization, with the common understanding that compensation is to be paid for such services, then, the corporation being in existence, and having power to accept or reject the benefit of such services, if it accepts them it must pay for them, on the principle of estoppel or ratification already considered.[83] One court has applied the same principle to the case where the services were rendered before the creation of the corporation, and for the purpose of assisting in bringing it into existence, placing its conclusion upon the principle of estoppel or ratification by accept-

512, 66 Am. Dec. 257; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Kennebec, etc., R. Co. *v.* Palmer, 34 Me. 366.

Massachusetts.—Thompson *v.* Page, 1 Metc. 565.

Michigan.—Michigan Midland, etc., R. Co. *v.* Bacon, 33 Mich. 466.

Minnesota.—Red Wing Hotel Co. *v.* Friedrich, 26 Minn. 112, 1 N. W. 827.

New Hampshire.—Ashuelot Boot, etc., Co. *v.* Hoit, 56 N. H. 548.

New York.—Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. 157.

Pennsylvania.—Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

Tennessee.—Gleaves *v.* Brick Church Turnpike Co., 1 Sneed 491.

Texas.—Belton Compress Co. *v.* Saunders, 70 Tex. 699, 6 S. W. 134.

76. Penn Match Co. *v.* Hapgood, 141 Mass. 145, 7 N. E. 22. The statement made by Vice-Chancellor Green of New Jersey, that "no rights, legal or equitable, arise in favor of a corporation in respect of transactions, whether complete or inchoate, merely because entered into in contemplation of the creation of such corporation" (Plaquemines Tropical Fruit Co. *v.* Buck, 52 N. J. Eq. 219, 230, 27 Atl. 1094), cannot possibly be the law.

77. Marchand *v.* Loan, etc., Assoc., 26 La. Ann. 389.

78. Bell's Gap R. Co. *v.* Christy, 79 Pa. St. 54, 21 Am. Rep. 39.

79. See *infra*, IX, C, 5.

80. See *infra*, IX; X.

81. Paxton *v.* Bacon Mill, etc., Co., 2 Nev. 257, opinion by Lewis, C. J.

82. Paxton *v.* Bacon Mill, etc., Co., 2 Nev. 257. And see Chicago Coffin Co. *v.* Fritz, 41 Mo. App. 389.

83. Low *v.* Connecticut, etc., R. Co., 45 N. H. 370. *Compare* Preston *v.* Liverpool, etc., R. Co., 21 L. J. Ch. 61, 1 Sim. N. S. 586, 7 Eng. L. & Eq. 124, 40 Eng. Ch. 586.

ing the benefits.[84] But it is difficult to understand how the corporation could be estopped by accepting benefits which it had no power to reject, without uncreating itself. Under any theory with respect to this question, in order to bind the corporation for such services, they must have been necessary and reasonable, and must have been performed under a contract with the promoter or promoters, assuming to act in behalf of the future corporation, with the intention and expectation that they should be paid for by the corporation, and should not be mere gratuities.[85] The services performed must be intended at the time to inure to the benefit of the future corporation; must be made or done in its behalf, and with the expectation and confidence that the company will be bound and not the credit of the individuals.[86]

5. Distinction Between Cases Where Remedy Is in Equity and at Law. Where the contract made by the promoters is intended to inure to the benefit of the future corporation when organized, the other contracting party may, under circumstances, acquire an equity to have the contract carried into effect. But it becomes a legal right only where the corporation affirms the contract or does some act from which an affirmance may be implied. At law the rule obtains that corporations cannot be bound by acts done or promises made by others in their behalf before they come into existence, and this on the simple conception that there is no privity of contract.[87]

6. Liability to Subscribers For Deposits Where Undertaking Proves Abortive — a. Statement of Liability. A person who has paid money for shares in a company which never comes into existence, or who has paid money afterward to a scheme which is abandoned before it is carried into execution, has paid it on a consideration which has failed, and he may therefore recover it back in an action at law as so much money had and received to his use, unless it can be shown that he has consented to or has acquiesced in the application of the money which those into whose hands it has come have made of it;[88] and he may maintain a bill in equity for the same purpose.[89] Where a person has paid money to the pro-

84. Low *v.* Connecticut, etc., R. Co., 45 N. H. 370.

Other cases where the corporation, after coming into existence, was held liable on the theory of implied contract or of estoppel are Hawkins *v.* Mansfield Gold Min. Co., 52 Cal. 513; Morrison *v.* Gold Mountain Gold Min. Co., 52 Cal. 306; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852.

85. Bellows, J., in Low *v.* Connecticut, etc., R. Co., 45 N. H. 370.

86. Perry *v.* Little Rock, etc., R. Co., 44 Ark. 383, 396, per Eakin, J.

87. This principle is stated in Perry *v.* Little Rock, etc., R. Co., 44 Ark. 383. It was ground of decision in Bommer *v.* American Spiral Spring Butt Hinge Mfg. Co., 81 N. Y. 468, where an action in the nature of an action at law was sustained on the ground of ratification. See also Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164, where there is a full discussion of the subject. It was there announced that the doctrine cannot apply to cases in which private persons, contracting exclusively for their individual benefit, afterward create a corporation for the more convenient management and enjoyment of the benefits acquired by the contract. The same doctrine is found in the leading case of Low *v.* Connecticut, etc., R. Co., 45 N. H. 370.

88. Nockels *v.* Crosby, 3 B. & C. 814, 5 D. & R. 751, 27 Rev. Rep. 497, 10 E. C. L. 367; Ashpitel *v.* Sercombe, 5 Exch. 147, 19 L. J. Exch. 82, 6 R. & Can. Cas. 224; Chaplin *v.* Clarke, 4 Exch. 403; Vollans *v.* Fletcher, 1 Exch. 20, 16 L. J. Exch. 173; Ward *v.* Londesborough, 12 C. B. 252, 74 E. C. L. 252.

89. Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425; Kempson *v.* Saunders, 4 Bing. 5, 13 E. C. L. 373, 2 C. & P. 366, 12 E. C. L. 621, 12 Moore C. P. 44 (holding that in getting at the original projectors "a great service will be done"); Grand Trunk, etc., R. Co. *v.* Brodie, 9 Hare 823, 41 Eng. Ch. 823; Williams *v.* Salmond, 2 Jur. N. S. 251, 2 Kay & J. 463, 4 Wkly Rep. 64 (where the principle was recognized, although the bill was dismissed); Green *v.* Barrett, 6 L. J. Ch. O. S. 6, 1 Sim. 45, 2 Eng. Ch. 45; Walstab *v.* Spottiswoode, 15 L. J. Exch. 193, 15 M. & W. 501; Colt *v.* Woollaston, 2 P. Wms. 154, 24 Eng. Reprint 679. For a case where the provisional directors of a railway company promised to pay a landowner £3000 for a right of way through his land, which he in consideration of this sum agreed to convey to the proposed company, and where, the company having proved abortive, it was held that the projectors must nevertheless pay the £3000 see Bland *v.* Crowley, 6 Exch. 522, 20 L. J. Exch. 218, 6 R. & Can. Cas. 756. *Compare* Webb *v.* Direct London, etc., R. Co., 9 Hare 129, 41 Eng. Ch.

moters of a projected corporation, under an agreement that shares shall be issued to him when the company is formed, he will be entitled to recover his money back from them unless the organization of the company is accomplished within a reasonable time.[90]

b. Grounds of Recovery — (i) *At Law.* In such cases there are two grounds of recovery at law: (1) Failure of the project; and (2) the want of acquiescence in the expenditure of the money paid in its support, both of which are questions of fact, and in such an action they must both be determined in favor of plaintiff in order to enable him to recover. As to the first ground of recovery, that the undertaking has failed, the burden of proof is on plaintiff; as to the second, that plaintiff has not consented to, or acquiesced in, the application of his money which has been made, the burden is on defendant; since, in the absence of all proof on this point, such acquiescence will not be presumed. On familiar grounds these questions are to be determined by the jury, unless the evidence arises wholly out of documents, which are to be construed and their meaning expounded by the court. If a case arises in which there is evidence on the first ground of recovery, namely, that the undertaking has proved abortive, and no evidence, either for the court or for the jury, that plaintiff has acquiesced in the use of his money which has been made, then it is not a misdirection for the judge to leave out of view the second ground of recovery, namely, a want of acquiescence on the part of plaintiff in the expenditure of his money, which has been made, and to tell the jury that if the project has been abandoned as abortive, plaintiff is entitled to recover his deposit.[91] While partners cannot recover contribution from copartners in actions at law, yet even in England, where joint-stock companies, when fully formed, were deemed no more than extensive partnerships, it was held that one who had subscribed for shares in a proposed company did not, so long as it remained a mere project, become a partner or even a quasi-partner with the promoters of it.[92] This is in accordance with the rule already stated, that a partnership is not created by a mere agreement to organize a partnership under common law. The same principle may be stated by saying that the shareholders in a corporation are in no legal sense partners with the promoters of it, unless they have specially agreed to become such and to share profits and losses, from which it easily follows that the shareholders of an abortive corporation are not, as shareholders merely, liable for the debts of the concern.[93]

(ii) *In Equity.* The jurisdiction of equity to entertain suits by subscribers to abortive corporations, to recover from the promoters or directors money which they have advanced in support of the scheme rests upon the two grounds of fraud and trust. Where the undertaking is a swindle in its inception — a bubble, such as a proposition to extract oil from English radishes — courts of equity will sustain a bill by a subscriber to the shares of the concern to recover back the money which he has paid as deposit on such shares on the ground of fraud.[94]

129 [*reversed* in 1 De G. M. & G. 521, 16 Jur. 323, 21 L. J. Ch. 337, 50 Eng. Ch. 400].

90. Hudson *v.* West, 189 Pa. St. 491, 42 Atl. 190, 29 Pittsb. L. J. (Pa.) 283.

91. Ashpitel *v.* Sercombe, 5 Exch. 147, 19 L. J. Exch. 82, 6 R. & Can. Cas. 224.

92. Walstab *v.* Spottiswoode, 15 L. J. Exch. 193, 15 M. & W. 501.

93. Fay *v.* Noble, 7 Cush. (Mass.) 188.

94. Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425; Green *v.* Barrett, 5 L. J. Ch. O. S. 6, 1 Sim. 45, 2 Eng. Ch. 45; Colt *v.* Woollaston, 2 P. Wms. 154, 24 Eng. Reprint 679.

Circumstances relieving subscribers from liability to promoters.— For circumstances under which, after the organization of the corporation, it made a contract with the promoters for their services, different from the arrangement between the promoters and the subscribers to shares, made prior to the organization, which was held to release the subscribers from their liability to the promoters see Mildenberg *v.* James, 31 Misc. (N. Y.) 607, 66 N. Y. Suppl. 77; Kent *v.* Freehold Land, etc., Co., L. R. 4 Eq. 588, 17 L. T. Rep. N. S. 77; Twycross *v.* Grant, 2 C. P. D. 469, 46 L. J. C. P. 636, 36 L. T. Rep. N. S. 812, 25 Wkly. Rep. 701 (judgment of Lord Coleridge, C. J.). In Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328, similar relief was granted against directors of a company under similar circumstances, although the promoters were not par-

A promoter who makes a fraudulent overissue of shares to himself, and who thereafter sells them to innocent persons, may be compelled to account to his associates for the money thus acquired.[95]

c. Measure of Recovery in Equity. A promoter participating in the fraud of his personal representative is liable to *bona fide* subscribers, not only for their due proportions of the profits he himself has realized, but also for their due proportions of the fund which he has received as trustee and misappropriated by paying it over to those privately interested with him.[96]

d. In Restoring Deposits, Breach of Trust to Prefer Particular Shareholders. If it appears that the managing committee of a company which has proved abortive, in restoring to the subscribers for its shares what remains of their advances after the payment of expenses, prefer certain of such subscribers by treating their advances as loans, and by paying them in full, while the others get back only a percentage of their deposits, the transaction will be undone by a court of equity in a bill by a subscriber for an accounting.[97] It follows that if the promoters or managers of the company give effect to such a fraudulent agreement, by restoring in full and not *pro rata* with other subscribers, the moneys which the particular subscriber has advanced in pursuance of it, they will be subject to account for it in equity to those whose rights have been prejudiced by the transaction.[98] The

ties to the suit. *Compare* Foss *v.* Harbottle, 2 Hare 461, 24 Eng. Ch. 461, where a bill of two shareholders, filed on behalf of themselves and all other shareholders, was dismissed on the ground that it showed no obstacle to the bringing of a bill by the company for the relief prayed for. For a case in which Vice-Chancellor Bacon thought that it was no fraud on subscribers to shares for a person to purchase a colliery for £16,000, and then to promote a company to purchase it from him, to sell it to the company for £23,000, to become manager therein, and to conceal the real facts of the transactions from subscribers see Craig *v.* Phillips, 3 Ch. D. 722, 46 L. J. Ch. 49, 35 L. T. Rep. N. S. 198. But it seems that this case should be regarded as having been overruled by Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65 [*affirming* 5 Ch. D. 73, 46 L. J. Ch. 425, 36 L. T. Rep. N. S. 222, 25 Wkly. Rep. 436]; Twycross *v.* Grant, 2 C. P. D. 469, 46 L. J. C. P. 636, 36 L. T. Rep. N. S. 812, 25 Wkly. Rep. 701, and as being opposed to the doctrine of the house of lords, in Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65.

That the remedy in equity may be lost by laches, although the period of time may be extended, where plaintiff has been prevented by fraud, concealment, or obstruction from obtaining the facts necessary to support his suit see Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425.

That equity repels actions of this kind when brought for barratrous purposes see Grand Trunk, etc., R. Co. *v.* Brodie, 9 Hare 823, 41 Eng. Ch. 823. But not where plaintiff has an interest in the success of the suit, although small, even if he is prosecuting it under a barratrous contract with a solicitor. Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425.

As to the necessary parties to such a bill see Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425; Clements *v.* Bowes, 1 Drew. 684; Grand Trunk, etc., R. Co. *v.* Brodie, 9 Hare 823, 41 Eng. Ch. 823; Williams *v.* Salmond, 2 Jur. N. S. 251, 2 Kay & J. 463, 4 Wkly. Rep. 64.

95. Huiskamp *v.* West, 47 Fed. 236.

96. Getty *v.* Devlin, 70 N. Y. 504, 54 N. Y. 403. *Contra*, Bent *v.* Priest, 10 Mo. App. 543, Lewis, P. J., dissenting.

97. Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425.

98. Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425.

That secret arrangements for releasing particular shareholders, the same not being *bona fide* forfeitures for non-payment of calls, are void, will be shown when dealing with shareholders; and see specially on the subject *In re* United Service Co., L. R. 5 Ch. 707, 39 L. J. Ch. 730, 23 L. T. Rep. N. S. 331, 18 Wkly. Rep. 1058.

Release by contract of right to recover deposits.— That applicants in English railway companies released their rights to recover deposits under what was termed the "Subscriber's Agreement and Parliamentary Contract" see Chaplin *v.* Clarke, 4 Exch. 403; Willey *v.* Parratt, 3 Exch. 211, 18 L. J. Exch. 82, 6 R. & Can. Cas. 32; Jones *v.* Harrison, 2 Exch. 52, 12 Jur. 122, 17 L. J. Exch. 132, 5 R. & Can. Cas. 138; Clements *v.* Todd, 1 Exch. 268, 17 L. J. Exch. 31, 5 R. & Can. Cas. 132. That such an agreement estopped subscriber where the money advanced by him had been expended as therein authorized, although the scheme of incorporation became abortive, but not if the agreement tendered him for execution contained provisions not authorized by law see Ashpitel *v.* Sercombe, 5 Exch. 147, 19 L. J. Exch. 82, 6 R. & Can. Cas. 224. That this agreement did not estop them in the absence of fraud see Atkinson *v.* Pocock, 1 Exch. 796, 12 Jur. 60. That the fact that deposits had been made on but little more than one-half the shares which

case is rendered worse by the fact that the money repaid to subscribers was in consideration of their making a colorable subscription to defraud the legislature, to whom an application had been made for a charter.[99] In all such cases the governing principle is that whoever makes a colorable subscription for shares in a company, for the mere purpose of deceiving others, with an understanding between himself and the promoters or managers that he is not to be held to the liabilities of a subscriber, will nevertheless be held, both at law and in equity, to the very form of the contract which he has made and published.[1]

7. Liability of Promoters — a. In Actions For Damages For Deceit. If the promoters of a corporation put forth a fraudulent prospectus or otherwise make fraudulent representations whereby persons are induced to become subscribers to the shares of the projected company, by reason of which they sustain damages, they have, under the principles of the common law, a direct action against those who have been guilty of the fraud, to recover the damages which they have thereby suffered.[2] In an action at law for this kind of deceit, the measure

had been allotted, which fact was not communicated to the subscriber, did not constitute such fraud as would release him see Vane *v.* Cobbold, 1 Exch. 798.

What provisional committeemen were not liable.— The committeeman not shown to have received the money advanced by the plaintiff subscriber, but whose name had been published as a provisional committeeman, but who attended one meeting only of the committee, at which he presided as chairman, but at which he dissented from the proceedings, was not liable in an action by a subscriber for the repayment of his deposit money. Burnside *v.* Dayrell, 3 Exch. 224, 19 L. J. Exch. 46, 6 R. & Can. Cas. 67.

99. Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425; Clements *v.* Bowes, 1 Drew. 684.

1. Litchfield Bank *v.* Church, 29 Conn. 137; White Mountains R. Co. *v.* Eastman, 34 N. H. 134; Custar *v.* Titusville Gas, etc., Co., 63 Pa. St. 381; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Centre, etc., Turnpike Road Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140. See also Miller *v.* Hanover Junction, etc., R. Co., 87 Pa. St. 95, 30 Am. Rep. 349.

2. Walker *v.* Anglo-American Mortg., etc., Co., 72 Hun (N. Y.) 334, 25 N. Y. Suppl. 432, 55 N. Y. St. 54; Gerhard *v.* Bates, 1 C. L. R. 868, 2 E. & B. 476, 17 Jur. 1097, 22 L. J. Q. B. 364, 1 Wkly. Rep. 383, 20 Eng. L. & Eq. 129, 75 E. C. L. 476.

Liability ex contractu.— It has been held that an action *ex contractu* will not lie. Haines *v.* Franklin, 87 Fed. 139. But this does not appear to be sound, since, as already seen, such actions have been frequently maintained in England, as actions for money had and received upon a consideration which has failed. This right of action has been placed upon a supposed fiduciary relation, arising between promoters and those whom they solicit to become shareholders in the corporation, and upon the consequent obligation on the part of the promoters to exercise the utmost good faith toward the shareholders. Walker *v.* Anglo-American Mortg., etc., Co., 72 Hun (N. Y.) 334, 25 N. Y. Suppl. 432, 55 N. Y. St. 54. But it does not seem that there is any such fiduciary relation, and it is perfectly clear that no such fiduciary relation is necessary in order to sustain an action at law for damages for deceit.

Priorities between mortgage bondholders.— Where promoters, by falsely representing to the owner of property that improvements of great value will be placed upon the property and paid for, induce him to convey the property to the corporation, and to accept in part payment second-mortgage bonds of the corporation, so as to let in, as a first lien, first-mortgage bonds which are held by themselves, and issue to themselves shares of the corporation for which they pay nothing, they will not be allowed to assert the lien of the first mortgage in priority to the second mortgage. Hooper *v.* New York Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262.

Where promoters by various devices cause shares of stock to be issued and assigned to themselves as full-paid, in consideration of property acquired by the corporation, when in fact the property has not been paid for by the shares, and the promoters also hold bonds on the corporate estate secured by a first mortgage, they will not be allowed to recover from the corporation, as first-mortgage bondholders, without paying what is due from them to the corporation as shareholders, if the rights of one who sold the property to the corporation are thereby put in jeopardy. One promoter in such case is affected by the fraud of another in making the guaranty that the money placed in his hands will be used in putting improvements upon the property, and in such a case a promoter of a corporation who has not paid his stock subscription will not be permitted to take an assignment of a claim for improvements made on corporate property, so as to enforce the same in priority to valid mortgages on such property. Hooper *v.* New York Cent. Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262.

Statutes making "officers" of corporations liable for making false certificates or public notices do not apply to a case where a false certificate is made by an incorporator to bring the corporation into being; since, until the corporation is brought into existence, it

of damages of the defrauded sharetaker is, it seems, the money which he has paid on account of his subscription for the shares, with interest, giving a credit to defendants for what the shares were really worth, at the time when they were bought, but not for any fictitious value which they had acquired by reason of the false representation by which they had been imposed upon the public.[3]

b. Injunction Against Promoters For Nuisance After Formation of Company. A continuing nuisance, such as the unlawful occupation of a street by a railway company, will not authorize an injunction against the promoters of a company, where the company has been duly incorporated, although the nuisance may have been commenced by the promoters; but the injunction, if any, should be against the corporation.[4]

c. Personal Liability of Promoters on Contracts Made For Projected Company — (i) *Recent American Doctrine.* The promoters of a corporation are personally liable for debts which they assume to contract in its name and behalf, before it has acquired a *de facto* organization, such as cannot be attacked except by the state,[5] and if the governing statute prescribes a condition precedent to corporate existence, such as filing of articles of incorporation, they are personally liable for engagements which they have assumed to make in the name of the supposed corporation before that condition has been fulfilled.[6] So, if they assume to make contracts in the name of the proposed corporation and then voluntarily abandon their purpose of forming it, they become personally liable to make good those contracts, and each becomes liable to make good such as he has directly or indirectly authorized or ratified.[7] So the promoters of a corporation were liable personally for materials purchased by one elected by them as superintendent and general manager, necessary for the proposed business, where they procured a charter in which they were named as directors for the first year, and as such directors elected themselves officers, but no *bona fide* subscription of stock, or arrangements for the payment of debts or liabilities were ever made.[8] So, although there may be a corporation in existence for which work is being done, it is quite possible that the person contracting to do such work may not be aware of that fact, and may contract with its promoters as individuals, so as to make it a question of fact for the jury whether the contract is a contract of the individuals as partners or of the corporation.[9] With regard to the liability of one promoter for the engagements of others made in the name of the corporation before it has been brought into existence, a person who signs articles of incorporation which are filed for record and recorded may be liable as a partner for permitting the use of his name as an officer of the corporation by other signers of the articles who, without being legally incorporated, carry on business in the assumed name of the corporation, where he has knowledge of such use of his name or is guilty of negligence in not knowing it.[10]

(ii) *In Case of Parol Contracts, Liability Question of Fact For*

has no "officers." Thomson-Houston Electric Co. *v.* Murray, 60 N. J. L. 20, 37 Atl. 443.

3. Twycross *v.* Grant, 2 C. P. D. 469, 46 L. J. C. P. 636, 36 L. T. Rep. N. S. 812, 25 Wkly. Rep. 701, judgment of Lord Coleridge, C. J. See also the views of Lord Cockburn on the same question, at pp. 542–546.

4. Deiter *v.* Estill, 95 Ga. 370, 22 S. E. 622.

5. Hersey *v.* Tully, 8 Colo. App. 110, 44 Pac. 854; Colorado Land, etc., Co. *v.* Adams, 5 Colo. App. 190, 37 Pac. 39; McLennan *v.* Hopkins, 2 Kan. App. 260, 41 Pac. 1061.

6. McLennan *v.* Hopkins, 2 Kan. App. 260, 41 Pac. 1061; Queen City Furniture, etc., Co. *v.* Crawford, 127 Mo. 356, 30 S. W. 163; Wechselberg *v.* Flour City Nat. Bank, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470.

7. Hersey *v.* Tully, 8 Colo. App. 110, 44 Pac. 854; McLennan *v.* Anspaugh, 2 Kan. App. 269, 41 Pac. 1063; Roberts Mfg. Co. *v.* Schlick, 62 Minn. 332, 64 N. W. 826.

8. Whetstone *v.* Crane Bros. Mfg. Co., 1 Kan. App. 320, 41 Pac. 211.

9. Rust-Owen Lumber Co. *v.* Wellman, 10 S. D. 122, 72 N. W. 89.

10. Wechselberg *v.* Flour City Nat. Bank, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470. Construction of statute creating an individual liability for omitting the word "limited" from the corporate name see Lehman *v.* Knapp, 48 La. Ann. 1148, 20 So. 674.

A promoter cannot be held liable for engagements made by his associates with which he had no part, in behalf of the corporation,

Jury. If the contract rests in parol, then it will ordinarily be a question of fact for the jury whether the party advancing the supplies or the money to the promoters did so on the credit of the promoters or on the credit of the prospective corporation.[11] For example it has been held that the character in which the members of what has been called in England the provisional committee of a projected corporation are liable, upon contracts for work and labor, etc., is a question of fact for a jury.[12]

(III) *In Case of Written Contracts, Liability Question of Interpretation For Court.* But if the contract is in writing, and is unambiguous in such a sense as excludes the aid of parol evidence in its interpretation, then the question is a mere question of interpretation for the court, and the promoters will stand bound or discharged from liability according to the terms of the contract by which the parties have seen fit to bind themselves. For example, if the contract stipulates that the obligee will not look to the promoters for payment of indemnity, but will take his chances of their succeeding in organizing the proposed company, and of the company when organized ratifying the contract which they thus assume to make for it, then there will be no room for controversy, and the promoters will not be liable.[13] So if a person agrees with the promoters of a company to bear, himself, the expense of promoting it, he cannot recover such expense from the company when organized, although (it being organized under a special act of legislation) the act contains a provision to the effect that the company shall pay the costs of the passing of the bill — the reason being that the previous agreement inures to the benefit of the company.[14]

(IV) *When Promoters Liable on Theory of Breach of Warranty of Agency.* The obligee in the contract being innocent, and not being aware of the fact that the corporation has not been called into existence, if the promoters assume to hold it out to him as an existent body capable of contracting, and if they assure him that as its agents they have a right to bind it by the contract into which they induce the obligee to enter, and if in point of fact the corporation is not yet existent, then the promoters will be liable to the obligee to make good the contract, on the theory that they have been guilty of a breach of warranty of their agency.[15] The importance of this principle lies in the fact that unless the promoters can be thus charged no one is liable, and the innocent third parties whom they have duped into making the contract and the advance under it must be compelled to bear the loss; since, as already seen, the corporation is

where all the necessary steps to bring it into existence have been taken. Railroad Gazette *v.* Wherry, 58 Mo. App. 423.

Circumstances under which defective acknowledgment of articles of incorporation does not make promoters liable for a purchase of land made in behalf of the intended corporation. See Shields *v.* Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 45 Am. St. Rep. 700, 26 L. R. A. 509.

11. Higgins *v.* Hopkins, 3 Exch. 163, 18 L. J. Exch. 113, 6 R. & Can. Cas. 75.

12. Reynell *v.* Lewis, 16 L. J. Exch. 25, 15 M. & W. 517, 4 R. & Can. Cas. 351.

Considerations which under the English law are to govern the jury in determining the question. Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815; Kerridge *v.* Hesse, 9 C. & P. 200, 38 E. C. L. 126.

13. Such was the contract in Landman *v.* Entwistle, 7 Exch. 632, 21 L. J. Exch. 208; Higgins *v.* Hopkins, 3 Exch. 163, 18 L. J. Exch. 113, 6 R. & Can. Cas. 75. *Compare* Thomas *v.* Edwards, 2 M. & W. 215, Tyrw. & G. 872.

14. Savin *v.* Hoylake R. Co., L. R. 1 Exch. 9, 4 H. & C. 67, 11 Jur. N. S. 934, 35 L. J. Exch. 52, 13 L. T. Rep. N. S. 374, 14 Wkly. Rep. 109.

15. *Arkansas.*— Garnett *v.* Richardson, 35 Ark. 144.

Illinois.— Biglow *v.* Gregory, 73 Ill. 197; Pettis *v.* Atkins, 60 Ill. 454.

Iowa.— Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85.

Louisiana.— Field *v.* Cooks, 16 La. Ann. 153.

Michigan.— Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

Minnesota.— Johnson *v.* Corser, 34 Minn. 355, 25 N. W. 799.

Missouri.— Hurt *v.* Salisbury, 55 Mo. 310.

Nebraska.— Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416.

New Jersey.— Hill *v.* Beach, 12 N. J. Eq. 31.

not ordinarily bound by contracts made in its behalf by its promoters before it comes into existence, but is at liberty to ratify or reject them as it may see fit.[16] For example, where the signers of a promissory note affixed their names to it, with the addition of the words "directors," and "as directors," and in the body of the instrument promised "as directors" of the [corporation] to pay to the person named or to his order a certain sum, and the corporation had not yet acquired a legal existence, they were held liable to pay the same as partners.[17] Where a contract made in behalf of a pretended corporation is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it; and a stranger cannot, by a subsequent ratification, relieve him from liability.[18] This rule applies with full force to the managers of a pretended corporation who have carried on business and acquired credit in its pretended name, and especially where the business is such that the corporation if in existence would be prohibited from doing it.[19] It applies with peculiar force where the circumstances are such that the corporation could not have existed at all, as where the associates have assumed to form a corporation under a statute which is void.[20]

(v) *When Promoters Liable on Ground of Fraud.* If the promoters who assume to make contracts in the name of a corporation before it has been called into existence do so with the fraudulent purpose of deceiving the other party to the contract, they ought at least to pay the damages which they have thus visited upon the other party to it, on another principle which, stated in the most general terms, is that fraud followed by damage gives a right of action in tort for an indemnification. But, more particularly stated, the principle here is that they who cause injury to others by a fraudulent use of corporate powers are liable in damages therefor.[21]

(vi) *Promoters Not Necessarily Liable as Partners.* Promoters may or may not become liable as partners, each for the others, and consequently each for the whole indebtedness, according to the character in which they bind themselves, which, as already seen, will be a question of fact, except where that character is shown by an unambiguous writing; and this will be in an action at law a question of fact for the jury, and in a suit in equity a question of fact for the decision of the chancellor, depending upon the terms of the agreement and the circumstances of the case.[22] The doctrine of the English courts seems to be that persons who serve on provisional committees, appointed at public meetings or otherwise, for the purpose of getting up a company, are not *ipso facto* partners, so that one will be liable upon contracts made by the others, although special facts may exist which will make them liable as such.[23] The reason of the

Pennsylvania.— Hess *v.* Werts, 4 Serg. & R. 356.

16. Erle, C. J., in Kelner *v.* Baxter, L. R. 2 C. P. 174, 12 Jur. N. S. 1016, 36 L. J. C. P. 94, 15 L. T. Rep. N. S. 313, 15 Wkly. Rep. 278.

17. Hurt *v.* Salisbury, 55 Mo. 310.

18. Kelner *v.* Baxter, L. R. 2 C. P. 174, 12 Jur. N. S. 1016, 36 L. J. C. P. 94, 15 L. T. Rep. N. S. 313, 15 Wkly. Rep. 278.

Other illustrative cases where promoters, assuming to contract for an existing corporation, were held personally liable are Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416; Scott *v.* Ebury, L. R. 2 C. P. 255, 36 L. J. C. P. 161, 15 L. T. Rep. N. S. 506, 15 Wkly. Rep. 517.

19. Fay *v.* Noble, 7 Cush. (Mass.) 188; Medill *v.* Collier, 16 Ohio St. 599.

20. Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

21. Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; Vose *v.* Grant, 15 Mass. 505; Medill *v.* Collier, 16 Ohio St. 599; Bartholomew *v.* Bentley, 1 Ohio St. 37; Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596.

22. Johnson *v.* Corser, 34 Minn. 355, 25 N. W. 799.

23. Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815; Newton *v.* Belcher, 12 Q. B. 921, 13 Jur. 253, 18 L. J. Q. B. 53, 6 R. & Can. Cas. 38, 64 E. C. L. 921; Forrester *v.* Bell, L. R. 10 Ir. 555; Matter of Wolverhampton, etc., R. Co., 1 Drew. 204, 2 Hall & T. 391, 16 Jur. 681, 19 L. J. Ch. 368, 2 Macn. & G. 192, 48 Eng. Ch. 148 [*affirming* 3 De G. & Sm. 205, 14 Jur. 539 note, 6 R. & Can. Cas. 310]; Land-

rule is said to be that a partnership is not created by agreement to organize a future partnership.[24] Another reason is that an agreement to form a corporation does not make the coadventurers partners with respect to their engagements made prior to the existence of the corporation, for the reason that there is no agreement among them to share any profit or loss.[25]

(VII) *PROMOTERS NOT AS SUCH CONTRIBUTORIES.* Promoters, being neither partners nor members of the company in virtue of the fact that they are promoters, are not liable, on the company being wound up, to contribute to the fund raised to pay its debts and to pay the expenses of the winding-up.[26] In the United States the rule would be substantially the same, and for substantially the same reasons. If the corporation had never become organized, then, in case of its being wound up in equity, the promoters would or would not be liable to contribute to the payment of its debts and to the expenses of its winding-up, according to the position in which, by their contracts, they had placed themselves, which would be a question of fact, or of fact and law, in each particular case. If the corporation had been called into existence, then they would not ordinarily be liable to contribute to the payment of its debts, for the reason that as promoters they are neither shareholders nor members of it.

(VIII) *WHETHER ONE PROMOTER CAN SUE ANOTHER AT LAW*—(A) *In General.* If promoters have assumed, as among themselves, the character of partners — which, as already seen, is *prima facie* not the case — then one of them cannot sue another for contribution in respect of a debt which they have contracted in their character as partners, under a well-known rule.[27] If, however, the defendant promoter personally undertook to pay the plaintiff promoter the rule would be different.[28] Thus if a person who is an inventor of a scheme gets gentlemen to act as a committee, with the intention of forming a joint-stock company to carry it into effect, and he himself acts as secretary to the committee, he cannot maintain an action against one of the committee for his services as such secretary,

man *v.* Entwistle, 7 Exch. 632, 21 L. J. Exch. 208; Burnside *v.* Dayrell, 3 Exch. 224, 19 L. J. Exch. 46, 6 R. & Can. Cas. 67 [*overruling* Barnett *v.* Lambert, 15 M. & W. 489]; Higgins *v.* Hopkins, 3 Exch. 163, 18 L. J. Exch. 113, 6 R. & Can. Cas. 75; Norris *v.* Cottle, 2 H. L. Cas. 647, 14 Jur. 703; Carrick's Case, 15 Jur. 645, 20 L. J. Ch. 670, 1 Sim. N. S. 505, 40 Eng. Ch. 505; Wood *v.* Argyll, 13 L. J. C. P. 96, 6 M. & G. 928, 7 Scott N. R. 885, 46 E. C. L. 928; Matter of Wolverhampton, etc., R. Co., 2 Macn. & G. 185, 48 Eng. Ch. 143; Reynell *v.* Lewis, 15 M. & W. 517. See the observations of Lord Brougham in Norris *v.* Cottle, 2 H. L. Cas. 647, 14 Jur. 703. The cases of Holmes *v.* Higgins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. K. B. O. S. 47, 8 E. C. L. 33; Lucas *v.* Beach, 4 Jur. 631, 1 M. & G. 417, 1 Scott N. R. 350; 39 E. C. L. 831, and Hutton *v.* Upfill, 2 H. L. Cas. 674, are overruled on this point.

24. Forrester *v.* Bell, L. R. 10 Ir. 555. See to the general question Fay *v.* Noble, 7 Cush. (Mass.) 188; Bourne *v.* Freeth, 9 B. & C. 632, 1 L. J. K. B. O. S. 292, 4 M. & R. 512, 17 E. C. L. 285; Fox *v.* Clifton, 6 Bing. 776, 8 L. J. C. P. O. S. 257, 4 M. & P. 676, 31 Rev. Rep. 536, 19 E. C. L. 347 [*affirmed* in 9 Bing. 115, 1 L. J. C. P. 180, 2 Moore & S. 146, 23 E. C. L. 509]. It is upon this ground that an allottee of shares in an abortive company is not a contributory. There never was a contract of partnership on his part, but only an agreement to become a partner in case the company should be formed under an act of parliament. Hutton *v.* Thompson, 3 H. L. Cas. 161.

25. Reynell *v.* Lewis, 16 L. J. Exch. 25, 15 M. & W. 517, 4 R. & Can. Cas. 351.

26. Matter of Direct Exeter, etc., R. Co., 3 De G. & Sm. 205, 14 Jur. 539 note, 6 R. & Can. 310 [*affirmed* in 1 Drew. 204, 2 Hall & T. 391, 16 Jur. 681, 19 L. J. Ch. 368, 2 Macn. & G. 192, 48 Eng. Ch. 148]; Bright *v.* Hutton, 3 H. L. Cas. 341, 16 Jur. 695 [*overruling* Hutton *v.* Upfill, 2 H. L. Cas. 674, and many previous English cases].

27. Milburn *v.* Codd, 7 B. & C. 419, 1 M. & R. 238, 14 E. C. L. 191.

28. Holmes *v.* Higgins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. K. B. O. S. 47, 8 E. C. L. 33; Goddard *v.* Hodges, 1 Cromp. & M. 33, 2 L. J. Exch. 20, 3 Tyrw. 209; Wilson *v.* Curzon, 11 Jur. 47, 16 L. J. Exch. 122, 16 M. & W. 532, 5 R. & Can. Cas. 24. But one who had entered into a contract to perform work and furnish materials with a committee associated together for the purpose of obtaining an act of parliament for making a turnpike road was not precluded from maintaining such an action by the fact that, subsequently to such contract, he became a shareholder in the company; although it would prevent him from recovering for the value of any services rendered subsequently to the time when he became a shareholder. Lucas *v.* Beach, 4 Jur. 631, 1 M. & G. 417, 1 Scott N. R. 350, 39 E. C. L. 831.

for his trouble, or for journeys which he undertakes in furtherance of the execution of the scheme, unless upon express evidence that the member of the committee whom he sues employed him.[29]

(B) *Circumstances Under Which One Can Maintain Action Against Others For Contribution.* If one promoter pays a debt for which all the promoters are liable, he may of course have contribution from the others in a proper proceeding. In such a case it seems that each pays an aliquot portion of the original indebtedness and no more — not being liable to contribute to make up deficiencies caused by the death or insolvency of any of the others.[30] Circumstances may of course arise in which one promoter will be entitled to maintain an action at law against another promoter to recover advances made at the special instance and request of such other — as where one committeeman incurs and pays costs, at the request of another committeeman, in bringing actions against still other committeemen to recover the amount of his claim, in which case he might at common law recover the amount of such costs from the committeeman at whose instance he sued, under the common count for money paid.[31]

29. Parkin *v.* Fry, 2 C. & P. 311, 12 E. C. L. 590.

30. Batard *v.* Hawes, 3 C. & K. 277, 2 E. & B. 287, 17 Jur. 1154, 22 L. J. Q. B. 443, 1 Wkly. Rep. 387, 75 E. C. L. 287. See to the same effect Edger *v.* Knapp, 1 D. & L. 73, 7 Jur. 583, 5 M. & G. 753, 6 Scott N. R. 707, 44 E. C. L. 393. Thus A, B, and C hired premises of D, for the purposes of a company, of which A, B, and C were the contract committeemen. The company having suffered the rent to get in arrear, D sued and recovered it of A. It was held that A could maintain separate actions at law against B and C for contribution. Boulter *v.* Peplow, 9 C. B. 493, 14 Jur. 248, 19 L. J. C. P. 190, 67 E. C. L. 493.

31. Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815. As to the action at law to recover upon an undertaking for the payment of money when an incorporated company which the parties proposed to form shall be organized see Childs *v.* Smith, 55 Barb. (N. Y.) 45.

That a committeeman subsequently joining is not liable for engagements of committeemen made prior to his joining, unless made so by his own special agreement or conduct, see Beale *v.* Mouls, 10 Q. B. 976, 11 Jur. 845, 16 L. J. Q. B. 410, 5 R. & Can. Cas. 105, 59 E. C. L. 976. *Compare* for a similar rule in respect of incoming partners Woods *v.* Russell, 5 B. & Ald. 942, 1 D. & R. 587, 24 Rev. Rep. 621, 7 E. C. L. 512; Helsby *v.* Mears, 5 B. & C. 504, 8 D. & R. 289, 4 L. J. K. B. O. S. 214, 11 E. C. L. 559. And see further Clarke *v.* Spence, 4 A. & E. 448, 5 L. J. K. B. 161, 6 N. & M. 399, 31 E. C. L. 206; Maudslay *v.* Le Blanc, 2 C. & P. 409, 12 E. C. L. 643; Whitehead *v.* Barron, 2 M. & Rob. 248; *Ex p.* Peele, 6 Ves. Jr. 602; *Ex p.* Jackson, 1 Ves. Jr. 131, 1 Rev. Rep. 91.

Members of provisional committee in England are not, as matter of law, liable for the engagements of the managing committee appointed by them (Williams *v.* Pigott, 2 Exch. 201, 12 Jur. 313, 17 L. J. Exch. 196, 5 R. & Can. Cas. 544), in the absence of proof of an intention or an agreement to be so bound (Brown *v.* Andrew, 13 Jur. 938, 18 L. J. Q. B. 153), which would be a question of fact for a jury (Williams *v.* Pigott, 2 Exch. 201, 12 Jur. 313, 17 L. J. Exch. 196, 5 R. & Can. Cas. 544). If judgments are obtained in separate actions against persons who are jointly liable, for the same subject-matter, a satisfaction of one judgment is in effect a satisfaction of both. Bailey *v.* Haines, 15 Q. B. 533, 14 Jur. 835, 19 L. J. Q. B. 402, 69 E. C. L. 533; Turner *v.* Davies, 2 Saund. 137*l*. If therefore separate actions are brought against several committeemen of a projected corporation upon a demand for which they are jointly liable, and pending such actions one of them pays the whole debt and the costs in the suit against himself, the others will be entitled to have the proceeding against them stayed without payment of costs. Newton *v.* Blunt, 3 C. B. 675, 4 D. & L. 674, 16 L. J. C. P. 121, 5 R. & Can. Cas. 29, 54 E. C. L. 675. "A plaintiff who, to multiply his chances of success, brings several actions for a joint debt against the co-contractors, has no reason to complain if his success in obtaining payment of the debt and costs in one, deprives him of the right to recover costs in the other actions." Joint contractors are entitled, under this rule, to be discharged without payment of costs, even after verdict, if judgment against them has not been signed. Nor does it make any difference that separate evidence may be necessary to establish the joint liability of each of the committeemen separately sued; for it frequently happens, where actions on joint contracts are brought against several, that it is necessary to establish the case against each by separate evidence. Bailey *v.* Haines, 15 Q. B. 533, 538, 14 Jur. 835, 19 L. J. Q. B. 402, 69 E. C. L. 533, per Lord Campbell, C. J. Upon the question of what evidence may be resorted to to charge committeemen with the debts incurred in promoting a corporation see Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815; Matter of Direct Exeter, etc., R. Co., 3 De G. & Sm. 224 [*affirmed* in 2

d. Liability of Promoters to Company—(i) *Promoters Must Account to Future Corporation For Secret Profits.* Although the promoters of a corporation are not its agents for the purpose of binding it by their acts and engagements,[32] yet they are its fiduciaries; they occupy such a relation of trust and confidence toward the body which they are calling into existence — or, more properly speaking, toward those whom they invite to join them in the intended enterprise by becoming members of such body — as requires the same good faith on their part which the law exacts of the directors of corporations and of other fiduciaries. They are trustees in a sense which disables them from taking to themselves a secret profit made out of their trust, to the detriment of the future corporation or its members; and they will be required to account for such profits to the corporation, to its shareholders, or to its receiver or other representative in insolvency proceedings.[33]

Macn. & G. 176, 48 Eng. Ch. 137 (*reversed* in 3 Macn. & G. 287, 49 Eng. Ch. 217)] (committeeman leaving the room before passage of resolution incurring the liability, not bound to contribute to its liquidation); Matter of Direct Exeter, etc., R. Co., 3 De G. & Sm. 205, 14 Jur. 539 note, 6 R. & Can. Cas. 310 [*affirmed* in 1 Drew. 204, 2 Hall & T. 391, 16 Jur. 681, 19 L. J. Ch. 368, 2 Macn. & G. 192, 48 Eng. Ch. 148]; Reynell *v.* Lewis, 16 L. J. Exch. 25, 15 M. & W. 517, 4 R. & Can. Cas. 351. That a member of such committee, who takes part in its affairs so as to make himself liable for contracts made on a given day, does not thereby make himself liable for services rendered after that day where the order for such services was given before it see Newton *v.* Belcher, 12 Q. B. 921, 13 Jur. 253, 18 L. J. Q. B. 53, 6 R. & Can. Cas. 38, 64 E. C. L. 921. For further illustrations of evidence to charge committeemen under the English law see Abbott *v.* Cobb, 17 Vt. 593; Newton *v.* Belcher, 12 Q. B. 921, 13 Jur. 253, 18 L. J. Q. B. 53, 6 R. & Can. Cas. 38, 64 E. C. L. 921; Riley *v.* Packington, L. R. 2 C. P. 536, 36 L. J. C. P. 204, 16 L. T. Rep. N. S. 382, 15 Wkly. Rep. 746; Patrick *v.* Reynolds, 1 C. B. N. S. 727, 87 E. C. L. 727; Matter of Direct Exeter, etc., R. Co., 3 De G. & Sm. 214; Wood *v.* Duke of Argyll, 13 L. J. C. P. 96, 6 M. & G. 928, 7 Scott N. R. 885, 46 E. C. L. 928; Reynell *v.* Lewis, 16 L. J. Exch. 25, 15 M. & W. 517, 4 R. & Can. Cas. 351; Matter of Direct Exeter, etc., R. Co., 3 Macn. & G. 287, 49 Eng. Ch. 217 [*reversing* 2 Macn. & G. 176, 48 Eng. Ch. 137 (*affirming* 3 De G. & Sm. 224)]. *Compare* Braithwaite *v.* Skofield, 9 B. & C. 401, 7 L. J. K. B. O. S. 274, 17 E. C. L. 184; Hole's Case, 3 De G. & Sm. 241; Rennie *v.* Clarke, 5 Exch. 292, 19 L. J. Exch. 278.

For a collection of facts which were held sufficient to charge all the members of an abortive corporation with expenses incurred in prosecuting the work which it was intended the corporation should prosecute when called into existence see Johnson *v.* Corser, 34 Minn. 355, 25 N. W. 799.

Evidence to charge the associates with liability for the expenses of an agent chosen by them to procure a charter for the corporation where the agent failed in his quest see Sproat *v.* Porter, 9 Mass. 300.

32. See *supra*, I, Q, 2.

33. *California.*— Burbank *v.* Dennis, 101 Cal. 90, 35 Pac. 444; Ex-Mission Land, etc., Co. *v.* Flash, 97 Cal. 610, 32 Pac. 600.

Connecticut.— Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90.

Kentucky.— Paducah Land, etc., Co. *v.* Mulholland, 24 S. W. 624, 15 Ky. L. Rep. 624.

Massachusetts.— Emery *v.* Parrott, 107 Mass. 95.

Missouri.— South Joplin Land Co. *v.* Case, 104 Mo. 572, 16 S. W. 390; St. Louis, etc., Min. Co. *v.* Jackson, 5 Centr. L. J. 317.

New Jersey.— Woodbury Heights Land Co. *v.* Loudenslager, 55 N. J. Eq. 78, 35 Atl. 436; Plaquemines Tropical Fruit Co. *v.* Buck, 52 N. J. Eq. 219, 27 Atl. 1094.

New York.— Getty *v.* Devlin, 54 N. Y. 403, 70 N. Y. 504.

Pennsylvania.— Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628; McElhenny's Appeal, 61 Pa. St. 188.

Virginia.— Central Land Co. *v.* Obenchain, 92 Va. 130, 22 S. E. 876.

Wisconsin.— Fountain Spring Park Co. *v.* Roberts, 92 Wis. 345, 66 N. W. 399, 53 Am. St. Rep. 917; Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149; Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433; *In re* Taylor Orphan Asylum, 36 Wis. 534; Pickett *v.* Wiota School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105; Puzey *v.* Senier, 9 Wis. 370.

United States.— Krohn *v.* Williamson, 62 Fed. 869; Chandler *v.* Bacon, 30 Fed. 538.

England.— Whaley Bridge Calico Printing Co. *v.* Green, 5 Q. B. D. 109, 49 L. J. Q. B. 326, 41 L. T. Rep. N. S. 674, 28 Wkly. Rep. 351; Kimber *v.* Barber, L. R. 8 Ch. 56, 27 L. T. Rep. N. S. 526, 21 Wkly. Rep. 65; Emma Silver Min. Co. *v.* Grant, 11 Ch. D. 918, 40 L. T. Rep. N. S. 804; Bagnall *v.* Carlton, 6 Ch. D. 371, 47 L. J. Ch. 30, 37 L. T. Rep. N. S. 481, 26 Wkly. Rep. 243; New Sombrero Phosphate Co. *v.* Erlanger, 5 Ch. D. 73, 46 L. J. Ch. 425, 36 L. T. Rep. N. S. 222, 25 Wkly. Rep. 436; Tyrrell *v.* London Bank, 10 H. L. Cas. 26, 8 Jur. N. S. 849, 31 L. J. Ch. 369, 6 L. T. Rep. N. S. 1, 10 Wkly. Rep. 359; Beck *v.* Kantorowicz, 3 Kay & J. 230; Fawcet *v.* Whitehouse, 4 L. J. Ch. O. S. 64,

(II) *Bound to Provide Company With Independent Board of Directors and to Make Full Disclosures to Them*— (A) *Rule Stated.* The foregoing principle requires two things on the part of the promoter: (1) In organizing the intended corporation, to see that it is provided with a board of directors which in dealing with him will act independently and individually for the company and not for him.[34] (2) To make a full and fair disclosure to such directors of his interest and of all the facts which the corporation ought to know before entering into the intended contract.[35]

(B) *What Is Full and Fair Disclosure.* The promoter must faithfully state to the governing body of the company, or to its shareholders, all material facts relating to the property which they propose to sell to the company which would be likely to influence the company or the shareholders in deciding the question of the desirability of purchasing it.[36] It has been held that the mere statement in a prospectus inviting subscriptions to the stock of a corporation of the date and parties to an agreement, by which a seller of property taken by the corporation offers the promoters a certain sum for the formation of the company, is a sufficient disclosure.[37] If — as happened in several of the foregoing cases — there was not only not a full and fair disclosure, but affirmative misrepresentation, fraud, and deceit, then not only the promoter, but other persons as well, who stand in no fiduciary relation toward the corporation or its members, but who, with knowledge of the fraud, concur with the promoter in carrying out his fraudulent scheme, will become liable to the corporation for what it has lost thereby.[38]

(III) *Cannot Purchase at One, and Sell to Company at Higher, Valuation, Without Full Disclosure.* The common form which the breaches of trust by promoters toward the future company and toward those whom they may induce to join the future company assume is the purchasing of property at one valuation, and then, without making a full and fair disclosure of the facts to those whom they induce to join the enterprise, or to the managing body of the future company whom they in a sense create, the selling of it to the company at a

8 L. J. Ch. O. S. 50, 1 Russ. & M. 132, 5 Eng. Ch. 132; Charlton *v.* Hay, 31 L. T. Rep. N. S. 437, 23 Wkly. Rep. 129; Hichens *v.* Congreve, 1 Russ. & M. 150, 5 Eng. Ch. 150.

Canada.— Matter of Hess Mfg. Co., 23 Can. Supreme Ct. 644 [*affirming* 21 Ont. App. 66].

See 12 Cent. Dig. tit. "Corporations," § 98.

34. Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65 [*affirming* 5 Ch. D. 73].

A later case denies this doctrine and holds that there is no duty imposed on the promoters of a company to provide it with an independent board of directors, if the real truth is disclosed to those who are induced by the promoters to join the company; so that where the promoters are vendors to the company the contract of sale cannot be set aside under such circumstances merely because the board of directors were not independent. Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, 68 L. J. Ch. 699, 81 L. T. Rep. N. S. 334, 48 Wkly. Rep. 74.

35. Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65 (per Lord Penzance); Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, 68 L. J. Ch. 699, 81 L. T. Rep. N. S. 334, 48 Wkly. Rep. 74 [*distinguishing* Salomon *v.* Salomon, [1897] A. C. 22, 66 L. J. Ch. 35, 75 L. T. Rep. N. S. 426, 4 Manson 89, 45 Wkly. Rep. 193, which does not seem to have been well decided]. Where land has been bought by the promoters at one price and sold to the corporation at a much higher price, the fact that one of the promoters, in selling the shares which he received for his interest in the land, represented that the land had been turned over to the corporation at what it had cost the promoters does not give a right of action to the corporation against such promoter, unless, in the state of the law, such a right of action otherwise exists. Spaulding *v.* North Milwaukee Town Sits Co., 106 Wis. 481, 81 N. W. 1064.

36. Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65 [*affirming* 5 Ch. D. 73].

37. *Re* Sale Hotel, 78 L. T. Rep. N. S. 368, 46 Wkly. Rep. 617 [*reversing* 77 L. T. Rep. N. S. 681].

38. Fountain Spring Park Co. *v.* Roberts, 92 Wis. 345, 66 N. W. 399, 53 Am. St. Rep. 917. For a case where a corporation was defrauded by having land transferred to it at one thousand five hundred dollars an acre, taking its shares in payment, which had been bought by the promoters for one thousand dollars an acre, and where under the circumstances the fraud was regarded as that of one of them perpetrated upon another, vesting the right of action in that other, see Spaulding *v.* North Milwaukee Town Site Co., 106 Wis. 481, 81 N. W. 1064.

higher price, and thereby taking to themselves a secret profit. Such transactions can never be allowed to stand where justice is properly administered, but they will be enjoined in equity, and the promoters will be compelled to account for and to disgorge the secret profit which they have thus made fraudulently and in breach of their trust; and in some jurisdictions the corporation may sue and recover the sum in actions at law.[39] The theory upon which the courts work out this conclusion and apply the remedy may not be material; at least, it will be sufficient to say that when the corporation, through its governing body, acquires full knowledge of all the facts of the transaction, it may, like any other trustee under similar circumstances, elect to affirm or disaffirm or to charge the profits made by the trustee or agent with an implied trust for his benefit.[40] It is immaterial that the company gets the property at a good bargain. This does not relieve the promoter from liability, for the company has a right to the best bargain which those acting in its interest as fiduciaries can, with full knowledge of the facts, give it.[41] Nor is it an answer to such an action that the company is a fluctuating body, and that it may be that no person who was a member at the time of the transactions is a member at the time of the bringing of the suit; but in such case the court is bound to consider the company as having a perpetual existence, and is not at liberty to go into the question of what individuals compose it.[42]

(IV) *Company May Proceed Against Promoters to Recover Secret Profits Either in Equity or at Law.* Promoters who thus, in breach of their trust and in fraud of the corporation, take to themselves secret profits are liable to account for the same in equity at the suit of the corporation;[43] and it may maintain an action of assumpsit against them and recover such profits where an accounting is not necessary, as so much money had and received by them to its use, although the gravamen of the action is fraud and deceit.[44] The fact that

39. See *infra*, I, Q, 7, d, (IV).

40. *Kansas.*— St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544.

Massachusetts.— Parker *v.* Nickerson, 137 Mass. 487; Parker *v.* Nickerson, 112 Mass. 195.

Pennsylvania.— Simonds *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628.

Wisconsin.— Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433; *In re* Taylor Orphan Asylum, 36 Wis. 534; Pickett *v.* Wiota School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105; Puzey *v.* Senier, 9 Wis. 370.

England.— Kimber *v.* Barber, L. R. 8 Ch. 56, 27 L. T. Rep. N. S. 526, 21 Wkly. Rep. 65; Society, etc. *v.* Abbott, 2 Beav. 559, 4 Jur. 453, 9 L. J. Ch. 307, 17 Eng. Ch. 559; *In re* British Seamless Paper Box Co., 17 Ch. D. 467, 50 L. J. Ch. 497, 44 L. T. Rep. N. S. 498, 29 Wkly. Rep. 690; New Sombrero Phosphate Co. *v.* Erlanger, 5 Ch. D. 73, 46 L. J. Ch. 425, 36 L. T. Rep. N. S. 222, 25 Wkly. Rep. 436; Tyrrell *v.* London Bank, 10 H. L. Cas. 26, 8 Jur. N. S. 849, 31 L. J. Ch. 369, 6 L. T. Rep. N. S. 1, 10 Wkly. Rep. 359.

See also Morowitz Priv. Corp. (1st ed.) § 279 [*commenting* on New Sombrero Phosphate Co. *v.* Erlanger, 5 Ch. D. 73, 46 L. J. Ch. 425, 36 L. T. Rep. N. S. 222, 25 Wkly. Rep. 436]. And note the strong language of Sir Nathaniel Lindley in the first edition of his celebrated work on Partnership. Lindley Partn. (1st ed.) 497. See also the opinion of Sir John Romilly, M. R., in London Bank *v.* Tyrrell, 5 Jur. N. S. 924 [*distinguishing* Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711]; and the language of Thompson, J., in Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628.

41. Beck *v.* Kantorowicz, 3 Kay & J. 230.

42. Phosphate Sewage Co. *v.* Hartmont, 5 Ch. D. 394, 46 L. J. Ch. 661, 37 L. T. Rep. N. S. 9, 24 Wkly. Rep. 530.

For illustrative cases see Chandler *v.* Bacon, 30 Fed. 538; Atwool *v.* Merryweather, L. R. 5 Eq. 464 note; Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65 [*affirming* 5 Ch. D. 73]; Nant-y-glo, etc., Ironworks Co. *v.* Grave, 12 Ch. D. 738, 38 L. T. Rep. N. S. 345, 26 Wkly. Rep. 504; Emma Silver Min. Co. *v.* Grant, 11 Ch. D. 918, 40 L. T. Rep. N. S. 804; *In re* British Provident L., etc., Assoc., 5 Ch. D. 306, 46 L. J. Ch. 360, 36 L. T. Rep. N. S. 329, 25 Wkly. Rep. 476; *In re* Moriah Consols Tin Min. Co., 2 Ch. D. 1, 45 L. J. Ch. 148, 33 L. T. Rep. N. S. 517, 24 Wkly. Rep. 49; *In re* Western of Canada Oil, etc., Co., 1 Ch. D. 115, 45 L. J. Ch. 5, 33 L. T. Rep. N. S. 645, 24 Wkly. Rep. 165.

43. Atwool *v.* Merryweather, L. R. 5 Eq. 464 note; Lydney, etc., Iron Ore Co. *v.* Bird, 33 Ch. D. 85, 55 L. T. Rep. N. S. 558, 34 Wkly. Rep. 749; Emma Silver Min. Co. *v.* Grant, 11 Ch. D. 918, 40 L. T. Rep. N. S. 804. *Compare* Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. (N. Y.) 553.

44. Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628; Whaley Bridge

the directors may have had knowledge of the fraud when it was perpetrated by the promoters will be no defense, as matter of law, to such an action, since they may have been in collusion with the promoters in defrauding the company.[45]

(v) *Cases in Which Promoters Are Not Required to Account For Profits.* The foregoing principles do not apply where the contract is made at a time when no fiduciary relation exists, before the relation of promoter has been assumed. In such a case the person selling property to the company is not bound to disclose what he gave for the property; the case stands precisely like a case of bargain and sale between two strangers; and if without fraud he gets a good bargain from the company it is so much good fortune for him.[46] So the mere fact that a person sells property to a corporation and afterward becomes a director in it does not make him liable for the profit which he acquired, if he acted openly and honestly and as an independent vendor.[47] Even where the fiduciary relation exists, the rule prohibits only the taking of secret profits by the promoter from the corporation which he promotes. It does not inhibit the taking of open profits. It does not prevent a promoter from buying property, and then organizing a corporation and selling the property to the corporation at a profit to himself, so that he does it fairly and openly, and so that there is a body representing the corporation independently of himself with whom he may deal — a body acting independently for the corporation, and not merely his own dummies.[48]

(vi) *Company May Affirm Promoters' Contract and Enforce It For Its Own Benefit.* It is not at all necessary to the right of the company, as against its promoters, to recover whatever secret profits they have made in violation of their trust that there should be a rescission of the contract between them and the strangers from whom they may have purchased the property which they have conveyed to the company at an enhanced price.[49] On the contrary it is within the pleasure of the company to elect to disaffirm and recover specifically what it has parted with, where such a recovery can be had, or to affirm and compel its promoters to account for their profits.[50] And if part of the "promotion money," as it is termed in the English books, remains unpaid, the company may recover it, in an action at law against the vendors, as so much money belonging to the company and not to its promoters.[51]

(vii) *Not Necessary That Company Rescind Whole Transaction.* It is not necessary for the company, when it comes into existence, to rescind the whole transaction. It may affirm the transaction in so far as it is honest, and disaffirm it in so far as it is fraudulent and against its rights.[52]

Calico Printing Co. *v.* Green, 5 Q. B. D. 109, 49 L. J. Q. B. 326, 41 L. T. Rep. N. S. 674, 28 Wkly. Rep. 351; Emma Silver Min. Co. *v.* Lewis, 4 C. P. D. 396, 48 L. J. C. P. 257, 40 L. T. Rep. N. S. 168, 27 Wkly. Rep. 836 (holding that such an action at law may be maintained on the ground of conspiracy). Unsuccessful action for damages by shareholder against a promoter, on the ground that he had received promotion money not stated in the prospectus. Arkwright *v.* Newbold, 17 Ch. D. 301, 50 L. J. Ch. 372, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 455.

45. Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628.

46. *In re* Coal Economising Gas Co., 1 Ch. D. 182, 45 L. J. Ch. 83, 33 L. T. Rep. N. S. 619, 24 Wkly. Rep. 125. See also Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65 [*affirming* 5 Ch. D. 73, and *reversing* the decision of Vice-Chancellor Malins in 5 Ch. D. 91, which proceeded on the authority of Gover's case].

47. Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; Lungren *v.* Pennell, 10 Wkly. Notes Cas. (Pa.) 297; Albion Steel, etc., Co. *v.* Martin, 1 Ch. D. 580, 45 L. J. Ch. 173, 33 L. T. Rep. N. S. 660, 24 Wkly. Rep. 134.

48. Plaquemines Tropical Fruit Co. *v.* Buck, 52 N. J. Eq. 219, 27 Atl. 1094; Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65.

49. Emma Silver Min. Co. *v.* Lewis, 4 C. P. D. 396, 48 L. J. C. P. 257, 40 L. T. Rep. N. S. 168, 27 Wkly. Rep. 836. *Compare* Ladywell Min. Co. *v.* Brookes, 35 Ch. D. 400, 56 L. J. Ch. 684, 56 L. T. Rep. N. S. 677, 35 Wkly. Rep. 785.

50. Chandler *v.* Bacon, 30 Fed. 538.

51. Whaley Bridge Calico Printing Co. *v.* Green, 5 Q. B. D. 109, 49 L. J. Q. B. 326, 41 L. T. Rep. N. S. 674, 28 Wkly. Rep. 351.

52. This was held in Lydney, etc., Iron Ore Co. *v.* Bird, 33 Ch. D. 85, 55 L. T. Rep. N. S. 558, 34 Wkly. Rep. 749. It is illustrated by the following cases, in none of which

(VIII) *RIGHT OF PROMOTERS TO REIMBURSEMENT OR DEDUCTIONS FOR EXPENSES INCURRED IN PROMOTING COMPANY.* In a proceeding whereby the promoters of a corporation are held to account for secret profits they will be entitled to reimbursements or deductions to the extent of expenses which they have *bona fide* incurred and paid in promoting the corporation; as for example in procuring options upon property for the benefit of the prospective corporation;[53] and to the extent of the money charged for the report, the fees paid to solicitors and brokers, the sums paid for printing, advertising, etc., but not for payments made by a fraudulent promoter in procuring the issue of shares or for a sum which such a promoter had expended in obtaining from another person a guarantee to a sharetaker who had been induced to subscribe for some of the shares.[54]

(IX) *NO DEFENSE TO PROMOTER THAT COMPANY HAS COMPROMISED SUIT AGAINST VENDORS.* The fact that the company has compromised a suit against the vendors, for rescission of the contract of sale, affords no defense, in an action against the promoters, to compel them to account for secret profits; since the promoters occupy toward the company a position entirely different from that of vendors who are strangers to it.[55]

(X) *PROMOTERS BOUND TO DISCLOSE WHAT THEY ARE TO GET FOR THEIR SERVICES.* It is a part of this doctrine that the promoters of a company are bound to disclose to those whom they induce to become members of the company what their compensation for promoting the company is to be — concealment of which fact is treated as a fraud upon the future company.[56]

(XI) *NATURE AND INSTANCES OF REMEDY IN EQUITY.* To enable the corporation to sue and recover the secret profits thus made by a promoter, no offer to rescind is necessary; and this, although the property which the corporation was induced to purchase was worth as much or more than was paid for it.[57] If the promoters, while they are still shareholders, vote to issue their shares to themselves in payment for their services rendered to it in securing options on land which they assign to it, the stock so issued equalizing the estimated profits to be

was the whole transaction set aside: Whaley Bridge Calico Printing Co. *v.* Green, 5 Q. B. D. 109, 49 L. J. Q. B. 326, 41 L. T. Rep. N. S. 674, 28 Wkly. Rep. 351; Bagnall *v.* Carlton, 6 Ch. D. 371, 47 L. J. Ch. 30, 37 L. T. Rep. N. S. 481, 26 Wkly. Rep. 243; Emma Silver Min. Co. *v.* Lewis, 4 C. P. D. 396, 48 L. J. C. P. 257, 40 L. T. Rep. N. S. 168, 27 Wkly. Rep. 836; Beck *v.* Kantorowicz, 3 Kay & J. 230.

53. Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725. Or, in England, in securing the services of directors, and providing their qualifications, and in payments made to the brokers and officers of the company, and to the public press in advertising it. Emma Silver Min. Co. *v.* Grant, 11 Ch. D. 918, 40 L. T. Rep. N. S. 804.

54. Lydney, etc., Iron Ore Co. *v.* Bird, 33 Ch. D. 85, 55 L. T. Rep. N. S. 558, 34 Wkly. Rep. 749.

55. Bagnall *v.* Carlton, 6 Ch. D. 371, 47 L. J. Ch. 30, 37 L. T. Rep. N. S. 481, 26 Wkly. Rep. 243.

56. *In re* Hereford, etc., Waggon, etc., Co., 2 Ch. D. 621, 45 L. J. Ch. 461. But the concealment of a subagreement between the promoters of a company and four of its directors by which a part of a sum which, according to the articles of association, is to be paid to the promoters for their labor and expense in getting up the concern is in fact paid to such directors vitiates the whole contract between the company and promoters. *In re* Madrid Bank, L. R. 2 Eq. 216, 35 L. J. Ch. 474, 14 L. T. Rep. N. S. 456, 14 Wkly. Rep. 706. But where H, a contractor, obtained from one of the cantons of Switzerland a concession for building a railroad, which concession he transferred to a company formed for that purpose, it was held no ground for relieving a shareholder in such company from his contract of subscription that H secretly agreed to give to a certain director paid-up shares in consideration of his consenting to act as a director; or that he had secretly given to two other persons, who afterward became directors, a sum of money in bills, in consideration of their procuring a credit company to bring out the railway company in question. The reason assigned by Lord Romilly, M. R., for so holding was that these transactions were not such as materially affected the success of the undertaking, and hence the fact that they had been concealed from the shareholder would not entitle him to say that if he had known of them he would not have taken the shares. Heymann *v.* European Cent. R. Co., L. R. 7 Eq. 154.

57. Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90. Circumstances under which a

derived from such options, and thereafter invite the public to subscribe for shares, without disclosing to the subscribers the consideration for which they have acquired them, or without getting the consent of the subscribers to the payment of such remuneration, they are guilty of a fraud upon the subscribers and the company; and the company can, without reconveying the lands acquired under the options, maintain an action for the recovery of the shares or for damages for the loss of them. In such a case the fraudulent promoters may not only be compelled to account for the shares so received with the dividends thereon received by them; for the proceeds of any sales of the shares made by them, with interest from the dates of the sales; for the market value of the shares at the time when they were issued and thus acquired by the promoters; or, if they had no market value at the time when they were issued, for the reason that the corporation was not yet launched, then for the value at a time when a market value of them may be found to have been established.[58] It has been said that in such cases equity does not give damages, but decrees a restoration of the thing wrongfully taken, that is, the money received, or an equal sum, with interest.[59] The company recovers from the promoter the amount of profit which he has made out of the secret agreement. This is not necessarily the round sum which he secretly received from the vendor of the property; nor, where the transaction has taken the form of a sale of the property by the vendor to him, and by him to the company, is it necessarily the round difference between the amount which he received from the company and the amount which he paid to the vendor; but it is the net profit which he made out of the transaction — what went into his pocket beyond what would have gone there if no such transaction had taken place. In other words he must surrender to the company the sum he received, less the costs, charges, and expenses properly incurred by him in the promotion of the company.[60] In taking an account of such profits he would be credited with all sums *bona fide* expended by him in procuring the services of directors and providing their qualification, and all *bona fide* payments made to promoters and officers of the company, and to the public press in relation to the company.[61] It is needless to add that arrangements by which promoters get secret profits at the expense of the corporation will not be judicially enforced,[62] especially where the rights of innocent third parties have supervened.[63]

(XII) *Liable to Company For Fraudulent Misrepresentations or Concealments.* Where promoters, through fraudulent misrepresentations, or negative concealments of the truth which it is their duty to disclose, foist property upon the corporation which they are bringing into existence at an excessive valuation the company may maintain an action in equity against them, and also against the directors who concur in the fraud, to recover what it has lost thereby.[64] But

judgment setting aside a purchase-money mortgage from a corporation to its promoters need not rescind the sale and restore the land. Ex-Mission Land, etc., Co. *v.* Flash, 97 Cal. 610, 32 Pac. 600.

58. Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725.

59. McElhenny's Appeal, 61 Pa. St. 188.

60. Emma Silver Min. Co. *v.* Grant, 11 Ch. D. 918, 40 L. T. Rep. N. S. 804; Bagnall *v.* Carlton, 6 Ch. D. 371, 47 L. J. Ch. 30, 37 L. T. Rep. N. S. 481, 26 Wkly. Rep. 243.

61. Emma Silver Min. Co. *v.* Grant, 11 Ch. D. 918, 40 L. T. Rep. N. S. 804.

62. Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90.

63. Dillon *v.* Commercial Cable Co., 87 Hun (N. Y.) 444, 34 N. Y. Suppl. 370, 68 N. Y. St. 449. The supreme court of Canada have reasoned that a sale to a corporation by its promoter, through a board of directors not independent of him, may be rescinded if the property remains in such a position that the parties may be restored to their original status. Matter of Hess Mfg. Co., 23 Can. Supreme Ct. 644 [*affirming* 21 Ont. App. 66].

64. The ruling principle is found in the leading case of Charitable Corp. *v.* Sutton, 2 Atk. 400, 9 Mod. 349, 26 Eng. Reprint 642, where Lord Hardwicke held that a corporation can maintain an action against its directors to recover money lost through their gross frauds or breaches of trust. The following cases are to the same effect: St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544; Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149; Overend, etc., Co. *v.* Gibb, L. R. 5 H. L. 480, 42 L. J. Ch. 67; Lindsay Petroleum Co.

promoters are not liable for representations made in good faith, with an honest belief in their truth; since they are not in the fullest sense guarantors of the truth of their representations unless they have agreed to become such,[65] although where they make a representation in unqualified terms, intending that those to whom they make it shall act upon it, but without knowing whether it is true or false, then they are so liable.

e. Who May Bring Action in Equity. On a principle hereafter discussed when treating of the rights of shareholders, it will appear that primarily the right of action lies in the defrauded corporation, as already seen; but if the directors have connived with or participated in the fraud, and, being in control of the machinery of the corporation, refuse to bring the action, a court of equity will open its doors to an action by a defrauded shareholder, on behalf of himself and the other shareholders except the defendants, upon his showing that the directors have refused to allow the action to be brought in the name of the company.[66] But it will be shown hereafter, when treating of the rights of shareholders, that they are not proper plaintiffs, unless they can make it appear that they have made a fair and successful effort to induce the directors to bring the action in the name of the corporation, or unless upon cause shown the court sees fit to allow them to be joined as plaintiffs.[67]

8. Liability of Aiders and Abetters of Fraudulent Promoters. In such an action, where there is more than one defendant, in order to sustain a joint recovery against them, it is necessary to show that they were partners in the fraudulent scheme, or else that they participated in the proceeds of the fraud.[68]

v. Hurd, L. R. 5 P. C. 221, 22 Wkly. Rep. 492; Society, etc. *v.* Abbott, 2 Beav. 559, 4 Jur. 453, 9 L. J. Ch. 307, 17 Eng. Ch. 559; Phosphate Sewage Co. *v.* Hartmont, 5 Ch. D. 394, 46 L. J. Ch. 661, 37 L. T. Rep. N. S. 9, 24 Wkly. Rep. 530; *In re* Morvah Consols Tin Min. Co., 2 Ch. D. 1, 45 L. J. Ch. 148, 33 L. T. Rep. N. S. 517, 24 Wkly. Rep. 49. See also Panama, etc., Tel. Co. *v.* India Rubber, etc., Co., L. R. 10 Ch. 515, 45 L. J. Ch. 121, 32 L. T. Rep. N. S. 517, 23 Wkly. Rep. 583; Ireland Land Credit Co. *v.* Fermoy, L. R. 5 Ch. 763, 39 L. J. Ch. 477, 23 L. T. Rep. N. S. 439, 18 Wkly. Rep. 1089; Joint Stock Discount Co. *v.* Brown, L. R. 8 Eq. 381, 20 L. T. Rep. N. S. 844, 17 Wkly. Rep. 1037. As to the like liability of the directors see *infra*, IX, O, 9. The same result has been reached in England by putting the fraudulent promoters on the list of contributories in the event of insolvency and winding-up. *In re* Royal Victoria Palace Theatre Syndicate, L. R. 18 Eq. 661, 43 L. J. Ch. 751, 31 L. T. Rep. N. S. 83, 22 Wkly. Rep. 873.

65. Petrie *v.* Guelph Lumber Co., 11 Can. Supreme Ct. 451. It has been thought by some courts that, while this doctrine is sound in its application to the fraudulent misrepresentations or concealments of existing corporations, it does not apply to the same misrepresentations or concealments when made by commissioners whose office it is to procure subscriptions to a future corporation. Rutz *v.* Esler, etc., Mfg. Co., 3 Ill. App. 83; Smith *v.* Heidecker, 39 Mo. 157. But this view is plainly untenable.

For a case illustrating the text, where certain persons obtained a mining option for twenty thousand dollars, and, by fraudulently representing to the persons whom they induced to join them to complete the purchase that it would cost ninety thousand dollars, and the profit of seventy thousand dollars was pocketed by the fraudulent promoters, and the corporation maintained an action to recover it, see Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149, Lyon, J., dissenting.

It is no defense to such an action that the corporation raised the money to make the purchase from the fraudulent promoters, by making an illegal issue of stock. Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149, opinion by Taylor, J.

66. Atwool *v.* Merryweather, 37 L. J. Ch. 35. *Compare* Beatty *v.* Neelon, 13 Can. Supreme Ct. 1. That shareholders who have been defrauded by such a secret arrangement on the part of the promoters are proper plaintiffs in a suit in equity to compel them to account for the secret profits was held in Getty *v.* Devlin, 70 N. Y. 504, 54 N. Y. 403 [*affirming* 9 Hun (N. Y.) 603].

67. That latitude is allowed in the admission of evidence in actions for the redress of such frauds see Massey *v.* Young, 73 Mo. 260; Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628.

68. Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628. Thus, in the celebrated case of Colt *v.* Woollaston, 2 P. Wms. 154, 157, 24 Eng. Reprint 679, it was held just that one of the defendants named Arnold as well as the principal defendant Woollaston, should be charged; "for as Woollaston was the first projector and procurer of the patent, and purchaser of the land, so Arnold was his trustee, accepted the conveyance, was the treasurer, received the money,

II. REORGANIZATION AND REINCORPORATION.

A. General Considerations — 1. Distinction Between Continuation of Old Corporation and Creation of New. It is often a matter of great importance to determine whether the effect of a statutory provision or a corporate act is to revive and continue an old corporation or to create a new one.[69] If it has the latter effect, the new corporation does not possess the rights and is not subject to the liabilities of the old one,[70] but if the effect is simply to renew or continue an old corporation its identity remains unchanged and its liabilities unimpaired.[71]

and gave the receipts, was partner in the fraud, and plainly *particeps criminis.*" Whether the liability of managing committeemen under English law, when proceeded against in equity for fraud, is joint or several see Matter of London, etc., Extension, 5 De G. & Sm. 402, 16 Jur. 900, 21 L. J. Ch. 835.

69. The question is one of intention. Miller *v.* English, 21 N. J. L. 317; Marshall *v.* Western, etc., R. Co., 92 N. C. 322; Young *v.* Rollins, 85 N. C. 485.

Where answer to question sought.— If the change is wrought by a special act of the legislature, the answer must be sought in the act itself. Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 7 Am. Dec. 194; Bellows *v.* Hallowell, etc., Bank, 3 Fed. Cas. No. 1,279, 2 Mason 31. If it is accomplished by a corporate act under general laws, the answer must be drawn from an interpretation of what the officers have done. Grand River College *v.* Robertson, 67 Mo. App. 329; Miller *v.* English, 21 N. J. L. 317.

Whether question of law or fact.— In the former case it is a question of law for the court, in the latter it is one of fact for the jury. Miller *v.* English, 21 N. J. L. 317.

70. Smith *v.* Morse, 2 Cal. 524; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; Bellows *v.* Hallowell, etc., Bank, 3 Fed. Cas. No. 1,279, 2 Mason 31; Colchester *v.* Seaber, 3 Burr. 1866, 1 W. Bl. 591; Luttrel's Case, 4 Coke 86*a*; Scarborough *v.* Butler, 3 Lev. 237; Rex *v.* Pasmore, 3 T. R. 199, 1 Rev. Rep. 688; Angell & A. Corp. (11th ed.) § 780.

A reorganization after foreclosure creates a new corporation. See *infra*, II, B, 1, b.

Rechartering corporation already existing in another state.— One state may incorporate a corporation of another state as such, without any specific provision for the stock or internal government of the new corporation, and it will not be a license to be a foreign corporation, but will be its own domestic corporation. Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378. The result is the creation of two corporations with the same name but having a different paternity. State *v.* Tompkins, 48 S. C. 49, 25 S. E. 982; Bradley *v.* Ohio, etc., R. Co., 78 Fed. 387 [*reversing* 119 N. C. 744, 26 S. E. 169]; Missouri Pac. R. Co. *v.* Mech, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250. And where a corporation is created by the concurring action of the legislatures of two or more states, or where two or more corporations created by the legislatures of as many states consolidate, the corporation created is a domestic corporation in each state and not domestic in one and foreign in the rest. Missouri Pac. R. Co. *v.* Meeh, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250. See also Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615; Chicago, etc., R. Co. *v.* Auditor-Gen., 53 Mich. 79, 18 N. W. 586.

71. Miller *v.* English, 21 N. J. L. 317; St. Philip's Church *v.* Zion Presb. Church, 23 S. C. 297.

The effect of a reincorporation is the same. See *infra*, II, C.

Effect of renewal of charter.— It has been held that the renewal of a charter has not the effect of creating a new corporation, but merely continues the existence of the old one. St. Philip's Church *v.* Zion Presb. Church, 23 S. C. 297, where the court held that, although the application was delayed by the carelessness of an officer, the renewal, when granted, related back so as to prevent a reverter of property, applying by analogy the rule that a sheriff's deed may relate back to the time of sale so as to protect a defendant in possession. See also Kingman *v.* Glover, 3 Rich. (S. C.) 27, 45 Am. Dec. 756; State Bank *v.* South Carolina Mfg. Co., 3 Strobh. (S. C.) 190, 49 Am. Dec. 640; Colchester *v.* Seaber, 3 Burr. 1866, 1 W. Bl. 591 (where it was held that where a corporation by the death of some of its members becomes disabled to act, a grant and acceptance of a new charter does not create a new corporation but only revives the old one); Haddock's Case, 1 T. Raym. 435 (holding that a new charter does not merge or extinguish ancient privileges). To the same effect see Rex *v.* Pasmore, 3 T. R. 199, 1 Rev. Rep. 688. See also People *v.* Marshall, 6 Ill. 672; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

Reorganization under National Banking Act. — The identity of a state bank reorganized under an enabling act of a state and the provisions of the National Banking Act (U. S. Stat. at L. p. 112, c. 106, § 44) is not changed and its obligations remain the same (Coffey *v.* National Bank, 46 Mo. 140, 2 Am. Rep. 488; Grocers' Nat. Bank *v.* Clark, 48 Barb. (N. Y.) 26; Thorp *v.* Wegefarth, 56 Pa. St. 82, 93 Am. Dec. 789). See also Banks and Banking, 5 Cyc. 574, note 34.

Reincorporation of municipal and other public corporations.— The same effect has

2. FRANCHISE TO BE CORPORATION NOT TRANSFERABLE. A franchise to be a corporation is distinct from a franchise, as a corporation, to carry on a certain business, e. g., to maintain and operate a railway. The latter is in the nature of private property, is vendible on execution, is the subject of mortgage, and may pass to a purchaser at a foreclosure sale; but the franchise to be a corporation is not the subject of sale and transfer, unless made so by a statute, which provides a mode for exercising it,[72] and a mortgage of the franchises of a corporation, made in the exercise of a power given by statute, confers no right upon the purchasers at a foreclosure sale to exist as the same corporation.[73]

B. Reorganization — 1. BY PURCHASERS AT FORECLOSURE SALE — a. Statutory Provisions. The position of purchasers at such a foreclosure sale, as owners of property that requires a franchise of corporate existence to make it operative or valuable, has therefore led to the enactment of statutes giving them a right or imposing upon them the duty of reorganization as a new corporation, to exercise the privileges and perform the duties of the old.[74] In many states such statutes exist permitting a reorganization after the sale upon the performance of certain specified acts by the purchasers.[75]

been given to the reincorporation of a municipal corporation. Goulding *v.* Clark, 34 N. H. 148. The privileges of the old corporation are not extinguished. Smith *v.* Morse, 2 Cal. 524. See also Hopkins *v.* Swansea, 4 M. & W. 621. It has been held that the corporate rights and powers of the University of Alabama, a public corporation subject to the control of the legislature, were not affected by subsequent legislation or by the constitution of 1868. State University *v.* Moody, 62 Ala. 389. See also Atty.-Gen. *v.* Joy, 55 Mich. 94, 20 N. W. 806.

Extension of corporate existence.— The identity of a corporation is not changed by the renewal or extension of its term of existence by a special act (National Exch. Bank *v.* Gay, 57 Conn. 224, 17 Atl. 555, 4 L. R. A. 343. See also Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 38 N. W. 113; Frostburg Min. Co. *v.* Cumberland, etc., R. Co., 81 Md. 28, 31 Atl. 698), or under a general law (Ovid Elevator Co. *v.* State Secretary, 90 Mich. 466, 51 N. W. 536; Grand River College *v.* Robertson, 67 Mo. App. 329). Construction of statutes relating to renewal of charter in the state of Michigan (Taggart *v.* Perkins, 73 Mich. 303, 41 N. W. 426) and in the state of New York (People *v.* James, 5 N. Y. App. Div. 412, 39 N. Y. Suppl. 313).

Waiver of penalty by revival of charter.— An act of a legislature reviving the charter of a corporation may operate as a waiver, on the part of the state, of penalties incurred by the corporation on account of its failure to comply with conditions imposed upon it by its original charter and estop the state from claiming the enforcement of those penalties. Matter of Mechanics' Soc., 31 La. Ann. 627.

72. Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672. See also Hall *v.* Sullivan R. Co., 11 Fed. Cas. No. 5,948, Brunn. Col. Cas. 613; and *infra*, XVI, C, 1.

Corporate life can be prolonged only by the state. Virginia Cañon Toll Road Co. *v.* People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711; Asheville Division No. 15, S. of T. *v.* Aston, 92 N. C. 578.

73. Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 837. *Compare* Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Acres *v.* Moyne, 59 Tex. 623; Stephenson *v.* Texas, etc., R. Co., 42 Tex. 162.

74. People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75. See also Pratt *v.* Munson, 84 N. Y. 582.

75. For example the New York Stock Corporation Law (N. Y. Laws (1890), c. 564, § 2, as amended by N. Y. Laws (1901), c. 354, § 3) provides that the purchasers at foreclosure may form a corporation to take and possess the property and franchises sold, upon making, acknowledging, and filing a certificate, naming the law under which the reorganization takes place, the corporation whose property is sold, the court ordering the sale, the date of the judgment, and a description of the property, together with the name of the new corporation, the location of its principal office, the amount of capital stock, the number of shares, their par value and classification, if any, with rights pertaining to each class. Permission is given to insert in the certificate any provisions relating to the new corporation or its management contained in any plan under which the reorganization may take place. And it is provided that the new corporation "shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation, last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on such corporations."

Rights of purchaser pending reorganization.— Such statutes give a purchaser no right to exercise purely corporate powers before reorganization. Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517.

Property to be transferred.— On reorgani-

b. Effect of Reorganization. The right to be a corporation, not being the subject of mortgage, does not pass by the sale, but is obtained by a direct grant from the state. A reorganization after a foreclosure sale therefore creates a new and entirely distinct corporation.[76] The new corporation succeeds to the powers, limitations, and duties of the old.[77] The old corporation, however,

zation the property should be transferred by the purchasers to the new corporation, although the purchasers are the shareholders. Thayer *v.* Wathen, 17 Tex. Civ. App. 382, 44 S. W. 906.

When minority of bondholders bound by reorganization by majority.— It has been held that where a railroad has taken private property and constructed its road it assumes the obligation of carrying into effect the objects of its charter, and its franchises and property stand charged primarily with this public trust even in the hands of mortgagees, and that a statute is therefore valid which empowers the bondholders, by a vote of a majority, to reorganize as a new corporation with the rights of the old corporation, as such action is merely a mode of securing the performance of the paramount public trust. Gates *v.* Boston, etc., R. Co., 53 Conn. 333, 5 Atl. 695. This is in accordance with views which have been expressed by Mr. Chief Justice Waite of the supreme court of the United States: "Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust." Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605, 25 L. ed. 757. A stricter view is that the scheme of reorganization can be made effective only by the consent of all the original bondholders, enforced by a foreclosure cutting off their lien; that a bondholder has a right to stand upon his contract, and the trustees have no power to compel him to make a new and different one. It is a part of this conclusion that the trustees and a majority of the bondholders have no right to enter into a scheme of reorganization, against the dissent of a minority, which shall involve a waiver of default in the payment of principal and interest on the bonds. Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782, 20 N. Y. St. 941 [*distinguishing* Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 3 S. Ct. 363, 27 L. ed. 1020, *denying* Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868]. Nor will equity compel minority bondholders to assent to a scheme of reorganization, the result of which will be to scale their bonds and give the benefits, if any, to the shareholders. Lake St. El. R. Co. *v.* Ziegler, 99 Fed. 114, 39 C. C. A. 431. But under British and Canadian arrangement acts the minority may be compelled to surrender their rights to the will of the majority. Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 3 S. Ct. 363, 27 L. ed. 1020; *In re* Cambrian R. Co.'s Scheme, L. R. 3 Ch. 278, 37 L. J. Ch. 409, 18 L. T. Rep. N. S. 522, 16 Wkly. Rep. 346; Jones *v.* Canada Cent. R. Co., 46 U. C. Q. B. 250. The validity of such legislation depends upon the supremacy of parliament. Such a result could not be accomplished by the legislatures of the American states. See *supra*, I, K, 1.

Right to object lost by laches.— The holder of a corporate security may lose his right to object to a scheme of foreclosure and arrangement by standing by until the rights of third parties have intervened in such a manner that the arrangement could not be broken up so as to place the parties *in statu quo*. Matthews *v.* Murchison, 15 Fed. 691; Wetmore *v.* St. Paul, etc., R. Co., 3 Fed. 177, 29 Fed. Cas. No. 17,469, 5 Dill. 531.

76. State *v.* Hannibal, etc., Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457; People *v.* Cook, 110 N. Y. 443, 18 N. E. 113, 18 N. Y. St. 100. See also Augusta, etc., R. Co. *v.* Augusta, 100 Ga. 701, 28 S. E. 126.

Organization tax.— The fact that a new corporation is created subjects the incorporators to the payment of the organization tax required of other corporations; and this is in nowise an impairment of the original obligation of the contract of mortgage. New York *v.* Cook, 148 U. S. 397, 13 S. Ct. 645, 37 L. ed. 498 [*affirming* 110 N. Y. 443, 18 N. E. 113, 18 N. Y. St. 100].

77. Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701; Daniels *v.* St. Louis, etc., R. Co., 62 Mo. 43; Downingtown Gas, etc., Co. *v.* Downingtown, 193 Pa. St. 255, 44 Atl. 282.

Transmission of privileges and duties.— On the one hand it has been held that special privileges under the charter of the old company are transferred by reorganization to the new and are not abrogated by the provisions of a general law existing at the time of reorganization. Daniels *v.* St. Louis, etc., R. Co., 62 Mo. 43; Campbell *v.* Marietta, etc., R. Co., 23 Ohio St. 168; Ball *v.* Rutland R. Co., 93 Fed. 513. See also State *v.* Newman, 51 La. Ann. 833, 25 So. 408, 72 Am. St. Rep. 476; Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205. On the other hand the doctrine of strict construction of corporate grants has been held to confine the new corporation to the duties imposed upon the old, unless a contrary intention unmistakably appears from the language of the statute. State University *v.* Moody, 62 Ala. 389; Gage *v.* Pontiac, etc., R. Co., 105 Mich. 355, 63 N. W. 318. In all such cases the solution of the question must be sought in the intent of the governing statute and applicatory constitutional provisions. Dow *v.* Beidelman, 49

is not destroyed, but continues for the purpose of legal remedies until regularly dissolved.[78]

c. Effect of Foreclosure. The valid foreclosure of a mortgage upon all the property and franchises of a corporation cuts off absolutely the rights of the shareholders. Thereafter they have no rights in the reorganized corporation, except such as are secured to them, if any, by the decree of foreclosure or by voluntary arrangements among the parties in interest.[79]

d. Under Plan or Agreement. In some states the statute authorizes the purchasers at foreclosure to buy the mortgaged property in pursuance of a plan for the readjustment of the respective interests therein of the mortgage creditors and shareholders of the company, permitting the latter to come into the new company on complying with the conditions of the plan.[80] Notwithstanding the formation of such a plan, however, the foreclosure becomes absolute against the corporation, and all its rights and all the proprietary interests of the shareholders are absolutely barred and cut off. The only property interest which a shareholder of the old company has left is in the surplus, if any, after satisfying the mortgage; all the statute secures to him is the option or privilege of joining the new company by a compliance with the terms of the plan within the required time.[81]

Ark. 325, 5 S. W. 297; Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637; Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560. Of course the new corporation can have no powers except such as are derived from the statute authorizing the reorganization. Savannah *v.* Georgia Steam Boat Co., R. M. Charlt. (Ga.) 342.

78. Cary *v.* Schoharie Valley Mach. Co., 4 Thomps. & C. (N. Y.) 280; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 837. But where after a consolidation there is a subsequent reorganization of one of the constituent companies and an attempt by it to claim the property transferred under the consolidation agreement it was held that equity would protect the consolidated company in the possession of the property transferred. New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418.

79. Vatable *v.* New York, etc., R. Co., 96 N. Y. 50; Thornton *v.* Wabash R. Co., 81 N. Y. 462.

80. For example the New York Stock Corporation Law (N. Y. Laws (1890), c. 564, § 4, as amended by N. Y. Laws (1901), c. 354, § 4) provides that the purchasers at or previous to the sale may form a plan or agreement "for or in anticipation of the readjustment of the respective interests therein of any creditors, mortgagees, and stockholders, or any of them," and for the representation of such interests in the bonds and stock of the new company. The plan may regulate the voting rights of the corporate securities involved, and when consistent with the laws of the state is to be binding on the corporation until changed as therein provided or otherwise provided by law, and the new company may issue bonds and stock as provided in the plan; may within six months compromise, settle, or assume debts or liabilities of the old company on terms approved by a majority of the agents or trustees intrusted with the carrying out of the plan; may establish preferences in favor of any portion of its capital stock, and may divide its stock into classes; but the capital stock of the new company must not exceed in the aggregate the amount mentioned in the certificate of incorporation.

81. Vatable *v.* New York, etc., R. Co., 96 N. Y. 50 [*reversing* 11 Abb. N. Cas. (N. Y.) 133]; Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75.

When fairness of plan of reorganization not questioned.— Upon a shareholder's application to defend a foreclosure the fairness of a reorganization plan will not be questioned; the sale being public, the shareholders may buy if they believe the assets to exceed the liabilities. Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 67 Fed. 49.

Shareholders bound to take notice and come in.— In the absence of a statutory provision to the contrary, shareholders are not entitled to special notice of a scheme of reorganization after foreclosure under a plan; they are bound to take notice of it and, where a reasonable time is allowed them to come in and assent to the scheme and comply with its terms, unless they do so within the prescribed time they will be barred and can have no relief in a court of equity. Vatable *v.* New York, etc., R. Co., 96 N. Y. 50 [*reversing* 11 Abb. N. Cas. (N. Y.) 133].

No action necessary to bar non-assenting shareholder.— Where the plan provides that the privileges thereunder of shareholders who fail to assent and pay their assessments within the prescribed time shall be ratably distributed among the shareholders who have assented and paid, the conditions of the agreement execute themselves, and the rights of non-assenting shareholders are transferred to assenting shareholders without further action on the part of the reorganization committee. Dow *v.* Iowa Cent. R. Co., 70 Hun (N. Y.) 186, 24 N. Y. Suppl. 292, 53 N. Y. St. 898 [*affirmed* in 144 N. Y. 426, 39 N. E. 398].

2. Without Foreclosure — a. Statutory Provisions. A statute exists in Maine under which a majority of the holders of the mortgage bonds of an insolvent corporation may reorganize the corporation and take possession of the property without a foreclosure proceeding.[82] In New Jersey a corporation which has been declared insolvent has power to take steps toward a reorganization and a resumption of its property and business pending an injunction and receivership under the New Jersey Corporation Act and may employ agents to aid in carrying out

It has, however, been held that a provision in a plan for the reorganization of a railroad corporation whereby the non-acceptance of the plan by the holders of securities within a specified time would exclude them from all rights of participation in the reorganization, which was to be brought about by the purchase of the property under foreclosures of receiver's certificates, should not be looked upon with favor and ought not to be enforced, if its enforcement would be inequitable. Raleigh *v.* Earle, 5 Pa. Dist. 111.

Rights of subscribers to the agreement.— The terms of the agreement must be substantially complied with or the signers will be entitled to stand on their original rights (Miller *v.* Rutland, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 413), and to secure its benefits the signers must fulfil their obligations under it or lose their rights (Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75; Van Alstyne *v.* Houston, etc., R. Co., 56 Tex. 373). Equities of particular bondholders or shareholders under arrangements for the reorganization of insolvent corporations see *Ex p.* White, 2 S. C. 469. Agreements void as against public policy see Bliss *v.* Matteson, 45 N. Y. 22; Munson *v.* Syracuse, etc., R. Co., 29 Hun (N. Y.) 76. *Compare* Harts *v.* Brown, 77 Ill. 226; Carter *v.* Ford Plate Glass Co., 85 Ind. 180; Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328; Jackson *v.* Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492. Where the agreement provides that the bonds of the new company shall be a first lien, an arrangement by which prior liens may be paid off or extended at the option of the holders is not a substantial compliance. Peoria, etc., R. Co. *v.* Coster, 97 Fed. 519.

Exclusion of general creditors.— A plan of reorganization which lets shareholders in the old company into the new organization upon agreed terms, but which does not include general creditors or tender them an opportunity to join therein, is not invalid, unless the scheme is one to give shareholders that which should go to creditors or otherwise to defraud creditors. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061; Paton *v.* Northern Pac. R. Co., 85 Fed. 838 [*distinguishing* Chicago, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117]. On the contrary when such schemes of reorganization are equitable they are favored by the courts. Central Trust Co. *v.* U. S. Rolling Stock Co., 56 Fed. 5; Robinson *v.* Philadelphia, etc., R. Co., 28 Fed. 340. See also Riker *v.* Alsop, 27 Fed. 251.

Creditors may purchase at foreclosure.— Creditors of a corporation may combine for the purpose of protecting themselves by purchasing the property when legally brought to sale at foreclosure, provided it is not part of an agreement to prevent competition at the sale or to acquire any unfair advantage over others. Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576. See also Sage *v.* Iowa Cent. R. Co., 99 U. S. 334, 25 L. ed. 394.

Expenses under an agreement.— The parties to an agreement should be charged with the expenses under that agreement and no other, although the transactions of a prior one may have resulted beneficially to them. Van Siclen *v.* Bartol, 95 Fed. 793.

Acts of committee of reorganization.— These schemes of reorganization are generally carried out by committees appointed by the bondholders from their number. Such schemes — often complicated — and the doings of the committees thereunder have been the subjects of frequent adjudication, but from these judgments in general it would be difficult to extract any rule of law or equity. The reorganization agreement is of course the source of the authority of the committee. The construction of such agreements, the powers conferred thereby upon the committee, and the validity of their acts thereunder is considered in the following cases: Cox *v.* Stokes, 156 N. Y. 491, 51 N. E. 316 (increase of bond issue); Coppell *v.* Hollins, 91 Hun (N. Y.) 570, 36 N. Y. Suppl. 500, 71 N. Y. St. 529 (action by two of a committee of three); Barnard *v.* Fitzgerald, 23 Misc. (N. Y.) 181, 50 N. Y. Suppl. 309 (reduction of bond issue); Van Siclen *v.* Bartol, 95 Fed. 793 (change of plan); Central Trust Co. *v.* Carter, 78 Fed. 225, 24 C. C. A. 73 (settlement of claims of doubtful priority). The liability of the reorganized company for the acts of the committee is considered in the following cases: Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453; Houston, East, etc., Texas R. Co. *v.* Keller, 8 Tex. Civ. App. 537, 28 S. W. 724. The personal liability of the members of the committee for their acts is considered in the following cases: Gerding *v.* Funk, 48 N. Y. App. Div. 603, 64 N. Y. Suppl. 423 (for services rendered); Glens Falls Paper Mill Co. *v.* Trask, 29 N. Y. App. Div. 449, 51 N. Y. Suppl. 977 (for payment of debt of corporation); Venner *v.* Fitzgerald, 91 Fed. 335 (for misconduct).

82. Somerset R. Co. *v.* Pierce, 88 Me. 86, 33 Atl. 772, where it was held that a bondholder could not be compelled to exchange his bonds for shares of a new corporation, but that dividends of the new corporation must be distrib-

such purposes, for whose compensation it will be liable if the injunction is dissolved and the receiver removed.[83]

b. Transfer of Corporate Assets. A reorganization may take place by the formation of a new corporation and the transfer to it of the assets of the old corporation in consideration of the issue of stock of the new company to shareholders of the old,[84] but the rights of creditors cannot be prejudiced thereby;[85] nor, in the absence of statutory provisions, can a majority of the shareholders force a minority into such a scheme against their will or compel them to accept an arbitrary value for their shares.[86]

uted to its shareholders and to the holders of the exchanged bonds of the old corporation in equal proportions.

83. Linn *v.* Joseph Dixon Crucible Co., 59 N. J. L. 28, 35 Atl. 2.

84. Post *v.* Beacon Vacuum Pump, etc., Co., 84 Fed. 371, 28 C. C. A. 431. The New York court of appeals, however, looks upon this process as a species of corporate suicide, an unauthorized termination of the life of the corporation, and, in a case where the directors of a New York corporation, pursuant to the vote of a majority, but against the protest of a minority, of the shareholders, transferred its property and business to a California corporation, the court permitted the attorney-general in behalf of the state to maintain an action to remove the directors and compel them to account for the property thus unlawfully diverted. The court further held that while the shareholders who consented might be estopped by their acts, those who did not consent could take advantage of this violation of their rights and the state could demand that those who did the wrong should make restitution. People *v.* Ballard, 134 N. Y. 269, 32 N. E. 54, 48 N. Y. St. 166, 17 L. R. A. 737 [*rehearing denied* in 136 N. Y. 639, 32 N. E. 611, 48 N. Y. St. 846].

85. Island City Sav. Bank *v.* Sachtleben, 67 Tex. 420, 3 S. W. 733; Post *v.* Beacon Vacuum Pump, etc., Co., 84 Fed. 371, 28 C. C. A. 431.

Liability of new corporation.— Although the new corporation may not be liable at their suit, the corporate assets may be followed into the hands of the new corporation and subjected to the payment of their claims. See *infra*, II, B, 3, b. The new corporation is of course liable for obligations incurred by it after the transfer. Calumet Paper Co. *v.* Stotts Invest. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. Rep. 362; Davis Provision Co. *v.* Fowler, 20 N. Y. App. Div. 626, 47 N. Y. Suppl. 205; Glidden, etc., Varnish Co. *v.* Interstate Nat. Bank, 69 Fed. 912, 16 C. C. A. 534.

86. Post *v.* Beacon Vacuum Pump, etc., Co., 84 Fed. 371, 28 C. C. A. 431; Mason *v.* Pewabic Min. Co., 25 Fed. 882. See also Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Right to object lost by laches.— But a minority shareholder may by laches lose his right to object to such a transfer. Post *v.* Beacon Vacuum Pump, etc., Co., 84 Fed. 371, 28 C. C. A. 431. See also Stoddard *v.* Decatur Cracker Co., 184 Ill. 53, 56 N. E. 327. Where, although objecting to the scheme, a shareholder subscribes for his proportion of the shares of the new company and stands by for eighteen months before bringing suit, he loses his right to set aside the transfer. Post *v.* Beacon Vacuum Pump, etc., Co., 84 Fed. 371, 28 C. C. A. 431. But mere delay will not prevent a shareholder from asserting any rights, if the transaction was without his concurrence, although he may no longer seek the aid of equity to reinstate him as a shareholder. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Continuation of business by new corporation.— Where a corporation has expired by limitation, the majority of the shareholders cannot by a reorganization bind the minority so as to continue their property in the new corporate venture. The minority are therefore not bound by a scheme of reorganization concocted by the majority, whereby the corporate property is to be transferred to the new corporation at a certain valuation, unless at an attempted cash sale at auction no more can be procured. Mason *v.* Pewabic Min. Co., 25 Fed. 882. See also Mills *v.* Hurd, 29 Fed. 410. But where stock in a new corporation represents large additional contributions, non-assenting shareholders of the old corporation are entitled to recognition only to the extent of the proportionate interest their stock continues to represent. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Members of shareholders' committee cannot purchase at sale.— On the principle that an agent or trustee cannot be both seller and buyer of the same property, a sale in which some of the committee appointed to sell turn out to be interested in the purchase will be set aside at the instance of other beneficiaries, although the price be adequate and the purchaser acquire no advantage. Reilly *v.* Oglebay, 25 W. Va. 36. This principle has been applied to a case where one of a majority of shareholders voting to sell corporate property buys it for the benefit of such members as should within a certain time pay their proportion of the debts and of the purchase-money, and a majority of the shareholders comply with the terms of the purchase and form a new corporation. It was held that the sale was void, but that a shareholder who failed to disaffirm the sale and delayed to move for relief for an unreasonable length of time, thereby avoiding risks, lost his right to object. Banks *v.* Judah, 8 Conn. 145.

3. Liability For Debts of Old Corporation — a. On Part of New Corporation. With regard to liability for debts of the old corporation the general rule is that a new corporation organized to succeed an old one is not liable for the debts of the latter.[87] The new corporation will, however, be liable for the debts of the old one: (1) Where the circumstances are such as to warrant the conclusion that the former is not a separate and distinct corporation, but merely a continuation of the latter, and hence the same person in law;[88] and (2) where it has in express terms or by reasonable implication assumed the debts of the old corporation,[89] where this liability is imposed by the statute under which the reorganization takes place,[90]

87. *Arkansas.*— Sappington *v.* Little Rock, etc., R. Co., 37 Ark. 23.

Illinois.— Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477. See also Morgan County *v.* Thomas, 76 Ill. 120.

Massachusetts.—Ewing *v.* Composite Brake Shoe Co., 169 Mass. 72, 47 N. E. 241; Child *v.* New York, etc., R. Co., 129 Mass. 170.

Michigan.— Cook *v.* Detroit, etc., R. Co., 43 Mich. 349, 5 N. W. 390.

Missouri.— Helton *v.* St. Louis, etc., R. Co., 25 Mo. App. 322.

Nebraska.— Austin *v.* Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 59 Am. St. Rep. 543, 35 L. R. A. 444.

New York.— Fernschild *v.* D. G. Yuengling Brewing Co., 154 N. Y. 667, 49 N. E. 159; Thornton *v.* Wabash R. Co., 81 N. Y. 462; Ferguson *v.* Ann Arbor R. Co., 17 N. Y. App. Div. 336, 45 N. Y. Suppl. 172.

Pennsylvania.— Campbell *v.* Pittsburgh, etc., R. Co., 137 Pa. St. 574, 20 Atl. 949; Stewart's Appeal, 72 Pa. St. 291.

Tennessee.— Memphis Water Co. *v.* Magens, 15 Lea 37.

Texas.— Houston, etc., R. Co. *v.* Shirley, 54 Tex. 125.

West Virginia.— Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

Wisconsin.— Pennison *v.* Chicago, etc., R. Co., 93 Wis. 344, 67 N. W. 702; Menasha *v.* Milwaukee, etc., R. Co., 52 Wis. 414, 9 N. W. 396; Neff *v.* Wolf River Boom Co., 50 Wis. 585, 7 N. W. 553; Gilman *v.* Sheboygan, etc., R. Co., 37 Wis. 317; Right *v.* Milwaukee, etc., R. Co., 25 Wis. 46; Smith *v.* Chicago, etc., R. Co., 18 Wis. 17; Vilas *v.* Milwaukee, etc., R. Co., 17 Wis. 497.

United States.—Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 12 S. Ct. 188, 35 L. ed. 1055; Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222, 8 S. Ct. 74, 31 L. ed. 130; Sullivan *v.* Portland, etc., R. Co., 94 U. S. 806, 24 L. ed. 324; Venner *v.* Farmers' L. & T. Co., 90 Fed. 348, 33 C. C. A. 95; Kittel *v.* Augusta, etc., R. Co., 78 Fed. 855.

Extent of liability.— A party seeking to recover of the new corporation for a debt of the old must prove at least that the new received some portion of its funds or property which was chargeable with his debt. Hopper *v.* Moore, 42 Iowa 563. See also *infra*, II, B, 3, b. Where a new corporation is established in the place of an old one whose property it has purchased, neither this property, except so far as it is subject to prior liens, nor the future earnings of the new company, can be taken to pay the debts of the old. Bruffett *v.* Great Western R. Co., 25 Ill. 353.

Pending reorganization.— The purchaser at foreclosure and not the reorganized company is liable for expenses incurred between the date of foreclosure and the organization of the new company (Pittsburgh, etc., R. Co. *v.* Tierst, 96 Pa. St. 144), and the old company is not liable for such expenses after the foreclosure sale, provided the purchaser has in point of fact taken possession (Wellsborough, etc., Plank-Road Co. *v.* Griffin, 57 Pa. St. 417).

88. Benesh *v.* Mill Owners' Mut. F. Ins. Co., 103 Iowa 465, 72 N. W. 674; Calumet Paper Co. *v.* Stotts Invest. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. Rep. 362; Austin *v.* Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 59 Am. St. Rep. 543, 35 L. R. A. 444; Reed Bros. Co. *v.* Weeping Water First Nat. Bank, 46 Nebr. 168, 64 N. W. 701; Eureka Fire Hose Co. *v.* Good Will Fire Co. No. 2, 7 Del. Co. (Pa.) 28. *Compare* Livingston County Agricultural Soc. *v.* Hunter, 110 Ill. 155; Grand River College *v.* Robertson, 67 Mo. App. 329.

89. Benesh *v.* Mill Owners' Mut. F. Ins. Co., 103 Iowa 465, 72 N. W. 674; Calumet Paper Co. *v.* Stotts Invest. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. Rep. 362; Austin *v.* Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 59 Am. St. Rep. 543, 35 L. R. A. 444; Davidson *v.* Mexican Nat. R. Co., 11 N. Y. App. Div. 28, 42 N. Y. Suppl. 1015. See also Fernschild *v.* D. G. Yuengling Brewing Co., 154 N. Y. 667, 49 N. E. 151 [*affirming* 15 N. Y. App. Div. 29, 44 N. Y. Suppl. 106]; Smith *v.* Chicago, etc., R. Co., 18 Wis. 17.

90. St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199; Plainview *v.* Winona, etc., R. Co., 36 Minn. 505, 32 N. W. 745; Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718; Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290. As to the liability of a successor railway corporation for damages for taking land *compare* Chicago, etc., R. Co. *v.* Hall, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231; Campbell *v.* Pittsburgh, etc., R. Co., 137 Pa. St. 574, 20 Atl. 949. But a statute providing that the reorganization shall in no way affect the liability of the old corporation has not the effect of making the contracts of the old binding on the new corporation. Keeler *v.* Atchison, etc., R. Co., 92 Fed. 545, 34 C. C. A. 523. Nor does a statute permitting share-

or where such liability is imposed upon it by the decree of the court on foreclosure.[91]

b. On Part of Corporate Assets. But the assets of the old corporation remain liable in the hands of the new one, where the circumstances are such as to render the transaction a diversion of corporate property as a trust fund for the payment of creditors,[92] or a conveyance for the purpose of hindering, delaying, or defrauding creditors.[93]

C. Reincorporation. A company, taking advantage of a statute permitting a corporation organized under a former statute to reincorporate under a statute superseding it, does not thereby become a new corporation; its identity is unchanged and its liabilities continue.[94]

III. CONSOLIDATION OR AMALGAMATION OF CORPORATIONS.

A. Power to Consolidate — 1. No Consolidation Without Consent of State. As the effect of the consolidation of two or more corporations is to create an

holders of the old corporation to come into the new without payment of money impose upon the new company the payment of the debts of the old. Stewart's Appeal, 72 Pa. St. 291.

91. Campbell *v.* Pittsburgh, etc., R. Co., 137 Pa. St. 574, 20 Atl. 949.

92. Livingston County Agricultural Soc. *v.* Hunter, 110 Ill. 155; Ewing *v.* Composite Brake Shoe Co., 169 Mass. 72, 47 N. E. 241; Marshall *v.* Western, etc., R. Co., 92 N. C. 322; Dobson *v.* Simonton, 86 N. C. 492; Western North Carolina R. Co. *v.* Rollins, 82 N. C. 523; Von Glahn *v.* De Rosset, 81 N. C. 467; Chicago R. Co. *v.* Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117 [*recognized* in Vose *v.* Cowdrey, 49 N. Y. 336]. See also Austin *v.* Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 59 Am. St. Rep. 543, 35 L. R. A. 444; Georgia Cent. R. Co. *v.* Paul, 93 Fed. 878, 35 C. C. A. 639.

Effect of foreclosure.— A valid foreclosure of course relieves the corporate assets of subsequent liens (Child *v.* New York, etc., R. Co., 129 Mass. 170; Cook *v.* Detroit, etc., R. Co., 43 Mich. 349, 5 N. W. 390; Thornton *v.* Wabash R. Co., 81 N. Y. 462; Vose *v.* Cowdrey, 49 N. Y. 336; Memphis Water Co. *v.* Magens, 15 Lea (Tenn.) 37; National Foundry, etc., Works *v.* Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125; Menasha *v.* Milwaukee, etc., R. Co., 52 Wis. 414, 9 N. W. 396; Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222, 8 S. Ct. 74, 31 L. ed. 130. See also Davidson *v.* Mexican Nat. R. Co., 11 N. Y. App. Div. 28, 42 N. Y. Suppl. 1015), but any surplus after satisfaction of the mortgage belongs to the old corporation, in whose hands it is a trust fund for creditors and cannot be distributed to shareholders under an arrangement with the mortgagees pursuant to which the property is bought at foreclosure (Chicago, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117).

Effect of transforming partnership into corporation.— A corporation formed by and consisting of the members of a partnership to conduct the partnership business by means of the partnership property takes the latter freed from equities subsisting among the partners, all of which are settled and extinguished by the transfer of the assets from the partnership to the corporation. Wellsborough, etc., Plank Road Co. *v.* Griffin, 57 Pa. St. 417. Such a transfer does not, however, divest any equities which creditors may have in respect of the partnership assets. Francklyn *v.* Sprague, 121 U. S. 215, 7 S. Ct. 951, 30 L. ed. 936. See also Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585.

93. San Francisco, etc., R. Co. *v.* Bee, 48 Cal. 398; Austin *v.* Tecumseh Nat. Bank, 49 Nebr. 412, 68 N. W. 628, 59 Am. St. Rep. 543, 35 L. R. A. 444; Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585, 19 Atl. 428, 19 Am. St. Rep. 663; McVicker *v.* American Opera Co., 40 Fed. 861; Blair *v.* St. Louis, etc., R. Co., 22 Fed. 36; Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 13 Fed. 516, 4 McCrary 432. In some jurisdictions the equitable interest of the old corporation in its assets, which have passed into the hands of the new, may be levied upon under an attachment or execution at the suit of a creditor of the old. Georgia Ice Co. *v.* Porter, 70 Ga. 637.

Liability from use of land.—Although a man may not maintain an action of debt against the new corporation on a judgment against the old corporation for the value of land appropriated by it, if the new one continues to use it, he may have a remedy in equity to compel payment for, or prevention of, its use. Gilman *v.* Sheboygan, etc., R. Co., 37 Wis. 317.

94. Matter of Consolidated Kansas City Smelting, etc., Co., 13 N. Y. App. Div. 50, 43 N. Y. Suppl. 51, which holds that not being a new corporation it is not bound to pay the organization tax required of other corporations.

Abortive corporations reincorporated under general law.— A company organized under a charter which is void may save its rights, so far as such rights are conferred in a general statute, by reorganizing under such general law. State *v.* Steele, 37 Minn. 428, 34 N. W. 903; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 22 Fed. Cas. No. 13,188*a*, 6 Sawy. 157. So it has been held that a corporation

entirely new and distinct corporation,[95] and as the consent of the state is necessary in all cases to the creation of a corporation,[96] it follows that there can be no valid consolidation of two or more corporations without the consent of the state expressed in some manner to which the state gives the effect of a law, either in special charter or general enabling act of the legislature.[97]

duly incorporated but dormant may without dissolution reincorporate under a different statute and acquire a valid corporate character thereunder. Hyde *v.* Doe, 12 Fed. Cas. No. 6,969, 4 Sawy. 133.

95. See *infra*, III, D, 1, a.

96. See *supra*, I, J, 1, a.

97. *Illinois.*—American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497.

Indiana.— Shelbyville, etc., Turnpike Co. *v.* Barnes, 42 Ind. 498; State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427 [*affirmed* in 161 U. S. 677, 16 S. Ct. 14, 40 L. ed. 849]; Botts *v.* Simpsonville, etc., Turnpike Road Co., 88 Ky. 54, 10 S. W. 134, 10 Ky. L. Rep. 669, 2 L. R. A. 594.

Mississippi.—Greenville Compress, etc., Co. *v.* Planters' Compress, etc., Co., 70 Miss. 669, 13 So. 879, 35 Am. St. Rep. 681.

Nebraska.— State *v.* Chicago, etc., R. Co., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564.

New Jersey.— Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

New York.— People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 31 N. Y. St. 781, 18 Am. St. Rep. 843, 9 L. R. A. 33; Davis *v.* Beth Tephila Israel Congregation, 40 N. Y. App. Div. 424, 57 N. Y. Suppl. 1015; Blatchford *v.* Ross, 54 Barb. 42; Chevra Bnai *v.* Israel Aushe Yanove, etc. *v.* Chevra Bikur Cholim Aushe Rod of Sholem, 24 Misc. 189, 52 N. Y. Suppl. 712; New York, etc., Canal Co. *v.* Fulton Bank, 7 Wend. 412.

Oklahoma.— Topeka Paper Co. *v.* Oklahoma Pub. Co., 7 Okla. 220, 54 Pac. 455, no statutory power to consolidate in Oklahoma.

Pennsylvania.— Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685, and note.

Texas.— East Line, etc., R. Co. *v.* State, 75 Tex. 434, 12 S. W. 690.

United States.— Ferguson *v.* Meredith, 1 Wall. 25, 17 L. ed. 604; Pearce *v.* Madison, etc., R. Co., 21 How. 441, 16 L. ed. 184; Kavanaugh *v.* Omaha L. Assoc., 84 Fed. 295.

England.— Clinch *v.* Financial Corp., L. R. 5 Eq. 450 [*affirmed* in L. R. 4 Ch. 117, 38 L. J. Ch. 1, 19 L. T. Rep. N. S. 334, 17 Wkly. Rep. 84]; *Re* Era Assur. Co., 1 Hem. & M. 672, 2 Johns. & H. 400, 6 Jur. N. S. 1334, 30 L. J. Ch. 137, 3 L. T. Rep. N. S. 314, 9 Wkly. Rep. 67; Charlton *v.* Newcastle, etc., R. Co., 5 Jur. N. S. 1096, 7 Wkly. Rep. 731. Accordingly, it is held in England that, in the absence of any special power for that purpose in their deeds of settlement, an amalgamation between two joint-stock companies is *ultra vires* and invalid, and that the obligations and liabilities arising out of such attempted amalgamation, and assumed by the directors of the purchasing company, cannot be enforced against the shareholders of such company. *Re* Era Assur. Co., 1 Hem. & M. 672, 2 Johns. & H. 400, 6 Jur. N. S. 1334, 30 L. J. Ch. 137, 3 L. T. Rep. N. S. 314, 9 Wkly. Rep. 67. That the power of one company to sell to another company, in consideration of receiving a stated part of shares of the purchasing company, all of the assets of the selling company except certain shares held by it in the purchasing company, is authorized by a clause in the memorandum of association of the selling company, allowing it to "amalgamate" with another company — with the additional conclusion that a provision in such an agreement for distributing the shares received from the purchasing company among the members of the selling company can, upon the question of legality, be severed from the agreement for the sale see Wall *v.* London, etc., Assets Corp., [1898] 2 Ch. 469, 67 L. J. Ch. 596, 79 L. T. Rep. N. S. 249, 47 Wkly. Rep. 219.

Statutes conferring power.— For the construction of statutes under which the power to consolidate has been held to exist see 7 Thompson Corp. § 8220, and the following cases:

Alabama.— Beggs *v.* Edison Electric Illuminating, etc., Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94, construing Ala. Code (1886), § 1565.

California.— Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225, construing Cal. Civ. Code, §§ 473, 510.

Illinois.— Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373, holding that one railroad company may, under the Illinois acts of June 30, 1885, and March 26, 1872 (3 Starr & C. Anno. Stat. Ill. (2d ed.) p. 3243, par. 36), be consolidated with another under the name of the latter, which is continued in existence with enlarged powers, franchises, and property rights; and that this consolidation may be brought about by a transfer of all the property, stock, and franchises of the one corporation to the other.

New York.— People *v.* Rice, 138 N. Y. 151, 33 N. E. 846, 51 N. Y. St. 853; Cameron *v.* New York, etc., Water Co., 62 Hun 269, 16 N. Y. Suppl. 757, 42 N. Y. St. 912 [*affirmed* in 133 N. Y. 336, 31 N. E. 104, 45 N. Y. St. 212]. The latter case construing N. Y. Laws (1877), c. 374, since repealed.

United States.— Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642, construing Ohio Rev. Stat. § 3380.

Statutes not conferring power.— For the construction of statutes which have been held not to confer the power to consolidate see

2. How Power to Consolidate Conferred — a. Must Be Conferred Upon All the Constituent Corporations. Moreover, in order to a valid consolidation, the power so to consolidate must have been conferred upon each of the constituent corporations by the state under whose laws it exists.[98] For example a provision in a charter of a railroad company empowering it to consolidate with "any other railroad company" does not empower it to consolidate with a company whose charter contains no such provision.[99] Nor does such a provision authorize a company formed by its consolidation with other railroad companies to consolidate with still another company, although the act authorizing their consolidation provides that all the rights, privileges, and franchises granted in the charter of any of the companies shall inure to the consolidated company.[1]

b. State May Impose Such Terms and Conditions as It Sees Fit. As the state has the power to withhold entirely the privileges of consolidating, it manifestly may grant the privilege subject to such terms and conditions as it may see fit to couple with the grant.[2] It must follow, under the doctrine of the preceding paragraph, that if the terms and conditions which the state has annexed to the privilege of consolidation by any one of the constituent companies are too onerous to be accepted that will block the consolidation entirely. Thus if several corporations created under the laws of several different states seek to consolidate, and the legislature of one of those states imposes an onerous condition upon the corporation created under the laws of that state, precedent to such consolidation, such as the payment of a so-called "consolidation tax," that condition must be fulfilled or there can be no such consolidation.[3]

3. State May Withdraw Power to Consolidate Before Consolidation Effected. The power given to a railroad company, by the statute of its creation, to form a union by consolidation with other companies, has been said to be a right in the nature of a contract, when the statute is accepted and acted upon by the corporation, which cannot be subsequently withdrawn or substantially impaired by the state, in consequence of the prohibition of the contract clause of the constitution of the United

7 Thompson Corp. § 8221; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; State *v.* Vanderbilt, 37 Ohio St. 590; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427].

Construction of statute for consolidation, but with proviso "that no more than two corporations now existing shall be consolidated into one." See Barrows *v.* People's Gas Light, etc., Co., 75 Fed. 794.

98. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427]; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 33 L. ed. 748.

99. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*reversing* (Tex. Civ. App. 1895) 33 S. W. 899]. One court has, however, held that where power is given by statute to one railroad corporation to consolidate with any other, then, whatever other corporation it selects for such a union, and finds willing to join therein, has, by force of the statute, the power to unite with it, although such other corporation is not named in the statute. *In re* Prospect Park, etc., R. Co., 67 N. Y. 371. But an agreement cannot be made by which one railway company shall turn over its railway to be operated by another company, unless the latter company possesses, under its governing statute, the power to receive and operate it; for the former company cannot delegate or transfer its power to operate the road to the latter. Winch *v.* Birkenhead, etc., Junction R. Co., 5 De G. & Sm. 562, 16 Jur. 1035. *Compare* State *v.* Consolidation Coal Co., 46 Md. 1; South Yorkshire R., etc., Co. *v.* Great Northern R. Co., 3 De G. M. & G. 576, 22 L. J. Ch. 761, 1 Wkly. Rep. 203, 52 Eng. Ch. 448, which two cases affirm the principle that without legislative authority a railway company cannot mortgage or sell its property to another company.

1. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*reversing* (Tex. Civ. App. 1895) 33 S. W. 899].

2. See to the governing principle Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427]; Home Ins. Co. *v.* New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. ed. 1025; California *v* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150; Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456, 22 L. ed. 678; Ducat *v.* Chicago, 10 Wall. (U. S.) 410, 19 L. ed. 972; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 15 L. ed. 451; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

3. Ashley *v.* Ryan, 153 U. S. 436, 14 S. Ct. 865, 38 L. ed. 773 [*affirming* 49 Ohio St. 504, 31 N. E. 721 (*affirming* 6 Ohio Cir. Ct. 208)].

States.[4] But it is an established exception to the rule in the Dartmouth College case[5] that so long as the grant of a franchise or privilege remains *in fieri* — unexecuted, and not merely unaccepted — the state is at liberty to recall it.[6] Recent applications of this doctrine made by the supreme court of the United States are to the effect that where the state has granted to corporations the power to consolidate the grant may be withdrawn at the pleasure of the legislature, at any time before a consolidation has actually taken place.[7] Therefore, where parallel and competing railroad companies possess under their charters the power to consolidate, the state may, in the exercise of its police power, prevent such a consolidation at any time before it has actually taken place, by a constitutional amendment or a statute prohibiting the consolidation of parallel and competing lines.[8] From this it follows that a privilege conferred upon corporations by a general statute of consolidating with each other may be withdrawn by a repeal of the statute, at any time before a consolidation has actually taken place under it; but this will not be so where the repealing statute contains a saving clause providing that such a repeal shall not affect or impair any act done or right accruing, accrued, or acquired before the date named. In such a case where a proceeding under the repealed statute to consolidate several corporations into one was begun three days before the date named, but was not consummated, and had not yet received the requisite assent of the shareholders, it was held that the corporations had the right to proceed with the consolidation as though the repealing statute had not been passed.[9]

4. Consolidation of Parallel and Competing Railway Lines — a. Prohibitions Against. Numerous statutes providing for the consolidation of corporations contain express prohibitions against the consolidation of parallel and competing railway lines; and such provisions have been embodied in several recent state constitutions.[10] On the principle that grants of franchises to corporations or to individuals are to be strictly construed in favor of the state and against the grantees, it is held that neither the power of competing railroad companies to consolidate, nor the power of one of such roads to acquire the others by purchase, is conferred by a collection of statutes authorizing railroad companies to purchase and acquire branch roads, although one of such statutes contains the words "and may purchase and hold any road constructed by any company."[11] Nor can a constitutional or statutory prohibition against the consolidation of parallel or competing railway lines be evaded by going through the form of effecting a judicial sale of one of such roads. "The prohibition is not upon the power of the court foreclosing the mortgage to order a judicial sale of the property, but upon its power to confirm a sale made to a parallel or competing road."[12] But it is conceded that the shareholders even of a parallel and competing railway may purchase a railway property at a judicial sale and organize a new corporation, and this will be a separate corporation from the parallel and competing corpora-

4. Zimmer *v.* State, 30 Ark. 677, per Harrison, J.

5. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

6. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

7. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427]; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

8. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

9. Cameron *v.* New York, etc., Water Co., 133 N. Y. 336, 31 N. E. 104, 45 N. Y. St. 212 [*affirming* 62 Hun (N. Y.) 269, 16 N. Y. Suppl. 757, 42 N. Y. St. 912].

10. Of these the following among many others are examples: Ark. Acts (1887), No. 81, p. 113; Fla. Acts (1887), c. 3745, No. 65, p. 117; Mo. Rev. Stat. (1889), § 2569; Mo. Rev. Stat. (1899), § 1062; N. Y. Rev. Stat. (1889), p. 1783 *et seq.* And see, generally, Railroads.

11. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427].

12. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 693, 16 S. Ct. 714, 40 L. ed. 849.

tion, and will not be within the prohibition against the consolidation of parallel and competing lines.[13] The power of the state to forbid one transportation company from purchasing or consolidating with a parallel or competing line has been before the courts in a large number of cases, in some of which, relating to interstate railways, it was said *arguendo* that such statutes infringe the exclusive power of congress conferred over the regulation of interstate commerce.[14] Frequent decisions of the subordinate federal courts confirm the same power.[15] Finally it has been settled by the only court whose decision can settle the question, that the power to prohibit the consolidation of parallel and competing lines of railway is within the police power of the state, and that this power may be exercised within wide limits of legislative discretion whenever its exercise will not trench upon rights already vested; and further that, although the power to consolidate may have been distinctly conferred, yet so long as it has not been acted upon and consolidations effected thereunder, it may be withdrawn at the will of the legislature;[16] and this although there exists at the time no reserve of power in the state to alter, amend, or repeal charters or acts of incorporation.[17]

b. What Unions Are Within Prohibitions. Upon the question what unions or connections between railway companies are within the meaning of prohibitions of this kind, it has been held, in a judgment destined to acquire a great reputation, that a statute prohibiting a railroad company from consolidating, leasing, or in any way becoming the owner of or controlling any other railroad corporation which owns a parallel or competing line, or any stock thereof, is violated by an agreement by one railroad company to purchase half the stock of a competing line, to make a traffic arrangement with it, and to pay therefor by a guaranty of its bonds, and by an arrangement under which a railroad company, in return for a guaranty of its bonds, turns over to a trustee for the entire body of shareholders of another company owning a parallel road one half of its stock, with an agreement contemplating an interchange of traffic and the use of terminal facilities, and with the probability that the complete control of the former will be obtained by the latter company.[18]

c. What Are Parallel and Competing Lines Within Prohibitions. It seems that such prohibitions against consolidations apply only where the two railroads are both parallel and competing; so that although they are parallel for considerable distances, yet they are not competing lines within the sense of the prohibition where they extend between different termini.[19] So it has been held that railroads which do not touch any two common points, having between them for more than forty miles another road, and one of which is in reality a suburban road, not more than one per cent of whose traffic would in any event pass over

13. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849. See also Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838.

14. *Louisiana.*— Texas, etc., R. Co. *v.* Southern Pac. R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445.

Nebraska.— State *v.* Atchison, etc., R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

New Hampshire.— Currier *v.* Concord R. Corp., 48 N. H. 321.

Ohio.— Hafer *v.* Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 760, 29 Cinc. L. Bul. 68.

Pennsylvania.— Gyger *v.* Philadelphia, etc., R. Co., 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369; Pennsylvania R. Co. *v.* Com., (1886) 7 Atl. 368.

Texas.— Gulf, etc., R. Co. *v.* State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849; East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

15. Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683; Hamilton *v.* Savannah, etc., R. Co., 49 Fed. 412; Kimball *v.* Atchison, etc., R. Co., 46 Fed. 888; Langdon *v.* Branch, 37 Fed. 449, 2 L. R. A. 120.

16. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838.

17. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

18. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

19. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849.

the other, are not competing lines within the meaning of a statute[20] prohibiting the consolidation of such lines, or the purchase, lease, or control of one such line by the other.[21]

5. Consolidation of Connecting Railway Companies. An examination of the statutes will show that many statutes which prohibit the consolidation of parallel and competing railway lines nevertheless in express terms permit the consolidation of connecting lines. Such unions seem to be regarded as tending to the public advantage rather than to the public detriment; and hence it has been held that two railroad companies whose lines connect so that if united they will form a continuous line have the power to enter into a joint arrangement for operating their roads as one line, and to become jointly liable for money borrowed to be used in furtherance of the business of such line.[22] But the power to consolidate or amalgamate the two corporations is not included in a grant of power to one railroad company to unite or connect its road with the other road. The power to unite or connect with another road refers merely to a physical connection of the tracks, and does not authorize the purchase or even the lease of such other road, or any union of the franchises of the two companies.[23] Thus a provision in the charter of a railroad company giving it the right to "connect itself" with any other railroad company and operate and maintain its railroad in "connection or consolidation" with such other company authorizes merely a traffic consolidation and not a corporate consolidation.[24]

6. Construction of Statutes Conferring Power to Consolidate. It has been held that one railroad company which has paid for the construction of the line of another, owns practically all of its capital stock, and is in possession and operation of it for and under an agreement for future consolidation, will be considered as its owner within the meaning of a statute permitting reconsolidation in case of the breaking up of a consolidated road of which a corporation of a state owns a part, although it has no legal title thereto.[25]

B. Consolidation of Domestic With Foreign Corporations — 1. Express and Clear Statutory Authorization Necessary — a. Rule Stated. Upon a well-known principle of interpretation[26] the power of a domestic corporation to consolidate with a foreign corporation does not exist, unless it is distinctly conferred by statute; and if the statute in which such power is sought is doubtful or ambiguous, the doubt must be resolved against the existence of the power.[27]

b. Power Must Be Found in Statute Law of All the Constituent Companies. On a principle already stated,[28] in order to justify the consolidation of connecting railway companies of adjoining states, a power to consolidate must be found in the statute law governing each of the constituent corporations.[29] On a principle already stated,[30] where this power of consolidation is afforded by the statute law of one only of the constituent companies, an attempted consolidation does not

20. Mo. Rev. Stat. (1889), § 2569; Mo. Rev. Stat. (1899), § 1062.

21. Kimball *v.* Atchison, etc., R. Co., 46 Fed. 888.

22. Chicago, etc., R. Co. *v.* Ayres, 140 Ill. 644, 30 N. E. 687 [*affirming* 39 Ill. App. 607].

23. Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427]. See also Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. ed. 291.

24. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*reversing* (Tex. Civ. App. 1895) 33 S. W. 899].

25. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155 [*rehearing denied* in 96 Fed. 784, 37 C. C. A. 587 (*modifying* 82 Fed. 642, 86 Fed. 929)].

26. See *infra*, XVI, B, 1, a.

27. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153.

28. See *supra*, III, A, 2, a.

29. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153; Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642 (doctrine recognized).

30. See *supra*, I, O, 2, d.

create even a corporation *de facto*, nor would such an attempted consolidation be validated by a subsequent statute unless in its terms retroactive.[31]

2. VIEW THAT CONSOLIDATION CREATES TWO CORPORATIONS. The early view, first expressed by Mr. Justice Story, at circuit, was that where two corporations, created by the legislation of two states for the purpose of constructing a public improvement extending across the boundary between such states, are united by new concurrent acts of the legislatures of the two states, by which the shareholders of each are made shareholders in the other, they do not cease to exist as distinct corporations, and the effect of such legislation is a mere union of stocks and interests, but not a merger of powers.[32] This doctrine seems to have remained that of the courts of the United States down to the year 1851,[33] and still inheres in our jurisprudence to a qualified extent — the modern conception being that the new corporation formed by the consolidation becomes a domestic corporation within each of the states.[34] The legislature of one state may make a corporation organized under the laws of another state, which has become the purchaser of the properties and franchises of a corporation of the domestic state, a domestic corporation *quoad* any property thus purchased which has its *situs* within the domestic jurisdiction.[35] Such statutes, passed by the legislatures of concurring states creating corporations of the same name, clothed with the same powers, organized for the same purposes, having the same board of directors, acting generally at the same place and in the same manner, do not transfer the law of one of the states to the other except permissibly, or displace the local law except as otherwise provided.[36] It cannot escape attention that the effect of this

31. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153. *Compare* Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642, where the statute law of one of the states — Ohio — permitted railway companies to consolidate with other companies whose road extended to the boundary line of the state of Ohio, and yet where judicial ingenuity sanctioned a simultaneous consolidation of three railway corporations created respectively in Ohio, Indiana, and Illinois; a decision which, although modified on another point, was subsequently confirmed. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155 [*rehearing denied* in 96 Fed. 784, 37 C. C. A. 587 (*modifying* 82 Fed. 642, 86 Fed. 929)], where it was held that a railroad which is mortgaged in two sections is purchased as an entirety within the meaning of a statute permitting a reconsolidation of a road which is formed by consolidation of several parts and is sold as an entirety, although the mortgages are separately foreclosed, where both divisions are sold the same day and conveyed by a single master's deed to one person who purchases in the interest of bondholders, with a view to the reorganization and reconstruction of the railroad.

32. Farnum *v.* Blackstone Canal Corp., 8 Fed. Cas. No. 4,675, 1 Sumn. 46.

33. Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130.

34. *Minnesota.*— *In re* St. Paul, etc., R. Co., 36 Minn. 85, 30 N. W. 432.

Nebraska.—Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New York.— Farmers' L. & T. Co. *v.* Kansas Farmers' L. & T. Co., 1 N. Y. Suppl. 44, 21 Abb. N. Cas. 104.

Ohio.— Ashley *v.* Ryan, 49 Ohio St. 504, 31 N. E. 721 [*affirming* 6 Ohio Cir. Ct. 208 and *affirmed* in 153 U. S. 436, 14 S. Ct. 865, 38 L. ed. 773].

West Virginia.— Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572.

United States.— Bradley *v.* Ohio, etc., R. Co., 78 Fed. 387.

For the purpose of service of process it is a domestic corporation. *In re* St. Paul, etc., R. Co., 36 Minn. 85, 30 N. W. 432.

Is declared to be a domestic corporation by the constitution of Colorado. Colo. Const. (1876), art. 15, § 14.

May increase its capital stock in pursuance of the law of its creation. Atty.-Gen. *v.* Boston, etc., R. Co., 109 Mass. 99.

35. Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354. See also Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518; Indianapolis, etc., R. Co. *v.* Vance, 96 U. S. 450, 24 L. ed. 752; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130.

36. Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157. Thus a mortgage made by such a consolidated corporation will be valid and operative as the mortgage of a domestic corporation, with respect to so much of the property as is situated in the domestic state. Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595. Such a corporation is also a domestic corporation in each of the states which have concurred in creating it with respect to the taxation of its property in such state. Ohio, etc., R. Co. *v.* Weber,

anomalous doctrine is that two corporations are created within each state, the one a domestic and the other a foreign corporation.[37] In accomplishing such a union one of the states can dispense with such inconveniences as shareholders, directors, and officers, by merely recreating the foreign corporation as a domestic corporation, with the usual corporate powers;[38] and it may authorize the consolidation of this new "entity" with a similar corporation existing under the laws of a third state.[39]

3. To What Powers and Liabilities New Interstate Corporation Succeeds. The new interstate corporation succeeds to the financial powers, such as the power of issuing its bonds and mortgaging its properties and franchises, which were possessed by both of the preceding companies under their governing statutes respectively.[40] Such a consolidation does not operate to enlarge the rights of lien-holders with respect to the property of either of the precedent corporations, nor is it competent for the legislature to diminish them.[41]

4. Selling Out to Foreign Corporation and Taking Its Shares in Payment. Consolidations have often taken the form of a purchase and sale, that is, a purchase by one corporation of all the shares of stock of another corporation, payment being made in the shares of the purchasing corporation.[42] Of course it is competent for the legislature to authorize one corporation to become consolidated with a foreign corporation, in such a manner as to place the control of the con-

96 Ill. 443 [*following* Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615]. Such concurrent legislation does not displace the local law of either of the concurring states, or import into such state the law of the other state with respect to condemning land for the right of way, unless the concurring statutes otherwise provide. Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157. Nor is the fact of the existence in the foreign state of a foreclosure suit with respect to domestic property which has passed to the consolidated corporation a bar to the prosecution of such an action in the domestic state, since a state will not be considered as having parted with its own jurisdiction unless it has expressed that purpose in the clearest manner. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457 [*citing*, to the principle just stated, Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 408; Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464].

37. Missouri Pac. R. Co. *v.* Meeh, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250.

38. Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646 [*quoted* by Taft, J., in Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378].

39. Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378.

40. Mead *v.* New York, etc., R. Co., 45 Conn. 199. For an act of consolidation passed by the concurring legislation of two states which was held to pass to the new company the rights and privileges which the original companies had previously possessed under their respective charters — the rights and privileges which one of the original companies had enjoyed in the state of its creation, and the rights and privileges which the other had in like manner enjoyed in the state of its creation — and not to transfer to either state or to enforce therein the legislation of the other, leaving each company to stand as its constituent company had previously stood in the state of its creation, invested with the same rights and subject to the same liabilities, see Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888.

41. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457 (per Perkins, J.); Scobey *v.* Gibson, 17 Ind. 572, 79 Am. Dec. 490; Gantly *v.* Ewing, 3 How. (U. S.) 707, 11 L. ed. 794. Thus the lien of a mortgage upon the roadway of one of the precedent companies may be foreclosed, although the foreclosure may operate to sell a portion of the new continuous line created by the consolidation; and the consolidated company, having purchased such line after it had been mortgaged, will be estopped to set up the defense in the foreclosure suit that a foreclosure and sale will sever its continuous line. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457.

Power to condemn land. — Being a domestic corporation in each state, it may, if a railroad company, condemn land for its use, just as any other domestic railroad company may. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

It is answerable as a domestic corporation for any acts done within either state, in like manner as any other domestic corporation of such state. Bradley *v.* Ohio, etc., R. Co., 78 Fed. 387.

Consolidation with corporation of third state. — The consolidation of a corporation organized in one state, which has been incorporated in another state, with a corporation of a third state, transfers the franchises obtained by the incorporation in the second state to the consolidated organization. Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378.

42. Such was the scheme in the case of Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

solidated stock in the board of directors of the foreign company,[43] but this cannot be done without legislative authorization; and the statute authorizing it ought to be express. Such a power will not be allowed to arise upon a doubtful implication.[44] Accordingly it has been held that a corporation organized under the laws of the state of New York has no power to transfer all its property to a foreign corporation carrying on the same business, taking in payment the stock of the foreign company, and thus terminating its own existence. Nor can a majority of the shareholders bind a dissenting minority by a scheme of this kind, which operates to dissolve the domestic corporation and to transfer its property to the foreign one, so as to escape that scrutiny into its affairs which is enjoined by the laws of New York. In such a case a dissenting shareholder may maintain a suit in equity to have the transaction enjoined and the corporation wound up. Said the court: "He became a stockholder under the security of the New York law, and, when that is taken from him, at least he should have the property of his corporation applied to the payment of its debts, and the surplus, if any, divided among the stockholders."[45] Where such an attempt is made a dissenting shareholder may maintain a suit in equity to have the transfer enjoined and to have the corporation wound up.[46]

5. Effect of Consolidations Upon Federal Jurisdiction. The effect of such consolidations upon federal jurisdiction, grounded on diverse state citizenship, is full of anomalies. If the consolidated corporation is sued in a state in which one of the constituent corporations was created, defendant cannot have the cause removed from the state court to the circuit court of the United States, because within that state the corporation is a domestic corporation and hence a citizen of that state; so that both plaintiff and defendant are in theory of the law citizens of the same state.[47] If a Missouri railroad company acquires by consolidation a line in Arkansas, so as to make it *quoad* its operations in Arkansas, a domestic corporation of that state, and, in operating its lines in Missouri commits an actionable tort against a citizen of Missouri, the Missouri citizen cannot maintain an action against it in the circuit court of the United States in Arkansas, for the reason that in theory of the law the wrong was done by a Missouri corporation, which was a citizen of the same state as that of plaintiff in the action.[48] From these cases the conclusion may be drawn that a corporation formed by the consolidation of corporations of several different states, pursuant to the laws of each state, is within each state a corporation of that state; and hence cannot be sued in any one of such states by a citizen of such state, on the ground of diverse

43. Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595.

44. Thus where a statute authorizes railroad companies to lease their properties, but does not in terms authorize such a company to lease its property to a railroad company created by the legislature of another state, such a power will be held not to exist, on the settled rule of construction, in respect of legislative grants to corporations, that what is not clearly granted is withheld, and that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public. Or, as it has been expressed, "To be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation." Black *v.* Delaware, etc., R. Co., 24 N. J. Eq. 455.

45. Taylor *v.* Earle, 8 Hun (N. Y.) 1, 3.

46. Or if this is attempted by the trustees without the authorization of all the shareholders, a dissenting shareholder may recover of the trustees the value of his shares thus wrongfully disposed of by them, in an action proceeding on the theory of a conversion. Frothingham *v.* Barney, 6 Hun (N. Y.) 366. That a shareholder has a right to have the contract, embodied in the articles of association, performed by the trustees according to its terms, and that he has a right to the aid of a court of equity to compel them to perform it, as for instance to compel them to wind up the company, dispose of its property, and distribute its proceeds as provided in the articles, although some different scheme might be more profitable and more beneficial to all the shareholders, was held in Mann *v.* Butler, 2 Barb. Ch. (N. Y.) 362.

47. Bradley *v.* Ohio River, etc., R. Co., 78 Fed. 387 [*overruling* Hudson *v.* Charleston, etc., R. Co., 55 Fed. 248].

48. St. Louis, etc., R. Co. *v.* James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802, Harlan, J., dissenting on the authority of Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. ed. 176.

state citizenship of the parties, both being citizens of the same state.[49] The mere sale by a domestic corporation of all its property to a foreign corporation, and a subsequent registration of the purchasing company in the domestic state as a foreign corporation doing business therein, does not make the purchasing corporation a domestic corporation of that state, under a statute which provides in substance that in case of a consolidation of a domestic with a foreign corporation, the corporation so formed shall be a domestic corporation.[50]

C. Consent of Shareholders and Creditors — 1. Legislature Cannot Compel Consolidation — a. Rule Stated. The legislature cannot compel the consolidation of private corporations unless the state has reserved the power to do so in the instrument creating them or in some other operative instrument; for the reason that it is beyond the scope of legislative power to force a man into a contract or into an association formed for private purposes against his will.[51] In the absence of such a predicate corporate action is necessary. This must be the action of the shareholders or members, and not of the directors or officers merely, unless the latter have been expressly empowered so to act by some valid governing instrument; and the action of the shareholders or members, subject to qualifications hereafter stated, must show unanimous consent.[52] In the absence of a statute permitting a consolidation to take place by the vote of a less number of the shareholders than the whole, those shareholders who do not give their consent to the consolidation are entitled to withdraw from the corporation, and cease to be liable upon their subscriptions to its shares.[53] An enabling act author-

49. Missouri Pac. R. Co. *v.* Meeh, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250, where the applicatory decisions are carefully gone over by Thayer, J. But this question has been so far confused by other decisions as to result in the conclusion that one of the domestic corporations so created can, in its character of domestic corporation in one of the states and in its fictitious character of "citizen" of such state, bring and maintain, in a court of the United States, an action in another state in which it has also been incorporated and in which it is hence a domestic "citizen," against another citizen of the latter state. Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363; Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378. Whereas, as just seen, if the last-named "citizen" attempts to sue the same corporation in a circuit court of the United States within the state where he resides, he is confronted with the proposition that he cannot do it, because it is a domestic citizen of the state whereof plaintiff is also a citizen. It is, in any one of the states in which it is incorporated, a foreign "citizen" for the purpose of being a plaintiff therein, but a domestic "citizen" for the purpose of being a defendant therein.

50. Rust *v.* U. S. Waterworks Co., 70 Fed. 129, 17 C. C. A. 16.

51. Mason *v.* Finch, 28 Mich. 282. And this was conceded in *In re* Pennsylvania College Cases, 13 Wall. (U. S.) 190, 20 L. ed. 550.

52. *Alabama.*— Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747. See also Tompkins *v.* Compton, 93 Ga. 520, 21 S. E. 79, holding that the stock of one corporation cannot, under the laws of Alabama, in the absence of express statutory authority, be consolidated with that of another so as to create a consolidated company composed of the shareholders of both corporations, over the objection of a minority of the shareholders in either corporation.

Illinois.— Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237.

Indiana.— McCray *v.* Junction R. Co., 9 Ind. 358; Fisher *v.* Evansville, etc., R. Co., 7 Ind. 407.

Kentucky.— Botts *v.* Simpsonville, etc., Turnpike Road Co., 88 Ky. 54, 10 S. W. 134, 10 Ky. L. Rep. 669, 2 L. R. A. 594; Louisville, etc., R. Co. *v.* Howard, 15 Ky. L. Rep. 25.

Michigan.— Mason *v.* Finch, 28 Mich. 282.

New Jersey.— Kean *v.* Johnson, 9 N. J. Eq. 401.

New York.— McVicker *v.* Ross, 55 Barb. 247; Blatchford *v.* Ross, 54 Barb. 42, 5 Abb. Pr. N. S. 434, 37 How. Pr. 110. In an action by a dissenting shareholder to set aside an invalid agreement for a consolidation, the fact that the consolidation may be deemed advantageous is consequently no defense. Davis *v.* Beth Tephila Israel Congregation, 40 N. Y. App. Div. 424, 57 N. Y. Suppl. 1015.

Ohio.— Chapman *v.* Mad River, etc., R. Co., 6 Ohio St. 119.

Texas.— Indianola R. Co. *v.* Fryer, 56 Tex. 609.

United States.— Earle *v.* Seattle, etc., R. Co., 56 Fed. 909; Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

53. State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405; McCray *v.* Junction R. Co., 9 Ind. 358; Ferguson *v.* Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604.

izing the consolidation of corporations has been held to be permissive merely, so as not to bind dissenting shareholders or make them members of the new corporation, although the enabling act may have been accepted by a majority of the members of each of the old companies.[54] But where there is a reservation in the constitution of the state, allowing the legislature of the state "to alter, revoke, or annul any charter of incorporation thereafter granted, whenever in their opinion it may be injurious to the citizens, . . . in such manner, however, that no injustice shall be done to the corporators," an act of consolidation, unless plainly unjust to some of the corporators, is not unconstitutional on the ground of impairing the obligation of a contract.[55]

b. Effect of Reserved Power to Alter or Amend Charters or Statutes Relating to Corporations. If power on the part of the legislature to alter or amend charters or statutes relating to corporations was reserved at the time when the corporation came into existence, then this, it has been held, authorizes the legislature, by a statute passed after a corporation has been formed, to provide that it may be consolidated with another upon the consent of less than a majority of its shareholders.[56]

c. Effect of Law Existing at Date of Share Subscription Authorizing Consolidation. If the constitutional or statute law in existence at the time when a subscription is made to the share capital of a corporation authorizes a subsequent consolidation with another corporation, it will not have the effect of releasing the subscriber, unless the nature of the consolidation is such as to work a material change in the organization and design of the company as originally projected.[57] The governing principle seems to be that a subscriber to the stock of a corporation is released from his subscription by a subsequent alteration of the organization or purpose of the corporation, only when such alteration is at once of a fundamental nature and is not provided for or contemplated either by the charter or the statute under which the corporation was formed, or by any other operative constitutional or statutory law of the state.[58]

2. Purchasing Shares of Dissenting Shareholders. Where the state of the law existing at the time when a consolidation is attempted requires the unanimous consent of the shareholders of the constituent companies, and a minority of them dissent, the supreme court of Pennsylvania has acted upon the principle that the majority may get rid of the dissenting minority by purchasing their shares at their actual value,[59] a conclusion which seems doubtful, unless the state of the law existing at the time when the dissenting shareholders became subscribers authorized such a course of procedure.[60] Where, in order to carry through a scheme for a consolidation, it becomes necessary to buy off a dissenting shareholder, this must be done openly. Nothing less than the unanimous consent of the share-

54. Hamilton Mut. Ins. Co. *v.* Hobart, 2 Gray (Mass.) 543.

55. *In re* Pennsylvania College Cases, 13 Wall. (U. S.) 190, 20 L. ed. 550 [*affirming* 63 Pa. St. 428].

56. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225; Hale *v.* Cheshire R. Co., 161 Mass. 443, 37 N. E. 307. Nor according to one doubtful decision is it necessary that any action on the part of the shareholders or directors should appear, where the consolidation has been effected by direct legislation. Bishop *v.* Brainerd, 28 Conn. 289.

A power conferred upon the executive committee and a majority of the trustees to amend the articles of association does not extend so far as to enable them to abrogate a provision in the articles prohibiting a consolidation with any other company without the consent of a majority of the shareholders.

57. Mansfield, etc., R. Co. *v.* Stout, 26 Ohio St. 241; Nugent *v.* Putnam County, 19 Wall. (U. S.) 241, 22 L. ed. 83.

58. Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369. To the same effect see Bish *v.* Johnson, 21 Ind. 299. *Compare* Cork, etc., R. Co. *v.* Paterson, 18 C. B. 414, 37 Eng. L. & Eq. 398, 86 E. C. L. 414; Nixon *v.* Brownlow, 3 H. & N. 686, 4 Jur. N. S. 878, 27 L. J. Exch. 509.

59. Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

60. See Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78, where the Pennsylvania case (Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685) is criticized by McDonald, J.

holders of a consolidated corporation can justify the withdrawal of its funds to pay a shareholder for the surrender of his shares in one of the constituent corporations, in addition to the consideration contemplated by the consolidation agreement between the constituent corporations, secretly agreed upon between him and a promoter of the consolidation, who is an officer of the consolidated corporation.[61] Statutes have been enacted intended to obviate these difficulties by providing for an appraisement or arbitration as to the value of the shares of dissenting shareholders and by causing the values so ascertained to be paid before the consolidation takes place.[62]

3. How Consent of Shareholders Manifested. Manifestly the proper way to exhibit the consent of the shareholders is by a vote taken at a corporate meeting, duly convened, and not by passing a subscription paper around among them privately — a proceeding which received judicial sanction in one questionable case.[63] The consent of the shareholders may also be manifested by a subsequent ratification, provided it takes place fairly and after full knowledge of the facts. Those entitled to vote at a shareholders' meeting convened for this purpose are as in other cases shareholders who are shown to be such by the books of the corporation; and this of course means those who are holders of shares which have been issued, since merely potential shares will not be counted.[64]

4. Rights of Dissenting Shareholder — a. When Entitled to Injunction to Restrain Consolidation. If the law of the jurisdiction requires the unanimous consent of the shareholders to a consolidation, or if for any reason a shareholder is entitled to dissent from such a proceeding, he will be entitled to an injunction to restrain the directors and officers from carrying the scheme into effect, on the ground of an unlawful diversion of the trust funds in which he has an interest.[65]

b. When Entitled to Action in Equity Against Consolidated Company. Where a consolidation between two corporations is wrongfully effected, a dissenting

61. Trenton Pass. R. Co. *v.* Wilson, 55 N. J. Eq. 273, 37 Atl. 476.

62. N. Y. Laws (1890), c. 567, § 14; Pittsburgh, etc., R. Co. *v.* Garrett, 50 Ohio St. 405, 34 N. E. 493 (construing 87 Ohio Laws 159).

It has been held that such a statute is not exclusive, and does not prevent the dissenting shareholder from resorting to his remedy in the courts in the exercise of their ordinary powers. Langan *v.* Francklyn, 20 N. Y. Suppl. 404, 29 Abb. N. Cas. (N. Y.) 102.

63. The case alluded to is Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

64. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

65. *Alabama.*— Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

Indiana.— State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405.

Pennsylvania.— Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

Vermont.— Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545, a very learned decision on this question, where Chancellor Bennett issued an injunction at the suit of a shareholder to restrain the directors of a railway company from applying its funds or pledging its credit for the purpose of constructing a road beyond the termini fixed by the statute of its creation.

United States.— Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

England.— Charlton *v.* Newcastle, etc., R. Co., 5 Jur. N. S. 1096, 7 Wkly. Rep. 731.

See 12 Cent. Dig. tit. "Corporations," § 2346.

The corporation must be made a party defendant in such an action it seems. Ridgway Tp. *v.* Griswold, 20 Fed. Cas. No. 11,819, 1 McCrary 151.

Grounds for dissolving injunction.— The injunction will not be dissolved on the ground that the attempt has been abandoned, unless the abandonment is shown by appropriate corporate action. Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747. Nor should it be dissolved upon an answer which fails to allege the consent of plaintiff to the consolidation, where unanimous consent is necessary. Botts *v.* Simpsonville, etc., Turnpike Road Co., 88 Ky. 54, 10 S. W. 134, 10 Ky. L. Rep. 669, 2 L. R. A. 594.

Clause not construed as compelling consent. — A clause in the charter conferring upon it the rights and privileges of the most favored corporations of the kind is not construed as compelling one of its shareholders to consent to a consolidation with another company. Botts *v.* Simpsonville, etc., Turnpike Road Co., 88 Ky. 54, 10 S. W. 134, 10 Ky. L. Rep. 669, 2 L. R. A. 594.

Extent of the relief granted in such an injunction proceeding see Blatchford *v.* Ross, 54 Barb. (N. Y.) 42, 5 Abb. Pr. N. S. (N. Y.) 434, 37 How. Pr. (N. Y.) 110.

Effect of having interest secured.— That

shareholder of one corporation may maintain an action in equity against the consolidated corporation, for the damages which he has sustained, upon the theory of a wrongful appropriation by it of his equitable interest in the original corporation of which he was a member. In such a case he is not debarred by a delay of two years, although such a delay might operate to prevent him from maintaining a suit to restrain the consolidation.[66]

c. Cannot Sue Directors For Damages. Where the consolidation is effected by the action of the shareholders it cannot be made the foundation of an action by a dissenting shareholder against the directors for damages.[67]

d. Effect of Acquiescence and Laches on Part of Shareholders. The shareholders who consent to the consolidation thereby estop themselves, in the absence of fraud, from raising future objections to it.[68] They also become estopped to object to any precedent steps which have formed an inducement to the consolidation.[69] But a shareholder is not precluded from making such an objection by the fact of his having failed to object to an enlargement of the charter of the former company, which did not on its face purport to give the power to consolidate.[70]

5. Right of Consolidated Company to Enforce Share Subscriptions of Shareholders. Generally speaking, upon the consolidation being perfected, a shareholder of one of the old companies becomes a shareholder in the new company, so that it may maintain actions on his share subscription for assessments,[71] although this is a matter which may be varied by the governing statute or the contract.[72] This is generally effected by a formal assignment by the constituent companies of all their properties and rights in action, etc., to the new company.[73] A subscription to the stock of the amalgamated company is manifestly a sufficient con-

such an injunction will not be granted at the suit of a shareholder whose interest is secured see the doubtful case of Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

For a decree requiring a bond with security, that, upon final judgment, all property transferred to the consolidated company shall, if so required by the judgment, be delivered to the custody of the court for the protection of all the shareholders see McVicker *v.* Ross, 55 Barb. (N. Y.) 247.

66. International, etc., R. Co. *v.* Bremond 53 Tex. 96, holding that in such an action the shareholder is not precluded by the erroneous estimates of the officials of the corporation of which he was a member, embodied in a published report, from showing the true value of its assets.

67. International, etc., R. Co. *v.* Bremond, 53 Tex. 96.

68. To this principle see Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

69. Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108.

70. International, etc., R. Co. *v.* Bremond, 53 Tex. 96.

Presumption that director, present at the adoption of the preliminary resolution for consolidation, and not objecting, assents to it, but not estopped, as a shareholder, by such tacit assent. Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

Laches.— When bill in equity to undo an alleged fraudulent consolidation will be dismissed for laches see Bell *v.* Pennsylvania, etc., R. Co. (Pa. 1887) 10 Atl. 741.

71. Wells *v.* Rodgers, 60 Mich. 525, 27 N. W. 671; Ridgway Tp. *v.* Griswold, 20 Fed. Cas. No. 11,819, 1 McCrary 151; Lord *v.* Copper Miners' Co., 1 Hall & T. 85, 12 Jur. 1059, 18 L. J. Ch. 65, 2 Phil. 716; Foss *v.* Harbottle, 2 Hare 461, 7 Jur. 163, 24 Eng. Ch. 461; Cooper *v.* Shropshire Union R., etc., Co., 13 Jur. 443, 6 R. & Can. Cas. 136; Exeter, etc., R. Co. *v.* Buller, 11 Jur. 527, 16 L. J. Ch. 449, 5 R. & Can. Cas. 211; Mozley *v.* Alston, 11 Jur. 315, 16 L. J. Ch. 217, 1 Phila. 790, 4 R. & Can. Cas. 636, 19 Eng. Ch. 790.

72. Bishop *v.* Brainerd, 28 Conn. 289.

73. Bishop *v.* Brainerd, 28 Conn. 289.

Validity of such transfer as against creditors see Bishop *v.* Brainerd, 28 Conn. 289.

Ratification of transfer.— Circumstances under which an assignment to the new company of a stock subscription made to the old company may be validated by a subsequent ratification of the board of directors of the new company see Bishop *v.* Brainerd, 28 Conn. 289.

Circumstances under which equity will refuse to enjoin a call made upon the shareholders of the new company to raise a fund to pay off the indebtedness of one of the old companies see Mozley *v.* Alston, 11 Jur. 315, 1 Phil. 790, 4 R. & Can. Cas. 636, 19 Eng. Ch. 790.

Injunction to restrain a creditor from enforcing his demands against a shareholder in one of the precedent companies denied, on the ground of an adequate remedy at law. Hardinge *v.* Webster, 1 Dr. & Sm. 101, 6 Jur. N. S. 88, 29 L. J. Ch. 161, 1 L. T. Rep. N. S. 261, 8 Wkly. Rep. 71.

sent on the part of a shareholder to the amalgamation.[74] A dissenting shareholder will not be exonerated from his subscription where it appears that the consolidation has merely the effect of carrying out the design of the original incorporation of the company in which he is a shareholder;[75] since one corporation may well be created with the purpose of being consolidated with or absorbed by another corporation.[76] But no action can be maintained in the name of the new corporation until the proceedings for consolidation have so far progressed that it has come into being as a distinct entity,[77] by complying with the conditions precedent demanded by the statute under which the proceeding to consolidate has taken place, as by filing the instrument of consolidation in the office of the secretary of state[78] or by electing a new board of directors.[79] The new company must of course show its title to maintain an action on the share subscription made to the old company, that is to say, it must show in what manner it has succeeded to the right of the original company to enforce the contract against the subscriber.[80] In the absence of conduct on the part of defendant which estops him from denying the title of the new company to maintain the action against him, the new company must show that the statutory requirements of a transfer by succession of the subscription from the old company to the new company have been complied with.[81] On the other hand the shareholder in the old company may dispute the title of the new corporation to maintain the action against him upon his share subscription in the old corporation by pleading no corporation, which is in the nature of a plea of *nul tiel corporation*.[82] He is not precluded from questioning the validity of the steps leading to the formation of the new corporation, although they have been sufficiently formal to create a corporation *de facto*. The reason is that no change which has proceeded in violation of substantial statutory conditions can bind a dissenting shareholder or compel him to submit to the new order of things against his will.[83]

6. Consent of Creditors and Bondholders Not Necessary. Creditors of the constituent corporations have no standing to object to a consolidation,[84] provided, in case of a railroad, that the consolidation will not confuse the data by which the extent of their security is determined.[85]

74. Fisher *v.* Evansville, etc., R. Co., 7 Ind. 407.

75. Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30.

76. Nugent *v.* Putnam County, 19 Wall. (U. S.) 241, 22 L. ed. 83; Washburn *v.* Cass County, 29 Fed. Cas. No. 17,213, 3 Dill. 251.

The old corporation may maintain an action to enforce a share subscription unless the consolidation is pleaded in abatement, in which case the action may be revived or may proceed in the name of the new corporation. Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30; Swartwout *v.* Michigan Air-Line R. Co., 24 Mich. 389.

77. Midland Great Western R. Co. *v.* Leech, 3 H. L. Cas. 872, 22 Eng. L. & Eq. 45 [*affirmed* in 28 Eng. L. & Eq. 17]. But see Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223; Cork, etc., R. Co. *v.* Paterson, 18 C. B. 414, 37 Eng. L. & Eq. 398, 86 E. C. L. 414.

78. Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

79. Peninsular R. Co. *v.* Tharp, 28 Mich. 506.

80. Mansfield, etc., R. Co. *v.* Drinker, 30 Mich. 124.

81. Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247; Mansfield, etc., R. Co. *v.* Drinker, 30 Mich. 124; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

82. Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247; Mansfield, etc., R. Co. *v.* Stout, 26 Ohio St. 241.

83. Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247. See also Mansfield, etc., R. Co. *v.* Drinker, 30 Mich. 124.

It was therefore held that the new corporation must show, in order to maintain such an action, that it had succeeded to the rights of the predecessor corporations by the election of a board of directors of its own. Mansfield, etc., R. Co. *v.* Drinker, 30 Mich. 124 (decision under Ohio statute); Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

If the subscription to the shares in the old company was made upon a valid condition it passes to the new company subject to such condition, and the new company cannot disregard it. Mansfield, etc., R. Co. *v.* Pettis, 26 Ohio St. 259.

84. Friedenwald Co. *v.* Asheville Tobacco Works, etc., Co., 117 N. C. 544, 23 S. E. 490.

85. Hart *v.* Ogdensburg, etc., R. Co., 69 Hun (N. Y.) 378, 23 N. Y. Suppl. 639, 52 N. Y. St. 799, holding that mortgage bondholders have no right to a vote on the subject of consolidation, although they are empowered to vote at corporate elections.

D. Effect of Consolidation — 1. Upon Existing Rights and Obligations — a. Whether Consolidation Creates New Corporation. This question must be answered upon a consideration of the terms of the statute under which the consolidation takes place. For most purposes a complete consolidation of the capital stock, franchises, and properties of two or more corporations creates a new corporation, but not for all purposes.[86] For example rights of action against the constituent corporations survive against the new corporation. So a corporation may be formed by the consolidation of several street railroad corporations under the civil code of California,[87] and consequently may be organized for a term of fifty years, irrespective of the terms of the constituent corporations.[88] The general rule that the consolidation of two or more corporations into one creates a new company in such a sense as to work a dissolution of the original corporations forming the consolidated company is said to be subject to exceptions, and to depend upon the statute under which the consolidation is effected. One corporation may absorb another, so to speak, by purchasing, under a statutory power, all the shares, franchises, and properties of the other, and this may have the effect of absorbing only the selling corporation without creating a new corporation, but merely continuing the purchasing corporation in existence with an enlarged capital and possibly with enlarged franchises.[89]

b. Whether Consolidation Works Dissolution of Constituent Companies. It has been frequently said that the usual effect of the consolidation of two railway companies is to extinguish the two companies and to make of them one new company, which necessarily has the effect of dissolving the old ones.[90] But it seems that whether the consolidation of two corporations works a dissolution of the constituent companies depends upon the terms of the statute under which the consolidation takes place.[91] One corporation may absorb another by purchasing all its assets, stock, and franchises, and issuing its own shares to the shareholders of the absorbed corporation, in which case the purchasing corporation will not be absorbed, but will continue in existence, with enlarged powers, franchises, and property rights.[92] Or it may simply purchase the shares of the other corporation

86. See the reasoning in State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865. It has been judicially asserted in a case which attracted great attention, that a consolidation of the stock of two or more corporations resulted uniformly and necessarily in the creation of a new corporation. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956. To this principle the court cites: Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; St. Louis, etc., R. Co. *v.* Berry, 113 U. S. 465, 5 S. Ct. 529, 28 L. ed. 1055; Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185; Ferguson *v.* Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604.

87. Cal. Civ. Code, §§ 473, 510.

88. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

89. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373. *Compare* Ohio, etc., R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657; Hart *v.* Ogdensburg, etc., R. Co., 69 Hun (N. Y.) 378, 23 N. Y. Suppl. 639, 52 N. Y. St. 799.

90. McMahan *v.* Morrison, 16 Ind. 172, 79 Am. Dec. 418; Fee *v.* New Orleans Gas Light Co., 35 La. Ann. 413; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; Ferguson *v.* Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604; Ridgway Tp. *v.* Griswold, 20 Fed. Cas. No. 11,819, 1 McCrary 151 (per Dillon, J.). *Compare* the following cases:

Maine.— State *v.* Maine Cent. R. Co., 66 Me. 488, old corporation continues to exist for the protection of creditors, mortgagees, etc., and ceases to exist when that necessity ceases.

Massachusetts.— Hamilton Mut. Ins. Co. *v.* Hobart, 2 Gray 543, creates new corporation.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956 [*overruling* Natchez, etc., R. Co. *v.* Lambert, 70 Miss. 779, 13 So. 33].

Pennsylvania.— Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9, creates new corporation.

Ohio.— State *v.* Sherman, 22 Ohio St. 411, new corporation becomes subject to the provisions of the existing constitution.

Texas.— Indianola R. Co. *v.* Fryer, 56 Tex. 609, consolidation extinguishes old corporations so that thereafter no action can be commenced or prosecuted against them.

United States.— Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

91. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]; Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

92. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*distinguishing* Ohio, etc.,

and merge them, thereby effecting, *de facto* at least, a dissolution of the old corporation, while its own existence continues as before.[93] Or it may, after purchasing the shares of the old corporation, place them in the hands of its own nominees and thereby cause the old corporation to be continued in existence, although under its own power and control.[94] Again it is possible, although not usual, for one of the consolidating companies to be revived by the legislature as a separate corporation, although this, it is supposed, should rather be regarded as the creation of a new one.[95] If the legislative intent is plain not to discontinue the existence of one of the consolidated corporations, then it will maintain a separate existence at least for the purpose of holding and enjoying an exemption from taxation granted to it by the state before the consolidation.[96]

c. View That Legal Existence of Old Corporations Is Continued in New. One court has held upon a stress of justice that, for the purposes of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents, their existence continuing in it, under the new form and name, their liabilities still existing as before, and being capable of enforcement against the new company the same as if no change had occurred in its organization or name.[97]

d. New Company Estopped to Deny New Name and Character. Where an action is brought against the new company upon an obligation of the old, and the act or acts of consolidation by which it has become the successor of the old in respect of the obligation are pleaded, and the new company pleads the general issue, it is estopped to deny the name in which it is sued, and also to deny that the old company executing the obligation by the name then used has, by force of the consolidation, assumed the name by which the new company is sued;[98] a decision which seems to mean that in such a case the non-liability of defendant must be specially pleaded and proved. The same principle has been declared with reference to a case where an action was depending against one of the old companies at the time of the consolidation, and the consolidated company appeared by its counsel and defended. By so appearing it admitted its corporate existence, its successorship to the precedent corporation, and its liability in case the precedent corporation should be adjudged liable.[99]

e. New Corporation Succeeds to Rights and Obligations of Old Ones — (i) *In General.* As a general rule the new company succeeds to the rights, duties, obligations, and liabilities of each of the precedent companies, whether arising *ex contractu* or *ex delicto*.[1] The charter powers, privileges, and immunities of

R. Co. *v.* People, 123 Ill. 467, 14 N. E. 874; People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657].

93. See for example Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

94. For a consolidation between two railroad companies where the absorbing company was held to become the proper legal representative of the absorbed company with regard to a lease executed by the latter, and hence entitled to the benefit of the provisions of such lease, see New York Cent. R. Co. *v.* Saratoga, etc., R. Co., 39 Barb. (N. Y.) 289.

95. New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418.

96. Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

Transfer to new corporation by trustees to wind up.—When directors and managers, acting as statutory trustees to wind up a dissolved corporation, may make a valid transfer to the new corporation of a patent belonging to the old one see Edison Electric Light Co. *v.* New Haven Electric Co., 35 Fed. 233.

Estoppel of old corporation to deny dissolution.— Circumstances under which one of the old corporations may become estopped from claiming that it remains undissolved, against one seeking to enforce rights which accrue to him by reason of its dissolution. Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357.

97. Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654, opinion by Frazer, J.

98. Columbus, etc., R. Co. *v.* Skidmore, 69 Ill. 566.

99. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 382.

1. *Arkansas.*— Sappington *v.* Little Rock, etc., R. Co., 37 Ark. 23; Zimmer *v.* State, 30 Ark. 677.

Georgia.— Montgomery, etc., R. Co. *v.* Boring, 51 Ga. 582; Selma, etc., R. Co. *v.* Harbin, 40 Ga. 706. Construction of an agreement of consolidation which was held to bind the new

the constituent corporations pass to and become vested in the consolidated company,[2] except so far as otherwise provided by the act under which the consolidation takes place, or by other applicatory constitutional or legislative provisions.[3] It holds the property to which it thus succeeds in its own right, and not in trust for the constituent companies. As the power to amalgamate with another corporation is in the nature of a privilege or franchise, the legislature may grant it on terms. It may, as a condition of the grant, require the new company to assume the liabilities of the old corporations;[4] and in most cases no doubt statutes authorizing consolidations so provide in express terms.[5] The mere fact that a

company to carry out the contracts of carriage embraced in mileage and trip tickets issued by the absorbed company the same as if such contracts had been made by the new company. Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992.

Illinois.— Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; Peoria, etc., R. Co. *v.* Coal Valley Min. Co., 68 Ill. 489; St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199.

Indiana.— Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283; Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654.

Kansas.— Atchison, etc., R. Co. *v.* Phillips County, 25 Kan. 261.

Maryland.— Baltimore *v.* Baltimore, etc., R. Co., 6 Gill 288, 48 Am. Dec. 531.

Missouri.—Thompson *v.* Abbott, 61 Mo. 176; State *v.* Greene County, 54 Mo. 540.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Musselman, 2 Grant 348.

Tennessee.— Miller *v.* Lancaster, 5 Coldw. 514.

Virginia.— Barksdale *v.* Finney, 14 Gratt. 338.

United States.— Tomlinson *v.* Branch, 15 Wall. 460, 21 L. ed. 189; Brum *v.* Merchants' Mut. Ins. Co., 16 Fed. 140, 4 Woods 156; Harrison *v.* Union Pac. R. Co., 13 Fed. 522, 4 McCrary 264; Ridgway Tp. *v.* Griswold, 20 Fed. Cas. No. 11,819, 1 McCrary 151; Washburn *v.* Cass County, 29 Fed. Cas. No. 17,213, 3 Dill. 251.

England.— A railroad company to which the undertaking of a former company has been transferred upon its dissolution by statute, "subject to the obligations and liabilities" of the old company, is liable upon the covenants of such company, as part of the consideration for land purchased, to maintain accommodation works and perform personal services. Fortescue *v.* Lostwithiel, etc., R. Co., [1894] 3 Ch. 621, 64 L. J. Ch. 37, 71 L. T. Rep. N. S. 423, 8 Reports 664, 43 Wkly. Rep. 138.

See 12 Cent. Dig. tit. "Corporations," § 2354.

2. *Arkansas.*— Zimmer *v.* State, 30 Ark. 677.

Illinois.— Robertson *v.* Rockford, 21 Ill. 451.

Michigan.— Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

Missouri.— Daniels *v.* St. Louis, etc., R. Co., 62 Mo. 43.

New York.— New York Cent. R. Co. *v.* Saratoga, etc., R. Co., 39 Barb. 289.

United States.— Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

3. Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; Greene *v.* Woodland Ave., etc., St. R. Co., 62 Ohio St. 67, 56 N. E. 642.

4. Day *v.* Worcester, etc., R. Co., 151 Mass. 302, 23 N. E. 824.

5. 1 Thompson Corp. § 305 *et seq.* See also Western Union R. Co. *v.* Smith, 75 Ill. 496; Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477; Shaw *v.* Norfolk County R. Co., 16 Gray (Mass.) 407; Lightner *v.* Boston, etc., R. Co., 15 Fed. Cas. No. 8,343, 1 Lowell 338. It has been observed, in view of numerous decisions, that "it is usual for consolidating statutes to introduce more or less the element of succession, or continuity of legal person as to existing rights and duties, notwithstanding the fact that in other respects the old and new corporations are not the same." Holmes, J., in John Hancock Mut. L. Ins. Co. *v.* Worcester, etc., R. Co., 149 Mass. 214, 220, 21 N. E. 364 [*citing* Abbott *v.* New York, etc., R. Co., 145 Mass. 450, 15 N. E. 91; Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340; Pullman Palace Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587, 6 S. Ct. 194, 29 L. ed. 499]. Where such is the provision of the statute, the new corporation may lawfully use a patented invention, which both the old corporations had been licensed to use, without a formal assignment of it. Lightner *v.* Boston, etc., R. Co., 15 Fed. Cas. No. 8,343, 1 Lowell 338. Under such a statute provision a person who was surety by bond to one of the companies before amalgamation, for the conduct of an employee, was liable to the new company for breaches of the bond committed after the amalgamation. Eastern Union R. Co. *v.* Cochrane, 2 C. L. R. 292, 9 Exch. 197, 17 Jur. 1103, 23 L. J. Exch. 61, 7 R. & Can. Cas. 792, 2 Wkly. Rep. 43, 24 Eng. L. & Eq. 495. The power of a railroad company to begin proceedings for the condemnation of lands in Michigan is not lost by its consolidation with another railroad company into a new organization so as to constitute a corporation subject to the laws of the same state as the original company. Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

Succeeds to rights of constituent having fewest privileges.— For the doctrine that the consolidated company succeeds to the rights, powers, privileges, and immunities of that one of the constituent companies which has

corporation is created with the same name and with the same franchises as those possessed by a preceding corporation does not make it a continuation of the preceding corporation and liable for its debts.[6] But where the legislature authorizes the surrender of the charter of one company and its incorporation into another existing company, in such a sense that the latter company succeeds to the property, rights, and privileges of the former and becomes merely its successor, it will be bound for its liabilities.[7]

(II) *Whether It Succeeds to Exemption From Taxation.* If the precedent corporations enjoy, under their statutes, an exemption from taxation, and if the statute authorizing the consolidation provides, by whatever language, that the new company shall succeed to the rights, privileges, and immunities of the old, this exemption from taxation will pass to and become vested in the new corporation,[8] except where at the time of consolidation there exists a constitutional prohibition against exemptions.[9] If one of the precedent corporations enjoys this exemption, it will not be enlarged by the consolidation. Nor will it be diminished; but, as to its property which passes to the new corporation, the latter will take it subject to the exemption.[10] Thus where one of the consolidating companies enjoyed under its charter an exemption from taxation, this exemption did not, by the consoli-

the fewest privileges see State *v.* Maine Cent. R. Co., 66 Me. 488.

6. For an example of this see Bruffett *v.* Great Western R. Co., 25 Ill. 353, and the very lucid opinion of Walker, J.

7. Montgomery, etc., R. Co. *v.* Boring, 51 Ga. 582.

Right to municipal aid.— That the consolidated railway corporation succeeds to the privilege conferred upon the constituent companies of having municipal corporations subscribe to its bonds or to its shares to aid in building its road, where the aid is voted prior to the consolidation, see Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30; Atchison, etc., R. Co. *v.* Phillips County, 25 Kan. 261; State *v.* Greene County, 54 Mo. 540; Smith *v.* Clark County, 54 Mo. 58; Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294; Henry County *v.* Nicolay, 95 U. S. 619, 24 L. ed. 394; East Lincoln *v.* Davenport, 94 U. S. 801, 24 L. ed. 322; Scotland County *v.* Thomas, 94 U. S. 682, 24 L. ed. 219; Callaway County *v.* Foster, 93 U. S. 567, 23 L. ed. 911; Branch *v.* Charleston, 92 U. S. 677, 23 L. ed. 750; Nugent *v.* Putnam County, 19 Wall. (U. S.) 241, 22 L. ed. 83; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; Washburn *v.* Cass County, 29 Fed. Cas. No. 17,213, 3 Dill. 251. That it so succeeds where the aid has not been voted prior to the consolidation see State *v.* Greene County, 54 Mo. 540; Smith *v.* Clark County, 54 Mo. 58; Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294; Henry County *v.* Nicolay, 95 U. S. 619, 24 L. ed. 394; Scotland County *v.* Thomas, 94 U. S. 682, 24 L. ed. 219; Lewis *v.* Clarendon, 15 Fed. Cas. No. 8,320, 5 Dill. 329. When such a consolidation revokes the power of municipalities so to subscribe see Harshman *v.* Bates County, 92 U. S. 569, 23 L. ed. 747. This case is distinguishable from Scotland County *v.* Thomas, 94 U. S. 682, 24 L. ed. 219, and the other cases cited above, on the ground that in the latter case there was no question of agency.

8. State *v.* Woodruff, 36 N. J. L. 94; Southwestern R. Co. *v.* Georgia, 92 U. S. 676 note, 23 L. ed. 762.

Statute which was held to pass an exemption from taxation to the new company. Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637.

Contrary to the doctrine of the above text, it was recently held in Mississippi, in a case which was earnestly contested, that, notwithstanding the fact that the statute authorizing consolidation provides for the continuation of the exemption, and the further fact that the new constitution of that state provides for the continuation of exemptions to which corporations were "legally entitled" at the time of the adoption of the constitution, and notwithstanding the further fact that the same instrument provides for the continuation of the rights and charters of corporations, yet, as the right of corporations to consolidate is the grant of a franchise, and as the new constitution provides that new grants of franchises shall be subject to the provisions of that instrument, one of which prohibits exemptions from taxation, and further, as the consolidation of two or more companies creates a new corporation, the effect of such a consolidation is to bring the new company under the provisions of the new constitution of the state, and to cut off an exemption from taxation enjoyed by one of the precedent companies. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, motion to strike out files denied in 24 So. 317. There were several of these cases, and they were all affirmed by the supreme court of the United States. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395, motion for rehearing denied in 181 U. S. 580, 21 S. Ct. 729, 45 L. ed. 1011.

9. Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450.

10. State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511; Chesapeake, etc., R. Co. *v.* Virginia, 94 U. S. 718, 24 L. ed. 310; Branch *v.* Charleston, 92 U. S. 677, 23

dation, become extended to the new company in respect to its entire road, but only in respect to that portion of it which it had acquired from the company which had enjoyed the exemption.[11] So where one company which under its charter enjoyed an exemption from taxation for a limited period became merged in another company which enjoyed a perpetual exemption, this perpetual exemption did not, by the consolidation, become extended to the road of the company which thus became merged.[12]

(III) *What Other Rights and Immunities Pass to Consolidated Corporation.* Under various statutes and conditions it has been held that the following rights and immunities pass to the consolidated corporation: The statutory right conferred upon a street railway company to occupy the streets of the city with its tracks upon obtaining the consent of the city,[13] although a subsequent constitutional provision is adopted providing for the organization of corporations and subjecting them to alteration and repeal, and subsequently to this statutes are enacted for the consolidation of corporations, under which the particular consolidation takes place;[14] and special exemption of the officers, agents, and servants of the corporation from military, jury, and road duty.[15]

(IV) *New Corporation Succeeds to What Debts and Obligations of Old* — (A) *In General.* The consolidated corporation succeeds to the debts and liabilities of the old ones.[16] According to one view such liabilities are enforceable against it the same as if no change had been made.[17] Under this view the con-

L. ed. 750; Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 707; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888; Charleston *v.* Branch, 15 Wall. (U. S.) 470, 21 L. ed. 193; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; Philadelphia, etc., R. Co. *v.* Maryland, 10 How. (U. S.) 376, 13 L. ed. 461.

11. Philadelphia, etc., R. Co. *v.* Maryland, 10 How. (U. S.) 376, 13 L. ed. 461.

12. Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189.

What accretions and betterments of railroad property carry the exemption from taxation after consolidation. Branch *v.* Charleston, 92 U. S. 677, 23 L. ed. 750; Charleston *v.* Branch, 15 Wall. (U. S.) 470, 21 L. ed. 193; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189.

Exemption does not follow consolidation where it depends upon certain precedent acts to be done by each company, and the new company is neither required, nor able, to perform such acts. State *v.* Maine Cent. R. Co., 69 Me. 488 [*affirmed* in 96 U. S. 499, 24 L. ed. 836].

Release of exemption.— When a consolidation of corporations claiming an exemption from general taxation, with corporations not thus exempted, operates to release the exemption as to all, see Bicknell *v.* Trickey, 34 Me. 273; Miller *v.* Scherder, 2 N. Y. 262.

13. Africa *v.* Knoxville, 70 Fed. 729.

14. Citizens' St. R. Co. *v.* Memphis, 53 Fed. 715, doubtful decision.

Construction of statute.— That a statute (N. Y. Laws (1892), c. 340) authorizing an existing street railway company to consolidate with other street railroads, the consolidated company to succeed to the rights of the existing corporations and to assume their legal burdens, obligations, and liabilities, is not void because it does not require the consent of the abutting property-owners and of the local authorities see Bohmer *v.* Haffen, 161 N. Y. 390, 55 N. E. 1047 [*affirming* 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030 (*affirming* 22 Misc. (N. Y.) 565, 50 N. Y. Suppl. 857)].

15. Zimmer *v.* State, 30 Ark. 677.

16. Thompson *v.* Abbott, 61 Mo. 176.

17. Montgomery, etc., R. Co. *v.* Boring, 51 Ga. 582; Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654.

Some of the decisions qualify this statement by the expression, "at least to the extent of the assets received from the old corporation." Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654; U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832; Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276, 10 S. Ct. 550, 33 L. ed. 900; Brum *v.* Merchants' Mut. Ins. Co., 16 Fed. 140, 4 Woods 156; Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 13 Fed. 516, 4 McCrary 432; Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 10 Fed. 596, 3 McCrary 368. *Compare* Indianapolis R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654; Howe *v.* Boston Carpet Co., 16 Gray (Mass.) 493; Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 27 N. E. 831, 38 N. Y. St. 155, 24 Am. St. Rep. 448. While there is no doubt of this principle, as we shall presently see, yet where the consolidating company absorbs the franchises of the old company which consist of the possibility of making money by the exercise of special privileges received from the state, not enjoyed by the inhabitants of the state generally, there is the greatest propriety in holding it personally liable for the debts of the old com-

solidated corporation is answerable in a direct action for the torts[18] or the contracts[19] of the constituent corporations; may be compelled specifically to perform their contracts;[20] and may be compelled to perform a public obligation imposed by charter or statute upon one of them, such as, in the case of a street railway company, to pay the cost of paving and repaving the portion of the street occupied by its track.[21] In short any obligation imposed by charter or statute upon one of the constituent companies reads itself into the charter of the consolidated company and becomes a part of its being.[22]

pany without regard to the existence of the assets received; and public policy demands this, and the statute law in most cases requires it. There are, however, unfortunate judicial decisions, which proceed in disregard of this principle. One of these holds that where all the property and franchises of one corporation are sold and transferred to another corporation, and the transaction is *bona fide*, the purchaser is not responsible for the liabilities of the seller, in the absence of statute or agreement otherwise providing. Chase *v.* Michigan Telephone Co., 121 Mich. 631, 80 N. W. 717; Pennison *v.* Chicago, etc., R. Co., 93 Wis. 344, 67 N. W. 702. It seems to have been in substance held by the supreme court of the United States that a consolidation was valid, although it did not provide for the payment of all the debts of the absorbed companies, but provided in a schedule for the payment of certain debts from which a valid claim was omitted, so that the omitted claimant could not maintain a suit in equity to have his claim paid in the manner provided by the statute for the payment of the debts which were included in the schedule. Smith *v.* Chesapeake, etc., Canal Co., 14 Pet. (U. S.) 45, 10 L. ed. 347. *Compare* Thomas *v.* Frederick County School, 7 Gill & J. (Md.) 369. But it seems that such a consolidation, by which the assets are passed to the new company under a scheme providing for the payment of some debts and pretermitting others, ought to be regarded as being in the nature of a fraudulent conveyance.

The principle of the text has no application to the case stated in the subdivision relating to reorganization (see *supra*, II, B, 1, c), where the properties and franchises of the corporation are sold in a proceeding to foreclose a mortgage, in which case the demands of all creditors junior to the mortgage foreclosed are wiped out, unless saved by a statute operative at the time when the mortgage was made, or by some arrangement made between the interested parties at the time of the foreclosure with a view to a reorganization. National Foundry, etc., Works *v.* Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125. If therefore there has been, prior to the consolidation, the foreclosure of a mortgage upon all the property and franchises of one of the companies, the effect of the consolidation is not to make the new company liable for the general debts of the old company existing prior to the mortgage foreclosure. In such a case the general creditor could only claim through the purchasers at the foreclosure sale; and as already seen he can have no rights against them except on the conditions above stated. Houston, etc., R. Co. *v.* Shirley, 54 Tex. 125. Nor will a statute providing for a consolidation and enacting that the consolidated company shall be liable for all the debts of each company entering into the arrangement be construed as retrospective in such a sense as to revive the general debts of one of the antecedent companies which have been cut off by a mortgage foreclosure, and to make the consolidated company liable therefor; and if such a statute were in terms retroactive, it would be invalid, as impairing the obligation of the contract between the original corporation and its mortgagee. Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477. For rulings upon this question under the statutes of Texas see Houston, etc., R. Co. *v.* Shirley, 54 Tex. 125; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

18. Cleveland, etc., R. Co. *v.* Prewitt, 134 Ind. 557, 33 N. E. 367; Cashman *v.* Brownlee, 128 Ind. 266, 27 N. E. 560; Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Berry *v.* Kansas City, etc., R. Co., 52 Kan. 774, 36 Pac. 724, 39 Am. St. Rep. 381 [*rehearing denied* in 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371]; State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865; Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823.

19. Friedenwald *v.* Asheville Tobacco Works, etc., Co., 117 N. C. 544, 23 S. E. 490. *Compare* Smith *v.* Los Angeles, etc., R. Co., 98 Cal. 210, 33 Pac. 53.

20. Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952, 39 Wkly. Notes Cas. (Pa.) 72.

21. Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695, 28 Wkly. Notes Cas. (Pa.) 388.

22. Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695, 28 Wkly. Notes Cas. (Pa.) 388.

For the construction of statutes which so provide see Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 (holding that a judgment creditor of the old corporation may maintain an action of debt on the judgment against the new corporation, such judgment being for a tort); Deer Lake Co. *v.* Michigan Land, etc., Co., 89 Mich. 180, 50 N. W. 807 (a new corporation bound by the terms of a warranty deed given by one of the old ones); *In re* Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521 [*affirming* 19 N. Y. App. Div. 627, 46 N. Y. Suppl. 1102, holding that the

(B) *Liable in Equity to Extent of Assets Received*—(1) IN GENERAL. Where several corporations are consolidated and turn over their assets to the new corporation, it becomes liable for the debts of the consolidated companies, under any theory, to the extent of the assets which it receives from them.[23] The governing principle here is that a corporation cannot give away its assets to the prejudice of its creditors,[24] but that a court of equity will follow such assets as a trust fund into the hands of any new custodian, the same not being a creditor or *bona fide* purchaser.[25] In such a case the consolidated corporation holds the property received from the absorbed company with notice of any trust attaching to it in favor of its creditors, and cannot claim the right of a *bona fide* purchaser without notice.[26]

(2) EXCEPTION IN CASE OF BONA FIDE SALE OF ASSETS BY ONE CORPORATION TO ANOTHER—(a) STATEMENT OF RULE. It seems that the foregoing rule is not applicable to a *bona fide* sale by one corporation to another of all its properties for a good consideration, but that in such a case the purchasing corporation would hold the assets discharged of any obligation toward the creditors of the selling corporation.[27] It would be a mere substitution of trust funds, and upon a well-settled principle the purchasing corporation would not be bound to see to the proper application of the trust fund, consisting of the purchase-price which it turned over to the selling corporation.[28]

(b) RIGHTS OF BONA FIDE PURCHASERS FROM CONSOLIDATED COMPANY. In such a case it follows that if, before any judgment or other lien has attached to the property, the consolidated company conveys it to an innocent purchaser, one who brings an action against the original company and prosecutes it to judgment against the consolidated company cannot maintain a suit in equity against the innocent purchaser to charge the property in his hands. In the absence of fraud the case is simply that of a party who is in debt conveying his property to a third person who takes as an innocent purchaser.[29]

(V) *ACCEPTANCE BY CREDITORS OF OLD CORPORATION OF NEW CORPORATION AS THEIR DEBTOR.* It is optional with the creditors of the old corporations to accept the new or consolidated corporation as their debtor.[30] Such an acceptance is shown by the act of a creditor of the old corporation in bringing an action against the new one for a debt of the old.[31] But creditors of the old corporation are not bound to accept the new one as their debtor. Thus where a railroad com-

statutory right of a creditor of one of the constituent corporations to enforce his demand against the consolidated corporation is not impaired by the recovery of a judgment against such corporation; and that the taking of a renewal note will not discharge the recourse of the creditor against the new corporation, where the intent was a mere extension of the original notes, and not a payment of them]; Kavanagh *v.* Omaha L. Assoc., 84 Fed. 295 (new attempted corporation not liable for debts of old ones, where there was no statute authorizing the consolidation).

23. *Georgia.*—Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992.

Indiana.— U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832.

New York.— Hurd *v.* New York, etc., Steam Laundry Co., 29 Misc. 183, 60 N. Y. Suppl. 813.

Virginia.— Barksdale *v.* Finney, 14 Gratt. 338.

United States.— Harrison *v.* Union Pac. R. Co., 13 Fed. 522, 4 McCrary 264.

24. Goodwin *v.* McGehee, 15 Ala. 232.

25. Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412; Bacon *v.* Robertson, 18 How. (U. S.) 480, 15 L. ed. 499; Curren *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705.

26. Montgomery, etc., R. Co. *v.* Branch, 59 Ala. 139; Young *v.* The Key City, 14 Wall. (U. S.) 653, 20 L. ed. 896.

27. Powell *v.* North Missouri R. Co., 42 Mo. 63. See also Bruffett *v.* Great Western R. Co., 25 Ill. 353; Chase *v.* Michigan Telephone Co., 121 Mich. 631, 80 N. W. 717; Pennison *v.* Chicago, etc., R. Co., 93 Wis. 344, 67 N. W. 702.

28. Goodwin *v.* American Nat. Bank, 48 Conn. 550; Fountain *v.* Anderson, 33 Ga. 372; Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Ashton *v.* Atlantic Bank, 3 Allen (Mass.) 217; Mason *v.* Bank of Commerce, 16 Mo. App. 275; Mo. Rev. Stat. (1879), § 3937.

29. McMahan *v.* Morrison, 16 Ind. 172, 79 Am. Dec. 418.

30. Smith *v.* Los Angeles, etc., R. Co., 98 Cal. 210, 33 Pac. 53.

31. Smith *v.* Los Angeles, etc., R. Co., 98 Cal. 210, 33 Pac. 53.

pany agrees to give its bonds in consideration of certain moneys to be paid in instalments, and afterward becoming, by legislative authority, amalgamated with two other companies, tendered the bonds of the consolidated corporation and brought suit for the money, it was held that the action would not lie, the consideration offered not being that agreed for.[32] The governing principle here is that a party to a contract who disables himself from rendering the agreed consideration cannot require the performance of a promise which rests on that consideration.[33]

(VI) *Rights of Creditors Not Impaired by Agreements Between Combining Corporations.* The rights of creditors of the constituent corporations cannot be impaired, or in a legal sense affected, by agreements which may be made among the combining corporations, to which such creditors are not parties and to which they do not give their assent.[34]

(VII) *Power of New Corporation to Deal With Creditors of Old.* As the new company succeeds to the rights of each of the precedent companies, it may compromise and settle a claim against one of them, and sustain an action to enforce the settlement;[35] and the directors of the new company have authority, without a vote of the shareholders, to pay and cancel as many of the outstanding obligations of one of the precedent corporations as they may see fit.[36]

(VIII) *Right to Recover Damages From New Company For Refusing to Carry Out Obligations of Old.* Where the new company is thus made the heir, so to speak, of the obligations of the old, if the new company refuses to carry out such an obligation the obligee can maintain an action against it for the resulting damages.[37]

f. Right of Bondholders of Old Companies to Notice of Privileges Given Them by Act of Consolidation. Upon the consolidation of two corporations, the holder of the bonds of one, containing a clause authorizing their conversion at any time into stock at par, cannot be deprived of his right to demand such conversion, and relegated to different rights conferred by the articles of consolidation, until he has had a fair opportunity, after notice, to exercise his original rights, and has elected not to do so.[38]

g. New Company Must Perform Public Obligations of Old. In the case of consolidations between railroad companies, or other companies which, under their charters or statutes of incorporation, have assumed duties in favor of the public, the principle obtains that such companies cannot cast off their public duties by any agreement which they may make among themselves. Therefore so much of a contract for the consolidation of two railway companies as operates to prevent a

32. New Jersey Midland R. Co. *v.* Strait, 35 N. J. L. 322.

33. Newcomb *v.* Brackett, 16 Mass. 161; Frost *v.* Clarkson, 7 Cow. (N. Y.) 24; Planche *v.* Colburn, 8 Bing. 14, 21 E. C. L. 424, 5 C. & P. 58, 24 E. C. L. 452, 1 Moore & S. 51; Keys *v.* Harwood, 2 C. B. 905, 15 L. J. C. P. 207, 52 E. C. L. 905.

34. Smith *v.* Los Angeles, etc., R. Co., 98 Cal. 210, 33 Pac. 53; State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865; *In re* Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521 [*affirming* 19 N. Y. App. Div. 627, 46 N. Y. Suppl. 1102].

Personal liability of officers.—Circumstances under which the officers of one insurance company combining with another were held not to be liable to the policy-holders of the other company upon a guaranty of the obligations of such other company. Wise *v.* Morgan, 13 Daly (N. Y.) 402.

35. Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

36. Shaw *v.* Norfolk County R. Co., 16 Gray (Mass.) 407.

37. John Hancock Mut. L. Ins. Co. *v.* Worcester, etc., R. Co., 149 Mass. 214, 21 N. E. 364.

38. Rosenkrans *v.* Lafayette, etc., R. Co., 18 Fed. 513.

The words "all the obligations, debts, and liabilities," and "all claims and contracts," in a statute (N. H. Acts (1883), c. 239, and Mass. Acts (1883), c. 129) relating to the liability of a consolidated corporation for claims against one of the old companies, include its liability on a contract to exchange stock for bonds; and where such stock would be exchangeable share for share for the stock of the new company its stock must be delivered. Day *v.* Worcester, etc., R. Co., 151 Mass. 302, 23 N. E. 824.

Validity of bonds of the old corporation reissued and put in circulation by the new corporation. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457.

faithful discharge by the new company of its public duties is void as against public policy.[39]

h. Consolidated Company Becomes Subject to Existing General Laws Reserving Right of Legislative Alteration or Repeal. Where the scheme of consolidation is such that it operates to create a new corporation, this new corporation, unless the governing statute otherwise provides, comes into existence subject to any right reserved to the legislature of the state or in the constitutional or statute law, to amend, alter, or repeal charters and other statutes of incorporation. Such a constitutional or statutory provision is held to qualify a special act granting the power to consolidate, unless the contrary conclusion is expressed therein.[40] It has been added that rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand on a different footing.[41] This principle applies where the consolidation takes place in such a manner that the act of consolidation is to be deemed in law the creation of a new company.[42] If the merger is, under the governing statute, of such a character as not to create a new company, but merely to continue the existence of the old one,[43] then a different principle may apply.

2. Upon Remedies and Procedure — a. View That Consolidation Dissolves Old Companies and Abates Actions By or Against Them. Upon the question of the effect of consolidation of corporations upon pending actions, a strictly logical, although highly inconvenient, doctrine is that a consolidation operates to create a new corporation and to work a dissolution of the precedent corporations, in such a sense as to abate all pending actions by or against the preceding corporations.[44] Under this doctrine a judgment against the consolidated corporation, rendered in an action pending against one of the precedent corporations, without new process against the new company and proof of the fact of the consolidation and successorship, would be erroneous.[45] But plainly the record ought to show the successorship in some way, especially where the new corporation has taken a different name from the old one against which the action was originally brought. On the other hand the doctrine that the consolidation operates *ipso facto* to create a new corporation and to dissolve the constituent corporations prohibits the prosecution of actions against the constituent corporations after the consolidation is completed. Necessarily therefore plaintiff in an action against one of the old corporations has the right in some manner to set up the fact of consolidation and successorship; and it has been held error to sustain a demurrer to an amended complaint setting up this fact.[46]

39. Peoria, etc., R. Co. *v.* Coal Valley Min. Co., 68 Ill. 489.

Enforcement of stipulations in contract of consolidation.— The difficulty of the enforcement, in a court of equity, of a stipulation in the agreement of consolidation by an individual shareholder, and even by a class of shareholders, was considered at length in Port Clinton R. Co. *v.* Cleveland, etc., R. Co., 13 Ohio St. 544, where it was said that the remedy of the class of shareholders who deem themselves aggrieved lies in the election of a new board. See also Lord *v.* Copper Miners' Co., 1 Hall & T. 85, 12 Jur. 1059, 18 L. J. Ch. 65, 2 Phil. 740.

40. Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185.

41. Maine Cent. R. Co. *v.* Maine, 96 U. S. 499, 24 L. ed. 836 [*affirming* 66 Me. 488]. *Compare* New Jersey *v.* Yard, 95 U. S. 104, 24 L. ed. 352; Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454, 21 L. ed. 204.

42. Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185.

43. As was the case in Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757.

Provision making shareholders personally liable.—If at the time when the consolidation takes place there is a provision in the constitution of the state subjecting the shareholders of such corporations to a personal liability to creditors, the shareholders in the consolidated corporation will become subject to this liability. Gardner *v.* Minneapolis, etc., R. Co., 73 Minn. 517, 76 N. W. 282.

44. Kansas, etc., R. Co. *v.* Smith, 40 Kan. 192, 19 Pac. 636; Wagner *v.* Atchison, etc., R. Co., 9 Kan. App. 661, 58 Pac. 1018; Copp *v.* Colorado Coal, etc., Co., 29 Misc. (N. Y.) 109, 60 N. Y. Suppl. 293 [*reversing* 28 Misc. (N. Y.) 795, 59 N. Y. Suppl. 1101].

45. Selma, etc., R. Co. *v.* Harbin, 40 Ga. 706.

46. Indianola R. Co. *v.* Fryer, 56 Tex. 609.

One court has extended this doctrine so far as to hold that where all the assets and franchises of one corporation are transferred

b. **Doctrine That Consolidation Does Not Abate Pending Actions.** Another, and a more convenient, although less logical, view is that, so far as it affects remedies and procedure, a consolidation between two corporations is like the mingling of two streams, whereby the existence of each of the precedent corporations is continued, so to speak, in the new one.[47] An outgrowth of this doctrine is that a consolidation of two or more corporations is not such a dissolution of either of the constituent ones as will abate an action which was commenced by or against it before the consolidation was completed.[48] The case has been held to be like the case of an action commenced against a *feme sole*[49] who marries while the action is pending, in which case new process is not necessary, but according to the principles of procedure at common law the action proceeds against her by her former name.[50] This rule also arises under statutes of consolidation, many of which provide that a consolidation shall not affect pending actions, in which case the judgment rendered after the fact of a consolidation will if necessary be treated as having been recovered before the consolidation or purchase, and the debt as having been merged therein.[51] Under this rule new process against the consoli-

to another, a liability of the old corporation, founded on a tort, must be established by a judgment against it before it can be enforced against the transferee corporation. Chase *v.* Michigan Telephone Co., 121 Mich. 631, 80 N. W. 717.

A backward swing of the judicial pendulum has resulted in the conclusion that where an action is brought against the consolidated company to recover damages for a tort committed by one of the precedent companies and the complaint fails to aver the fact that the tort was committed by the precedent company, and also fails to aver the fact of the consolidation, this constitutes a mere variance which might have been occasion for an amendment at the trial, and which will hence not afford ground for reversing the judgment. Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654.

47. In conformity with this view, it has been reasoned that the consolidation of corporations is a merger, a union or amalgamation, by which the stock of the two is made one, their property and franchises combined into one, their powers become the powers of one, their names merge into one, and the identity of the two, practically, if not actually, runs into one. State *v.* Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271.

48. Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Baltimore, etc., R. Co. *v.* Musselman, 2 Grant (Pa.) 348. It has been said that if the rule were different the question could not be raised by a motion in arrest of judgment; and that if the original corporation were to prosecute an appeal to the supreme court and give an appeal-bond in its own name it would thereby be estopped to deny its corporate existence. East Tennessee, etc., R. Co. *v.* Evans, 6 Heisk. (Tenn.) 607.

49. For the common-law rule in case of a feme sole see Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581.

50. Shackleford *v.* Mississippi Cent. R. Co., 52 Miss. 159, opinion by Campbell, J. Under this rule a suit by one of the consolidated companies, pending at the time of the consolidation, against one of its shareholders, for an assessment in respect to his shares, does not abate by the consolidation. Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30. It seems that in such an action the fact of the consolidation is not pleadable in bar, but only in abatement, by a plea *puis darrein continuance,* and that if so pleaded, the suit can proceed in the name of the new company upon the proper suggestion being made. Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

51. Chicago, etc., R. Co. *v.* Ashling, 56 Ill. App. 327 [*affirmed* in 160 Ill. 373, 43 N. E. 373].

The purchase by one corporation of the property and franchises of another, under the authorization of a statute, has been held to be a consolidation for the purposes of this rule. Chicago, etc., R. Co. *v.* Ashling, 56 Ill. App. 327 [*affirmed* in 160 Ill. 373, 43 N. E. 373].

Under a statute providing that a consolidation shall not affect suits pending to which the constituent corporations are parties, an action instituted against a corporation two years after its consolidation with another, on a contract executed prior thereto, cannot be maintained, since the suit was not pending at the time of the consolidation, and the liability had become that of the new corporation. Copp *v.* Colorado Coal, etc., Co., 32 Misc. (N. Y.) 241, 65 N. Y. Suppl. 789 [*affirmed* in 33 Misc. (N. Y.) 773, 67 N. Y. Suppl. 970]. Nor does a statute providing that the dissolution of a corporation shall not take away or impair any remedy against it for liabilities incurred before its dissolution apply to such a case, where the defendant corporation was consolidated with another so as to form a new corporation, with respect to a contract executed by such corporation with the plaintiff prior to the consolidation. Copp *v.* Colorado Coal, etc., Co., 32 Misc. (N. Y.) 241, 65 N. Y. Suppl. 789 [*affirmed* in 33 Misc. (N. Y.) 773, 67 N. Y.

dated corporation is not necessary; and it has even been held that an appearance by its attorney and an oral admission that he has been "informed unofficially" that a consolidation has taken place will prevent the reversal of a judgment against the new company in an action commenced against the old.[52]

c. Direct Action by Creditors of Old Company Against New Company. Where the statute authorizing the consolidation substitutes the new corporation in the place of the old with respect to the liabilities of the old, the creditors of the old may maintain a direct action upon debts or obligations of the old against the new corporation.[53] Such actions are supportable on the theory of an implied assumpsit by the new company of the debts and liabilities of the old one.[54] Nor is it necessary that the act of consolidation should in express terms make the new company answerable for the debts of the old, since that is the implication of the law, especially in the case of municipal and other public corporations.[55] Upon this subject it has been well said: "The law abhors circuity of action, and there is no good reason why the defendant who is to pay may not be directly sued."[56]

d. How Fact of Consolidation Proved. The ordinary evidence of a consolidation will be an authenticated copy of the instrument of incorporation on file in the office of the secretary of state, or in such other public office in which it is lodged and kept on file or recorded in compliance of the provisions of the governing statute.[57] And it is assumed that if the act authorizing the consolidation is a private act, and if the rule of the jurisdiction does not require courts to notice private acts of the legislature, the statute must ordinarily be proved by production of the book of statutes, published by public authority, in which it is contained.[58]

e. Binding Effect of Admissions and Other Acts Done in Litigation by One of Precedent Corporations. If a judicial proceeding is prosecuted in the name of one of the original corporations and if the prosecution is continued by the consolidated company, the admissions and acts of the precedent company, made and

Suppl. 970]. *Compare* Chase *v.* Michigan Telephone Co., 121 Mich. 631, 80 N. W. 717.

52. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 574.

Oral evidence of the fact of incorporation, received without objection, is sufficient without a new citation to allow the action to proceed against the new company and to support a judgment against it. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 382.

When error to substitute the new company for the old company after the coming in of the report of a referee. Prouty *v.* Lake Shore, etc.. R. Co., 50 N. Y. 363.

53. Warren *v.* Mobile, etc., R. Co., 49 Ala. 582; Western Union R. Co. *v.* Smith, 75 Ill. 496; Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Pullman Palace Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587, 6 S. Ct. 194, 29 L. ed. 499; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699.

54. Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435 [*citing* Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37; Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654].

55. Thompson *v.* Abbott, 61 Mo. 176, case of a school-district.

56. Warren *v.* Mobile, etc., R. Co., 49 Ala. 582, 586 [*citing* Ready *v.* Tuskaloosa, 6 Ala. 327].

As to what is a necessary averment of the fact of consolidation, not setting out the details, see Collins *v.* Chicago, etc., R. Co., 14 Wis. 492.

For a pleading which was held void for not setting up the facts upon which the averment of a consolidation should have been predicated see Hubbard *v.* Chappel, 14 Ind. 601 [*citing* Wright *v.* Bundy, 11 Ind. 398].

How the averment of a consolidation, made by defendant in quo warranto, is replied to by plaintiff and how defendant rejoins thereto see Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9.

When judgment will be given in favor of defendant on the production of a record of the consolidation deposited with the secretary of state see Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9.

Whether transfer of assets was upon consideration.— In an action against the consolidated company to recover a debt due from one of the constituent companies, where the constituent company turned over assets sufficient to render itself insolvent, in consideration of shares of stock in the new company, it is not necessary to allege and prove that the transfer of its assets was without consideration. U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832.

57. Columbus, etc., R. Co. *v.* Skidmore, 69 Ill. 566.

58. See *supra*, I, M, 3.

done in the litigation, bind the consolidated company, since they are deemed to have been made and done by the same corporation.[59]

f. Effect of Dissolving Consolidation Upon Judgments Against Consolidated Company. Such a dissolution, it has been held, has no effect upon the rights of plaintiff in the action, and after the severance his judgment stands substantially as a judgment against both the constituent companies; so that he may have execution against either.[60]

E. What Steps Necessary to Secure Consolidation — 1. What Arrangements Do Not Create Consolidations. It follows from what has just been said that a corporation, for example a railway company, by "associating, allying, and connecting itself" with another, does not thereby become equitably "amalgamated" with it;[61] although two such companies may form by agreement such traffic arrangements as to operate their roads as a continuous line, and render either company liable to a passenger for the loss of his baggage,[62] or such as to render them jointly liable to shippers.[63] The mere purchase by one railroad company and its acquisition by deed of an undivided one half of the portion of the road of another such company, to enable the former company to reach a waterway, does not create a consolidation of the two companies.[64]

2. What Conditions Precedent Must Be Complied With. As in the case of the original organization of a corporation,[65] the essential steps required by the governing statute, such as have been called conditions precedent, must be complied with. If the governing statute requires a certificate of consolidation to be filed with the secretary of state, then, until this has been done, the new company does not exist.[66] On the other hand the legal effect of the filing of such an instrument is generally to create the new body a corporation *de jure* within the state.[67] The certificate must comply substantially with the requirements of the governing statute or there will be no new corporation.[68] It must for example state the residence of the directors of the new company;[69] and the same has been held with respect to the filing of a duplicate of the agreement of consolidation.[70] So too the election of a new board of directors may be a condition precedent, the performance of which is necessary to give the new corporation a valid existence.[71] An agreement to consolidate at a future time is no consolidation and will not amalgamate the two corporations under any circumstances or any theory, until the stipulated time arrives and the essential steps required by the governing statute have been taken.[72]

59. Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

60. Ketcham *v.* Madison, etc., R. Co., 20 Ind. 260.

61. Shrewsbury, etc., R. Co. *v.* Stour Valley R. Co., 2 De G. M. & G. 866, 21 Eng. L. & Eq. 628, 51 Eng. Ch. 677.

62. Lee Lin *v.* Terre Haute, etc., R. Co., 10 Mo. App. 125 (and cases there cited); Hart *v.* Rensselaer, etc., R. Co., 8 N. Y. 37, 59 Am. Dec. 447; Straiton *v.* New York, etc., R. Co., 2 E. D. Smith (N. Y.) 184.

63. Wyman *v.* Chicago, etc., R. Co., 4 Mo. App. 35.

Circumstances under which equity will interfere to protect rights which one company has acquired as to the joint use by two companies of a railway station. Shrewsbury, etc., R. Co. *v.* Stour Valley R. Co., 2 De G. M. & G. 866, 21 Eng. L. & Eq. 628, 51 Eng. Ch. 677.

64. U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290.

65. See *supra*, I, L, 3, d, (I).

66. Peninsular R. Co. *v.* Tharp, 28 Mich. 506; Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9.

67. Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9.

When it is proved that a certificate of consolidation has been deposited with the secretary of state, as provided by law, the presumption is that the secretary filed the same of record, and that it remains of record, and a mandamus will if necessary issue to the secretary of state to add the date of filing or to do any other ministerial act in the premises required by the governing statute. Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9.

68. State *v.* Vanderbilt, 37 Ohio St. 590. See also People *v.* Chambers, 42 Cal. 201; State *v.* Central Ohio Mut. Relief Assoc., 29 Ohio St. 399; State *v.* Lee, 21 Ohio St. 662; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

69. State *v.* Vanderbilt, 37 Ohio St. 590.

70. Mansfield, etc., R. Co. *v.* Drinker, 30 Mich. 124.

71. Mansfield, etc., R. Co. *v.* Drinker, 30 Mich. 124.

72. Shrewsbury, etc., R. Co. *v.* Stour Valley R. Co., 2 De G. M. & G. 866, 21 Eng. L. & Eq. 628, 51 Eng. Ch. 677.

3. Consolidation Effected by One Company Purchasing Capital Stock of Other Company. Consolidations frequently take place through the purchase by one company of all the shares of the other company, issuing its own shares or bonds in payment therefor, so that it becomes the sole shareholder so to speak of the sold-out company.[73] But as one corporation cannot, according to the best opinion,[74] become a permanent shareholder in another unless the right is conferred by statute, the more usual form is for the purchasing company to issue its own shares to the shareholders of the selling company in payment or exchange therefor.[75] It seems that a general power to consolidate includes the power to consolidate in this way. Accordingly it has been held that a land company empowered to form a "temporary or permanent consolidation" with any railroad company may purchase all the shares of stock of the railway company, and thereby control the company, if such control is in furtherance of its general powers.[76] A statute[77] authorizing one railroad company, under circumstances named therein, "to purchase and hold, in fee simple or otherwise, and to use and enjoy the railroad property, corporate rights, and franchises of the company or companies owning such other road or roads, upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders," etc., authorizes a consolidation; and such a purchase is a consolidation[78] and not a sale.[79] All this is compatible with the conclusion that the fact that one corporation owns the entire capital stock of another does not vest in the former the legal title to the property of the latter, or render the two corporations identical; but they continue to be separate legal entities. The fact of the sole ownership of the shares of a corporation is the same whether the owner be a natural person or another corporation.[80]

Agreements to consolidate enforceable in equity.— That contracts between different companies for an amalgamation are, in England, recognized and enforced in equity see Mozley *v.* Alston, 11 Jur. 315, 16 L. J. Ch. 217, 1 Phil. 790, 4 P & Can. Cas. 636, 19 Eng. Ch. 790.

73. Williamson *v.* New Jersey South. R. Co., 26 N. J. Eq. 398.

74. 1 Thompson Corp. § 1102; 7 Thompson Corp. § 8353.

75. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327].

Even where the right is given by statute it must be exercised in good faith toward the minority shareholders of the old company, and the dominant company will not be allowed so to exercise it as to own and wreck the other company to the prejudice of a minority of its shareholders. For a nefarious scheme of this nature which was judicially defeated see Farmers' L. & T. Co. *v.* New York, etc., R. Co., 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. Rep. 689, 34 L. R. A. 76.

76. Tod *v.* Kentucky Union Land Co., 57 Fed. 47.

77. 3 Starr & C. Anno. Stat. Ill. (2d ed.), p. 3243, par. 36.

78. Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642.

79. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]. *Compare* Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16.

80. Macon Exch. Bank *v.* Macon Constr. Co., 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800.

See as to the effect of the sole ownership of the shares of a corporation 3 Thompson Corp. § 2946, and the following cases:

Connecticut.— Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447.

Georgia.— Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847; Newton Mfg. Co. *v.* White, 42 Ga. 148.

Kansas.— Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 23 Pac. 151, 19 Am. St. Rep. 129, 7 L. R. A. 414.

Kentucky.—Louisville Banking Co. *v.* Eisenman, 94 Ky. 83, 21 S. W. 531, 1049, 14 Ky. L. Rep. 705, 42 Am. St. Rep. 335, 19 L. R. A. 684.

Maryland.— Swift *v.* Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; Bellona Co.'s Case, 3 Bland 442.

Massachusetts.— England *v.* Dearborn, 141 Mass. 590, 6 N. E. 837; Russell *v.* McLellan, 14 Pick. 63.

Minnesota.— Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261; Winona, etc., R. Co. *v.* St. Paul, etc., R. Co., 23 Minn. 179, 2 N. W. 489.

New York.— Wilde *v.* Jenkins, 4 Paige 481.

Wisconsin.— Button *v.* Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.

United States.— Pullman Palace Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587, 6 S. Ct. 194, 29 L. ed. 499; Van Allen *v.* Assessors, 3 Wall. 573, 18 L. ed. 229; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812.

England.— Reg. *v.* Arnaud, 9 Q. B. 806, 16 L. J. Q. B. 50, 58 E. C. L. 806.

Power to consolidate includes power to purchase shares.—That power given to a railroad company to consolidate with any other railroad corporation includes the power to purchase a portion of the stock of another com-

The validity of consolidations of this kind necessarily depends upon a grant from the legislature of the power so to consolidate.[81]

4. Fraudulent Amalgamations. Schemes of amalgamation which merely have the effect of one corporation absorbing all the assets of another, withdrawing them from the creditors of the other and leaving its debts unpaid, will be unraveled and set aside in proper proceedings in equity, and, on the theory of following the trust funds, the assets of the old corporation, in the hands of the new, will be laid hold of and applied in discharging the debts of the old.[82] Equity will track, dig up, and annul any scheme by which one of two companies, pending negotiations for a consolidation, commits a fraud upon the shareholders of the other.[83] Consolidations will be set aside in equity, which have been brought about by the action of the directors of the two companies, where the same person or persons are members of both boards of directors. The rule of equity in such cases is said to be inflexible and stubborn, and is designed to diminish the temptation to fraud and breach of trust.[84]

5. De Facto Consolidations. Where the power to consolidate exists and the

pany by an agreement to guarantee the bonds of the latter company see Pearsall *v.* Great Northern R. Co., 73 Fed. 933 [*reversed* on other grounds in 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838].

Validity of notice as to consolidation.— That a notice of a shareholders' meeting under the New York statute for the consolidation of the corporation with another, and proxies to be voted at such meeting, are not invalidated because, in designating the company, they state that it is of a town which has been annexed to a city, instead of the city ward into which the town has been changed, where no shareholders were misled thereby, see Langan *v.* Francklyn, 20 N. Y. Suppl. 404, 29 Abb. N. Cas. (N. Y.) 102.

Necessity of recording articles.— That articles of consolidation of railroad corporations are not, in Nebraska, required to be recorded in the county clerk's office, but that a duplicate of the agreement must be filed with the secretary of state, see Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

81. For an example of a statute authorizing this species of consolidation, which was held to have had the result of extinguishing a corporation of the state of Indiana and merging it in a corporation of the state of Ohio, see Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 487. There is judicial authority for the view that where a railroad company, by reason of a lack of proper running arrangements with other roads, is unable to pay its expenses, and it appears unavoidable that it must go to sale, either under a mortgage or under judgments obtained by its general creditors, there is nothing wrong or fraudulent in connecting companies combining and forming an association for purchasing it, and for operating it, under such arrangements as will give it through connections, enable it better to serve the public, and afford profit to its owners. Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224.

82. Langdon *v.* Branch, 37 Fed. 449, 2 L. R. A. 120; Brum *v.* Merchants' Mut. Ins. Co., 16 Fed. 140, 4 Woods 156.

For a fraudulent scheme of twistification and vermification by which one life-insurance company absorbed the assets of another, which was set aside in equity, see Alexander *v.* Relfe, 74 Mo. 495.

That secret agreements outside the articles of consolidation will not be enforced in equity against the consolidated company see Trenton Pass. R. Co. *v.* Wilson, 55 N. J. Eq. 273, 37 Atl. 476.

Circumstances under which a judgment at law against the old corporation is not necessary to the exercise of this equitable jurisdiction. Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 10 Fed. 596, 3 McCrary 368.

83. Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196.

84. Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 8 N. E. 355, opinion by Andrews, J. Where an insurance company, being in difficulties, transferred its assets and liabilities to another insurance company, on a contract that the shares of stock of the selling company should be taken up by shares of stock of equal par value of the purchasing company, issued to the shareholders of the selling company, and that the new shares so issued should be redeemable at par by the purchasing company within a year at the option of the shareholders, a receiver of the selling company could not, after the validity of the contract of transfer had been established in another proceeding, recover of one of such shareholders the redemption money which he had thus received for his shares from the purchasing company. Bent *v.* Hart, 73 Mo. 641 [*affirming* 10 Mo. App. 143, Sherwood, C. J., dissenting]. Under a familiar rule of equity, where two corporations have become consolidated through an arrangement under which a portion of the shares of stock of the purchasing company are transferred to a shareholder of the selling company, in lieu of his interest as a shareholder of the selling company, neither the purchasing company nor a shareholder therein can claim, in a court of equity, a cancellation of the shares so issued by the selling company, without offering to return the consideration which the purchasing company received for them. Buford *v.*

essential steps pointed out by the statute to effect a consolidation have been taken, the question whether the new company has acquired a legal existence, springing out of a doubt as to the legal existence of one of the constituent companies, is, as in other cases, a question which cannot be settled except in a proceeding instituted by the state. For example it cannot be settled in a proceeding instituted by some of the shareholders.[85] This doctrine has been carried so far as to result in the conclusion that the fact that some of the conditions required by the governing statute for the consolidation of two or more railroad corporations is wanting when such consolidation is attempted is not sufficient to prevent the attempted consolidation from forming a corporation *de facto*, provided that there might be, under the statute, a corporation composed of merely constituent parts, with the powers claimed and exercised by the consolidated corporation.[86] This principle can have no application unless there was a statute in existence under which a valid consolidation might have been made.[87]

6. Validation — a. By Curative Statutes. If the legislature has power in the first instance to authorize the consolidation of certain corporations, it has — subject to any constitutional inhibition against the passage of special laws — the power by a subsequent curative act to validate their consolidation if informally or irregularly made.[88]

b. By Legislative Recognition. As in other cases[89] an informal or defective consolidation may be rendered valid by a subsequent recognition by the legislature of the new corporation as a corporation *de jure*.[90]

7. Estoppel Against Denying Validity of Consolidation. In conformity with a principle already stated,[91] persons who deal with a corporation formed by a consolidation as though it were a corporation *de jure* thereby recognize its corporate existence and estop themselves from denying it.[92] Again, in an action against a body created by an attempt at consolidation, seeking to charge it as a corporation, defendant is estopped to deny the validity of the consolidation, and thereby to plead itself out of existence.[93]

Keokuk Northern Line Packet Co., 69 Mo. 611 [*affirming* 3 Mo. App. 159].

85. Bell *v.* Pennsylvania, etc., R. Co., (N. J. 1887) 10 Atl. 741.

86. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155 [*rehearing denied* in 96 Fed. 784, 37 C. C. A. 587 (*modifying* 82 Fed. 642, 86 Fed. 929)]. In the decision which is here modified, it was said by Mr. Circuit Judge Taft: "It may be safely stated as the rule, that when persons assume to act as a body, and are permitted, by acquiescence of the public and the State, to act as if they were legally a particular kind of corporation, for the organization, existence and continuance of which there is express recognition by general law, such body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so." Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642, 650 [*citing* State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409 (case of a public officer); Blackburn *v.* State, 3 Head (Tenn.) 689; Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178 (case of a public corporation); Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 455 (case of a county and therefore a strictly public corporation)].

87. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153.

Upon this principle it has been held that the mere fact that corporations of different states attempt to consolidate, in the absence of a statute authorizing such consolidation, and assume to act as a consolidated corporation, even in the full belief that they are legally incorporated, will not constitute them a corporation *de facto*. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153. It follows that the corporate existence of such a body may be assailed collaterally, and that its attempted contracts are void. American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153. A supposed corporation thus attempted to be created without authorization is not liable for the debts of one of the precedent corporations. Kavanagh *v.* Omaha L. Assoc., 84 Fed. 295.

88. Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621. *Compare* Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595. See also Fisher *v.* Evansville, etc., R. Co., 7 Ind. 407, where the doctrine is recognized.

89. See *supra*, I, M, 10.

90. Mead *v.* New York, etc., R. Co., 45 Conn. 199; McAuley *v.* Columbus, etc., R. Co., 83 Ill. 348.

91. See *supra*, I, N, 1, a.

92. Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642.

93. Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 373, 43 N. E. 373 [*affirming* 56 Ill. App. 327]. But it has been held that this prin-

8. PAYMENT OF SHARES ISSUED BY CONSOLIDATED CORPORATION IN "GOOD-WILL." Applying the rule that the capital stock of a corporation may be paid for in property at a reasonable valuation, it has been held that the good-will of a constituent corporation may properly be applied, at its market value, to the payment of stock issued by the consolidated corporation to the members of the constituent corporation.[94]

9. VALIDITY OF "ORGANIZATION TAX" EXACTED IN CASE OF CONSOLIDATION. A state statute requiring the payment of a fee to the secretary of state for filing articles of agreement of incorporation, and also articles of consolidation, which fee is to be proportional to the authorized capital of the corporation so organized, is a valid law, and applies to articles of agreement of consolidation between a domestic corporation and a corporation of another state as well as to consolidations between domestic corporations only. The reason is that the state is not bound to permit corporations to consolidate, and consequently may impose such terms upon consolidations as it may see fit; and corporations which accept the privilege must accept it with the burden.[95] A consolidation of two corporations has been held to create a new corporation in the sense which requires the payment of what has been called the organization tax,[96] and this is so although the new corporation retains the name of one of the old ones.[97]

10. ACCOUNTING BETWEEN CONSTITUENT CORPORATIONS WHERE ATTEMPTED CONSOLIDATION PROVES ABORTIVE. After a bill in equity to enjoin an attempted *ultra vires* consolidation has been dismissed by reason of a voluntary rescission of the consolidation agreement, a defendant who has in a cross bill prayed for an accounting may have the suit retained for that purpose.[98]

11. NOTICE OF MEETING TO DECIDE QUESTION OF CONSOLIDATION. A failure to give notice of such a meeting, as required by statute, will not invalidate the consolidation, where all the shareholders are present and vote for the measure.[99] In case of a meeting of the shareholders of an Indiana corporation to vote upon the question of a consolidation with companies existing in other states, it is not necessary that the shareholders of the Indiana corporation should be called together by the notice and should conduct the meeting by the methods prescribed by the laws of such other states.[1]

12. OTHER QUESTIONS GROWING OUT OF CONSOLIDATION PROCEEDINGS. An agreement by one insurance company that another, which it has absorbed by purchasing a controlling interest in its stock, shall pay to its president on his retirement a certain sum for his interest in securing the consolidation is invalid, and he cannot recover the amount from the purchasing company on refusal of payment.[2]

ciple does not apply so as to estop one who becomes a holder of a county bond issued to a railroad corporation two days after it makes an attempted consolidation with another corporation, but derives title to the bond through the constituent corporations and not through the pretended consolidated corporation, and whose title to the bond may be supposed to depend upon the question whether the corporation receiving it was in existence at the time, from denying the validity of the attempted consolidation, since he has entered into no contract and has done no act recognizing its existence. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56.

94. Beebe *v.* Hatfield, 67 Mo. App. 609.

95. Ashley *v.* Ryan, 49 Ohio St. 504, 31 N. E. 721 [*affirming* 6 Ohio Cir. Ct. 208; and *affirmed* in 153 U. S. 436, 14 S. Ct. 865, 38 L. ed. 773].

96. State *v.* Lesueur, 145 Mo. 322, 46 S. W. 1075.

97. Chicago, etc., R. Co. *v.* State, 153 Ind. 134, 51 N. E. 924.

That an agreement to consolidate is to be treated as the articles of incorporation of the new consolidated corporation, so far as concerns the filing of articles of incorporation and the collection of fees therefor, see Chicago, etc., R. Co. *v.* State, 153 Ind. 134, 51 N. E. 924.

98. Greenville Compress, etc., Co. *v.* Planters' Compress, etc., Co., 70 Miss. 669, 13 So. 879, 35 Am. St. Rep. 681.

99. Chicago, etc., R. Co. *v.* Ashling, 56 Ill. App. 327 [*affirmed* in 160 Ill. 373, 43 N. E. 373].

1. Bradford *v.* Frankfort, etc., R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819.

2. Wood *v.* Manchester F. Ins. Co., 30 Misc. (N. Y.) 330, 63 N. Y. Suppl. 427. Circumstances under which a promise made by the chairman of a reorganization committee to pay for services rendered in effecting the

13. Effect of One Company Refusing to Join in Agreement For Consolidation. The validity of the incorporation of a consolidated railroad company is not affected by the fact that one of the companies, whose name is inserted in the agreement and in the title of the new company, did not join in the agreement, where the agreement expressly binds the remaining companies to carry it out, notwithstanding the failure of any one of the companies named to enter into it.[3]

IV. CORPORATE MEETINGS AND ELECTIONS.

A. Necessity of Electing Board of Directors or Trustees — 1. In General. All of the statutory schemes for the formation and government of corporations created for private purposes with which the writer is acquainted provide for the management of the business of the corporation by a governing body generally called, in the case of business corporations, directors, and in the case of eleemosynary corporations, trustees. The necessity of having such a governing body is so obvious and the custom of having it so general that it has been held that the power to have it is inherent in all private corporations, and that no special power to that end need be conferred by statute.[4] Where the statute authorizes the election of such a board, a scheme of organization which dispenses with it until a large proportion of the proposed works are completed may be regarded as a fraud upon dissenting shareholders, such as will demand and receive relief in equity.[5] Nor can the directors of the corporation who are in office dispute the right of a shareholder holding a majority of the stock to have an election in accordance with the by-laws, on the ground that he intends to use his legal rights for purposes detrimental to the interests of the corporation, and that the desired election is merely a step toward that end.[6]

2. Mandamus to Compel Election. In cases where public rights are involved the holding of corporate elections may also be compelled by mandamus.[7] The modern use of this writ in America is probably such as to make it an appropriate mode of accomplishing the same object, even in the case of a private corporation where no rights of a strictly public nature are involved.[8]

3. Effect of Failure to Elect — a. Does Not Work Dissolution of Corporation. A failure to elect directors at the proper time does not necessarily work a dissolution of the corporation; since as will be presently shown [9] those who are in office hold over until their successors are elected or appointed. Hence an election may be held at any time subsequent to the regular time, assuming that proper notice of it is given.[10]

reorganization was the personal obligation of the chairman and not that of the committee. Gerding *v.* Funk, 48 N. Y. App. Div. 603, 64 N. Y. Suppl. 423.

It has been held that the phrase, "Such terms as they agree upon," in a statute authorizing the consolidation of railroad companies, relates to the mere administrative details attending the consolidation and conveys no substantive powers or rights. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 317, 28 So. 956.

3. Phinizy *v.* Augusta, etc., R. Co., 62 Fed. 678.

4. Hurlbut *v.* Marshall, 62 Wis. 590, 22 N. W. 852.

5. Hence where it was provided, in a scheme of organization of a telegraph company, that no general election of the company should be held until two thousand miles of the line should be equipped, an election of a board of directors and a mode of settling for the work already done were decreed in equity. Terwilliger *v.* Great Western Tel. Co., 59 Ill. 249.

6. Camden, etc., R. Co. *v.* Elkins, 37 N. J. Eq. 273.

7. Rex *v.* Cambridge, 4 Burr. 2008. See also *In re* Borough of Boffiny Case, 2 Str. 1003.

8. American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377 (manufacturing company); People *v.* Cummings, 72 N. Y. 433; People *v.* Albany Hospital, 61 Barb. (N. Y.) 397.

No defense to the application for mandamus that no demand had been made that such election be held, or that, since the papers were served, defendants had ordered an election, it appearing that they had attempted by altering the by-laws to alter the mode of publishing the annual election, to change the test of the right to vote thereat, and to give persons a right to vote who had not that right previously. People *v.* Albany Hospital, 61 Barb. (N. Y.) 397.

9. See *infra*, IV, A, 3, b.

10. Hicks *v.* Lanoeston, 1 Rolle Abr. 514, pl. 6.

b. Those In Office Hold Over Until Successors Elected and Qualified. Nearly all the statutes prescribe that the directors elected shall hold their offices for a stated period, and until their successors are chosen.[11] Where it is not so provided by statute, it is common to make by-laws so providing, and if there were no such statute or by-law, this would be the implication of the law.[12] Not only is this the rule as to ordinary corporate trustees, but it applies equally to the case of a trustee who is elected to fill a vacancy.[13] If a majority of the board of directors become disqualified for holding their offices by reason of having transferred their shares this will not affect the right of the others to remain in office; and therefore the election of an entire new board prior to the expiration of the term of office of those who are not qualified will be invalid.[14]

4. Directors Cannot Enlarge Their Own Tenure of Office. Where the tenure of the office of the directors is fixed by the charter, they cannot enlarge that tenure by establishing a by-law changing the time of holding the election, against the wishes of a majority of the holders of the shares,[15] even where the governing statute confers all the power of the corporation upon the directors, except the power to increase its capital stock.[16] An agreement by a majority of the directors and the owners of a majority of the shares, for the purpose of perpetuating themselves and their successors in office and the control of the company at large salaries during their own lives and for years after their death, without regard to the rights of the minority, is an unlawful combination and involves an abuse of trust.[17]

5. Power of Directors to Fill Vacancies in Board. The directors of a corporation, being the mere managers of its business, and possessing no power to make constituent changes in the corporation unless such power has been expressly conferred, have no valid power to fill vacancies in their own board.[18] Even where this power has been conferred by statute, it cannot be exercised by less than a

11. See for example Colo. Gen. Stat. (1883), c. 19, § 6.

12. Hunter *v.* Sun Mut. Ins. Co., 26 La. Ann. 13; Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; People *v.* Runkle, 9 Johns. (N. Y.) 147; Foot *v.* Prowse, 1 Str. 625. *Compare* Reg. *v.* Durham, 10 Mod. 146. See also Chamberlain *v.* Detroit Stove Works, 103 Mich. 124, 61 N. W. 532, holding that a failure to elect directors at the regular annual meeting does not prevent a subsequent election, and the consequent termination of the employment as secretary of one who was not reëlected as director.

13. Huguenot Nat. Bank *v.* Studwell, 6 Daly (N. Y.) 13.

Effect of judgment ousting trustees.—That a judgment ousting from office so many of the trustees as not to leave a quorum does not constitute an omission or neglect to choose officers, within the meaning of a statute, so as to invalidate the title of the remaining trustees or to allow the old board to hold over, see People *v.* Fleming, 59 Hun (N. Y.) 518, 13 N. Y. Suppl. 715, 37 N. Y. St. 157.

Construction of by-laws and statutes as to tenure.—Where there was a by-law providing that the directors should "serve for the term of one year or until such time as their successors shall be elected," it was held that the word "or" should be read "and" and that one having been duly elected must be considered liable as a director until it should be shown by him that a successor was elected. Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250, 30 N. E. 644, 43 N. Y. St. 876 [*reversing* 14 Daly (N. Y.) 361, 14 N. Y. St. 682]. Tenure of office of the first directors in New York under N. Y. Laws (1875), c. 611, see Post-Express Printing Co. *v.* Coursey, 10 N. Y. Suppl. 497, 32 N. Y. St. 748. Tenure of office of the first directors in Pennsylvania see Com. *v.* Helms, 26 Wkly. Notes Cas. (Pa.) 358.

14. Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

Statutes have been enacted empowering corporations to decrease the number of their directors by filing a certificate in the office of the secretary of state, such as N. J. Acts (1888), c. 22, p. 34.

15. Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 467. See also *infra*, IV, C, 1.

16 Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

17. Snow *v.* Church, 13 N. Y. App. Div. 108, 42 N. Y. Suppl. 1072.

18. Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763; Kearney *v.* Andrews, 10 N. J. Eq. 70.

Statutes conferring this power have, however, been frequently enacted. A statute conferring the power to fill vacancies created by certain named contingencies, "until the next election," has been construed to mean until the next annual election, although the regular date for holding an election may actually intervene if no election be in fact held thereat. Pennsylvania Milk Producers' Assoc. *v.* Honeybrook First Nat. Bank, 20 Pa. Co. Ct. 540.

majority of the board; so that if a majority of the board resign, the board cannot be filled up by appointments made by the remaining minority, but there must be a new election.[19] But neither the board of directors nor the body of shareholders can fill vacancies which do not exist; and hence an election of new directors where there are no vacancies to be filled is void; and it has been held that the persons so elected will be restrained at the suit of the shareholders from exercising the office, especially where their interests are antagonistic to the interests of the corporation.[20]

6. Changing Number of Directors to Be Elected. Where the statute empowers the corporation to make by-laws fixing and altering the number of its directors, and vests the power to make and alter by-laws in the shareholders, the shareholders may amend the by-laws by providing for an additional number of directors to take office at once.[21]

7. Shareholders Cannot Decide Questions Committed to Directors. As the directors cannot perform constituent acts,[22] so the shareholders cannot, at a shareholders' meeting, decide upon questions which the governing statute commits to the directors, such as electing a president;[23] or, in case of a mutual insurance company, passing upon claims for loss;[24] or as to issuing bonds to purchase certain property and rights, such vote being overruled by a vote of the directors.[25]

B. Place of Holding Corporate Elections — 1. Ordinarily Must Be Within Limits of State Creating Corporation. Unless the charter of the corporation or some other governing statute expressly confers upon it the power to hold its shareholders' meetings outside the state, the rule is that they can meet only within the limits of the state, for the purpose of electing directors or performing other constituent acts.[26] While corporations may exercise their secondary franchises, in other words conduct their business, through agents whom they may appoint, in states or countries other than the state of their creation,[27] yet it has been held that when their constituent members meet and attempt to act in their constituent capacity beyond the bounds of the sovereignty which has granted their charter the acts done at such meetings are wholly void.[28] Care must be taken to distinguish meetings of the shareholders or members held for constituent purposes from meetings of the directors convened for the purpose of transacting the business of the corporation, as for example to appoint a secretary,[29] to vote on the question of issuing negotiable bonds,[30] or to vote on the question of

19. Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763.

20. Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

21. Matter of Griffing Iron Co., 63 N. J. L. 168, 41 Atl. 931 [*affirmed* in 63 N. J. L. 357, 46 Atl. 1097].

22. See *infra*, IX, C, 7.

23. Walsenburg Water Co. *v.* Moore, 5 Colo. App. 144, 38 Pac. 60.

24. Stoehlke *v.* Hahn, 158 Ill. 79, 42 N. E. 150.

25. Cann *v.* Eakins, 23 Nova Scotia 475.

26. *Florida.*— Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484.

Minnesota.— Hodgson *v.* Duluth, etc., R. Co., 46 Minn. 454, 49 N. W. 197.

Missouri.— Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 86 Am. Dec. 128, doctrine qualified.

New Jersey.— Hilles *v.* Parrish, 14 N. J. Eq. 380.

Vermont.— Arms *v.* Conant, 36 Vt. 744.

United States.— Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. 459, 20 L. ed. 199; Runyan *v.* Coster, 14 Pet. 122, 10 L. ed. 382; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274.

See 12 Cent. Dig. tit. "Corporations," § 145.

27. Thus a corporation may, if not forbidden by its charter, make contracts in another state, providing the comity of such state allows it so to do, which contracts will be valid and enforceable. Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419.

28. Freeman *v.* Machias Water Power, etc., Co., 38 Me. 343; Miller *v.* Ewer, 27 Me. 509, 46 Am. Dec. 619. But see Copp *v.* Lamb, 12 Me. 312.

29. McCall *v.* Byram Mfg. Co., 6 Conn. 428.

30. Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199. *Compare* Hilles *v.* Parrish, 14 N. J. Eq. 380, where it was held that a resolution of the board of directors of a New Jersey corporation, passed at a meeting held in the city of Philadelphia, in the state of Pennsylvania, whereby certain transfers of stock were authorized, was void.

making an assignment for creditors.[31] Such meetings, unless prohibited by charter or statute, may be held without the limits of the state creating the corporation. A corporation created by the concurrent legislation of two or more states, receiving from each state what is in effect the same charter, although in theory existing as a separate corporation in each of the states, has a legal domicile in each of them, and may therefore hold its corporate elections in any of them.[32]

2. Meetings Held at What Places Within State. Where the charter does not prescribe the place where the annual elections are to be held, the board of managers have the right to fix the place, and the officers elected at the place so fixed will be at least officers *de facto* with power to hold their offices, unless ousted by quo warranto brought during their official terms.[33]

C. Time of Holding Corporate Elections — 1. Construction of Charters and Statutes. If the charter provides for an annual election of the board of managers, those in power cannot lengthen their term of office by changing the date of the annual election so as to extend their official terms.[34] A charter provision requiring the directors to be chosen at the annual meeting of the corporation has been held to be directory merely, so that its observance is not necessary to the validity of an election.[35] A statute requiring the directors and the treasurer of a corporation to be chosen annually by the shareholders, at such time and place as shall be provided by the by-laws of the company, has been held inapplicable to the first choice of officers upon organizing the corporation.[36] The time of holding

Whether directors elected at meeting held outside state are de facto officers.— It has been held that directors elected at a meeting of shareholders convened outside the state will not be even directors *de facto*, and that their acts will be a nullity. Miller *v.* Ewer, 27 Me. 509, 46 Am. Dec. 619; Franco-Texan Land Co. *v.* Laigle, 59 Tex. 339 (meeting held at Paris, in France). A preferable view, and one more in accordance with modern ideas, is that directors elected at such meetings are directors *de facto*, and that the question of the rightfulness of their tenure of office cannot be raised by third parties. Humphreys *v.* Mooney, 5 Colo. 282; Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706. Nor can a creditor who has dealt with a corporation upon the assumption of its being a valid body raise, in a collateral proceeding, the objection that its directors were elected at a meeting held in another state. Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706. But in the absence of circumstances of estoppel, and in a contest between the directors so elected and existing incumbents of the office, the latter will have the better title thereto. Hodgson *v.* Duluth, etc., R. Co., 46 Minn. 454, 49 N. W. 197. But the proceedings held at such a meeting will raise an estoppel against and bind all who participated in them without objection. Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227.

31. Webb *v.* Midway Lumber Co., 68 Mo. App. 546.

32. Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317.

Statutes have been frequently enacted permitting corporations to hold their meetings outside the limits of the state. Dak. Civ. Code, § 412, subs. 3; Minn. Laws (1887), c. 36, p. 85.

33. Corbett *v.* Woodward, 6 Fed. Cas. No. 3,223, 5 Sawy. 403. That the president of a corporation may call meetings of the directors at a place within the state other than the principal place of business of the corporation see Com. *v.* Smith, 45 Pa. St. 59. Mandamus refused to compel a corporation to keep its records at the place where its business of manufacturing was done. Pratt *v.* Meriden Cutlery Co., 35 Conn. 36. Election of directors void when held at a place other than the principal office of the corporation, although held at such other place for twelve years. Union Nat. Bank *v.* Scott, 53 N. Y. App. Div. 65, 66 N. Y. Suppl. 145.

The place of holding corporate meetings is very generally prescribed by statute, many of such statutes leaving the matter to be regulated by by-laws. Examples of some of these statutes may be found in 1 Thompson Corp. § 703.

34. Mottu *v.* Primrose, 23 Md. 482. See also *supra*, IV, A, 4.

Effect of non-publication of by-law regulating election.— Where the governing statute so provides, an election is not invalid because a by-law regulating the election had not been published as required by the statute. Matter of David Jones Co., 67 Hun (N. Y.) 360, 22 N. Y. Suppl. 318, 51 N. Y. St. 829.

35. Hughes *v.* Parker, 20 N. H. 58.

36. Boston Acid Mfg. Co. *v.* Moring, 15 Gray (Mass.) 211.

Where a bank charter provides that directors may be chosen "at any time," and a subsequent act provides that if they shall not be chosen on a day designated the president and directors shall notify an election to be held within thirty days thereafter, the latter is not a repeal of the former, and does not prevent an election being had after the thirty days. McNeely *v.* Woodruff, 13 N. J. L. 352.

It has been held no ground for postponing the election that the treasurer of the com-

corporate meetings for the purpose of choosing directors is very generally regulated by statute. Most of the statutes provide that directors shall be elected annually,[37] of which examples may be found in a recent work on corporations.[38]

2. Validity of Elections For Directors Held at Date Subsequent to That Regularly Appointed. Provisions in statutes and by-laws requiring the election of directors to be had on a specified day are regarded as directory, and the election, if not held on the regular day, may be held at a later day; and the directors then chosen, if there be no other irregularity or informality in their title, will be directors *de jure*.[39] The reason is that the power of electing officers is, by the common law, inherent in every corporation, and that the power is consequently not lost by failing to exercise it within the appointed time.[40]

3. Adjournment of Meeting to Subsequent Day. Although the members of the corporation have been convened to do certain acts which are required to be done on a stated day and no other, yet if the business cannot be completed on that day, it is competent for them to adjourn to a subsequent day, and no new notice need be sent to the members; the general rule being that the members of a corporation may transact any business at an adjourned meeting which they could have transacted at the original meeting, without giving notice of such adjourned meeting.[41] But it does not apply to sham adjournments, as where a faction, before the voting, withdrew from the meeting and proceeded to elect, in another room, a board of directors of their own, in which case they had no standing to invoke the superintending power of a court over the election, conferred by statute, applicable to cases where it can be shown that by reason of fraud, violence, or other unlawful conduct on the part of some of the shareholders, a fair and honest election cannot be held.[42] Moreover the power to adjourn resides in the shareholders assembled at the meeting, and not in the officials appointed by law to call the meeting. For example the commissioners appointed by law to call a meet-

missioners appointed by the statute for the organization of the corporation, according to a course in vogue during the period of special charters (see *supra*, I, J), withholds the funds which have been received from the control of the commissioners, although they have a right to them. Hardenburgh *v.* Farmers', etc., Bank, 3 N. J. Eq. 68.

It has been held that inspectors of an election for directors have a discretion to keep open the polls beyond the hour limited by the board from which they derive their authority. *In re* Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135.

The New York statute relative to the observance of Sunday does not apply to the proceedings of business meetings of societies held on that day. The holding of business meetings of a benevolent society, transacting its business, on Sunday, is not forbidden as illegal. People *v.* Young Men's Father Matthew Benev. Soc., 65 Barb. (N. Y.) 357.

37. Deering Code Cal. pt. 4, § 302; Colo. Gen. Stat. (1883), c. 19, § 86; 2 Sayle Stat. Tex. art. 4125 (railroad companies).

38. 1 Thompson Corp. § 702.

39. Nashua F. Ins. Co. *v.* Moore, 55 N. H. 48 (in regard to a by-law); Hughes *v.* Parker, 20 N. H. 58; Beardsley *v.* Johnson, 121 N. Y. 224, 24 N. E. 380, 30 N. Y. St. 691 [*affirming* 1 N. Y. Suppl. 608, 16 N. Y. St. 773]. See also Scanlan *v.* Snow, 2 App. Cas. (D. C.) 137, 22 Wash. L. Rep. 62; Vandenburgh *v.* Broadway Underground Connecting R. Co., 29 Hun (N. Y.) 348; Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; People *v.* Runkle, 9 Johns. (N. Y.) 147.

40. Hicks *v.* Lanceston, 1 Rolle Abr. 514, pl. 6.

Statutes have been enacted providing that in case of the failure to hold a corporate election at the appointed time the shareholders shall meet and hold one in the manner provided by the by-laws. Deering Code Cal. pt. 4, § 312; 2 Sayle Stat. Tex. (1888), art. 4129.

41. State *v.* Cronan, 23 Nev. 437, 49 Pac. 41. *Compare* People *v.* Batchelor, 22 N. Y. 128; Smith *v.* Law, 21 N. Y. 296; Warner *v.* Mower, 11 Vt. 385; Schoff *v.* Bloomfield, 8 Vt. 472; Scadding *v.* Lorant, 3 H. L. Cas. 418, 15 Jur. 955; Rex *v.* Carmarthen, 1 M. & S. 697. That it is the duty of the shareholders to meet and to elect directors on the day fixed by the by-laws and to continue balloting until the board has been filled was held in Forsyth *v.* Brown, 2 Pa. Dist. 765, 13 Pa. Co. Ct. 576, 33 Wkly. Notes Cas. (Pa.) 72.

42. Jenkins *v.* Baxter, 160 Pa. St. 199, 28 Atl. 682, 34 Wkly. Notes Cas. (Pa.) 114. That it is not competent for a majority of the shareholders, after acquiescing in the organization of the meeting and participating in its business, to withdraw from it and organize another meeting at the same time and place see *In re* Argus Printing Co., 1 N. D. 434, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L. R. A. 781.

ing to receive subscriptions to the shares of a corporation, after having called, in pursuance of law, a meeting of the subscribers to organize the corporation, have no power to adjourn the meeting; but their powers have become *functus officio* and the power of adjournment resides in the assembled shareholders only.[43]

D. Assembling the Meeting — 1. Necessity of Having Meeting Duly Assembled. The members of a corporation, public or private, can do no corporate act of a constituent character, such as must be done at a general meeting of all the members or of a quorum of them, unless the meeting is duly assembled, in conformity with the law of its organization.[44] It has been well said that the act of a majority of the corporators does not bind the minority, if it has not been expressed in the form pointed out by law; and accordingly, that the act of a majority, expressed elsewhere than at a meeting of the shareholders, is not binding on the corporation, as where the assent of each one is given separately and at different times.[45] The reason is that each member has the right of consultation with the others, and that the minority have the right to be heard. In the line of authority establishing the foregoing principles no break has been discovered, although it should be added that an election or other proceeding had at a meeting irregularly assembled may be valid if all attend and act or assent.[46]

2. Meetings, Except Stated Meetings, Invalid Unless Duly Notified. This leads to the conclusion that corporate meetings are invalid, and that the business transacted thereat is voidable, unless the members have been duly notified of the meeting in accordance with the governing statute or by-laws, except in the case of stated meetings, of which every member is bound to take notice.[47]

43. Hardenburg *v.* Farmers', etc., Bank, 3 N. J. Eq. 68.

Invalidity of election held by shareholders who remain after an adjournment has taken place, whether by a formal vote of record or *de facto* merely, before the time fixed for reassembling. State *v.* Smalley, 7 Ohio Cir. Ct. 400.

The president of a mining corporation has no authority under the California statutes to adjourn a meeting of the shareholders against their express will, upon his determination that a majority of the subscribed stock is not represented, in the absence of any by-law of the corporation conferring such authority. If the president attempts to adjourn the meeting without the consent of the shareholders, and refuses to proceed or to permit the meeting to be continued in the office of the company, the shareholders have the right to adjourn without his attendance, to another room and there hold their meeting. State *v.* Cronan, 23 Nev. 437, 49 Pac. 41.

Chairman not bound to adjourn shareholders' meeting, although articles of association give him the power so to do. Salisbury Gold Min. Co. *v.* Hathorn, [1897] A. C. 268, 66 L. J. P. C. N. S. 62, 76 L. T. Rep. N. S. 212, 45 Wkly. Rep. 591.

That it is competent for the inspectors, in the exercise of a sound discretion, to adjourn the election from day to day, where no time is fixed by the governing statute for its duration, see *In re* Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635.

It has been held that an election of directors at an adjourned meeting is not invalidated by the fact that votes were cast at a previous meeting, where the inspectors, with the acquiescence of the shareholders, after discovering that four of the candidates receiving a majority of the votes were ineligible, adjourned without declaring the result and held a new election regular in form. Matter of Newcomb, 18 N. Y. Suppl. 16, 42 N. Y. St. 442.

When illegal. — If, after a meeting for the election of directors has assembled, a call is addressed to such shareholders as belong to a certain faction to withdraw from the meeting, a meeting held after the disorder occasioned by the withdrawing of the factious shareholders is illegal and is not cured by a subsequent invitation to the other shareholders to participate in it. Com. *v.* Patterson, 158 Pa. St. 476, 27 Atl. 999, 34 Wkly. Notes Cas. (Pa.) 45.

Statutes have been enacted providing that in case a quorum does not assemble those who do assemble may adjourn from time to time. 1 Thompson Corp. § 721.

44. German Evangelical Congregation *v.* Pressler, 14 La. Ann. 799.

Statutes authorizing by-laws. — Many statutes have been enacted committing the time, the place, and the manner of holding corporate elections to the regulation of by-laws. 1 Thompson Corp. § 722.

45. Peirce *v.* New Orleans Bldg. Co., 9 La. 397, 29 Am. Dec. 448.

Proof of the fact of notice, after the lapse of several years, of a special meeting to reduce capital stock. Forest Glen Brick, etc., Co. *v.* Gade, 55 Ill. App. 181.

46. People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; Benbow *v.* Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454. See also *infra*, IV, D, 9.

47. Rex *v.* May, 5 Burr. 2681; Dillon Mun. Corp. (4th ed.) § 262.

3. If Meeting Is Special All Must Be Notified or It Will Be Void. If the meeting is special, all the members or shareholders must be summoned or the election will be void. The absence of a single member, not summoned by reason of his supposed absence and the consequent impracticability of summoning him, will, it has been held, render the election void.[48]

4. Notice Must Be Given in Statutory Mode. Where the time or manner of giving notice is prescribed by statute, by the charter, or by the by-laws of a corporation, it is necessary, in order to the validity of the acts done at the meeting, that the notice should be given as thus prescribed.[49] For example the provisions of a statute prescribing the time during which notice of a meeting must be given cannot be dispensed with by a by-law.[50] Where the statute prescribes what the notice shall set forth, a compliance with this requirement is considered necessary to the legality of any vote at the corporate meeting.[51]

5. General Statement of Requisites of Notice. The requisites of the notice may be enumerated as follows: (1) It must be issued by one who has authority to issue it.[52] (2) It must state the time of the meeting, unless there is a regular time fixed in the charter or by-laws, of which every member is presumed to have notice.[53]

Where the meeting is held upon a stated day, appointed by the charter or a by-law, no notice of the meeting is required, unless the giving of a notice is prescribed. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; Rex *v.* Hill, 4 B. & C. 426, 6 D. & R. 593, 10 E. C. L. 644; Angell & A. Corp. § 488. So if a particular day in the year is appointed for the transaction of business a notice of the particular business to be done is not required. Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78; People *v.* Batchelor, 22 N. Y. 128; Warner *v.* Mower, 11 Vt. 385; Angell & A. Corp. § 488. Nor is it material in what manner the stated meetings of the corporation have been fixed; if they are in fact regularly held on stated days that is sufficient. Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

48. Loubat *v.* Le Roy, 15 Abb. N. Cas. (N. Y.) 1, 65 How. Pr. (N. Y.) 138; Com. *v.* Guardians of Poor, 6 Serg. & R. (Pa.) 469; Rex *v.* Langhorn, 4 A. & E. 538, 6 N. & M. 203, 31 E. C. L. 243; Rex *v.* Hill, 4 B. & C. 441, 6 D. & R. 593, 10 E. C. L. 644; Rex *v.* May, 5 Burr. 2681; Rex *v.* Grimes, 5 Burr. 2598; Rex *v.* Doncaster, 2 Burr. 738, 2 Ld. Ken. 391; Rex *v.* Liverpool, 2 Burr. 723, 2 Ld. Ken. 424; Rex *v.* Theodorick, 8 East 543, 9 Rev. Rep. 494; Rex *v.* Shrewsbury, Cas. t. Hardw. 147; Smyth *v.* Darley, 2 H. L. Cas. 789; Musgrove *v.* Nevinson, 2 Ld. Raym. 1358, 1 Str. 584; Kynaston *v.* Shrewsbury, 2 Str. 1051; Rex *v.* Faversham, 8 T. R. 352, 4 Rev. Rep. 691 (per Lord Kenyon with reference to point whether all must be notified in case of special meetings). *Compare* People *v.* Batchelor, 22 N. Y. 128. It was decided in the house of lords, in 1849, that where certain acts of a corporation are to be performed at a special meeting of the members of that corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance; and that the omission to summon any one entitled to be summoned renders the acts done at such meeting in his absence invalid. Thus the election of a treasurer for the county of the city of Dublin was vested by statute (49 Geo. III, c. 20) in the "Board of Magistrates of the County of said City," and was directed to take place at the sessions court of the city, by vote of the magistrates there present. It was held by the lords that the recorder of Dublin was a member of that board, that he ought to have been summoned to a meeting of the magistrates summoned for that election, and that the omission to summon him rendered the election which took place in his absence invalid. Smyth *v.* Darley, 2 H. L. Cas. 789, holding further that a finding in a special verdict that a person entitled to be present at a meeting of the corporate body was not summoned, and that he was at the time within summoning distance, throws on the party supporting the validity of the acts done at such meeting the onus of showing sufficient cause for his not being summoned.

That this is the modern doctrine, holding a corporate election void where no sufficient notice of the meeting has been served on a single one of the shareholders, see Barthell *v.* Hencke, 99 Wis. 660, 75 N. W. 952.

49. Shelby R. Co. *v.* Louisville, etc., R. Co., 12 Bush (Ky.) 62; Hunt *v.* Norwich School Dist. No. 20, 14 Vt. 300, 39 Am. Dec. 225. *Compare* Cogswell *v.* Bullock, 13 Allen (Mass.) 90.

50. Charter Gas Engine Co. *v.* Charter, 47 Ill. App. 36.

51. Shelby R. Co. *v.* Louisville, etc., R. Co., 12 Bush (Ky.) 62; Cogswell *v.* Bullock, 13 Allen (Mass.) 90 (holding that a meeting called in any manner prescribed by the by-laws is legal); Hunt *v.* Norwich School Dist. No. 20, 14 Vt. 300, 39 Am. Dec. 225.

52. Bethany Cong. Soc. *v.* Sperry, 10 Conn. 200; Evans *v.* Osgood, 18 Me. 213; Stevens *v.* Eden Meeting-House Soc., 12 Vt. 688; Angell & A. Corp. § 491.

53. Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252; People *v.* Batchelor, 22 N. Y. 128; Angell & A. Corp. § 488.

(3) The place where the meeting is to be held, unless the place is settled and established by the charter or by-laws.[54] (4) The business to be transacted thereat.[55]

6. Who May Call Meeting. It is in general essential to the validity of acts done at a special or called meeting of a corporation that the call shall be made by the person or persons appointed by the governing statute or by-law to call such meetings;[56] although under some conditions acts done at a meeting called by unauthorized persons may be regarded as valid until called in question by the state.[57] Where the by-laws of an insurance company provided that a special meeting should be called by the president, or in his absence by the secretary, on application made to them in writing by ten members, this did not preclude the directors from calling a special meeting without such application.[58] So where the articles of association provide only that meetings of shareholders may be called by the board of directors or any three shareholders, proceedings had at a meeting called by the president and cashier do not bind the corporation unless all the shareholders attend and assent.[59] On the other hand if the by-laws provide that meetings of the shareholders shall be called by the trustees, this excludes any power in the president alone to call a meeting.[60] The demand by a shareholder upon the directors or trustees that a meeting for an election of trustees shall be convened must be made on them when they are in session as a board; a demand upon each individual trustee separately is not sufficient.[61] In respect of the officers who may call such a meeting, the principle which vindicates the action of *de facto* officers of corporations[62] has been held to apply; so that if those who hold under a previous election take measures for holding an election for the succeeding year their successors, chosen at such election, will be officers *de jure*.[63]

7. Time During Which Notice Must Be Given. If the time during which the

54. Angell & A. Corp. § 496.

55. Merritt *v.* Farriss, 22 Ill. 303; Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78; Little *v.* Merrill, 10 Pick. (Mass.) 543; Hunt *v.* Norwich School Dist. No. 20, 14 Vt. 300, 39 Am. Dec. 225; Warner *v.* Mower, 11 Vt. 385.

56. Bethany Cong. Soc. *v.* Sperry, 10 Conn. 200; Reilly *v.* Oglebay, 25 W. Va. 36; Matthews *v.* Columbia Nat. Bank, 79 Fed. 558.

In New Hampshire, where a corporation has no officer by whom a new meeting can be called, its powers are suspended or dormant till it is reorganized under a new charter, or by a meeting called under the statute, by a justice of the peace. Goulding *v.* Clark, 34 N. H. 148.

57. Walworth *v.* Brackett, 98 Mass. 98. It is not necessary, upon a collateral inquiry, that the notice for the election should have been given by the person named in the certificate of incorporation. Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225.

Whether call made by, or by direction of, persons authorized.— According to one view the call for an original meeting of corporators to elect directors need not be made by a formal order of those authorized to make the call, but it is sufficient if it be made by their direction. Hardenburgh *v.* New Brunswick Farmers', etc., Bank, 3 N. J. Eq. 68. A stricter view has resulted in the conclusion, under a statute (W. Va. Code, c. 53, § 41) that where the meeting is to be called by the board of directors, or by any number of shareholders holding together at least one tenth of the capital stock, a call made by the secretary, on the authority of shareholders holding one tenth of the capital, is invalid, and all proceedings thereunder illegal. Reilly *v.* Oglebay, 25 W. Va. 36. A similar strictness has prevailed in New Hampshire, in respect of a call made under a statute by a justice of the peace. The court hold that the statutory power must be strictly complied with, and accordingly that the justice cannot make the call unless on such a petition of proprietors as is prescribed by the statute; and, proceeding by analogy to the view that in such cases the jurisdiction must affirmatively appear, it is also held that the petition to the justice must be shown to be signed by the requisite number of proprietors. Goulding *v.* Clark, 34 N. H. 148. But as the act devolved upon the justice is merely ministerial the fact that he is a shareholder does not disable him from issuing the warning for the meeting or even from presiding thereat. Ashuelot R. Co. *v.* Elliot, 57 N. H. 397. For analogies relating to the "calling" and the "warning" of town meetings in New England see Stone *v.* Hamilton School Dist. No. 4, 8 Cush. (Mass.) 592; Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105.

58. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 8 Allen (Mass.) 217.

59. Matthews *v.* Columbia Nat. Bank, 79 Fed. 558.

60. State *v.* Pettineli, 10 Nev. 141.

61. State *v.* Wright, 10 Nev. 167.

62. See *infra*, IX, B.

63. Smith *v.* Erb, 4 Gill (Md.) 437.

Many statutes have been enacted prescribing who may call meetings of the shareholdd-

notice must be given is not specified in any statute or governing instrument, then the implication of the law is that the length of time must be reasonable.[64] But where the governing statute, or a valid by-law, prescribes the time which shall elapse between the giving of the notice and the meeting, the proceedings at the meeting will be voidable unless the notice is given for the prescribed time; nor can a by-law reduce the time prescribed by the charter.[65]

8. Certainty of Notice as to Time and Place. Where such a notice is required, either by the terms of the governing statute or by the operation of the principle just stated, unless it is explicitly given in respect of day, hour, and place, the meeting cannot be legally held, unless the shareholders are all present and consenting, whether in person or by proxy; and the fact that the by-laws fix the day upon which such a meeting shall be held is not a sufficient notice of the time and place.[66] On the other hand the mere fact that the meeting of the board of directors, at which the shareholders' meeting was summoned, was convened without the proper notice is not a good ground of challenging the validity of the action of the shareholders' meeting, provided it was otherwise regularly summoned.[67]

9. Waiver of Formal Notice by Appearing at Meeting and Assenting to Proceedings. It should constantly be kept in mind that no matter where the meeting is held or how defectively the members are notified the proceedings will bind all who appear at the meeting and participate in it without dissent.[68] But if a single member, having the right to be present and vote, is not notified in the prescribed manner, and is absent or refuses to consent to the proceedings held at the meeting, its proceedings will be illegal and void, unless the charter or governing statute otherwise provides.[69]

10. Ratification of Things Done at Meeting Informally Assembled. Acts done at meetings which have been assembled without notice, at least when such acts

ers of corporations, of which examples will be found in 1 Thompson Corp. § 705.

64. In case of a meeting to consider the question of a voluntary dissolution, if there is no statute prescribing the period for which the notice shall be given, a notice for the authorized time prescribed for a corporate election for any purpose will suffice. Titusville Oil Exch. *v.* Witherop, 2 Pa. Super. Ct. 508, 39 Wkly. Notes Cas. (Pa.) 185.

65. U. S. *v.* McKelden, MacArthur & M. (D. C.) 162.

66. San Buenaventura Commercial Min., etc., Co. *v.* Vassault, 50 Cal. 534; Brown *v.* Electric Min. Mach. Co., 22 Pittsb. Leg. J. N. S. 343. Where a church canon prescribed that notice of a meeting for the election of vestrymen should be given during divine service upon the Sunday previous thereto, a notice given several hours before divine service was insufficient, and the election was void. Dahl *v.* Palache, 68 Cal. 248, 9 Pac. 94. That an annual election on a movable day, such as Pinxter Monday, is valid see People *v.* Runkle, 9 Johns. (N. Y.) 147.

67. Browne *v.* La Trinidad, 37 Ch. D. 1, 57 L. J. Ch. 292, 58 L. T. Rep. N. S. 137, 36 Wkly. Rep. 289.

Statutory provisions as to the manner of giving notice, with respect to length of time, place of meeting, business to be transacted at the meeting, etc., have been frequently enacted, and many examples of them will be found in 1 Thompson Corp. § 711.

68. *Indiana.*— Jones *v.* Milton, etc., Turnpike Co., 7 Ind. 547; Judah *v.* American Live Stock Ins. Co., 4 Ind. 333.

New York.— People *v.* Peck, 11 Wend. 604, 27 Am. Dec. 104.

North Carolina.— Benbow *v.* Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454.

United States.— Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227.

England.— Henderson *v.* Australasia Bank, 40 Ch. D. 170, 58 L. J. Ch. 197, 59 L. T. Rep. N. S. 56, 37 Wkly. Rep. 332.

See 12 Cent. Dig. tit. "Corporations," § 742.

69. People *v.* Batchelor, 22 N. Y. 128 (Denio, J., dissenting); Rex *v.* May, 5 Burr. 2681; Rex *v.* Gaborian, 11 East 77; Rex *v.* Theodorick, 8 East 543, 9 Rev. Rep. 494; Angell & A. Corp. 495.

Some of the statutes, it may be observed, prescribe that the statutory notice may be dispensed with by the unanimous consent in writing of all the members.

Arkansas.— Dig. Stat. (1884), § 963.

California.— Deering Code, pt. 4, § 317.

Minnesota.— Rev. Stat. (1881), § 4008.

Oregon.— Hill Laws, § 3226.

Wisconsin.— Rev. Stat. (1878), § 1761.

The vote of a corporation which affects the liability of those of its members who are its debtors cannot be regarded as having been consented to by them if they were not present at the meeting at which the vote was passed, although they may have had the legal notice of the meeting. American Bank *v.* Baker, 4 Metc. (Mass.) 164.

This principle does not apply with the same force to public or municipal corporations, at least in New England, where the English

relate to the mere business of the corporation, may become valid by a subsequent ratification by the shareholders.[70] As will be seen in a future subdivision,[71] ratifications of informal or irregular corporate action often take place by the concurrent acquiescence, assent, or recognition of the validity of such acts, made by the shareholders, without any record thereof. On a similar principle, it has been held that where all shareholders of a corporation act together in its behalf, although there is no regular meeting or formal vote, their action is substantially corporate action.[72]

11. Stating in Notice Business to Be Transacted at Meeting. If the meeting is a special one, it seems that it is necessary that the notice should state the nature of the business for the transaction of which the meeting is convened; otherwise the transaction of business not embraced in the notice will be void unless all the members are present and consent thereto.[73] And even in the case of stated annual meetings, where any unusual business is to be transacted, it is necessary that notice should be given of that fact; as for example the making of a by-law, and this, although a custom may have existed in the corporation of transacting other business at stated meetings.[74] But here again the extra business so transacted is well done if all the shareholders appear at the meeting and consent to it.[75] A charter provision that two weeks' notice shall be given of a specified annual meeting for the election of directors does not make the transaction of other business at such meeting unlawful, where a long-continued custom has existed to perform other business at such meetings.[76] If a particular day in the year is appointed for the transaction of all business, a notice of the particular business to be transacted is not required.[77] There are holdings to the effect that where the statutory provision in regard to annual meetings is general, such meetings are *ex vi termini* for the transaction of all business incident to the corporate powers and interests;[78] and that the notice of a special meeting, when it is held for the transaction of ordinary business, need not state the object of the meeting;[79] but that where the meeting is called for the purpose of transacting business of special importance, not within the general routine of corporate business, upon a day not expressly set apart for that particular transaction, unless the notice of the meeting states the nature of such business, all acts done at the meeting will be illegal and void.[80]

doctrine that notice may be waived by unanimous consent is denied, and where the transactions had at meetings not duly notified are void, although the meetings are attended by all the voters capable of attending. 1 Dillon Mun. Corp. (4th ed.) § 265.

70. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375, meeting authorized the issue of corporate bonds secured by mortgage on corporate property.

71. See *infra*, XV, B, 7.

72. Woodbridge *v.* Pratt, etc., Co., 69 Conn. 304, 37 Atl. 688.

73. People's Mut. Ins. Co. *v.* Westcott, 14 Gray (Mass.) 440; St. Louis *v.* Withaus, 16 Mo. App. 247 [*affirmed* in 90 Mo. 646, 3 S. W. 395, municipal ordinance void if passed at a special meeting and having no reference to anything embraced in the message of the mayor calling the meeting]; Machell *v.* Nevinson, 2 Ld. Raym. 1355.

Certainty required in the notice of a meeting called to increase the capital stock see Jones *v.* Concord, etc., R. Co., 67 N. H. 234, 30 Atl. 614, 68 Am. St. Rep. 650.

74. Montgomery County Mutual F. Ins. Co. *v.* Farquhar, 86 Md. 668, 39 Atl. 527.

75. At least the business so transacted, for example the authorization of a mortgage, will not be void, but voidable only. Campbell *v.* Argenta Gold, etc., Min. Co., 51 Fed. 1.

76. Montgomery County Mut. F. Ins. Co. *v.* Farquhar, 86 Md. 668, 39 Atl. 527 [*citing* Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78; Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252; Warner *v.* Mower, 11 Vt. 385; State *v.* Conklin, 34 Wis. 21].

77. Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78; People *v.* Batchelor, 22 N. Y. 128; Warner *v.* Mower, 11 Vt. 385.

78. Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78.

79. New Haven Sav. Bank *v.* Davis, 8 Conn. 191.

80. People's Mut. Ins. Co. *v.* Westcott, 14 Gray (Mass.) 440; Rex *v.* Doncaster, 2 Burr. 738, 2 Ld. Ken. 391; Rex *v.* Liverpool, 2 Burr. 723, 2 Ld. Ken. 424; Rex *v.* Theodorick, 8 East 543, 9 Rev. Rep. 494; Angell & A. Corp. § 489; Potter Corp. § 323. Thus the levying of an assessment upon the shareholders was held to be an act of such importance that it could not be done at a special corporate meeting, unless the shareholders

12. When Personal Notice Is Required. If no mode of giving notice is prescribed by charter, statute, by-law, or other governing instrument, then personal notice must be given to the shareholders; otherwise the proceedings had at the meeting will not be binding.[81]

13. How Many Times Notice Must Be Published. This is almost entirely the the subject of statutory regulation. Where the statute required that the shareholders should meet on the second Monday of January, of which meeting public notice should be given "at least two weeks previously" by the secretary, it was held that the publication of one notice was sufficient, if it was published two weeks previously.[82]

were notified that such was the purpose of the meeting. Atlantic De Laine Co. *v.* Mason, 5 R. I. 463. And the same was held with respect to the meeting of a religious corporation called for the election of officers. Smith *v.* Erb, 4 Gill (Md.) 437. A notice of a second meeting, made conditional upon the passage of certain resolutions to be proposed to a prior meeting, has been held invalid, and not made good by the fact that the shareholders have acquired information *aliunde* that such resolutions were passed at the first meeting. Alexander *v.* Simpson, 43 Ch. D. 139, 59 L. J. Ch. 137, 61 L. T. Rep. N. S. 708, 1 Meg. 457, 38 Wkly. Rep. 161. A resolution passed at a general meeting of shareholders, under the English Joint-Stock Companies Acts, has been held not invalidated by the fact that the notice convening it did not suggest any reason why the contract could not be carried into effect without the sanction of a general meeting. Grant *v.* United Kingdom Switchback Railways Co., 40 Ch. D. 135, 58 L. J. Ch. 211, 60 L. T. Rep. N. S. 525, 1 Meg. 117, 37 Wkly. Rep. 312. Notice of an annual meeting to act on the report of the directors, choose a new board for the ensuing year, and transact any other business that may be brought before it, will not authorize a vote to increase the capital stock, under a statute permitting such an increase to be made "at any meeting called for the purpose." Jones *v.* Concord, etc., R. Co., 67 N. H. 119, 38 Atl. 120. Under Cal. Civ. Code, § 320, a mortgage authorized at a meeting, the notice for which does not specify the nature of the business to be transacted, is valid. Granger *v.* Original Empire Mill, etc., Co., 59 Cal. 678. Although directors may have been elected at a meeting, the notice of which did not specify the business to be transacted, yet the corporation cannot set up that fact as against its creditors, so as to repudiate obligations into which such directors have entered for it. Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78. A meeting of a mutual fire-insurance company, called "for the purpose of making such alterations in the by-laws of said company as may be deemed necessary, and for the transaction of such other business as may come before them," cannot, after voting to increase the number of directors (which is not limited by the by-laws), elect the additional directors; and an assessment or call made at a meeting of the board of directors, at which only the additional directors so chosen are present, is void. People's Mut. Ins. Co. *v.* Westcott, 14 Gray (Mass.) 440.

Not a badge of fraud for the secretary to omit to include a resolution in a communication to a shareholder who was represented by proxy at the meeting. Thames *v.* Central City Ins. Co., 49 Ala. 577, notice of the proxy being notice to his principal.

What notice to the shareholders of a consolidated corporation is not indefinite and uncertain, in case of a meeting called to consider a proposition to create a bonded indebtedness, to retire the existing one, and to increase the bonded indebtedness, although there was no existing bonded indebtedness except that of the constituent corporations. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225. A notice of meeting, stating the general character of the business to be transacted, and that a copy of the proposed new articles may be inspected at the office of the solicitors of the company, is sufficient notice to shareholders of a proposal to alter the articles of association of the corporation. Young *v.* South African, etc., Exploration, etc., Syndicate, [1896] 2 Ch. 268, 65 L. J. Ch. 638, 74 L. T. Rep. N. S. 527, 44 Wkly. Rep. 509.

81. New Haven Sav. Bank *v.* Davis, 8 Conn. 191; Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99; Wiggin *v.* First Freewill Baptist Church, 8 Metc. (Mass.) 301; Lockwood *v.* Mechanics Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253; Stevens *v.* Eden Meeting House Soc., 12 Vt. 688.

Where the meeting is of the board of trustees or directors, in the absence of any provision in the charter or by-laws prescribing the kind of notice which shall be given, each member of the board must have personal notice.

California.— Harding *v.* Vandewater, 40 Cal. 77.

Massachusetts.— Wiggin *v.* First Freewill Baptist Church, 8 Metc. 301.

New Jersey.—State *v.* Ferguson, 31 N. J. L. 107.

New York.— People *v.* Batchelor, 22 N. Y. 128.

England.— Rex *v.* Doncaster, 2 Burr. 738, 2 Ld. Ken. 391; Rex *v.* Liverpool, 2 Burr. 723, 2 Ld. Ken. 424; Rex *v.* Theodorick, 8 East 543, 9 Rev. Rep. 494.

See 12 Cent. Dig. tit. "Corporations," §§ 1298, 1299.

82. Weckerly *v.* Fell, etc., R. Co., 8 Pa. Dist. 89, 22 Pa. Co. Ct. 209.

E. The Quorum — 1. Where Body Is Composed of Indefinite Number — a. What Constitutes. The rule of the common law seems to be that where a body is composed of an indefinite number of persons a quorum, for the purposes of elections and voting upon other questions which require the sanction of the members, consists of those who assemble at any meeting regularly called and warned, although such number may be a minority of the whole; in which case a majority of those who assemble may elect, unless there is a different rule established by statute or by a valid by-law.[83] Except where the rule of voting is by shares, this rule of the common law is applicable to joint-stock corporations; because, although the number of shares is definite, yet the number of persons who hold those shares is constantly varying.[84] Under a strict observance of this rule such of the shareholders as actually assemble at a properly convened meeting, although a minority of the whole number and representing only a minority of the stock, even if but one is present, constitute a quorum for the transaction of business, unless it is otherwise provided in the charter or by-laws.[85]

b. Majority of This Quorum Necessary to Elect. It must be kept in mind that the doctrine of the preceding paragraph is inflexible, except where a different rule is established by statute or by-law, that a majority of this quorum is necessary to elect, and that a mere plurality does not elect.[86]

2. Where Body Is Composed of Definite Number. In all cases where an act is to be done by a corporate body, and the number is definite, it has been held that a majority of the whole number is necessary to constitute a legal meeting; and that if the actual number is reduced from any cause, the number necessary to constitute a quorum remains the same; but that at a legal meeting a majority of those present may act.[87] If the meeting is duly assembled and there is a quorum,

83. *Minnesota.*— Everett *v.* Smith, 22 Minn. 53.

Missouri.— Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53.

New York.— Field *v.* Field, 9 Wend. 394.

Pennsylvania.— Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417.

United States.— Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

See 12 Cent. Dig. tit. "Corporations," § 744.

This is the rule applied to meetings of religious societies.— Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 5 Rob. (N. Y.) 649; Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417.

84. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53; Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525. That, in America, except where otherwise provided, the voting unit is a single share see *infra*, IV, F, 1.

85. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174. And there are general expressions to the effect that the acts of a majority in a corporation bind the whole (see Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78), expressions which must be qualified by the statement that this rule is not applicable to those acts which work constituent changes in the constitution or purposes of the corporation, and which, in the absence of valid statutes otherwise providing, require the unanimous consent of the shareholders of the corporation.

86. State *v.* Wilmington City Council, 3 Harr. (Del.) 294. Hence, although illegal votes may have been cast and legal votes rejected, yet if notwithstanding this a majority of legal votes still appear for those who are returned as elected their election is valid. McNeely *v.* Woodruff, 13 N. J. L. 352. Hence where the governing by-law provides that no business shall be transacted at any meeting of the shareholders unless a majority of the stock is represented, and the stock consists of four hundred shares, and a board of directors is elected at a meeting where only one hundred and thirty-eight shares are represented, the election is void, and they are not even directors *de facto*. Ellsworth Woolen Mfg. Co. *v.* Faunce, 79 Me. 440, 10 Atl. 250. There is a seemingly untenable decision to the effect that an election of directors by those holding less than one half of the shares, brought about by the exclusion from voting of the shareholders by an injunction issued by a competent court, is legal. Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

87. *Massachusetts.*— Sargent *v.* Webster, 13 Metc. 497, 46 Am. Dec. 743.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

Missouri.— Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260; Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53.

New York.— Note to *Ex p.* Willcocks, 7 Cow. 402, 410, 17 Am. Dec. 525.

shareholders who do not vote when they might are bound by the result.[88] Even where, after an election has been commenced, a majority of those assembled protest that there is no vacancy, but do not cast their votes for some other candidate, a majority of the votes of those assembled, cast for a candidate put in nomination, elects him, provided there is a vacancy.[89] If the membership is divided into separate integral parts or classes, then a majority of the members of each class is necessary.[90]

3. Statutory Provisions as to What Shall Constitute. Numerous statutes governing this subject have been enacted which vary in their provisions as to what shall constitute a quorum, from those who attend by person or by proxy to two thirds of all the shares; and which vary, with respect to the proportion of the quorum necessary to elect directors and to carry this or that measure, from a mere plurality to two thirds of the shares.[91]

Rhode Island.— Lockwood *v.* Mechanics Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

England.— Rex *v.* Miller, 6 T. R. 268, 3 Rev. Rep. 172; Rex *v.* Bellringer, 4 T. R. 810.

88. State *v.* Chute, 34 Minn. 135, 24 N. W. 353. In such a case the consent of the minority of the quorum is taken to be included in the consent of the majority. Reg. *v.* Ipswich, Holt 443, 2 Ld. Raym. 1232, 2 Salk. 434. See also for the doctrine of the ancient common law as applicable to municipal corporations Cotton *v.* Davies, 1 Str. 53.

89. Oldknow *v.* Wainwright, 2 Burr. 1017, 1 W. Bl. 229.

90. State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

Invalidity of corporate act requiring a stated majority where one member, necessary to make the majority, quits the meeting before the act is passed see *Ex p.* Rogers, 7 Cow. (N. Y.) 526. A holding, applicable to a charitable corporation, which rejects the vote in a proceeding to ratify an invalid election of directors, where the member whose title is in controversy is necessary to constitute a quorum in the ratifying board. People *v.* New York Infant Asylum, 7 N. Y. St. 277, a doctrine which it is believed cannot apply to joint-stock corporations.

91. Many of these statutes are set out in 1 Thompson Corp. § 727.

That acts done at a corporate meeting at which a minority only of the shares is represented are void in such a sense that they cannot be ratified by the subsequent assent of the holders of a majority of the shares, if this assent be given elsewhere than at a meeting of the shareholders duly convened, see Peiree *v.* New Orleans Bldg. Co., 9 La. 397, 29 Am. Dec. 448.

Three fourths normal amount of issued shares.— Construction of the provision of articles of association of an English company, providing that the quorum shall be members holding or representing by proxy three fourths of the normal amount of the issued shares of the class, although other articles provide that the quorum for a general meeting shall be the holders of one tenth of the issued capital of the company, with the conclusion that the three fourths required by the former clause is necessary, etc. Hemans *v.* Hotchkiss Ordnance Co., [1899] 1 Ch. 115, 68 L. J. Ch. 99, 79 L. T. Rep. N. S. 681, 6 Manson 52, 47 Wkly. Rep. 276.

Majority of stock.— Construction of a corporate by-law providing that a majority of the stock, present in person or by proxy, at any meeting of the shareholders, shall constitute a quorum, with the conclusion that this requires a majority of the stock. Matter of Rapid Transit Ferry Co., 19 Misc. (N. Y.) 409, 43 N. Y. Suppl. 538 [*affirmed* in part and *reversed* in part in 15 N. Y. App. Div. 530, 44 N. Y. Suppl. 539, where the conclusion was reached that in view of the statutes of New York the by-law should not be held to apply to a meeting of the shareholders for the election of directors].

Majority in interest.— That a majority in interest, and not necessarily a majority in number, is required to amend a by-law at a special meeting, under a charter which requires the vote of a "majority of the shareholders," and which also provides that the New Jersey Corporation Act of 1896 shall apply, etc., and that a majority in interest may constitute a quorum although not a majority in number, under the same charter provision, when read in connection with another charter provision of the New Jersey Corporation Act of 1891, § 21, see Weinburgh *v.* Union Street Railway Advertising Co., 55 N. J. Eq. 640, 37 Atl. 1026. That "two thirds of the shareholders" in a statute means the holders of two thirds of the stock see State *v.* Horan, 22 Wash. 197, 60 Pac. 135. That a provision in the by-laws of a corporation that its "constitution" may be altered or amended by a two-thirds vote of the association at any annual meeting will not prevent the amendment of the by-laws by a majority vote see Scanlan *v.* Snow, 2 App. Cas. (D. C.) 137, 22 Wash. L. Rep. 62.

The phrase "holding at least one third of the shares of stock," in a by-law of a corporation requiring that to constitute a quorum there must be present at all legal meetings one third of the shareholders holding one third of the shares, refers to the stock issued and not to the stock authorized, especially where less than one third of the stock authorized has been issued. Castner *v.* Twitchell-Champlin Co., 91 Me. 524, 40 Atl. 558 [*citing* Greenpoint Sugar Co. *v.* Whitin, 69

F. Right to Vote at Corporate Elections — 1. Voting Unit Is Single Share. In the absence of constitutional provisions or statutes designed to afford a representation in the board of directors of minority shareholders,[92] and with other possible statutory exceptions, the single share is the voting unit in joint-stock corporations.[93] Where a charter is granted to certain persons, "their associates, successors, and assigns," the grantees can legally elect directors without having made any associates, successors, or assigns.[94]

2. Statutes Changing Rule and Limiting Number of Votes Cast by Single Shareholder. Statutes have been enacted changing this rule and limiting the number of votes which can be cast by a single shareholder, the end in view being the protection of minority shareholders; as for example a statute which provides that no shareholder shall be entitled to cast more than one fourth of the votes at any election of directors. Such a statute will be rigorously upheld, and will not be allowed to be defeated or evaded by the device of a shareholder making nominal transfers of his shares to dummies and having them vote in his interest.[95]

3. Right to Vote Rests in Those Registered as Shareholders on Books of Corporation — a. Rule Stated. In the absence of statutes or valid by-laws changing the rule, the right to vote ordinarily rests in those in whose names the shares stand registered on the corporate books, although in point of fact they may have transferred them by a blank power of attorney to some other party who has not seen fit to execute the power and to have himself registered as a shareholder for the purpose of exercising the voting power attached to the shares.[96] In other

N. Y. 328, and *overruling* Ellsworth Woolen Mfg. Co. *v.* Faunce, 79 Me. 440, 10 Atl. 250].

92. As to which see Procter Coal Co. *v.* Finley, 98 Ky. 405, 33 S. W. 188, 17 Ky. L. Rep. 950; Tomlin *v.* Farmers', etc., Bank, 52 Mo. App. 430; Wright *v.* Com., 109 Pa. St. 560, 1 Atl. 794; Dick *v.* Lehigh Valley R. Co., 4 Pa. Dist. 56.

93. See *infra*, IV, F, 4, and notes.

By-law authorizing vote for each share valid.— That a by-law providing that at a shareholders' meeting each shareholder shall cast a vote for each share of stock owned by him is valid under Ky. Const. § 207, providing for the cumulative system of voting at the elections of directors, see Procter Coal Co. *v.* Finley, 98 Ky. 405, 33 S. W. 188, 17 Ky. L. Rep. 950, holding that such a by-law authorizes that manner of voting for the chairman of the meeting, as well as in the election of directors, and that the fact that the chairman has, at all previous meetings of the company, been chosen by consent and by a *viva voce* vote, does not affect the right.

If the corporation has no power to issue shares of stock, then persons elected as its trustees by the votes of stock which it has assumed to issue have no title to the office, although the governing statute provides for a board of trustees, to "be elected at such times and in such manner as the said company shall by its rules and regulations direct," and although the company, acting in the assumed execution of the power so granted, established the mode of electing by a stock vote. Cooke *v.* Marshall, 196 Pa. St. 200, 46 Atl. 447 [*affirming* 191 Pa. St. 315, 43 Atl. 314, 44 Wkly. Notes Cas. (Pa.) 159].

Members of a reorganization committee, to whom, under the plan of reorganization, stock of the corporation was issued to be held by them for five years, unless in their judgment its distribution among the bondholders was sooner warranted, do not lose their power to vote upon it by selling their individual stock. Haines *v.* Kinderhook, etc., R. Co., 33 N. Y. App. Div. 154, 53 N. Y. Suppl. 368 [*affirming* 23 Misc. (N. Y.) 605, 52 N. Y. Suppl. 1061].

94. Hughes *v.* Parker, 19 N. H. 181. That a statute providing that in every library association every shareholder shall have at least one vote for each share of stock held by him became the law of a particular library association on being assented to by every shareholder therein, notwithstanding a provision in the special charter of the association which limited the voting power of shares held in blocks exceeding five by single owners, see Rankin *v.* Newark Library Assoc., 64 N. J. L. 265, 45 Atl. 622.

95. Mack *v.* De Bardeleben Coal, etc., Co., 90 Ala. 396, 8 So. 150, 9 L. R. A. 650.

Such regulation reasonable.— A regulation of an agricultural and mechanical association, providing that shareholders should have one vote for each share held by them up to ten shares, and fixing the proportion which their votes should bear to their shares above that number, has been held reasonable, when uniform in its operation, and binding on all the shareholders. Com. *v.* Detwiller, 131 Pa. St. 614, 18 Atl. 990, 25 Wkly. Notes Cas. (Pa.) 329, 7 L. R. A. 357.

96. *California.*— People *v.* Robinson, 64 Cal. 373, 1 Pac. 156.

Connecticut.— State *v.* Ferris, 42 Conn. 560.

Minnesota.— Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

Nevada.— State *v.* Pettineli, 10 Nev. 141.

New York.— Matter of Glen Salt Co., 17

words the right to vote follows the legal title to the shares, and this is especially true where the charter, governing statute, or a valid by-law provides that the shares shall be transferred only on the books of the corporation, in which case an unregistered transferee has only an equitable title, the legal title remaining in the transferrer; and the right to vote follows the legal title.[97] The right to vote his shares at corporate elections is an incident of the ownership of the shares; it inheres in the legal holder of them under the principles of the common law, and is in the nature of property.[98]

b. Right as Between Pledger and Pledgee of Shares. Keeping in mind the principle of the preceding paragraph, that, as between the corporation and the person claiming the right to vote, the right follows the legal title to the shares, then the question whether a pledge of the shares will carry with it the legal title to vote in respect of them depends upon whether the contract of pledge was of such a nature as to transfer the legal title to the pledgee. If it gives him the right to have the shares registered in his name on the books of the corporation, and if he exercises this right, then the right to vote with respect to them will become vested in him.[99] The pledger and the pledgee may arrange by contract between themselves which shall possess the voting power,[1] but they cannot so arrange where the arrangement proceeds in face of the governing statute.[2] The

N. Y. App. Div. 234, 45 N. Y. Suppl. 568 [*affirmed* in 153 N. Y. 688, 48 N. E. 1104].

Rhode Island.— Hoppin *v.* Buffum, 9 R. I. 513, 11 Am. Rep. 291.

Compare People *v.* Devin, 17 Ill. 84, where a different rule was applied.

See 12 Cent. Dig. tit. "Corporations," § 754.

Transfer of shares on corporate books ten days before the meeting for the election is essential to the right of the transferee to vote under New York statutes; and this is so although the transfer may have been sent to the corporation in a registered letter which was received in the post-office in time, but not withdrawn in time by the corporation, because its officials did not know that it had been received by the postmaster. Matter of Glen Salt Co., 17 N. Y. App. Div. 234, 45 N. Y. Suppl. 568 [*affirmed* in 153 N. Y. 688, 48 N. E. 1104].

The directors may properly adopt a new stock-book for the purpose of enabling holders of stock to have certificates transferred, when an election is imminent and a transfer is necessary to enable holders of stock to vote, and the original stock is inaccessible by reason of the absence of the custodian of it. *In re* Argus Co., 138 N. Y. 557, 34 N. E. 388, 53 N. Y. St. 270.

97. Miller *v.* Murray, 17 Colo. 408, 30 Pac. 46; Com. *v.* Dalzell, 152 Pa. St. 217, 25 Atl. 535, 34 Am. St. Rep. 640 [*reversing* 1 Pa. Dist. 667, 23 Pittsb. Leg. J. N. S. 69].

98. Com. *v.* Dalzell, 152 Pa. St. 217, 25 Atl. 535, 31 Wkly. Notes Cas. (Pa.) 301, 34 Am. St. Rep. 640 [*reversing* 1 Pa. Dist. 657, 23 Pittsb. Leg. J. N. S. 69].

99. State *v.* Smith, 15 Oreg. 98, 14 Pac. 814, 15 Pac. 137, 386.

1. Ervin *v.* Philadelphia, etc., R. Co., 7 R. & Corp. L. J. 87.

2. It has been held that where the right to vote at corporate elections is, by the governing statute, vested in the shareholders, one to whom shares of the corporate stock have been transferred in trust, under a contract of pledge for a third person who has advanced money to the corporation, cannot vote at corporate elections for directors in respect of the shares so held in pledge, although it is provided in the contract of pledge that he shall have the right so to do. The reason is plain; the governing statute having prescribed who shall vote at corporate elections, it is not competent for the corporation to make a different rule, otherwise a corporation could make for itself a new charter or recreate itself. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237. This case is cited in Griswold *v.* Seligman, 72 Mo. 110, to the point that a corporation cannot be its own shareholder; but in respect of the conclusion which the supreme court of Missouri deduced from this principle, that the pledgee is a shareholder and liable to creditors as such, the California decision cannot be quoted as authority. Again it has been held that where stock is held, under a written contract with the corporation, as security for advances made by the holders of it to the corporation, it is not competent to show by parol evidence that there was a verbal understanding that the holders of it were to have the privilege of voting in respect of the stock. Griswold *v.* Seligman, 72 Mo. 110. *Compare* Union Sav. Assoc. *v.* Seligman, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776; Erskine *v.* Loewenstein, 82 Mo. 301; Bray *v.* Seligman, 75 Mo. 31; Fisher *v.* Seligman, 75 Mo. 13. It has been held that where the legal title, and with it the right to vote, is in the pledger, and the shares stand on the books in the name of the pledgee, the pledger has a remedy in equity against the pledgee to compel him to retransfer the shares or else to give him a proxy to vote in respect of them. Vowell *v.* Thompson, 28 Fed. Cas. No. 17,023, 3 Cranch C. C. 428.

Where the pledgee has been registered on the corporate books as holding the shares the

conclusion then is that, in the absence of a contrary rule in the governing statute or by-laws authorized thereby, the pledger of shares which have been hypothecated is entitled to vote, unless the pledgee has been made a shareholder as between himself and the corporation, by having the shares transferred to him on the corporate books.[3] And it has been held without qualification, that in a clear case of hypothecation the pledger may vote. The possession may continue with him, consistently with the nature of the contract, and the stock remains in his name. Till enforced, and the title made absolute in the pledgee, and the name changed on the books, he should be received to vote. It is a question between him and the pledgee, with which the corporation has nothing to do.[4] On the other hand, if the stock has been transferred on the books of the corporation to one to whom it has been delivered under a contract of pledge, he is *prima facie* entitled to vote in respect of the shares, and after he has voted the corporate election will not be set aside because of his having voted, although his vote has determined the result. The corporation is not bound to inquire into the circumstances under which he holds as trustee, but if those circumstances are such that the pledger has a right to a retransfer, he may enforce that right in equity.[5] The general rule is that the right to vote remains in the pledger or mortgagor until the pledge or mortgage has been foreclosed; and while, as elsewhere seen,[6] the inspectors of the election cannot inquire into the equities upon which the shares are held, or look behind what appears on the face of the transfer-books, yet the courts can; and if it appears to them that a pledgee of corporate stock has, without authority from the pledger, caused it to be registered on the company's books in his name as trustee, they will restrain him from voting thereon.[7] Nor need the pledger, in order to maintain an action to restrain such voting, show that his rights would thereby be injuriously affected.[8]

c. Ownership of Shares Must Be Bona Fide. But this right to vote is necessarily predicated upon the *bona fide* ownership of shares; and under a statute affirming this principle,[9] a dummy to whom a block of shares has been issued by the secretary of a corporation to be voted at an election is not entitled to vote in respect of them, since he is neither a *bona fide* shareholder nor the representative of one.[10]

right to vote vests in him unless it is reserved to the pledger in the contract of pledge. Com. *v.* Dalzell, 152 Pa. St. 217, 25 Atl. 535, 31 Wkly. Notes Cas. (Pa.) 301, 34 Am. St. Rep. 640 [*reversing* 11 Pa. Dist. 657, 23 Pittsb. Leg. J. N. S. 69].

That the right to vote vests in the holder of the legal title to the shares, notwithstanding a contract for the sale thereof, conditioned upon the transfer of the stock upon the books of the corporation, which condition has neither been performed nor waived, see *In re* Argus Co., 138 N. Y. 557, 34 N. E. 388, 53 N. Y. St. 270.

3. Scholfield *v.* Union Bank, 21 Fed. Cas. No. 12,475, 2 Cranch C. C. 115.

4. *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525. This case has been cited in subsequent cases, to the principle that a corporation has no concern with private agreements between holders of its stock and third persons. *In re* Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135; *In re* Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429. It has also been cited to the principle that the pledger of hypothecated stock may vote thereon. New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534, per Ingraham, J.

5. Hoppin *v.* Buffum, 9 R. I. 513, 11 Am. Rep. 291. See also Vowell *v.* Thompson, 28 Fed. Cas. No. 17,023, 3 Cranch C. C. 428. To illustrate: M, the pledgee of stock which stood on the books as "M, Trustee," had repeatedly voted in respect of the shares without objection, and voted them at an election of directors under such circumstances that his vote determined the result. In quo warranto against the officers declared elected, it was held, (1) that M was entitled to vote, in the absence of any claim by the pledgers to do so; (2) that after the election it was too late for the pledgers to ask the court to disturb the result. Hoppin *v.* Buffum, 9 R. I. 513, 11 Am. Rep. 291. The case might better have been put upon the naked ground that those in whose name the stock is registered are the only ones entitled to vote, and that if the register is not correct it should be rectified prior to the election. *Compare* State *v.* Lehre, 7 Rich. (S. C.) 234.

6. See *infra*, IV, G, 2, a.

7. McHenry *v.* Jewett, 26 Hun (N. Y.) 453.

8. McHenry *v.* Jewett, 26 Hun (N. Y.) 453. *Compare* State *v.* Smith, 15 Oreg. 98, 14 Pac. 814, 15 Pac. 137, 386.

9. Cal. Code Civ. Proc. § 312.

10. Smith *v.* San Francisco, etc., R. Co., 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep.

d. Motive Governing Shareholder in Voting Not Subject to Judicial Inquiry. On the principle that a man has the right to do as he pleases with his own property, the motive which governs a shareholder in voting is not ordinarily a subject of judicial inquiry.[11] The fact that he may have a personal interest separate from that of the other shareholders, which he is endeavoring to subserve, does not deprive him of this right.[12] He does not lose the right to vote on a proposition to discontinue an action commenced by the corporation, although he is adversely interested to the corporation by reason of being a defendant in the action,[13] or because the shares in respect of which he claims the right to vote were sold to him in violation of an agreement, of which he had notice, between the seller and other shareholders.[14] Limitations of this principle exist in cases where one corporation purchases the shares of another for the purpose of absorbing that other.[15]

4. Right of Executors and Administrators to Vote. Executors and administrators have the right to vote with respect to stock standing on the corporate books in the name of the testator on exhibiting an exemplified copy of their letters testamentary or of administration; and this without any formal transfer of the shares on the books of the corporation to them.[16] If the legal title to the shares has been vested, under a will, in three executors, they can only vote as joint owners; and if they cannot agree as to the manner in which the shares shall be voted, they cannot vote with respect to them at all; and this although a codicil of the will provided that the shares should be voted as one of the executors should direct, and that the other executors should give him their proxies, where no proxy had in fact been given, and no legal proceedings had been begun to compel the giving of one.[17]

5. Right of Surviving Partners to Vote. A surviving partner has the right, while the partnership business remains unsettled, to vote upon corporate stock standing in the name of the firm, or which, although standing in the name of the deceased partner, is shown actually to be firm property.[18]

6. Right of Trustees to Vote. In like manner one is entitled to vote in respect of stock standing in his name as the trustee of others;[19] and for equally good reasons where the trust is not disclosed on the company's books.[20]

7. Right to Vote With Respect to Stock Standing in Name of Person With Addition of "Cashier," Etc. Stock standing on the corporate books in the name of a person with the addition of "cashier" subjoined, cannot be voted on a proxy given by his successor in office.[21]

119, 35 L. R. A. 309; Stewart *v.* Mahoney Min. Co., 54 Cal. 149. *Compare* Mack *v.* De Bardeleben Coal, etc., Co., 90 Ala. 396, 8 So. 150, 9 L. R. A. 650.

11. Moses *v.* Scott, 84 Ala. 608, 4 So. 742. See in affirmation of this principle Lewisohn *v.* Anaconda Copper Min. Co., 26 Misc. (N. Y.) 613, 56 N. Y. Suppl. 807, refusing to enjoin a majority of the shareholders of a Montana corporation, at the instance of a minority, from voting to accept an offer for the purchase of mining claims owned by the company.

12. Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483, 52 N. W. 48.

13. Socerro Mountain Min. Co. *v.* Preston, 17 Misc. (N. Y.) 220, 40 N. Y. Suppl. 1040.

14. *In re* Argus Co., 138 N. Y. 557, 34 N. E. 388, 53 N. Y. St. 270.

15. See for instance Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, 7 So. 108, 16 Am. St. Rep. 81, 7 L. R. A. 605. It has been held that power given to one of three executors to control the voting of corporate stock belonging to the estate cannot be abridged because he has used such power for his own interest, where his conduct is not such as will warrant his dismissal from the trust. Lafferty's Estate, 2 Pa. Dist. 215.

16. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225 (holding that they may so vote on the question of consolidation); *In re* Cape May, etc., Nav. Co., 51 N. J. L. 78, 16 Atl. 191; *In re* North Shore Staten Island Ferry Co., 63 Barb. (N. Y.) 556.

17. Tunis *v.* Hestonville, etc., Pass. R. Co., 149 Pa. St. 70, 24 Atl. 88, 15 L. R. A. 665 [*affirming* 1 Pa. Dist. 135]. That the provision of the codicil that the other executors should give such a proxy deprives them of any discretion as to the manner in which the stock shall be voted, and leaves them no ground for refusing the proxy, see Lafferty's Estate, 2 Pa. Dist. 215.

18. People *v.* Hill, 16 Cal. 113.

19. *In re* Barker, 6 Wend. (N. Y.) 509.

20. Wilson *v.* Central Bridge, 9 R. I. 590.

21. *In re* Mohawk, etc., R. C., 19 Wend. (N. Y.) 135.

8. Right to Vote With Respect to Shares Held by Joint Owners. Where stock in a corporation is owned by two persons jointly, and they disagree as to the vote to be cast upon the shares at an election for trustees, the vote of one of them upon such stock may be rejected.[22]

9. Right of Assignee in Bankruptcy to Vote in Respect of Shares Held by Bankrupt. An assignment in bankruptcy does not necessarily take away the right of the bankrupt to vote in respect of shares still standing in his name; and where the bankrupt and the assignee vote in respect of such shares, the other shareholders have no interest in the question whether the strict right to vote is in the bankrupt or in the assignee, such as will enable them to object thereto.[23]

10. Right of Corporation to Vote — a. In Respect of Its Own Shares. Corporations have, as hereafter seen,[24] a qualified power to deal in their own shares.[25] They may acquire them from defaulting shareholders, by forfeiture or by sale to foreclose their lien upon them,[26] as in the case of banking corporations that have a lien upon them for a general balance due.[27] But stock thus owned or held by the corporation cannot be voted at corporate elections,[28] although it is held by a trustee in pledge to secure a debt, under a contract which allows him to vote it.[29] It will not be permitted to a company thus to wield its own shares, through officers, for the purposes of an election, thus disturbing the rightful voting equilibrium subsisting among its shareholders.[30] As the right to vote in respect of stock transferred in pledge ordinarily remains in the pledger,[31] for stronger reasons it so remains where the pledge has been made to the corporation itself.[32] The rule which restrains the corporation, through its officers, from voting in respect of shares held by it, or in trust for it, has been held, under particular circumstances, not to apply, where the corporate funds were not used in the transactions by which the shares were deposited with its officers.[33]

22. Matter of Pioneer Paper Co., 36 How. Pr. (N. Y.) 111. And see *supra*, IV, F, 4. But that it is not necessary, in order to a right to vote at a corporate election, that the person should be the sole owner of the shares see Ervin *v.* Philadelphia, etc., R. Co., 7 R. & Corp. L. J. 87.

23. State *v.* Ferris, 42 Conn. 560.

24. See *infra*, XVII, B, 5.

25. Monsseaux *v.* Urquhart, 19 La. Ann. 482.

26. See *infra*, VI, O, 2, d, (I) *et seq.*

27. See *infra*, VII, D, 2, b, (I), note 60.

28. McNeely *v.* Woodruff, 13 N. J. L. 352; *Ex p.* Holmes, 5 Cow. (N. Y.) 426. By statute in Missouri stock held or hypothecated to the corporation cannot be voted. Mo. Rev. Stat. (1889), § 2487.

29. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237 (under a California statute); American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377; Union Sav. Assoc. *v.* Seligman, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776; *Ex p.* Holmes, 5 Cow. (N. Y.) 426. This rule does not extend to a case where the stock is held in trust for a shareholder. *In re* Barker, 6 Wend. (N. Y.) 509.

30. *Ex p.* Holmes, 5 Cow. (N. Y.) 426. See also McNeely *v.* Woodruff, 13 N. J. L. 352; *Ex p.* Desdoity, 1 Wend. (N. Y.) 98.

An agreement among shareholders of a railroad company, vesting in trustees the right to vote the stock at all meetings of the corporation, has been held void, as contrary to public policy, and as substantially amounting to a repeal of the Pennsylvania statute in regard to the right to vote being incident to the ownership of railroad stock. Vanderbilt *v.* Bennett, 6 Pa. Co. Ct. 193.

31. See *supra*, IV, F, 3, b.

32. Where the question was whether certain shares could be voted at a corporate election, and it appeared that there was a by-law of the corporation providing that when a director was indebted to the corporation eighty-five per cent of his stock should be considered as hypothecated and held as security, and not transferred till the debt was paid, and it appeared that some four hundred and fifty shares of such stock were voted on at an election, the validity of which was in controversy, in favor of the successful ticket, by the persons in whose names it stood, it was held that this could not be called hypothecated stock; that hypothecation is conventional, and implies the power of rendering the subject available by way of sale, to satisfy the debt on default of payment; and that, as the stock stood on the transfer-books in the names of the voters, this fact was conclusive upon the inspectors of the right of the voters to vote in respect of it. *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

33. Woodruff *v.* Dubuque, etc., R. Co., 30 Fed. 91.

Where the charter of an incorporated company has fixed the qualifications of voters by declaring that each share of stock shall be entitled to one vote, which may be cast by the shareholder in person or by proxy, any vote or votes cast by a party at an election of the corporation, without the qualification named,

b. In Respect of Shares Held in Other Corporations. Whether a corporation holding shares of another corporation may vote with respect to them at elections of such other corporation presents a contrariety of views upon the questions: (1) Whether one corporation can be a permanent shareholder in another. (2) Whether, if so, the voting power annexed to the shares passes into the hands of the corporation owning them as an incident of the ownership of the shares. If the first proposition is conceded, then the second one would seem to follow, although it may result in one corporation controlling another.[34] But in the absence of legislative authority or sanction for such a course of proceeding many courts take the view that it is against public policy to allow one corporation to purchase a majority of the shares of another for the purpose of absorbing it, controlling it, or effecting an unlawful consolidation with it; and hence that shares thus purchased cannot be voted by the purchasing corporation at meetings of the victim corporation.[35] A corporation formed under articles of association which assume such a power in the absence of legislative authorization will be dissolved in a proceeding by quo warranto.[36]

11. Right of Bondholders to Vote. The voting power is often attached, by stipulation in corporate mortgages and in the bonds thereby secured, to the holders of such bonds, thus giving them the power to control the officers of the corporation while escaping the responsibility of shareholders. Where the constitution or the statute law provides that directors shall be elected at annual meetings of the shareholders, by the vote of a majority in value of the stock, upon a cumulative system of voting and not otherwise, any by-laws, contracts, or stipulations which attempt to clothe bondholders of the corporation with the voting power are void.[37]

12. Right of Delinquent Shareholders to Vote. Assuming that a shareholder is the legal owner of the shares, in other words, that they stand registered in his name on the books of the corporation, the fact that he is delinquent in the payment of assessments or calls which have been made in respect of them does not deprive him of the right to vote with respect to them, in the absence of a statute

is null and void, and the election will be declared and enforced without counting such votes. The right of voting conferred by the charter is not to be tested by the mere ownership of stock, but the transfer of it must be patent on the stock-book; and where the stock of the company stands on the books in the name of an individual as president, and has not been transferred by him on the books of the company, he has no right to vote on it at an election. Nor can stock or shares standing on the books of the company in the name of the corporation itself be voted on by one of its officers. Monsseaux *v.* Urquhart, 19 La. Ann. 482.

34. So held in Davis *v.* U. S. Electric Power, etc., Co., 77 Md. 35, 25 Atl. 982; State *v.* Rohlffs, (N. J. 1890) 19 Atl. 1099 (in respect of a religious corporation holding shares in a building association, and voting them by proxy duly authorized by the board of trustees of such religious corporation); Oelbermann *v.* New York, etc., R. Co., 77 Hun (N. Y.) 332, 29 N. Y. Suppl. 545, 59 N. Y. St. 881 (under the operation of statutes).

35. *Alabama.*— Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, 7 So. 108, 16 Am. St. Rep. 81, 7 L. R. A. 605.

Georgia.— Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13; Central R. Co. *v.* Collins, 40 Ga. 582.

Illinois.— People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497.

Louisiana.— State *v.* Newman, 51 La. Ann. 833, 25 So. 408, 72 Am. St. Rep. 476.

New York.— Milbank *v.* New York, etc., R. Co., 64 How. Pr. 20, although such purchasing corporation has been permitted to vote with respect to the shares at such meetings in previous years.

United States.— Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683.

36. People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497 [*reversing* 9 R. & Corp. L. J. 536]. That a scheme whereby one railroad company, in the face of a provision in the constitution of the state against monopolies, gets control of the shares of stock of another such company with the view of preventing the construction of its line, is illegal and void, and constitutes all concerned in promoting the scheme, trustees as to the assets which come into their hands, in consequence of which, for the benefit of the persons whose rights have thus been invaded, see Langdon *v.* Branch, 37 Fed. 449, 2 L. R. A. 120.

37. Durkee *v.* People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340 [*affirming* 53 Ill. App. 396], holding that the bondholders are chargeable with notice of such restrictions

or valid by-law making a different rule. It has even been held that a corporation has no power to establish a by-law disfranchising delinquent shareholders.[38]

13. Right of Cumulative Voting. Under various constitutional provisions and statutes[39] designed for the protection of minority shareholders any shareholder may at his pleasure vote for an entire "ticket" so to speak, that is, for as many persons as there are directors to be elected, or he may cast for one particular director as many times the number of votes as there are directors to be elected. To illustrate: Suppose that there are five directors to be elected, and a particular shareholder is entitled to vote in respect to one fifth of the shares. He may cast one vote for five persons named on his ballot, or he may cast five votes for one person, and so in that proportion. In this way one who receives a majority of the cumulated votes is elected, although he does not receive the votes of the holders of a majority of the shares.[40] This right of cumulative voting does not exist at common law; it must have been conferred, if at all, by an operative constitutional or statutory provision.[41] Such constitutional or statutory provisions are not retroactive; they do not operate upon corporations in existence at the time of their adoption;[42] and if retroactive, they would be void as impairing the obligation of the contract embodied in the charter of the corporation, under a well-known principle of constitutional law.[43] Nor could such a constitutional or statutory provision be upheld so as to operate retroactively on the ground of its being a police regulation;[44] nor can the directors accept such a constitutional provision so as to bind the shareholders, for the directors are merely the business managers of the corporation, and have no power to work or to assent to constituent changes therein.[45] An election held for seven directors of a private corporation created under the Pennsylvania general corporation act of 1873, at which the cumulative system of voting was employed, where five directors only received

and consequently of the invalidity of such a provision.

38. Kinnan *v.* Sullivan County Club, 26 N. Y. App. Div. 213, 50 N. Y. Suppl. 95, holding that an agreement by a shareholder to hold his stock pursuant to the by-laws of the corporation as to dues and transfers does not authorize the subsequent passage of a by-law which takes away from him the right to transfer his stock or vote on the same until payment in full of all dues thereon. If the articles of incorporation provide that the capital stock shall be paid up, and that every shareholder shall be entitled to one vote for every share of stock so held, issued to him under an agreement that he shall pay a designated amount to be used in making improvements, he will be entitled to vote with respect to as many shares as he has paid for, although he has not paid for all of them. Price *v.* Holcomb, 89 Iowa 123, 56 N. W. 407. But under a section of the National Currency Act (U. S. Rev Stat. § 5144), the language of which is that "no shareholder whose liability is past due and unpaid, shall be allowed to vote," a shareholder who is in default to the corporation in respect of his share subscription is not entitled to vote at a corporate election. The disability being in the nature of a penalty has been restricted to that species of default, and has been held not to extend to a default in respect of any other indebtedness due the corporation. U. S. *v.* Barry, 36 Fed. 246.

39. Some of these constitutional provisions are set out in 1 Thompson Corp. § 754, and some of the statutory provisions in 1 Thompson Corp. § 755.

40. Schwartz *v.* State, 19 Ohio Cir. Ct. 350, 10 Ohio Cir. Dec. 413 [*affirmed* in 61 Ohio St. 497, 56 N. E. 201].

41. State *v.* Stockley, 45 Ohio St. 304, 13 N. E. 279.

42. State *v.* Greer, 78 Mo. 188 [*reversing* 9 Mo. App. 219]; Com. *v.* Butterworth, 160 Pa. St. 55, 28 Atl. 507; Baker's Appeal, 109 Pa. St. 461; Hays *v.* Com., 82 Pa. St. 518; Dick *v.* Lehigh Valley R. Co., 4 Pa. Dist. 56. Nor does the acceptance by a railroad corporation of a statute allowing it to extend its line, to purchase or lease other roads, and to issue stock or bonds to meet the cost of such purchase, operate to render it subject to a statute providing for cumulative voting at shareholders' meetings. Smith *v.* Atchison, etc., R. Co., 64 Fed. 272.

43. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. See also State *v.* Greer, 78 Mo. 188 [*reversing* 9 Mo. App. 219]; Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123; Sloan *v.* Pacific R. Co., 61 Mo. 24, 21 Am. Rep. 397. *Compare* Hays *v.* Com., 82 Pa. St. 518, cited by both of the Missouri courts. But see Atty.-Gen. *v.* Looker, 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947.

44. State *v.* Greer, 78 Mo. 188 [*reversing* 9 Mo. App. 219, and *citing* Sloan *v.* Pacific R. Co., 61 Mo. 24, 21 Am. Rep. 397]; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

45. Baker's Appeal, 109 Pa. St. 461.

the necessary pluralities, was valid as to the five so elected, and they had full power to act as a board, even though the two remaining directors were not chosen.[46] Nor can the constitutional and statutory right of a shareholder to vote on the cumulative plan be taken away from him by a resolution or by-law adopted by the other shareholders.[47]

14. Right to Vote by Proxy. At common law there is no right to vote by proxy at a corporate election, but every vote must be personally given.[48] This rule applies in the case of private corporations and even in those having a joint stock.[49] Some courts which follow the analogy of the common law hold that a by-law creating the right to vote by proxy is void,[50] but other courts, conforming to general usage and to practical convenience, take the view that such a by-law is valid.[51] A view has been taken which restrains the right to vote by proxy to mere routine matters, and which denies it in case of a vote for a fundamental change in the corporation or a surrender of its charter.[52] Numerous statutes have been enacted conferring the right to vote by proxy.[53] If the governing statute requires stock to be voted in the name standing on the transfer-book, either in person or by proxy, a proxy from such person must be produced, although he is the cashier of the corporation, and a proxy from his predecessor in office will not be sufficient.[54] A proxy may be revoked, even though given for a valuable consideration, where it is about to be used for a fraudulent purpose;[55] and an injunction will lie to restrain the voting by proxy, in fraud and in violation of the charter of the corporation.[56] The sale by a shareholder of his shares in a

46. Wright *v.* Com., 109 Pa. St. 560, 1 Atl. 794.

47. Tomlin *v.* Farmers', etc., Bank, 52 Mo. App. 430, holding that the silence of a shareholder at the time of a unanimous vote of all who vote upon a resolution which attempts to prevent the exercise by him of his constitutional and statutory right to vote on the cumulative plan will not affect his right so to vote.

A certain normal school in Pennsylvania, held to be within the provision of the constitution of Pennsylvania for cumulative voting for directors or managers by members or shareholders. Com. *v.* Yetter, 190 Pa. St. 488, 43 Atl. 226.

48. Angell & A. Corp. § 128; 1 Bl. Comm. 168.

49. Perry *v.* Tuskaloosa Cotton Seed Oil Mill Co., 93 Ala. 364, 9 So. 217; Philips *v.* Wickham, 1 Paige (N. Y.) 590.

50. Taylor *v.* Griswold, 14 N. J. L. 222, 27 Am. Dec. 33; People *v.* Twaddell, 18 Hun (N. Y.) 427; Brown *v.* Com., 3 Grant (Pa.) 209.

51. State *v.* Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162; People *v.* Crossley, 69 Ill. 195; Com. *v.* Detwiller, 131 Pa. St. 614, 18 Atl. 990, 25 Wkly. Notes Cas. (Pa.) 329, 7 L. R. A. 357.

Charter provision under which a by-law permitting voting by proxy was valid. Wilson *v.* American Academy of Music, 2 Pa. Co. Ct. 280.

How view supported.— This view is that a general power conferred upon a corporation to enact by-laws includes the power to establish a rule permitting shareholders to vote by proxy. Archer *v.* Murphy, 26 Wash. L. Rep. 98. Moreover a long-continued and unvaried usage of a corporation to permit voting by proxy establishes the legality of that method of voting, as much as an express by-law. Archer *v.* Murphy, 26 Wash. L. Rep. 98; Miller *v.* Eschbach, 43 Md. 1; Holly Springs Bank *v.* Pinson, 58 Miss. 421, 38 Am. Rep. 330.

52. Smith *v.* Smith, 3 Desauss. (S. C.) 557.

53. Many of these are collected in 1 Thompson Corp. § 738.

Under California statutes (Cal. Civ. Code, § 303) shareholders may vote by proxy on the question of issuing bonds of the corporation. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

54. *In re* Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135.

55. Reed *v.* Newburgh Bank, 6 Paige (N. Y.) 337.

56. Campbell *v.* Poultney, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559.

Grounds for injunction.— If on grounds of public policy the shareholder granting the proxy would be enjoined from voting his proxy would also be enjoined. Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683. While as a general rule the motives or grounds under which a shareholder sees fit to exercise his right of voting cannot be made a subject of judicial inquiry (see *supra*, IV, F, 3, d), yet where a proxy has been granted, irrevocable for five years, to vote at all shareholders' meetings upon the shares of certain members, in consideration of an agreement to continue one of them as manager at a salary, those who have given the proxy will be entitled to relief by injunction against voting in respect of it, notwithstanding their position *in pari delicto*. Cone *v.* Russell, 48 N. J. Eq. 208, 21 Atl. 847.

corporation will *ipso facto* revoke any proxies made or given to vote in respect of such shares.[57] Shareholders in a building and loan association may legally be

English decisions on this subject have little value in this country, since they turn upon provisions in articles of association under which the voting is by a show of hands, unless a poll is demanded (Reg. *v.* Government Stock Invest. Co., 3 Q. B. D. 442, 47 L. J. Q. B. 478, 39 L. T. Rep. N. S. 230), in which latter case the vote is sometimes to be counted according to the number of persons holding proxies and not according to the number of shares held (*In re* Bidwell, [1893] 1 Ch. 603. *Compare In re* Horbury Bridge Coal, etc., Co., 11 Ch. D. 109, 48 L. J. Ch. 341, 43 L. T. Rep. N. S. 353, 27 Wkly. Rep. 433; *Re* Caloric Engine, etc., Fog Signals Co., 52 L. T. Rep. N. S. 846, 62 L. J. Ch. 549). Proxies allowed by the articles of association of a corporation cannot be used at a general meeting on a vote by show of hands, but only the votes of members present in person at the meeting can be counted. Ernest *v.* Loma Gold Mines, [1897] 1 Ch. 1, 66 L. J. Ch. 17, 75 L. T. Rep. N. S. 317, 45 Wkly. Rep. 86 [*affirming* [1896] 2 Ch. 572, 65 L. J. Ch. 850, 75 L. T. Rep. N. S. 221].

Election set aside because date of election left blank in proxy. *Re* Townshend, 18 N. Y. Suppl. 905.

What agreements vesting voting power in committee to settle differences, etc., not against public policy. State *v.* Ohio, etc., R. Co., 6 Ohio Cir. Ct. 412.

Invalidity of a revocable proxy under N. Y. Laws (1892), c. 564, against shareholders selling their votes. Matter of Germicide Co., 65 Hun (N. Y.) 606, 20 N. Y. Suppl. 495, 48 N. Y. St. 294.

Validity, under New York statutes, of a change of the by-laws of a mutual fire-insurance company so as to permit members to vote by proxy. Grobe *v.* Erie County Mut. Ins. Co., 39 N. Y. App. Div. 183, 57 N. Y. Suppl. 290 [*affirming* 24 Misc. (N. Y.) 462, 53 N. Y. Suppl. 628].

57. Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397.

Revocability of proxy.— Under statutes of New York providing that every proxy shall be revocable at the pleasure of the person executing it, an irrevocable proxy cannot be given, although coupled with an interest. Matter of Germicide Co., 65 Hun (N. Y.) 606, 20 N. Y. Suppl. 495, 48 N. Y. St. 294. A proxy irrevocable for ten years is not within the provision of this statute that every proxy shall be revocable at the pleasure of the person executing it. Such a proxy is not revocable at the pleasure of the other joint owner. Hey *v.* Dolphin, 92 Hun (N. Y.) 230, 36 N. Y. Suppl. 627, 71 N. Y. St. 794.

Validity of proxy.— Proxies authorizing a vote at a meeting of shareholders and creditors of an insolvent corporation, to determine whether a scheme of reconstruction shall be adopted, are not irregular because the agent is named on the form sent to the creditors for signature. *In re* English, etc., Chartered Bank, [1893] 3 Ch. 385, 62 L. J. Ch. 825, 69 L. T. Rep. N. S. 268, 2 Reports 574, 42 Wkly. Rep. 4. Validity of proxies sent to the secretary with day and hour of the meeting left in blank to be filled up by him. Ernest *v.* Loma Gold Mines, [1897] 1 Ch. 1, 66 L. J. Ch. 17, 75 L. T. Rep. N. S. 317, 45 Wkly. Rep. 86 [*affirming* [1896] 2 Ch. 572, 65 L. J. Ch. 850, 75 L. T. Rep. N. S. 221].

Power of judge to order proxy to be sent to the receiver in Australia, of a corporation in process of winding-up. *In re* English Chartered Bank, [1893] 3 Ch. 385, 62 L. J. Ch. 825, 69 L. T. Rep. N. S. 268, 2 Reports 574, 42 Wkly. Rep. 4.

Power conferrable by proxy.— That a shareholder, having the power to bind himself by his verbal agreement to repay a portion of an advance made by a reorganization committee to the company, may confer the same power upon his proxy see Grant *v.* Pearce, 16 Ky. L. Rep. 204.

If a state of the Union is a holder of shares in a corporation, and by the charter of such corporation is entitled to vote by proxy and to name a certain number of its directors, the state has the right to change such proxies and to change the state directors as against the objection of the other shareholders. Tucker *v.* Russell, 82 Fed. 263.

A by-law providing that no proxy should be voted by any one who is not a shareholder of the corporation is invalid under Cal. Civ. Code, § 312, providing generally that shareholders may be represented by proxies. People's Home Sav. Bank *v.* San Francisco Super Ct., 104 Cal. 649, 38 Pac. 452, 43 Am. St. Rep. 147, 29 L. R. A. 844.

Proxies have the right to vote on motions to take a ballot or adjourn. Forsyth *v.* Brown, 2 Pa. Dist. 763, 13 Pa. Co. Ct. 576, 33 Wkly. Notes Cas. (Pa.) 72.

The agreement of a number of persons to unite and purchase a block of shares, and that they will vote it as a unit for five years, in accordance with the decision of a majority of them, to be determined by ballot, operates to create a proxy so to vote such shares. Smith *v.* San Francisco, etc., R. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309.

Right of pledger of stock.— It has been decided that a pledger of stock, which stands on the books of the corporation in the name of the pledgee, may by a suit in equity compel a transfer to him, or oblige the pledgee to give him a proxy to vote. Hoppin *v.* Buffum, 9 R. I. 513, 11 Am. Rep. 291; Vowell *v.* Thompson, 28 Fed. Cas. No. 17,023, 3 Cranch C. C. 428. It has been held that a mortgagor of stock is, until foreclosure and sale, entitled to vote as a shareholder, and accordingly a decree has been passed requiring the mortgagee to give to the mortgagor a power of attorney to vote in respect of the

represented by proxy at a meeting at which it is resolved to increase the assets of such association.[58] A proxy cannot bind his principal by waiving objections to a meeting not lawfully called and not attended by all the shareholders.[59] A proxy given to vote the shares of the principal at a shareholders' meeting does not authorize the holder of the proxy to assent to a resolution of the shareholders canceling bonds held by the shareholder who gave the proxy.[60] It is competent for a testator, appointing three executors of his will, to vest in one of them the power of controlling the vote of shares of stock belonging to the estate, and to require the other executors to give proxies for such voting to the one so empowered; and this does not vest in the others any discretion as to the manner in which the stock shall be voted, or entitle them to refuse the proxies on that ground.[61]

15. By-Laws Regulating Corporate Elections. Corporations having the general power, by implication of the law or by express grants, to make by-laws may make such by-laws, within the limits of the constitution of the state, the charter, the governing statute, and the common law, regulating corporate elections. Accordingly it has been well held that a corporation empowered by charter "to make rules, by-laws and ordinances, and to do everything needful for the good government and support of the congregation," may make a by-law giving the president thereof the power of appointing inspectors of the election of corporate officers.[62] But the power of voting conferred by the constitutional or statutory law, or by the charter of the corporation, cannot be limited or restrained by the by-laws;[63] nor can such right be limited by a mere resolution passed by the members at the meeting.[64]

16. Right of Non-Residents and Aliens to Vote. No principle of the common law exists which prevents alien friends from becoming shareholders in domestic corporations or of exercising the same right of voting in respect of their shares which is possessed by domestic shareholders.[65] Foreign executors may be shareholders, and on producing an exemplified copy of their letters testamentary they will be admitted by the rule of comity to vote in respect of the shares of their testator.[66] An alien domiciled and holding property in Pennsylvania can vote as a shareholder and serve as a director in corporations created by the laws of that

stock until the foreclosure of the mortgage. Vowell *v.* Thompson, 28 Fed. Cas. No. 17,023, 3 Cranch C. C. 428.

58. Broadwell *v.* Inter-Ocean Homestead, etc., Assoc., 161 Ill. 327, 43 N. E. 1067. See also Building and Loan Societies, 6 Cyc. 125, note 43.

59. Matthews *v.* Columbia Nat. Bank, 79 Fed. 558.

60. Moore *v.* Ensley, 112 Ala. 228, 20 So. 744.

61. Lafferty's Estate, 154 Pa. St. 430, 26 Atl. 388 [*affirming* by a divided court 2 Pa. Dist. 215].

62. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

Fixing form of ticket.— It may lawfully make a by-law providing that no ticket shall be counted "if, besides the names, there are other things upon the tickets," where the charter directs that the elections shall be by ballot; hence tickets upon which an eagle was engraved were held to be not legally voted. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

63. Archer *v.* Murphy, 26 Wash. L. Rep. 98.

64. *In re* Lighthall Mfg. Co., 47 Hun (N. Y.) 258. When therefore the charter provided that life members should be entitled "to vote at all elections for officers thereof by proxy," it was held that a resolution that no proxy should be voted on at any meeting of the society, unless showing within itself that it was specifically intended to be used for such meeting, was repugnant to the charter and void, as an attempt to limit the power given by the member to his proxy. White *v.* New York State Agricultural Soc., 45 Hun (N. Y.) 580, 10 N. Y. St. 594. A regulation of a corporation that shareholders shall have one vote for each share held by them up to ten shares, and fixing the proportion which their votes shall bear to their shares above that number, is a reasonable regulation, uniform in its operation, conflicts with no law, and is binding on all the shareholders. Com. *v.* Detwiller, 131 Pa. St. 614, 18 Atl. 990, 25 Wkly. Notes Cas. (Pa.) 329, 7 L. R. A. 357.

65. Detwiller *v.* Com., 131 Pa. St. 614, 18 Atl. 990, 25 Wkly. Notes Cas. (Pa.) 329, 7 L. R. A. 357. See also *supra*, I, F, 1.

66. *In re* Cape May, etc., Nav. Co., 51 N. J. L. 78, 16 Atl. 191.

state.[67] But an alien shareholder cannot vote by proxy where, by the terms of the act of incorporation, the right so to vote is given to citizen shareholders.[68]

17. VALIDITY OF AGREEMENTS RESPECTING MANNER IN WHICH STOCK SHALL BE VOTED. The right of the holder of the legal title of corporate shares to vote in respect of them at corporate elections may be restrained by agreements which he may make with third parties.[69] For example he may at common law[70] make an agreement of present sale, under which his shares are delivered to the third person, to be held in escrow, with the contingent right to resume the title on the failure of the purchaser to comply with the terms of the sale, and with the express stipulation that the right to vote shall be in the purchaser in the interim, so as to disable himself from voting until that time.[71] Moreover owners of the majority of the stock in a corporation may lawfully agree to be bound by the will of a majority of themselves in voting the stock.[72] An agreement to retain the power of voting shares of stock for five years, so as to keep the control of the corporation from passing to other persons, made by persons who unite in purchasing a block of stock, is not illegal as in restraint of trade; nor can one of the shareholders who has united in such an agreement withdraw from it at his pleasure, until the lapse of the time agreed upon.[73]

18. SEVERING VOTING POWER OF SHARES FROM THEIR BENEFICIAL OWNERSHIP. Whether the voting power of corporate shares can be severed from the beneficial ownership of the shares by private agreement is a question which does not seem to be uniformly settled. Such an arrangement is in substance and effect the creation of an irrevocable proxy to vote the shares — irrevocable for the time stated in the instrument creating the proxy. One court saw nothing illegal, or in restraint of trade, or against public policy, in such an arrangement, where the period fixed for its continuance was five years.[74] Another court, dealing with the question with reference to a corporation whose charter provided that its shares might be voted by proxy, held that a shareholder might sever the voting power attaching to his shares, from himself and the shares, and vest it irrevocably in a trust company and in holders of the debentures of the corporation, until such debentures should be paid; and that such a contract was not against public policy.[75] Such arrangements are prohibited by statute in New York, the provision of the statute being that no member of a corporation shall sell his vote or issue a proxy to vote to any person for any sum of money or thing of value.[76] This statute extends to transfers which are designed to confer upon the transferee the power to vote with respect to the shares for a certain period, although in point of form the transfer is absolute on its face; and any other shareholder may attack the right of the transferee to vote in respect of the shares.[77] The monopolistic trusts which were created in the early development of the so-called corporate trusts took this form. It seems that the legality of such arrangements will be determined by the design of those entering into them and the purposes they were intended to subserve. They are not necessarily illegal. Shareholders may place their shares in the hands of a depositary, with directions to vote it as directed by a committee appointed by themselves and subject to their control, since this is merely a convenient mode of voting by proxy.[78]

67. Com. *v.* Detwiller, 131 Pa. St. 614, 18 Atl. 990, 25 Wkly. Notes Cas. (Pa.) 329, 7 L. R. A. 357.

68. *In re* Barker, 6 Wend. (N. Y.) 509.

69. Com. *v.* Patterson, 158 Pa. St. 476, 27 Atl. 999, 34 Wkly. Notes Cas. (Pa.) 45.

70. And also under a statute of Pennsylvania. Pa. Act. May 7, 1889.

71. Com. *v.* Patterson, 158 Pa. St. 476, 27 Atl. 999, 34 Wkly. Notes Cas. (Pa.) 45.

72. Smith *v.* San Francisco, etc., R. Co., 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309. See also Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506.

73. Smith *v.* San Francisco, etc., R. Co., 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309.

74. Smith *v.* San Francisco, etc., R. Co., 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309.

75. Mobile, etc., R. Co. *v.* Nicholas, 98 Ala. 92, 12 So. 723.

76. See *supra*, IV, F, 14.

77. Matter of Glen Salt Co., 17 N. Y. App. Div. 234, 45 N. Y. Suppl. 568 [*affirmed* in 153 N. Y. 688, 48 N. E. 1104].

78. Ohio, etc., R. Co. *v.* State, 49 Ohio St. 668, 32 N. E. 933.

But where the view obtains that the voting power of shares cannot be separated from their beneficial ownership, then the conclusion will follow that the holders of trust certificates issued upon the deposit of stock in a corporation with a trustee, in pursuance of an agreement by the owner that the trustee shall vote upon it as directed by persons named, are entitled to control the vote of the trustee.[79] Nor can such an agreement be fastened upon or affect merely potential shares which were not issued at the time, but which were afterward issued directly to persons who were not parties to the contract; and this whether or not such parties had notice of the contract; and the takers of such new stock are entitled to have the other shares of the company stand upon an equal footing with their own shares, and to have the affairs of the company managed by a board of directors elected by a majority of the shareholders.[80] A contractual arrangement for the creation of a "voting trust" to control several corporations for the purpose of drawing them into a combination, being illegal under principles hereafter considered,[81] any shareholder can withdraw from such an arrangement; and this it seems without destroying the valid provisions of such contract if any there be.[82] A combination by which (omitting details and particulars) the shareholders of a number of corporations engaged in the same industry transfer all their shares to a central board of trustees, who themselves are not incorporated, with power to vote their shares at the meetings of their respective corporations, and in that way to fill at their pleasure and control the official boards of each corporation, and through them to control the business of each corporation, upon a scheme by which the output of the aggregate corporations is regulated, combinations of labor resisted, prices of the manufactured product advanced, and competition successfully destroyed, has been held unlawful, as being an attempt on the part of the corporations to combine into a partnership without legislative authority.[83] So an arrangement by which all the shareholders of several corporations place their shares in the hands of the same trustees and invest them with the power of voting in respect of the shares, at elections of their respective corporations, as the interests of such trustees may dictate, irrespective of the interests of the owners of the shares, is void as against the policy of statutes governing the formation and management of corporations, and is inconsistent with the purposes for which corporate bodies are created.[84] Where certain persons holding shares in a corporation as executors and trustees enter into a contract with other shareholders, in pursuance of which the former execute a proxy irrevocable for five years to the latter, to vote at all shareholders' meetings, in respect of the shares, upon consid-

79. White *v.* Thomas Inflatable Tire Co., 52 N. J. Eq. 178, 28 Atl. 75, from which it seems that such an agreement does not operate to restrain one who has entered into it from transferring his shares. Nor does it affect the voting power of the shares in the hands of the transferee. Thus it was held that an agreement between the original parties to the organization of a corporation to exploit patents, giving the promoters who advanced the cash to the enterprise the control and management thereof, although they own but a minority of the stock, giving the patentee a majority of the profits, depositing the stock issued with a trustee, and issuing trust certificates corresponding with the stock deposited, the trustee to vote the stock as directed by such promoters, is not invalid so long as each party retains his original interest and no other rights intervene; but upon the transfer of any of such stock or trust certificates such agreement is invalid as to the transferees, since an indispensable incident of such certificates is that the trustee shall vote as the beneficial owner shall direct.

80. White *v.* Thomas Inflatable Tire Co., 52 N. J. Eq. 178, 28 Atl. 75.

81. See *infra*, VII, D, 11, b, (II).

82. State *v.* Ohio, etc., R. Co., 6 Ohio Cir. Ct. 412 [*affirmed* in 49 Ohio St. 668, 32 N. E. 933].

83. People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 31 N. Y. St. 781, 25 Abb. N. Cas. (N. Y.) 1, 18 Am. St. Rep. 843, 9 L. R. A. 33 [*affirming* 54 Hun (N. Y.) 354, 7 N. Y. Suppl. 406, 27 N. Y. St. 282, 5 L. R. A. 386 (*affirming* 3 N. Y. Suppl. 401, 19 N. Y. St. 853, 22 Abb. N. Cas. (N. Y.) 164, 2 L. R. A. 33)]. To the same effect see Mallory *v.* Hanaur Oil Works, 86 Tenn. 598, 8 S. W. 396.

84. Ohio, etc., R. Co. *v.* State, 49 Ohio St. 668, 32 N. E. 933. See also State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145; Gould *v.* Head, 38 Fed. 886.

eration of an agreement to employ one of the former continuously as manager of the corporation at a stated salary, the former may have relief against the voting of such shares by the latter, by an injunction, although they were *in pari delicto*; because the agreement is void as against public policy, and also as a breach of their trust as executors and trustees; and it is their duty to recede from it at any time, and where they merely seek to rescind and undo their wrongful act the court will aid them.[85] So where the object of such a proxy is to vest all the shares of a number of competing corporations in the hands of a central board of control, with the view of stifling competition and enhancing the prices of the produce of such corporations, there is an added reason for holding the granting of such voting proxies to be void as against public policy.[86]

19. INVALIDITY OF STIPULATION THAT SHAREHOLDER MAY SELL SHARES BUT CANNOT SELL RIGHT TO VOTE. A stipulation that, although the signers of the agreement may sell their shares, yet they cannot sell the right to vote in respect of them, but that the transferee will only retain the transferrer's right, namely, the right to own, but not the right to vote, is in restraint of the alienation of property, and is void under the principles of the common law.[87]

20. STATUTORY PROVISIONS AS TO WHO ENTITLED TO VOTE. It must be constantly kept in mind that the right to vote at corporate elections has been very generally the subject of statutory regulation, and that advice cannot be safely given upon such a question without carefully searching the governing statute or statutes of the particular corporation.[88]

G. Conduct of the Election[89] — 1. APPOINTMENT OF INSPECTORS. Many statutes have been enacted regulating the conduct of corporate elections and providing for the appointment of inspectors of such elections.[90] Other statutes remit the whole subject of corporate elections to by-laws;[91] and there can can be no doubt, in the absence of statutes, of the power of the corporation to govern the subject by by-laws passed within lawful limits, which by-laws may govern and regulate the appointment of inspectors and prescribe their duties.[92] Where a statute fixes the number of inspectors at three, it has been held that two may act, whether of the class originally appointed or of substitutes legally appointed.[93] It seems that where the power to appoint inspectors has been vested in certain officers, and an emergency arises preventing them from making the appointment, it is competent for the corporators themselves to exercise the power.[94] But the president of the corporation has no power to assume the

85. Cone *v.* Russell, 48 N. J. Eq. 208, 21 Atl. 847.

86. State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145. This doctrine was applied by Robinson, J., of the superior court of Connecticut, in a case where a syndicate had purchased a majority of the capital stock of a railroad company, which was placed in a "voting trust," to continue for five years or until a consolidation was effected with some other railroad company, when it should be dissolved by agreement. *In re* Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32, where it was also held that such a voting power could only be given for one year under the terms of Conn. Gen. Stat. § 1927.

87. Moses *v.* Scott, 84 Ala. 608, 4 So. 742.

88. Many of these statutes will be found collected in 1 Thompson Corp. § 742.

89. Selection of chairman.— It has been held that a shareholder has no right to put his own motion for the election of a particular shareholder as chairman of the meeting, where the shareholder legally entitled to put nominations before the meeting, because the possession of the floor was conceded to him prior to a recess, refuses to do so; but he should appeal to the house from such refusal; and that a shareholder who puts in nomination a person for chairman at a shareholders' meeting before the proper time for the meeting arrives, and who requires as a condition of postponement that he shall still retain the floor, has the right to make, receive, and put nominations before the meeting when the hour for opening it arrives, no one objecting. Procter Coal Co. *v.* Finley, 98 Ky. 405, 33 S. W. 138, 17 Ky. L. Rep. 950.

90. Some of these statutes are set out in 1 Thompson Corp. §§ 746, 758.

91. See 1 Thompson Corp. § 722.

92. That an election which pursues neither the charter nor the by-law is void see Barber *v.* Boulton, 1 Str. 314.

93. Matter of Excelsior F. Ins. Co., 16 Abb. Pr. (N. Y.) 8.

94. Matter of Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361.

office of inspector, and to pass upon the right of a member to vote in respect of a proxy, unless the charter or by-law gives him such power, although the member by acquiescing may estop himself from claiming that he was thereby deprived of the right to vote.[95] The fact that a shareholder is a candidate for the office of director has been held not to disqualify him from acting as an inspector at an election.[96]

2. Duty of Inspectors — a. Ministerial Merely. Except where statutes have enlarged their powers,[97] it seems that the duties of the inspectors are merely ministerial, and that in case the right of a member to vote is challenged, they must determine the right by what appears on the transfer-books of the company, and cannot look beyond them[98] or require the corporator to prove his right to vote by his oath, as in the case of a public election, when such right is challenged.[99] Certainly, after the ballots have been received by them, without challenge or exception, whatever right they might previously have had to inquire into the right of the voter ceases, and their only remaining duty is to count the ballots and return the number of votes received and the names of those having the highest number.[1] They have no right to inquire into and pass upon the eligibility of candidates, but that question can be raised only in the judicial courts.[2]

b. Cannot Pass Upon Validity of Proxies. Except where they have been clothed with the power to do so by statute or by a valid by-law, it seems that the inspectors of elections have no power to try and determine the genuineness of the proxies offered by the members present; but if a proxy is apparently the act of a shareholder, and regular on its face, they must admit the holder of it to the right to vote in respect of it.[3] They cannot reject a written proxy, regular in form, because the date is omitted in the power of attorney, which fact excites their suspicion;[4] or on the ground that the proxy is not acknowledged or proved by a subscribing witness.[5]

95. State *v.* Chute, 34 Minn. 135, 24 N. W. 353.

96. *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

Elections held void.— Where the inspectors who acted at a corporate election were selected at a meeting at which only the president of the corporation and a director were present, who appointed themselves and another director such inspectors, and the full board was composed of nine directors, it was held that the election was void. *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525. For an instance of an election in a church corporation which was held void because the inspectors were illegally appointed see People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

That a failure to file the oath of the inspectors in the office of the clerk of the county, as required by statute, will not invalidate the election see Union Nat. Bank *v.* Scott, 53 N. Y. App. Div. 65, 66 N. Y. Suppl. 145.

97. Such as Pa. Pub. Laws (1899), No. 108, p. 102, which clothes the inspectors with power summarily to try the person tendering the vote, to see whether he is the valid owner of the shares with respect of which he offers to vote, when his right to vote thereon is challenged.

98. People *v.* Kip, 4 Cow. (N. Y.) 382 note.

99. People *v.* Kip, 4 Cow. (N. Y.) 382 note; People *v.* Tibbets, 4 Cow. (N. Y.) 358.

1. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. (N. Y.) 321, 19 How. Pr. (N. Y.) 245; People *v.* White, 11 Abb. Pr. (N. Y.) 168.

2. *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

That the tellers cannot reject votes made with respect to certain stock deposited by the holder of the share certificates, although he is under an injunction restraining him in general language from exercising any acts of ownership over such shares, it not being the intent of the injunction to affect his right to vote with respect of them at corporate elections, see Com. *v.* Stevens, 168 Pa. St. 582, 32 Atl. 111.

3. Matter of Cecil, 36 How. Pr. (N. Y.) 477.

4. *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

5. Matter of Cecil, 36 How. Pr. (N. Y.) 477.

What does not entitle holder to complain. — It has been held that the mere announcement by the president that a proxy which has been presented cannot be voted upon does not entitle the holder to complain, if he acquiesces and refrains from offering to vote upon it when the vote is taken; for the action of the president, being unauthorized

3. EFFECT OF FRAUD AND IRREGULARITIES IN CONDUCT OF ELECTIONS. A court possessing, whether by statute or otherwise, the power of superintending corporate elections will set such an election aside or grant other appropriate relief, according to the statute or to the principles of equity, where the successful party has succeeded by means of fraud, trickery, surprise, or other unfair practices.[6] So relief will be granted in case of irregularities in matter of substance so gross as to justify a court in declaring that there has been no election at all.[7] Irregularities in mere matter of form will not vitiate a corporate election fairly held in matter of substance.[8]

4. VOTING. The following holdings have been made by respectable courts of subordinate jurisdiction: That votes cannot be added to the ballot for directors of a corporation after it has been counted and announced; that if seven directors are to be elected, a vote at which four receive a majority of all the votes cast, elects such four, and that a second ballot should be held to fill the three vacant places;[9] and that a ballot cast at an election for secretary cannot be counted for either of two candidates, one of whose names is written and the other printed thereon, neither of which is crossed out, where the president on the day of election directed the name of the former, who was nominated on that day, to be written on all the ballots.[10] A shareholder may change his vote at any time before the polls have been closed, at least where sufficient time is left to allow any other shareholder thereafter to change his vote if he desires to do so.[11]

5. COUNTING VOTE — a. In General. The act of counting the vote is purely ministerial. The inspectors are ordinarily clothed with no power analogous to that of a court of justice in hearing a case of a contested election. In making their count the inspectors cannot reject votes which have been received unless they are illegal on their face, on the ground of the disqualification of the voter, because that is a question on which he is entitled to be heard.[12] They cannot inquire into his intentions except so far as it can be discovered in the ballot which he has deposited in the box. It is not admissible for him to prove that he intended to vote for one man when he actually cast his ballot for another man.[13] If two

and nugatory, his vote has not been in fact excluded. State *v.* Chute, 34 Minn. 135, 24 N. W. 353.

6. People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344, 7 Abb. Pr. N. S. (N. Y.) 265, 38 How. Pr. (N. Y.) 228, where the time of convening the meeting was twelve M., the meeting was called to order fifteen minutes before twelve M., and the election was set aside as a surprise and fraud upon the non-participating shareholders, although the meeting was reorganized at twelve.

7. As where, at a meeting of all the shareholders, only a portion of them participated in the election of trustees; where the president, although present, did not preside; where no president *pro tempore* was chosen; and where no person who participated was authorized to receive the ballots or to declare the result. State *v.* Pettineli, 10 Nev. 141.

Effect of denial of right to vote.— It has been held that a denial of his right to vote will not justify one who holds a majority of the stock in withdrawing from the meeting and organizing another meeting and voting there, since his vote at the original meeting may be rendered effective by judicial aid, notwithstanding its rejection. *In re* Argus Printing Co., 1 N. D. 434, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L. R. A. 781.

8. As where an adjournment takes place during the process of balloting (Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587), or where the inspectors keep the polls open somewhat longer than the hour named in the notice, in the exercise of a reasonable discretion, and for the purpose of enabling shareholders present and offering to vote to do so (People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344, 7 Abb. Pr. N. S. (N. Y.) 265, 38 How. Pr. (N. Y.) 228). The extent to which irregularities of form in elections of directors are overlooked in England may be gathered from *In re* Great Northern Salt, etc., Works, 44 Ch. D. 472, 59 L. J. Ch. 288, 62 L. T. Rep. N. S. 231, 2 Meg. 46.

9. Forsyth *v.* Brown, 2 Pa. Dist. 765, 13 Pa. Co. Ct. 576, 33 Wkly. Notes Cas. (Pa.) 72.

10. People *v.* Pangburn, 3 N. Y. App. Div. 456, 38 N. Y. Suppl. 217, 73 N. Y. St. 711 [*reversing* 14 Misc. (N. Y.) 195, 35 N. Y. Suppl. 655, 70 N. Y. St. 428; and attempting to *distinguish* People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191; People *v.* Love, 63 Barb. (N. Y.) 535].

11. State *v.* McGann, 64 Mo. App. 225.

12. Hartt *v.* Harvey, 10 Abb. Pr. (N. Y.) 321.

13. Loubat *v.* Le Roy, 15 Abb. N. Cas. (N. Y.) 1.

ballots are cast together, one for one candidate and the other for the opposing candidate, it is not permissible for the inspector to allow the person voting the double ballot to prove by his oath for which candidate he intended to vote.[14] If the number of officers to be chosen is fixed, a ballot containing the names of a greater number must be rejected as void.[15]

b. Majority of All Shares or Legal Votes Necessary to Elect. In the absence of a constitutional provision or statute otherwise providing, the general rule cannot be doubted that a joint-stock corporation is a body composed of a definite number, within the rule that a majority of that number is required to elect; and further that the number here intended is the number of shares and not the number of members.[16] Where the voting is *per capita* and not by shares, then the principle already stated applies[17] that a majority of the votes of those present and offering to vote and entitled to vote is necessary to elect; and hence that persons receiving a minority of the votes cast for directors cannot in a quo warranto proceeding be declared elected, although it appear that the judges improperly rejected enough legal votes offered to give them a majority.[18] The reception of illegal votes for a director who has without them a majority of the legal votes does not invalidate his election.[19]

c. Whether Votes For Ineligible Candidates Are Thrown Away. It seems that according to the old law votes cast for ineligible candidates were thrown away, the ineligibility being of course determined in a judicial proceeding.[20] But more recent authority is to the effect that votes cast for an ineligible candidate

14. People *v.* Seaman, 5 Den. (N. Y.) 409.

15. People *v.* Loomis, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33.

But where the voter casts his ballot for a candidate by his initials instead of by his christian name, for example, for J. R. Eastman, instead of John R. Eastman, he may, in a proceeding in the nature of a quo warranto, give evidence to the jury as to whom he intended to designate by the name as entered upon his ballot. People *v.* Seaman, 5 Den. (N. Y.) 409. See also People *v.* Ferguson, 8 Cow. (N. Y.) 102.

Votes cast in two separate polling-places. — In a judicial contest over an election for directors of a corporation, where it appeared that at the appointed time and place the shareholders assembled in two bodies and cast their ballots at separate polling-places, it was held that the court would take into consideration all the votes cast at both places for the purpose of determining who were elected. *In re* Cedar Grove Cemetery Co., 61 N. J. L. 422, 39 Atl. 1024.

Discretion to order new election. — In such a contest under a statute of Ohio (Ohio Rev. Stat. § 6776), where it appears that illegal votes were received or that legal ones were rejected in such numbers as to change the result, the court has a discretion to order a new election. State *v.* Schwartz, 19 Ohio Cir. Ct. 350, 10 Ohio Cir. Dec. 413 [*affirmed* in 61 Ohio St. 497, 56 N. E. 201].

16. Ellsworth Woolen Mfg. Co. *v.* Faunce, 79 Me. 440, 10 Atl. 250; *In re* Argus Printing Co., 1 N. D. 434, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L. R. A. 781.

By statute in Indiana there is to be one vote for each share. 2 Ind. Rev. Stat. (1888), § 3021.

17. See *supra*, IV, E, 1, b.

18. State *v.* McDaniel, 22 Ohio St. 354.

19. *In re* Argus Co., 138 N. Y. 557, 34 N. E. 388, 53 N. Y. St. 270.

Directors for first year. — A statute enacting that directors shall be chosen from the shareholders "by a majority of the votes of the shareholders voting" has no application to directors for the first year, named in the certificate of incorporation according to law. Hamilton Trust Co. *v.* Clemes, 163 N. Y. 423, 57 N. E. 614 [*affirming* 17 N. Y. App. Div. 152, 45 N. Y. Suppl. 141].

A social club created under N. Y. Laws (1875), c. 237, cannot legally issue stock or confer upon the holders of it the right to vote upon it as in a joint-stock company, but each member is entitled to one vote only. Anderson *v.* Reid, 19 Misc. (N. Y.) 95, 45 N. Y. Suppl. 742.

In England the person to whom a proxy has been given is counted as one vote without regard to the number of shares held by the person granting the proxy. *In re* Bidwell, [1893] 1 Ch. 603, 62 L. J. Ch. 549.

20. Reg. *v.* Boscawen [*cited* in Oldknow *v.* Wainwright, 2 Burr. 1017, 1021, 1 W. Bl. 229]; Taylor *v.* Mayor of Bath, temp. Ld. Ch. J. Lee, B. R. and Rex *v.* Withers, as quoted by Wilmot, J., in Oldknow *v.* Wainwright, 2 Burr. 1017, 1020, 1 W. Bl. 229.

Where there was a statute providing that at least three directors of every corporation should be citizens and residents of the state (Kan. Gen. Stat. (1889), § 1190), at a corporate election two opposing factions, voting cumulatively, had succeeded in electing eleven non-resident directors, thus filling the number of the board; but the chairman of the meeting declared that as the law required three directors to be citizens and residents,

will not be discarded, so as to give the election to a candidate having a minority of votes, unless it is made to appear that the electors knew of the ineligibility of the candidate so voted for.[21]

6. Certificate of Election. If the governing statute or a valid by-law requires the inspectors of the election to make out and deliver to the persons elected, or to deposit in some public office, a certificate of their election, then such certificate will be *prima facie* evidence of their right to hold the office; but this applies only to certificates which have no vitiating recitals on their face, and not to a certificate which recites facts which demonstrate that the persons declared elected were not in fact elected.[22] In a judicial contest over a corporate election, the rule is that it is the fact of the election which determines the right, and not the certificate which is merely *prima facie* evidence of the fact.[23] The certificate is not conclusive for the purpose of a judicial contest, but it is competent to go behind it and ascertain which of the contestants were in fact elected.[24]

H. Judicial Superintendence of Corporate Elections — 1. No Superintendence in Equity, but Equity Possesses Qualified Jurisdiction. As a general rule courts of equity do not undertake to superintend corporate elections, for the reason that any party entitled to complain of the result of such election is deemed to have an adequate remedy at law by an information in the nature of a quo warranto.[25] Courts of equity may and sometimes will interfere, where the circumstances are such that the remedy at law is plainly inadequate, as where it would be necessary to compel a discovery of certain records.[26] And courts of equity, proceeding on the well-recognized heads of equity jurisdiction, fraud, fraudulent conspiracy, and trust, have and sometimes exercise a jurisdiction to superintend or review such elections, even where there may be supposed to be a remedy at law. This jurisdiction has been more frequently exercised in the case of charitable and religious corporations and societies created for ideal purposes; but it also exists and has been exercised in the case of joint-stock corporations; as for instance by enjoining inspectors from holding any elections so long as plaintiffs and other owners of certain stock shall be forbidden to vote upon the same;[27] to review an election and adjudge it fraudulent and void, on the ground of insufficiency of notice and the falsity of the list of shareholders exhibited and acted upon as those

three residents and citizens who had received a few scattered votes were elected, and that the eight non-residents who had received the highest number of votes were elected to complete the board and the three non-residents who had been in fact elected, but who were thus excluded by the ruling of the chairman, brought a proceeding in the nature of a quo warranto to be installed, it was held that they could not maintain the proceeding because ineligible. Horton *v.* Wilder, 48 Kan. 222, 29 Pac. 566.

21. *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

22. Hartt *v.* Harvey, 10 Abb. Pr. (N. Y.) 321.

23. Hartt *v.* Harvey, 10 Abb. Pr. (N. Y.) 321; People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

24. People *v.* Seaman, 5 Den. (N. Y.) 409; People *v.* Vail, 20 Wend. (N. Y.) 12; People *v.* Ferguson, 8 Cow. (N. Y.) 102; People *v.* Van Slyck, 4 Cow. (N. Y.) 297.

25. Ogden *v.* Kip, 6 Johns. Ch. (N. Y.) 160; Paynter *v.* Clegg, 9 Phila. (Pa.) 480, 30 Leg. Int. (Pa.) 432; Mozley *v.* Alston, 11 Jur. 315, 16 L. J. Ch. 217, 1 Phil. 790, 4 R. & Can. Cas. 636, 19 Eng. Ch. 790 (per Lord Lyndhurst); Atty.-Gen. *v.* Clarendon, 17 Ves. Jr. 491; Atty.-Gen. *v.* Dixie, 13 Ves. Jr. 519.

26. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. (N. Y.) 321, 19 How. Pr. (N. Y.) 245. But in New York, where the legislature has provided a summary remedy by an application to the supreme court to set aside an election of corporate directors if it be illegal (1 N. Y. Rev. Stat. 603, § 5), the later doctrine was that a court of chancery would not take jurisdiction for that purpose; nor would such a court interfere to restrain by injunction the newly elected trustees of a corporation, on the ground that they are usurping the powers of trustees, unless there was an allegation that they were insolvent and irresponsible. Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103. See further as to the jurisdiction in New York People *v.* Albany, etc., R. Co., 57 N. Y. 161; Staten Island North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171; Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. (N. Y.) 321, 19 How. Pr. (N. Y.) 245.

27. People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344, 7 Abb. Pr. N. S. (N. Y.) 265, 38 How. Pr. (N. Y.) 228.

entitled to vote;[28] to examine the question of the legality of the election of a board of trustees, where the question arises incidentally, although necessarily, as upon a bill to enjoin an unlawful consolidation;[29] or to supervise and control an election of directors, whenever it is made to appear that by means of fraud, violence, or other unlawful conduct on the part of a portion of the corporators a fair and honest election cannot be held, and to appoint a master to preside over and supervise such election.[30]

28. Johnston *v.* Jones, 23 N. J. Eq. 216. *Compare* Owen *v.* Whitaker, 20 N. J. Eq. 122.

29. Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

30. But it has been held that an action will not lie by a corporation to recover a judgment for an account of money collected by a person alleged to have acted illegally as a director in the corporation, where the determination of the case would involve the question of the validity of his election, the proper remedy for the determination of that question being an action in the nature of a quo warranto. Carmel Natural Gas, etc., Co. *v.* Small, 150 Ind. 427, 47 N. E. 11 [*rehearing denied* in 50 N. E. 476].

Laches.— Minority shareholders of a corporation are not guilty of such laches in commencing suit to restrain the majority shareholders from voting in favor of disposing of all the corporate property as will prevent relief, where the suit is commenced before the time fixed for voting on the question of making the transfer. Forrester *v.* Butte, etc., Consol. Copper, etc., Min. Co., 21 Mont. 544, 55 Pac. 229 [*rehearing denied* in 21 Mont. 565, 55 Pac. 353].

Circumstances under which a court will not appoint a master to preside over a corporate election see Dick *v.* Lehigh Valley R. Co., 4 Pa. Dist. 56.

No equity is shown in a bill by a minority of the shareholders invoking relief against an election, where the gravamen of their complaint is that the majority shareholders agreed among themselves so to vote their stock that a certain policy might be pursued (Hartley *v.* Welsh, 8 Pa. Dist. 546, 23 Pa. Co. Ct. 78), or in a bill brought by a director to enjoin the election of other directors upon a showing as to what the directors so elected intend to do (Greenough *v.* Alabama Great Southern R. Co., 64 Fed. 22). Nor will an injunction be granted at the suit of one who is a shareholder in two corporations to enjoin the owner of a controlling interest in one of the corporations from voting at a shareholders' meeting therein, in favor of the proposition that such corporation shall engage in a certain business, on the ground that engaging in such business would be an illegal interference with the rights of the other corporation. Converse *v.* Hood, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521.

Reviewing corporate elections under New York statutes.— A summary proceeding has long existed in New York for reviewing, upon motion in the supreme court, all elections in private corporations. N. Y. Rev. Stat. tit. 4, c. 18, § 5; N. Y. Gen. Laws, c. 35, § 27; N. Y. Gen. Corp. Law (1890), c. 563, § 27. This statute has been held not unconstitutional as involving a deprivation of the right of trial by jury. Matter of Newcomb, 18 N. Y. Suppl. 16, 42 N. Y. St. 442. Notice of such a motion to the person who claims to have been elected, and to the corporation, is sufficient. It is not necessary that all the shareholders should have notice. *In re* Schoharie Valley Railroad Case, 12 Abb. Pr. N. S. (N. Y.) 394. Nor need it be served on the president, on the directors whose election is not questioned, or on the persons whose right to vote is not denied. *Ex p.* Holmes, 5 Cow. (N. Y.) 426. As in ordinary proceedings, counsel on both sides who appear on such motion will be deemed *prima facie* to be authorized to appear. But any person named as a relator may move to have his name struck from the proceedings if he did not authorize the application. *Ex p.* Holmes, 5 Cow. (N. Y.) 426. Corporation must have notice where the application is for a new election under N. Y. Laws (1890), c. 563, § 15. People *v.* Simonson, 18 N. Y. Suppl. 934, 44 N. Y. St. 935, 27 Abb. N. Cas. (N. Y.) 422. When denial of order for new election no bar to a subsequent application see Matter of Townsend, 18 N. Y. Suppl. 949, 42 N. Y. St. 953. In this state an election of directors of a corporation will be set aside where the holders of sixty per cent of the stock were prevented from participating in the election, by means of a temporary injunction which was set aside after the election. Matter of Townsend, 24 Misc. (N. Y.) 80, 53 N. Y. Suppl. 289. Circumstances under which a corporation will not be restrained from reducing its capital stock and holding an election for directors until a hearing can be had on an application for its dissolution, presented by directors representing less than three hundred shares of its stock, as against shareholders representing more than two thousand six hundred shares, see Matter of Colton, 26 Misc. (N. Y.) 571, 57 N. Y. Suppl. 556. Circumstances under which a subscriber to an incorporated dispensary is entitled to invoke this jurisdiction to annul the election of a trustee ineligible for the office see Matter of Northern Dispensary, 26 Misc. (N. Y.) 147, 56 N. Y. Suppl. 784. No one but a person "aggrieved" is entitled to be heard under this statute. *In re* Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135. A notice given by one as an attorney for a person named and others entitled only the person named to be heard. *In re* Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135. A share-

2. Injunction to Restrain Fraudulent or Ultra Vires Voting. An injunction will be granted to restrain the voting in respect of stock in a corporation issued in violation of its charter;[31] but not to restrain officers of a corporation from voting upon proxies of the shareholders at an approaching meeting in another state, upon an allegation that the statutes thereof do not provide for voting by proxy.[32]

V. By-Laws, Rules, and Regulations.

A. Nature, Interpretation, and Effect — 1. What Is a By-Law — a. Term Defined. A by-law is a rule or regulation established by a corporation as one of

holder is a person aggrieved within the meaning of this statute, and the fact that the trustees in question join in the application forms no objection to granting the relief. Matter of Pioneer Paper Co., 36 How. Pr. (N. Y.) 111. This provision of law cannot be invoked by one who was not a shareholder at the time of the election complained of, and who received his stock from one of the authors of the wrong complained of. *In re* Syracuse, etc., R. Co., 91 N. Y. 1. This statute is not restricted to moneyed corporations. Matter of Cecil, 36 How. Pr. (N. Y.) 477. By a later statute (N. Y. Laws (1880), p. 381), manufacturing companies were exempted from the operation of sections 5, 6, and 8 of this chapter; and this exempting statute operated retrospectively, and prevented further prosecution of proceedings theretofore commenced under the former statute. *In re* New York Express Co., 23 Hun (N. Y.) 615. This exemption was, however, repealed the next year. N. Y. Laws (1881), p. 161. Where votes rejected by inspectors at an election of directors, and which if received would have elected a certain ticket, are adjudged to have been erroneously rejected, the only remedy is to proceed under this statute to set aside the election. *In re* Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

Reviewing corporate elections under California statute.— Under a similar statute of California authorizing an inquiry by the district court on the application of any person or body corporate "aggrieved by an election held by any corporate body," etc. (Cal. Civ. Code, § 315), the word "election" does not include a mere appointment by the directors to fill a vacancy; and one displaced by such an appointment is not "aggrieved by any election by a corporate body," within the meaning of the statute, so as to confer upon the court jurisdiction to make the inquiry. Wickersham *v.* Brittan, 93 Cal. 34, 28 Pac. 792, 29 Pac. 51, 15 L. R. A. 106. Under this statute the court has jurisdiction of an action brought by shareholders to review a corporate election for directors and officers and to oust those who have been declared elected, if the election has not been conducted in conformity with the governing statute; and a complaint in such an action is not demurrable for ambiguity merely because it refers to the persons declared to be elected as "the board of directors," when it clearly appears from the whole pleading that they are not the legal board. Where such a complaint alleges that the corporation is controlled by the directors whom it alleges to have been illegally elected, it need not allege a demand on the corporation that the corporation bring the action and the refusal of the corporation so to do, since, the corporation being in the hands of the directors so elected, it would be absurd to bring a demand upon them to oust themselves. Whitehead *v.* Sweet, 126 Cal. 67, 58 Pac. 376. Under another section of the California code, a shareholder may maintain an action to set aside an election of directors, although at the time of the election no stock had stood in his name on the books of the corporation sufficiently long to entitle him to vote. Wright *v.* Central California Colony Water Co., 67 Cal. 532, 8 Pac. 70.

Reviewing elections under New Jersey statutes.— A statute of New Jersey (N. J. Rev. Stat. p. 184, § 44) makes it the duty of the supreme court, upon the application of persons complaining regarding an election, to give a hearing, and "thereupon establish the election so complained of, or to order a new election, or to make such order and give such relief in the premises as right and justice may appear to said supreme court to require." It was held that the statute applied to elections of officers of private corporations, and that the court, having determined who would have been elected if all the legal votes tendered had been received, could put such persons in office and put out intruders. *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

31. Webb *v.* Ridgely, 38 Md. 364; Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350; Campbell *v.* Poultney, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559.

Such an injunction was allowed, where it appeared that certain shares were transferred without consideration to divers persons, and that powers of attorney were taken back by the real owners to enable them to cast a greater number of votes than the charter would allow to a single holder of the shares. The bill was not faulty for not joining the corporation by name as a party, and also the transferees of the shares, it having alleged that they were unknown. Campbell *v.* Poultney, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559.

32. Woodruff *v.* Dubuque, etc., R. Co., 30 Fed. 91.

the incidents of its existence, for its internal government or for the government of its officers and members in the management of its affairs as among themselves.[33]

b. Distinguished From Resolution. It is distinguished from a resolution, which is directed to the attainment of a particular object in a given case. A resolution, it has been said, is not necessarily a by-law, although a by-law may be in the form of a resolution.[34] Where the governing statute prescribes that the corporation shall act in a given particular through a by-law, it cannot act through a mere resolution of its board of directors directed against a particular person, as a resolution forfeiting the shares of a particular member for the non-payment of an assessment,[35] or directing the officers of the corporation to exclude a director of the corporation from the enjoyment of his rights.[36]

c. Distinguished From Rule or Regulation Made For Government of Its Conduct Toward Third Persons — (I) *In General.* Again a corporate by-law is distinguished from those rules and regulations which a corporation may establish for the government of the public, or of those doing business with it, in the prosecution of its intercourse or business with it, of which pertinent examples are afforded by the regulations of common carriers in respect of the conduct of passengers, designed on the one hand to maintain the rights of the carrier, and on the other hand to promote the safety and comfort of the passenger.[37]

(II) *On Ground That Validity of By-Law Is Question of Law, While That of Regulation Is Question of Fact.* A distinction has been taken between a by-law and a regulation of a corporation to the effect that the validity of the former is a judicial question, while the latter is regarded as a matter *in pais*.[38] Thus the regulations of a railroad company which operate upon and affect the rights of its passengers are not, it has been said, properly speaking, by-laws of the corporation; and accordingly their validity depends upon the fact of their being reasonable, and their reasonableness depends upon particular circumstances or matters *in pais*, and is therefore a question for a jury.[39]

2. Members of Corporation Conclusively Presumed to Have Knowledge of Its By-Laws. The members of a corporation are conclusively presumed to have knowledge of its by-laws and cannot escape a liability arising thereunder on a plea of ignorance of them.[40]

33. 1 Thompson Corp. § 935. See also Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691; and By-Laws, 6 Cyc. 262.

Analogous to a municipal ordinance.— By-law, from Scandinavian *Byr*, a town or village; Icelandic *Bœr*, a collection of farm houses; Anglo-Saxon *Bylage*, a private law, originally designated a law or regulation of a municipal corporation; and the analogy between corporate by-laws and municipal ordinances has often been pointed out. Blanchard *v.* Bissell, 11 Ohio St. 96; Robinson *v.* Franklin, 1 Humphr. (Tenn.) 155, 34 Am. Dec. 625. See the learned note on municipal ordinances, 34 Am. Dec. 627 *et seq.*; Dillon Mun. Corp. (4th ed.) § 307 *et seq.*; and By-Laws, 6 Cyc. 262, note 65.

In an old work a by-law is defined to be "a law made *obiter*, or by the by" (Termes de la Ley, ed. 1721), but this definition, although established by Webster, seems to be an aberration.

34. Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508.

35. Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

36. People *v.* Throop, 12 Wend. (N. Y.) 183.

37. Instances of such regulations are found in the following among many other cases: Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224; Hadencamp *v.* Second Ave. R. Co., 1 Sweeny (N. Y.) 490; Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337.

For an extensive discussion of this subject in connection with carriers of passengers see 3 Thompson Neg. (2d ed.) § 3104 *et seq.*

38. Compton *v.* Van Volkenburgh, etc., R. Co., 34 N. J. L. 134.

39. State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671. See also Ayres *v.* Morris, etc., R. Co., 29 N. J. L. 393, 80 Am. Dec. 215.

40. *Colorado.*— Arapahoe Cattle, etc., Co. *v.* Stevens, 13 Colo. 534, 22 Pac. 823.

Indiana.— Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317. As enforcing and illustrating this principle see Bauer *v.* Samson Lodge K. of P., 102 Ind. 262, 1 N. E. 571.

Iowa.— Coles *v.* Iowa State Mut. Ins. Co., 18 Iowa 425; Simeral *v.* Dubuque Mut. F. Ins. Co., 18 Iowa 319.

Maine.— Cummings *v.* Webster, 43 Me. 192.

Missouri.— Palmyra *v.* Morton, 25 Mo. 593; McLellan *v.* St. Louis Public Schools, 15 Mo. App. 362.

3. To What Extent a Law. Although a by-law is from its nature applicable only to the particular corporate body, yet it is still in a certain sense a law, and is to be applied in the government of such body whenever the circumstances arise for which it was intended to provide.[41] If made in conformity with the charter or governing statute, it is as binding upon the individual members of the corporation as any public law of the state, although of course its sanctions may be different;[42] and according to the views of some they may be equally binding upon third persons acquainted with the method of business of the corporation,[43] although this is doubtful.

4. May Operate as Contract Among Members and Between Corporation and Members. A by-law may operate as a contract among the members of the corporation, a principle which is constantly brought into play in determining the rights in mutual benefit societies; and it may equally operate as a contract between the corporation on the one side and the members on the other.[44] Thus, although a by-law giving the directors the option to take the shares of any shareholder who desires to sell them at a value appraised by the directors, may be invalid, yet the subscriber may be bound by his agreement adopting the by-law.[45] So a by-law providing that before any dividend can be paid on the common stock a dividend of eight per cent per annum shall be payable on preferred stock, to be paid out of the net earnings of the corporation, has the force of a contract, and is properly given effect by declaring a dividend on the common stock for the balance of the net earnings remaining after paying the stipulated dividends on the preferred stock.[46] So a shareholder who, with notice of a by-law providing that no shareholder owing the company a matured debt shall transfer his stock or receive any dividend thereon until such debt is paid, except by consent of the board of directors, contracts a large debt to the corporation will be held to have pledged his stock for the debt, which pledge is binding between the corporation and such shareholder or his assignee for creditors.[47]

5. To What Extent Binding on Third Persons. There are decisions to the effect that a corporate by-law is binding on third persons doing business with the corporation, who have knowledge of the by-law.[48] But it is suggested that this principle can have no operation except where the by-law has established a course of business on the part of the corporation known to the third person; where it takes the form of a regulation of the business of the corporation as toward the public, as in the case of a common carrier of passengers;[49] or where the third

New York.— Buffalo *v.* Webster, 10 Wend. 99.

Pennsylvania.— Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa. St. 402; Susquehanna Ins. Co. *v.* Perrine, 7 Watts & S. 348.

For a view that the by-laws of a corporation are evidence against its officers, although they be not corporators, see Wilmington, etc., Bank *v.* Wollaston, 3 Harr. (Del.) 90.

41. Gosling *v.* Veley, 7 Q. B. 406, 19 L. J. Q. B. 135, 53 E. C. L. 406. And see Hopkins *v.* Swansea, 4 M. & W. 621.

42. *Alabama.*— Weatherly *v.* Montgomery County Medical, etc., Soc., 76 Ala. 567; Security Loan Assoc. *v.* Lake, 69 Ala. 456.

Georgia.— Harrington *v.* Workingmen's Benev. Assoc., 70 Ga. 340.

Louisiana.—German Evangelical Congregation *v.* Pressler, 17 La. Ann. 127; Union Bank *v.* Gnice, 2 La. Ann. 249.

Maine.—Cummings *v.* Webster, 43 Me. 192; Came *v.* Brigham, 39 Me. 35.

Maryland.— Anacosta Tribe No. 12 I. O. R. M. *v.* Murbach, 13 Md. 91, 71 Am. Dec. 625.

New York.— Kent *v.* Quicksilver Min. Co., 78 N. Y. 159; Poultney *v.* Bachman, 31 Hun 49; McDermott *v.* Board of Police, 5 Abb. Pr. 422; Brick Presb. Church *v.* New York, 5 Cow. 538.

See 12 Cent. Dig. tit. "Corporations," § 159.

43. Cummings *v.* Webster, 43 Me. 192.

44. Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691.

45. New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271.

46. Seattle Trust Co. *v.* Pitner, 18 Wash. 401, 51 Pac. 1048.

47. John C. Grafflin Co. *v.* Woodside, 87 Md. 146, 39 Atl. 413.

48. Cummings *v.* Webster, 43 Me. 192. *Contra*, State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

49. 3 Thompson Neg. (2d ed.) § 3104 *et seq.*

person has been in some way affected with knowledge of it and brought into privity with it, so that it may operate as a contract between the corporation and himself. In other cases it operates merely as a regulation among the members of the corporation *inter sese*, or as between the corporation and its members, and has no effect as a law, upon third persons,[50] and no influence upon contracts between the corporation and other parties.[51] A third person can enforce them only when he shows some privity, as where he has advanced money or other value upon the credit of a corporate by-law or the like.[52]

6. Not Noticed Judicially, but Must Be Proved. Like the special charters of corporations, where they consist of private statutes, the by-laws and ordinances of such bodies are not noticed judicially, but must be proved as facts.[53]

7. Whether Capable of Being Waived. In favor of third persons, it seems clear that the provisions of a by-law may be waived by the corporation;[54] although as among the members themselves the officers of a corporation, for example a mutual insurance company, have no authority to waive the provisions of a by-law, because it is in the nature of a private statute by which the members have agreed to be governed.[55] But as the doctrine of waiver in this relation generally arises with respect to contracts of insurance or of mutual insurance, it is not within the purview of the present article and will not be further considered.

8. No Extraterritorial Force. By-laws of corporations cannot have, *proprio vigore*, any operation outside the state within which the corporation exists,[56] although, as in the case of charters, they may be allowed by comity to operate among the members as the law of the corporation.[57]

9. Interpretation of By-Laws. In the interpretation of by-laws the same principles obtain which govern in the interpretation of statutes, contracts, and other private instruments.[58] As in the case of statutes, so in the case of by-laws, the courts will, in construing them, where two interpretatons are possible, one of which will save them and make them valid and the other of which will render them invalid, so interpret them as to make them valid; since the purpose of violating the law of the land will not be imputed to their authors except where necessary.[59] They should have a reasonable construction.[60]

10. Actions Upon By-Laws. Actions are constantly brought by corporations

50. Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691; Mechanics', etc., Bank *v.* Smith, 19 Johns. (N. Y.) 115.

51. Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, Woolw. 400, McCahon (Kan.) 214.

52. Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691.

Illustrations of the text.— Accordingly a by-law of a bank that all payments made and received must be examined at the time does not prevent a party dealing with the bank from showing afterward that there was a mistake in his account of deposits and receipts. Mechanics', etc., Bank *v.* Smith, 19 Johns. (N. Y.) 115. The facts that the by-laws of a corporation express an individual liability of members for company debts, and that each member subscribed the by-laws merely to become a member, are not enough to sustain an action by a creditor of the company against a member for the amount due. He must at least show that he gave credit or parted with value on the faith of the by-laws having been so drawn up and signed by the members. Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691.

53. Lucas *v.* San Francisco, 7 Cal. 463; Haven *v.* New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512.

54. Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36.

55. Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347; Evans *v.* Trimountain Mut. F. Ins. Co., 9 Allen (Mass.) 329; Murphy *v.* People's Equitable Mut. F. Ins. Co., 7 Allen (Mass.) 239; Mulrey *v.* Shawmut Mut. F. Ins. Co., 4 Allen (Mass.) 116, 81 Am. Dec. 689; Priest *v.* Citizens' Mut. F. Ins. Co., 3 Allen (Mass.) 602; Brewer *v.* Chelsea Mut. F. Ins. Co., 14 Gray (Mass.) 203; Hale *v.* Mechanics' Mut. F. Ins. Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410; Clark *v.* New England Mut. F. Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44; Westchester F. Ins. Co. *v.* Earle, 33 Mich. 143; Union Mut. F. Ins. Co. *v.* Keyser, 32 N. H. 313, 64 Am. Dec. 375.

56. Mitchell *v.* Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406.

57. See, generally, Foreign Corporations.

58. State *v.* Conklin, 34 Wis. 21; *In re* Dunkerson, 8 Fed. Cas. No. 4,158, 4 Biss. 277.

59. Hibernia Fire Engine Co. *v.* Com., 93 Pa. St. 264; Poulters' Co. *v.* Phillips, 6 Bing. N. Cas. 314, 4 Jur. 124, 9 L. J. C. P. 190, 8 Scott 593, 37 E. C. L. 640.

60. Osceola Tribe No. 11 I. O. R. M. *v.* Rost, 15 Md. 295; Boogher *v.* Maryland L.

against their members, and, within limits already pointed out,[61] against third persons, upon by-laws, where the by-law operates as a contract between the corporation and a member, by a member against the corporation.[62] By-laws are not noticed judicially, but must be pleaded and proved as facts; the pleader proceeding in the same way in which he would proceed where any other private instrument was the foundation of his action.[63]

B. Power to Enact and Mode of Enacting — 1. Inherent Power to Make. By the principles of the common law, every corporation aggregate possesses the inherent power to make all necessary rules and regulations for its government and operation, although such power may not be expressly conferred in its charter, in the statute of its creation, or in any other statute.[64] It is regarded as a power that is included in the grant of the capacity of being a corporation. It is generally said to be "an incident to a corporation."[65] But if the charter or governing statute contains an express grant of power to enact by-laws, and the grant is by terms limited to specified cases or specified purposes, the grant will operate as a restriction upon the power of legislation possessed by the corporation in this respect, and will exclude all other objects by implication, on the principle *expressio unius exclusio alterius.*[66]

2. Effect of Failure to Make. Where the governing statute in express terms confers upon the corporation the power to adopt by-laws, the failure to exercise the power will be ascribed to mere non-action, which will not render void any acts of the corporation which would otherwise be valid.[67]

3. Must Be Adopted by Whom — a. When by Corporators, and Not by Directors or Officers. Unless the constitution of the corporation or its governing statute has vested the power of making by-laws in some particular board or body of the corporation, it can be exercised only by the constituent body,[68] and then only by the most numerous body or constituency.[69]

Ins. Co., 6 Mo. App. 592; Higgins *v.* McCrea, 116 U. S. 671, 6 S. Ct. 557, 29 L. ed. 764; 1 Thompson Trials, § 1057 *et seq.*

Interpretation of various clauses in by-laws.— Meaning of the words "earnings and dividends," not used in the ordinary sense of declared dividends. Bigbee, etc., River Packet Co. *v.* Moore, 121 Ala. 379, 25 So. 602. That a shareholder in a corporation organized to establish and maintain a law library is liable for annual dues established by a by-law, although he does not use the library. Omaha Law Library Assoc. *v.* Connell, 55 Nebr. 396, 75 N. W. 837.

61. See *supra*, V, A, 5.

62. See Schrick *v.* St. Louis Mut. House Bldg. Co., 34 Mo. 423, where it was held that such an action could not be maintained if the by-law had been repealed by substitution during the membership of plaintiff and before the bringing of his action.

63. Kehlenbeck *v.* Logeman, 10 Daly (N. Y.) 447.

64. People *v.* Erie County Medical Soc., 24 Barb. (N. Y.) 570; Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508; Martin *v.* Nashville Bldg. Assoc., 2 Coldw. (Tenn.) 418.

65. Mechanics', etc., Bank *v.* Smith, 19 Johns. (N. Y.) 115 (per Woodworth, J.); Rex *v.* Westwood, 4 B. & C. 781, 10 E. C. L. 799, 7 Bing. 1, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 37, 6 Eng. Reprint 637, 7 D. & R. 267; London City *v.* Vanacker, Carth. 480 (per Lord Holt, C. J.). Cases are found where the proposition is put forward that corporations must show their power to pass by-laws (Dunham *v.* Rochester, 5 Cow. (N. Y.) 462) and bring themselves by proof within that power (Taylor *v.* Griswold, 14 N. J. L. 222, 27 Am. Dec. 33), but the proper conception is that the possession of the power is presumed.

66. State *v.* Ferguson, 33 N. H. 424; State *v.* Morristown, 33 N. J. L. 57; Child *v.* Hudson's Bay Co., 2 P. Wms. 207, 24 Eng. Reprint 702; Angell & A. Corp. § 325.

Whether a non-profit corporation has power to make by-laws without express authority see Bailey *v.* Master Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561.

67. Steger *v.* Davis, 8 Tex. Civ. App. 23, 27 S. W. 1068.

68. Grant Corp. 77 [*citing* Rex *v.* Westwood, 4 B. & C. 781, 10 E. C. L. 799, 7 Bing. 1, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267].

69. *Indiana.*— Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4, where it is said that in Indiana the power to make by-laws resides in the members of the corporation at large, where there is no law or valid usage to the contrary.

Maryland.— Union Bank *v.* Ridgely, 1 Harr. & G. 324.

Massachusetts.— Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111.

Mississippi.— Holly Springs Bank *v.* Pinson, 58 Miss. 421, 58 Am. Rep. 330.

b. Where Charters and Statutes Confer Power Upon Directors and Other Officers. Many charters and statutes exist conferring the power to enact by-laws upon the directors and other officers, of which numerous examples have been given in a recent work.[70] These statutes are so numerous and variant and are subject to such frequent changes that no attempt will be made to set them out here. Examples of them may be suggested by saying that one of them gives the directors the power to adopt a by-law prescribing the transfer of shares while the owner is in default.[71] The statutory delegation to a select body of the corporation of the power to make by-laws does not divest the inherent power of the general body so to do, unless the statute so declares in express terms. Thus, although the power of making by-laws is vested in the managers of the corporation, and not in the shareholders, a by-law passed at a meeting called as a shareholders' meeting will be valid, if the shareholders and managers were the same persons, and all were present and participated.[72]

4. Formalities Required in Enacting. If the charter prescribes any formality to be followed in the adoption of by-laws, of course it must be observed;[73] but if the charter is silent as to the formalities to be observed, a by-law may be adopted by acts as well as by words; by the uniform course of proceedings of the corporation as well as by an express vote manifested in writing.[74] It has been said, speaking with reference to the question whether a certain by-law had been enacted, "Even if there was no record or the record was deficient, we consider it settled by the authorities that the enactment of a by-law need not necessarily be in writing, but may be inferred from facts proved."[75]

5. Quorum to Enact. Where a statute authorizes a select body, e. g., the

Missouri.— State Sav. Assoc. *v.* Nixon-Jones Printing Co., 25 Mo. App. 642; Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249.

Nevada.— State *v.* Curtis, 9 Nev. 325.

Tennessee.— Martin *v.* Nashville Building Assoc., 2 Coldw. 418.

England.—Rex *v.* Westwood, 4 B. & C. 781, 10 E. C. L. 799, 7 Bing. 1, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267.

Numerous statutes have been enacted vesting the power to enact by-laws in the corporation or in its members, of which examples may be found in 1 Thompson Corp. § 962 *et seq.* Many of these statutes reënact the rule of the common law that such by-laws must not be inconsistent with law, etc. (1 Thompson Corp. § 962), and then prescribe in detail what may be the subject-matter of such by-laws, such as the management and regulation of the affairs of the corporation (1 Thompson Corp. § 963), the regulation of the corporation, the management of its affairs, and the transfer of its stock (1 Thompson Corp. § 964), or the holding of corporate meetings (1 Thompson Corp. § 965). Sometimes such subjects as corporate meetings and voting, the forfeiture of shares, penalties, etc., are thrown together in these permissive statutes. 1 Thompson Corp. § 966. In other cases we find thrown together the subjects of officers, of meetings, and of elections. 1 Thompson Corp. § 967. In others the management of the corporate property, the regulation of the affairs of the corporation, the transfer of its shares, the duties of its officers, the number of its directors, penalties, liens upon its shares, etc. 1 Thompson Corp. §§ 968, 969. In some cases we find special provisions applicable to railroad companies. 1 Thompson Corp. § 971. In other cases provisions applicable to boom and navigation companies. 1 Thompson Corp. § 972. In other cases provisions relating to the forfeiture of shares. 1 Thompson Corp. § 974. In other cases provisions prescribing the manner in which by-laws must be enacted, amended, or repealed. 1 Thompson Corp. §§ 975, 976.

70. 1 Thompson Corp. § 978 *et seq.*

71. Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388.

72. People *v.* Sterling Burial Case Mfg. Co., 82 Ill. 457.

For another illustration of this principle in the case of a municipal corporation see the decision of the house of lords in Rex *v.* Westwood, 4 B. & C. 781, 10 E. C. L. 799, 7 Bing. 1, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267.

73. Dunston *v.* Imperial Gas Light, etc., Co., 3 B. & Ad. 125, 1 L. J. K. B. 49, 23 E. C. L. 63.

74. Fairfield Turnpike Co. *v.* Thorp, 13 Conn. 173; Langsdale *v.* Bonton, 12 Ind. 467; Dunston *v.* Imperial Gas Light, etc., Co., 3 B. & Ad. 125, 1 L. J. K. B. 49, 23 E. C. L. 63.

75. Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 334, 11 Am. Rep. 253 [*citing* Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Reuter *v.* Electric Tel. Co., 6 E. & B. 341, 2 Jur. N. S. 1245, 26 L. J. Q. B. 46, 4 Wkly. Rep. 564, 88 E. C. L. 341; Angell & A. Corp. §§ 238, 328].

directors of a corporation, to make by-laws, a majority of that body at least is necessary to constitute a quorum.[76] Where the charter of a corporation authorizes the president and directors to adopt by-laws, it is held that by-laws may be adopted by a meeting at which the president and a quorum of the directors are present; and where the quorum consists of a majority, the assent of a majority is sufficient in order to make the by-laws valid.[77] Where the by-laws are enacted by the shareholders in their constituent character, there must, on principles already explained,[78] be a quorum consisting of a majority of the whole body; but where the stock subscription has not been entirely filled up, this means a majority of the holders of the subscribed shares and not a majority of the potential shares.[79]

6. Amendment and Repeal of By-Laws. A corporation which is authorized by its charter or governing statute to make such by-laws as may be necessary to attain the objects for which it is created has power to change such by-laws from time to time, when necessary to carry out such objects;[80] but it cannot make such changes, although expressly empowered thereto by the charter or governing statute, as will impair any rights that have become vested by virtue of the previous by-law.[81]

C. Requisites and Validity of By-Laws — 1. Must Not Be Contrary to Charter. By-laws which are contrary to the charter or governing statute of the corporation are void.[82]

2. Must Not Attempt to Enlarge Powers Granted by Charter or Governing Statute. By-laws whereby the members of the corporation undertake to acquire powers or franchises not granted by their charter or governing statute are in like manner void.[83]

3. Must Not Be Contrary to Articles of Incorporation. The articles of incorporation, sometimes called the articles of association, constitute the charter of the corporation when read in connection with the governing statute. A by-law which is contrary to such articles is therefore void, especially where it attempts to change rights among the members thereby established.[84]

76. *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525. See also *supra*, IV, E.

77. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

78. See *supra*, IV, E.

79. Castner *v.* Twitchell-Champlin Co., 91 Me. 524, 40 Atl. 558.

80. Scanlan *v.* Snow, 2 App. Cas. (D. C.) 137, 22 Wash. L. Rep. 62 (may be altered or amended at any meeting of the shareholders at which a quorum is present, by a majority vote of those present, although the previous by-laws make no provision for their own alteration or amendment); Schrick *v.* St. Louis Mut. House Bldg. Co., 34 Mo. 423. *Compare* Crittenden *v.* Southern Home Bldg., etc., Assoc., 111 Ga. 266, 36 S. E. 643, determined on a question of pleading.

For a statute and condition of fact under which by-laws were held to be new by-laws and not mere amendments of the former by-laws see Murphy *v.* Pacific Bank, 130 Cal. 542, 62 Pac. 1059.

81. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

When a shareholder will not be estopped from objecting see Bergman *v.* St. Paul Mut. Bldg. Assoc., 29 Minn. 275, 13 N. W. 120.

82. *California.*— Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237.

Illinois.— Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129.

Indiana.— Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317.

Louisiana.— New Orleans *v.* Philippi, 9 La. Ann. 44.

Maine.— Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256.

Massachusetts.— Supreme Council A. L. of H. *v.* Perry, 140 Mass. 580, 5 N. E. 634.

Minnesota.— Bergman *v.* St. Paul Mut. Bldg. Assoc., 29 Minn. 275, 13 N. W. 120.

Nevada.— State *v.* Curtis, 9 Nev. 325.

New Hampshire.— Great Falls Mut. F. Ins. Co. *v.* Harvey, 45 N. H. 292.

New Jersey.— Kearney *v.* Andrews, 10 N. J. Eq. 70.

New York.— Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

United States.— Chicago City R. Co. *v.* Allerton, 18 Wall. 233, 21 L. ed. 902.

England.— Rex *v.* Bumstead, 2 B. & Ad. 699, 9 L. J. K. B. O. S. 321, 22 E. C. L. 292; Rex *v.* Cutbush, 4 Burr. 2204; Rex *v.* Spencer, 3 Burr. 1827; Harscot's Case, Comb. 202 (per Holt, C. J.); Rex *v.* Weymouth, 7 Mod. 373.

See 12 Cent. Dig. tit. "Corporations," § 154.

83. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256; Carr *v.* St. Louis, 9 Mo. 191.

84. Bergman *v.* St. Paul Mut. Bldg. Assoc., 29 Minn. 275, 13 N. W. 120.

4. Must Not Be Contrary to General Law. Generally speaking a by-law which is contrary to the law of the land, common or statutory, is void.[85]

5. Must Not Be Contrary to Constitution, State or Federal. For stronger reasons a by-law is void if it is contrary to the constitution of the state or the United States, for an act of the legislature in such a case would be void.[86]

6. Must Not Be Contrary to Common Right. Corporate by-laws must not contravene those principles of common right which are embodied in the common law.[87]

7. Must Operate Equally. By-laws must operate equally upon all persons of the class which they are intended to govern.[88]

85. *California.*— People *v.* Crockett, 9 Cal. 112.

Connecticut.— Hayden *v.* Noyes, 5 Conn. 391.

Louisiana.— New Orleans *v.* Philippi, 9 La. Ann. 44.

Maine.— Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470.

Michigan.— People *v.* Detroit Fire Dept., 31 Mich. 458.

New York.—People *v.* New York Operative Masons Benev. Soc., 3 Hun 361; People *v.* Erie County Medical Soc., 24 Barb. 570.

United States.— Bullard *v.* National Eagle Bank, 18 Wall. 589, 21 L. ed. 923.

So a municipal ordinance which is repugnant either to the constitution of the United States, the constitution of the particular state, or its general law, whether statute or common, is *ipso facto* void.

Arkansas.— Vance *v.* Little Rock, 30 Ark. 435.

Georgia.—Livingston *v.* Albany, 41 Ga. 21; Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452; Haywood *v.* Savannah, 12 Ga. 404.

Illinois.—Illinois Cent. R. Co. *v.* Bloomington, 76 Ill. 447.

Indiana.— Indianapolis *v.* Indianapolis Gas Light, etc., Co., 66 Ind. 396.

Iowa.— Burlington *v.* Kellar, 18 Iowa 59.

Louisiana.— Walker *v.* New Orleans, 31 La. Ann. 828; New Orleans *v.* State Sav. Bank, etc., Co., 31 La. Ann. 637; Cullinan *v.* New Orleans, 28 La. Ann. 102; Shreveport *v.* Levy, 26 La. Ann. 671, 21 Am. Rep. 553; State *v.* Caldwell, 3 La. Ann. 435.

Minnesota.— Judson *v.* Reardon, 16 Minn. 431.

Nebraska.— State *v.* Hardy, 7 Nebr. 377.

New York.— Wood *v.* Brooklyn, 14 Barb. 425.

Pennsylvania.— Wilkesbarre City Hospital *v.* Luzerne County, 84 Pa. St. 55.

Tennessee.—Pesterfield *v.* Vickers, 3 Coldw. 205.

England.—*In re* London Case, 8 Coke 121*b*; Kirk *v.* Nowill, 1 T. R. 118, 1 Rev. Rep. 160.

Legislature cannot delegate power to enact by-laws contravening general law.— As the legislative power cannot be delegated, it is not competent for the legislature to confer upon a moneyed corporation power to enact by-laws contravening, repealing, or in any wise changing the statutory or common law of the land. Seneca County Bank *v.* Lamb, 26 Barb. (N. Y.) 595.

Limitation of rule of above text.— A sound limitation of the rule of the above text is believed to be that if a by-law of a corporation is not unreasonable, or contrary to the general policy of the law or to those fundamental principles of right guaranteed by the law, the fact that it introduces a new rule which is different from the rule of the common law does not render it invalid. Goddard *v.* Merchants' Exch., 9 Mo. App. 290 [*affirmed* in 78 Mo. 609].

86. State *v.* Cincinnati, 23 Ohio St. 445.

87. This principle more commonly arises with respect to the ordinances of municipal corporations, but it must be equally applicable to the by-laws of private corporations, and especially to quasi-public corporations, such as railway companies, telegraph companies, and the like. For illustrations of municipal ordinances which have been held contrary to common right see 38 Am. Dec. 636 note; 1 Thompson Corp. § 1017; and the following cases:

Connecticut.— Willard *v.* Killingworth, 8 Conn. 247; Hayden *v.* Noyes, 5 Conn. 391.

Illinois.— Stack *v.* East St. Louis, 85 Ill. 377, 28 Am. Rep. 619.

Indiana.— Pettis *v.* Johnson, 56 Ind. 139; Evansville *v.* Martin, 41 Ind. 145.

Louisiana.— Lanfear *v.* New Orleans, 4 La. 97, 23 Am. Dec. 477.

North Carolina.—Edenton *v.* Capeheart, 71 N. C. 156.

Tennessee.— Memphis *v.* Battaile, 8 Heisk. 524, 24 Am. Rep. 285.

88. People *v.* Young Men's Father Matthew Total Abstinence Benev. Soc. No. 1, 41 Mich. 67, 1 N. W. 931; Goddard *v.* Merchants' Exch., 9 Mo. App. 290; Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

Under this principle a corporation cannot exercise its power to make by-laws by directing a resolution against the shares of a particular member. Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

Examples of municipal ordinances which have been held void because operating unequally may be found in *Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642; Judson *v.* Reardon, 16 Minn. 431; Pinkerton *v.* Verberg, 30 Centr. L. J. 352; Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554; Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205.

8. Must Not Disturb Vested Rights. A by-law which disturbs vested rights of the members of a corporation is of course void, since a statute so operating would be void,[89] and, although the power is reserved to a corporation by its charter to alter, amend, or repeal its by-laws, it cannot repeal a by-law so as to impair rights which have become vested thereunder.[90]

9. Must Not Attempt to Make Members Liable For Corporate Debts. It follows from what has just preceded that where neither the charter nor the governing statute imposes on the members a personal liability to pay the debts of the corporation, such a liability cannot be created by any by-law or vote of the corporation so as to be binding on dissenting members,[91] unless the member sought to be charged is in some way connected with the by-laws so as to bring him into privity with the creditor.[92]

10. Must Not Operate Retrospectively. A by-law which attempts to operate retrospectively, disturbing existing rights or creating new penalties, and being hence in the nature of an *ex post facto* law, is of course void.[93]

11. Must Not Be Unreasonable, Oppressive, or Extortionate — a. Rule Stated. In its operation between the corporation and its members, a by-law in order to be valid must not be unreasonable, oppressive, or extortionate.[94] Included in the foregoing is a principle of the common law, running back so far that its origin cannot be found, that the by-laws of corporations will be set aside by the judicial courts when deemed unreasonable.[95]

89. People *v.* Crockett, 9 Cal. 112; Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; People *v.* Detroit Fire Dept., 31 Mich. 458.

90. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159 [*affirming* 12 Hun (N. Y.) 53].

91. *Georgia.*— Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

Maine.— Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470.

Massachusetts.— Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691; South Parish Free Schools *v.* Flint, 13 Metc. 539.

Nebraska.— Omaha Law Library Assoc. *v.* Connell, 55 Nebr. 396, 75 N. W. 837.

New York.— Sullivan County Club *v.* Butler, 26 Misc. 306, 56 N. Y. Suppl. 1, holder of full-paid shares not bound by a recital in the certificate that he held them pursuant to a by-law authorizing their assessment, which by-law had been passed subsequently to his payment of them.

92. Flint *v.* Pierce, 99 Mass. 69, 96 Am. Dec. 691.

On the same principle a bank cannot make its shareholders liable for its bills, merely by printing a notice thereon that they are so liable. Lowry *v.* Inman, 46 N. Y. 119.

So where a city has granted to a street railway company a franchise to operate a railway with a double track, it cannot, after the company has expended money under the grant, restrict it to a single track, by an amendment to the ordinance conferring the franchise. Burlington *v.* Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145.

93. Howard *v.* Savannah, T. U. P. Charlt. (Ga.) 173; People *v.* Detroit Fire Dept., 31 Mich. 458.

94. Shannon *v.* Howard Mut. Bldg. Assoc., 36 Md. 383; State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Citizens' Mut. Loan, etc., Assoc. *v.* Webster, 25 Barb. (N. Y.) 263; People *v.* Throop, 12 Wend. (N. Y.) 183; Buffalo *v.* Webster, 10 Wend. (N. Y.) 99; Forrest City United Land, etc., Assoc. *v.* Gallagher, 25 Ohio St. 208; Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186.

95. *New York.*— People *v.* Erie County Medical Soc., 24 Barb. 570. See also Stokes *v.* New York, 14 Wend. 87; Buffalo *v.* Webster, 10 Wend. 99; Hudson City *v.* Thorne, 7 Paige 261.

Oregon.— Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

Pennsylvania.— Northern Liberties *v.* Northern Liberties Gas Co., 12 Pa. St. 318; Com. *v.* Cain, 5 Serg. & R. 510; Com. *v.* St. Patrick's Benev. Soc., 2 Binn. 441, 4 Am. Dec. 453.

South Carolina.— Palmetto Lodge No. 5, I. O. O. F. *v.* Hubbell, 2 Strobh. 457, 49 Am. Dec. 604; St. Luke's Church *v.* Mathews, 4 Desauss. 578, 585, 6 Am. Dec. 619.

England.— Feltmakers *v.* Davis, 1 B. & P. 98; Rex *v.* Spencer, 3 Burr. 1827; Rex *v.* Richardson, 1 Burr. 517, 2 Ld. Ken. 85; *In re* Sutton's Hospital Case, 10 Coke 1*a*; Norris *v.* Staps, Hob. 293; London City *v.* Vanacker, 1 Ld. Raym. 496; Bacon Abr. tit. By-Law; Comyns Dig. tit. Franchise (F) 10; 2 Kyd Corp. 95.

The principle had its origin when nearly all corporations were public or municipal in their character; and the following cases assert and illustrate the principle that municipal by-laws or ordinances will be set aside by the judicial court when deemed unreasonable.

Arkansas.— Waters *v.* Leech, 3 Ark. 110.

California.— *Ex p.* Chin Yan, 60 Cal. 78; *Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642.

Georgia.— Gilham *v.* Wells, 64 Ga. 192.

b. Limitations of Rule. If, in a strictly private association, the members agree among themselves that a particular rule is reasonable, the same not being opposed to the law in the sense of being immoral or criminal, the courts will give effect to it as a private contract and will not set it aside because they may deem it unreasonable.[96] Neither can a by-law be set aside as unreasonable by the judicial courts, when it is within the powers expressly conferred upon the corporation; for where the legislature, by a valid and constitutional law, have declared that a certain thing is reasonable, the courts cannot say that it is unreasonable.[97] Moreover, before a court will declare a corporate by-law or ordinance unreasonable, its unreasonableness must clearly appear. The courts will not look closely into mere matters of judgment, where there may be a reasonable difference of opinion.[98]

c. Question of Reasonableness One of Law For Court. The question whether a corporate by-law is reasonable, or whether it ought to be set aside as unreasonable, is a question of law for the court and is not to be submitted to a jury.[99] This rule applies to the regulations of public carriers[1] and to the by-laws or ordinances of municipal corporations.[2]

Illinois.— Tugman *v.* Chicago, 78 Ill. 405.
Iowa.— Davis *v.* Anita, 73 Iowa 325, 35 N. W. 244; Meyers *v.* Chicago, etc., R. Co., 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50.
Kentucky.— Com. *v.* Steffee, 7 Bush 161.
Massachusetts.—Pedrick *v.* Bailey, 12 Gray 161; Com. *v.* Robertson, 5 Cush. 438.
Missouri.—Cape Girardeau *v.* Riley, 72 Mo. 220.
New Hampshire.— State *v.* Freeman, 38 N. H. 426.
New Jersey.— Kip *v.* Paterson, 26 N. J. L. 298; Dayton *v.* Quigley, 29 N. J. Eq. 77.
New York.— People *v.* Throop, 12 Wend. 183; Dunham *v.* Rochester, 5 Cow. 462.
Pennsylvania.— O'Maley *v.* Freeport, 96 Pa. St. 24, 42 Am. Rep. 527; Northern Liberties *v.* Northern Liberties Gas Co., 12 Pa. St. 318; Fisher *v.* Harrisburg, 2 Grant 291.
Tennessee.— Whyte *v.* Nashville, 2 Swan 364; Memphis *v.* Winfield, 8 Humphr. 707; Columbia *v.* Beasly, 1 Humphr. 232, 34 Am. Dec. 646.
Virginia.—Kirkham *v.* Russell, 76 Va. 956.
Wisconsin.— Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; Clason *v.* Milwaukee, 30 Wis. 316.
See further as to the validity of by-laws of municipal corporations Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441; Floyd *v.* Eatonton, 14 Ga. 354, 58 Am. Dec. 559; Tanner *v.* Albion, 5 Hill (N. Y.) 121, 40 Am. Dec. 337; Robinson *v.* Franklin, 1 Humphr. (Tenn.) 155, 34 Am. Dec. 625. And see note 34 Am. Dec. 627 *et seq.*

96. Kehlenbeck *v.* Logeman, 10 Daly (N. Y.) 447.

97. District of Columbia *v.* Waggaman, 4 Mackey (D. C.) 328; Haynes *v.* Cape May, 50 N. J. L. 55, 13 Atl. 231.

98. St. Louis *v.* Weber, 44 Mo. 547.
Municipal ordinance both reasonable and unreasonable.— That a municipal ordinance may be adjudged reasonable as applicable to one state of facts and unreasonable as applicable to another see Knapp, J., in Nicoulin *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513. See also Pennsylvania R. Co. *v.* Jersey City, 47 N. J. L. 286.

99. Com. *v.* Worcester, 3 Pick. (Mass.) 462; St. Louis *v.* Weber, 44 Mo. 547; Merz *v.* Missouri Pac. R. Co., 14 Mo. App. 459; St. Louis *v.* St. Louis R. Co., 14 Mo. App. 221; Neier *v.* Missouri Pac. R. Co., 12 Mo. App. 25; Ayres *v.* Morris, etc., R. Co., 29 N. J. L. 393, 80 Am. Dec. 215; State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

1. Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138; State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Vedder *v.* Fellows, 20 N. Y. 126.
At the same time it has been held proper to admit testimony in regard to the necessity of such a rule. Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138.
Whether a certain regulation of a railway company is sufficient for the prevention of collisions has been held a question for a jury. Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109.
Where the facts are undisputed it has been held that the question of the reasonableness of a rule established by a railway company is a question of law for the court. Vedder *v.* Fellows, 20 N. Y. 126; Old Colony R. Co. *v.* Tripp, 33 Am. & Eng. R. Cas. 488. But when the question depends upon the existence of particular facts and circumstances, it is said to be a question for the jury, under proper instructions from the court. Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. St. 140, 16 Atl. 607, 10 Am. St. Rep. 517, 2 L. R. A. 489.

2. Dayton *v.* Quigley, 29 N. J. Eq. 77; Kneedler *v.* Norristown, 100 Pa. St. 368, 45 Am. Rep. 383; Northern Liberties *v.* Northern Liberties Gas Co., 12 Pa. St. 318; Fisher *v.* Harrisburg, 2 Grant (Pa.) 291; 1 Dillon Mun. Corp. §§ 319, 320, 321.
Instances of by-laws held void because unreasonable see 1 Thompson Corp. § 1023; Sayre *v.* Louisville Union Benev. Assoc., 1 Duv. (Ky.) 143, 85 Am. Dec. 613; State *v.* Union Merchants' Exch., 2 Mo. App. 96; Rob-

12. Must Not Be in Restraint of Trade — a. Rule Stated. As a general rule by-laws which operate in restraint of trade are void, as against public policy, under the principles of the common law;[3] and this is also true of municipal ordinances,[4] and especially of municipal ordinances tending to create monopolies, excluding of course those cases where the grant of exclusive franchises is necessary, as in the case of gaslight companies, water-supply companies, and the like.[5]

b. Establishing Combinations Among Workmen to Maintain Prices. It seems that a by-law of an incorporated association of workmen, having the effect of maintaining reasonable prices for the work performed by the members of the association, but without interfering with the freedom of contract of the individual members or interposing the mere will of the association for the views of the individual in determining what price is reasonable, would be unobjectionable, and would not be set aside as unreasonable or as opposed to sound morals or public policy.[6]

c. Restraining Transfer of Corporate Shares — (i) *In General.* Shares of stock in a corporation being personal property, and the *jus disponendi* being incident to the very nature of property, it follows that a by-law which undertakes to prohibit a shareholder from freely transferring his shares is ordinarily void, as being in restraint of trade and against common right.[7]

inson *v.* Groscot, Comb. 372; London *v.* Salisbury, Comb. 221.

Numerous instances of municipal by-laws held void because unreasonable see 1 Thompson Corp. § 1024.

Instances of municipal by-laws held not unreasonable see 1 Thompson Corp. § 1025.

Ancient by-laws touching admission of persons to freedom of corporation or place see 1 Thompson Corp. § 1026; Green *v.* Durham, 1 Burr. 127; *In re* Ipswich Tailors Case, 11 Coke 53*a*.

By-law compelling elected members to wear livery and pay initiation fee or suffer a forfeiture see 1 Thompson Corp. § 1027; Vintners' Co. *v.* Passey, 1 Burr. 235, 1 Ld. Ken. 500; Taverner's Case, T. Raym. 446.

Instances of by-laws of various kinds of corporations held reasonable and valid see 1 Thompson Corp. § 1052.

Validity of by-laws regulating conduct of members of the corporation see London, etc., Tobacco Pipe Makers Co. *v.* Woodroffe, 7 B. & C. 838, 14 E. C. L. 374.

3. *Kentucky.*— Sayre *v.* Louisville Union Benev. Assoc., 1 Duv. 143, 85 Am. Dec. 613.

Massachusetts.— Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476.

Missouri.—Moore *v.* Bank of Commerce, 52 Mo. 377; Chouteau Spring Co. *v.* Harris, 20 Mo. 382.

Pennsylvania.— *In re* Butchers' Beneficial Assoc., 35 Pa. St. 151.

England.— Clark *v.* Le Cren, 9 B. & C. 52, 17 E. C. L. 33; Woolley *v.* Idle, 4 Burr. 1951; Harrison *v.* Godman, 1 Burr. 12; *In re* Ipswich Tailors Case, 11 Coke 53*a*; London *v.* Compton, 7 D. & R. 597, 4 L. J. K. B. O. S. 49, 16 E. C. L. 299.

See also Angell & A. Corp. 184; 1 Bacon Abr. 547; Will Corp. 142.

One of the beginnings of the ancient law on this subject is found in the cases of *In re* Ipswich Tailors Case, 11 Coke 53*a*, where it was held that a by-law of a corporation preventing a member from working at his trade of tailoring who had not served an apprenticeship of seven years is void. The case is set out at length in 1 Thompson Corp. § 1029. *Compare* Silk Throusters *v.* Fremantee, 2 Keb. 309, where it was held that a by-law providing that no man should work to exceed one hundred and sixty spindles who was not an assistant, and that no man who was an assistant should have more than two hundred and forty spindles, under pain of £3 10s. was not bad.

4. St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462; State *v.* Fisher, 52 Mo. 174; St. Louis *v.* Grone, 46 Mo. 574; Hayes *v.* Appleton, 24 Wis. 542. See also 1 Thompson Corp. § 1028, note 2.

5. See 1 Thompson Corp. § 1028, note 3, citing numerous cases.

6. See the reasoning of Bullitt, J., in Sayre *v.* Louisville Union Benev. Assoc., 1 Duv. (Ky.) 143, 85 Am. Dec. 613. See also Snow *v.* Wheeler, 113 Mass. 179; Carew *v.* Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Bowen *v.* Matheson, 14 Allen (Mass.) 499; Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Reg. *v.* Rowlands, 17 Q. B. 671, 5 Cox C. C. 466, 2 Den. C. C. 364, 16 Jur. 268, 21 L. J. M. C. 81, 79 E. C. L. 671.

The law of this subject is still in a state of formation.— It has been expounded with great clearness and propriety by Chief Judge Parker, of the court of appeals of New York, in Steam Fitters, etc., Nat. Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135. The case of People *v.* Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501, decided under a statute, does not express the modern law.

7. Victor G. Bloede Co. *v.* Bloede, 84 Md. 129, 34 Atl. 1127, 33 L. R. A. 107, 57 Am. St. Rep. 373; Brinkerhoff-Farris Trust, etc., Co. *v.* Home Lumber Co., 118 Mo. 447, 24 S. W. 129 (invalidity of by-law restricting the right of shareholders to convey their

(II) *Forbidding Transfer While Shareholder Is Indebted to Corporation.* If the charter of a banking corporation authorizes its board of directors to make rules regulating the transfer of its shares, a by-law adopted by them forbidding the transfer of stock so long as the owner is indebted to the bank is valid, although inconsistent with the general law of the state governing the transfer of property.[8]

(III) *Restricting or Hampering Mode of Transfer.* A by-law requiring transfers of shares to be made only at the office of the corporation, personally or by attorney, with the consent of the president thereof, has been held contrary to the general law of the state respecting the right to transfer personal property,[9] resulting in the conclusion that a transfer, accompanied with a delivery of the share certificates to the vendee, although not made on the books of the corporation, is valid, not only as between the vendor and vendee, but as against an attaching creditor of the vendor, whose attachment was levied before he or the treasurer of the company had notice of the transfer.[10]

(IV) *Creating Lien Upon Shares.* According to the weight of authority, a by-law creating a lien on the shares of a member for dues owing by him to the corporation is valid and binding,[11] except as against innocent purchasers for value,[12] although this necessarily operates to restrain a transfer of the shares on the books of the corporation until the indebtedness is paid;[13] but it should be

shares to any one until the directors have refused to purchase them or while the shareholders are indebted to the corporation; but see the next paragraph); Kinnan *v.* Sullivan County Club, 26 N. Y. App. Div. 213, 50 N. Y. Suppl. 95; Ireland *v.* Globe Milling Co., 21 R. I. 9, 41 Atl. 258, 79 Am. St. Rep. 769 (holding that the right of a shareholder to transfer his shares cannot be abridged by a by-law providing that he must first offer them to the corporation for a period of thirty days). And see *infra*, VII, D, 1, f, (II).

8. Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388 [*approved* in Spurlock *v.* Pacific R. Co., 61 Mo. 319, and *distinguished* in Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249]. *Compare* Moore *v.* Bank of Commerce, 52 Mo. 377; Chouteau Spring Co. *v.* Harris, 20 Mo. 382.

9. Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

10. Sargent *v.* Essex Mar. R. Corp., 9 Pick. (Mass.) 202; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

11. *Alabama.*— Planters', etc., Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585.

California.— Jennings *v.* State Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233; People *v.* Crockett, 9 Cal. 112.

Connecticut.—Vansands *v.* Middlesex County Bank, 26 Conn. 144.

Iowa.— Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398.

Maine.— Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996.

Mississippi.— Holly Springs Bank *v.* Pinson, 58 Miss. 421, 38 Am. Rep. 330.

Missouri.— Spurlock *v.* Pacific R. Co., 61 Mo. 319; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388.

New Hampshire.— Costello *v.* Portsmouth Brewing Co., 69 N. H. 405, 43 Atl. 640 (by-law reserving lien on shares for shareholder's indebtedness to the corporation not within the prohibition of a statute forbidding restraints upon the free sale of shares); Hill *v.* Pine River Bank, 45 N. H. 300.

New Jersey.— Young *v.* Vough, 23 N. J. Eq. 325.

Rhode Island.— Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

United States.— Knight *v.* Old Nat. Bank, 14 Fed. Cas. No. 7,885, 3 Cliff. 429; Pendergast *v.* Stockton Bank, 19 Fed. Cas. No. 10,918, 2 Sawy. 108.

See 12 Cent. Dig. tit. "Corporations," § 609.

12. *California.*—Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359.

Iowa.— Des Moines Nat. Bank *v.* Warren County Bank, 97 Iowa 204, 66 N. W. 154, holding that failure of a bank to post its by-laws in its principal place of business, as required by statute, defeats its right to enforce such a lien against a purchaser of shares in good faith.

Louisiana.— Pitot *v.* Johnson, 33 La. Ann. 1286.

Michigan.— Bronson Electric Co. *v.* Rheubottom, 122 Mich. 608, 81 N. W. 563.

Missouri.—Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249.

New York.— Driscoll *v.* West Bradley, etc., Mfg. Co., 59 N. Y. 96; Conklin *v.* Oswego Second Nat. Bank, 45 N. Y. 655.

Pennsylvania.—Merchants' Bank *v.* Shouse, 102 Pa. St. 488.

United States.— Bullard *v.* National Eagle Bank, 18 Wall. 589, 21 L. ed. 923; South Bend First Nat. Bank *v.* Lanier, 11 Wall. 369, 20 L. ed. 172.

13. Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996.

understood that there are decisions which deny the right of a corporation to create such liens.[14]

13. Releasing Shareholders From Obligation of Paying For Shares. The assets of a corporation being a trust fund for its creditors, and the indebtedness of shareholders to the corporation for their shares being a part of this trust fund, a by-law which attempts to release shareholders from the obligation incurred by their contract of subscription or by their knowing acquisition of shares which have not been fully paid up, by allowing them to pay a percentage of what is due in respect of their shares and to forfeit their shares and be discharged from the obligation of paying the remainder, is void as to creditors of the corporation.[15]

14. Restricting Right to Sue in Courts. By-laws restricting the right to sue in the courts are generally void;[16] and hence a by-law of an insurance company providing that any suit on a policy must be brought in a certain county is not binding on the assured,[17] although by-laws in the nature of statutes of limitation, prescribing the time within which suits must be brought, are upheld where the time is not unreasonably short.[18]

14. That a corporation is not, under the Missouri statute providing that the stock of any company formed under the act shall be personal estate and shall be "transferable in the manner prescribed by the by-laws of the company," authorized to pass by-laws reserving a lien upon all shares issued or held by any shareholder for the security of any debt due the corporation by him see Atchison County Bank *v.* Durfee, 118 Mo. 431, 24 S. W. 133, holding, however, that such a by-law may be binding upon one who assisted in passing it, and upon a purchaser from him of the shares with notice of the lien.

15. Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273. That a by-law prescribing that any shareholder paying fifty per cent of his shares shall be discharged from all future calls on his subscription except by way of forfeiture is valid even as against creditors, upon his complying with it before dissolution of the corporation, see Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273. See also *infra*, VIII, B, 1 *et seq.*

Ratification by creditor.— What act of a creditor who is also a trustee of the corporation will not be deemed a ratification of such a by-law see Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

16. For the governing principle see Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445, 22 L. ed. 365; Scott *v.* Avery, 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. 303, 4 Wkly. Rep. 746.

On the same principle a custom that a party having a claim due upon contract may not pursue the remedies provided by law to collect it is not a good custom. Spears *v.* Ward, 48 Ind. 541; Manson *v.* Grand Lodge A. O. U. W., 30 Minn. 509, 16 N. W. 395.

17. Nute *v.* Hamilton Mut. Ins. Co., 6 Gray (Mass.) 174.

That a by-law of a municipal corporation prohibiting members from pursuing their legal remedies beyond the jurisdiction of the corporation is void see Ballard *v.* Bennet, 2 Burr. 775; Player *v.* Archer, 2 Sid. 120.

18. Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray (Mass.) 596; Wilson *v.* Ætna Ins. Co., 27 Vt. 99; Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,375, 1 Blatchf. 280.

Applied to what corporations.— The principle of the text is generally applied only with respect to those corporations where property rights are involved. It does not apply to the case of religious societies, fraternal organizations, social clubs, etc., where, generally stated, it is the policy of the law to compel members to settle their grievances before their own corporate judicatories, before resorting to the judicial courts. See on this subject Harrington *v.* Workingmen's Benev. Assoc., 70 Ga. 340; Supreme Council O. of C. F. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Bauer *v.* Samson Lodge K. of P., 102 Ind. 262, 1 N. E. 571; Lafond *v.* Deems, 81 N. Y. 507; Poultney *v.* Bachman, 31 Hun (N. Y.) 49; White *v.* Brownell, 2 Daly (N. Y.) 329.

As illustrating the disinclination of the courts to interfere with the by-laws of private societies organized for ideal purposes whether incorporated or not see the following cases:

Alabama.— Weatherly *v.* Montgomery County Medical, etc., Soc., 76 Ala. 567.

Georgia.— Hussey *v.* Gallagher, 61 Ga. 86; Savannah Cotton Exch. *v.* State, 54 Ga. 668.

Illinois.— People *v.* Chicago Bd. of Trade, 80 Ill. 134.

Maryland.— Osceola Tribe No. 11, I. O. R. M. *v.* Schmidt, 57 Md. 98; Anacosta Tribe No. 12, I. O. R. M. *v.* Murbach, 13 Md. 91, 71 Am. Dec. 625.

Michigan.— People *v.* St. George's Soc., 28 Mich. 261.

New York.— Lafond *v.* Deems, 81 N. Y. 507, 18 Abb. N. Cas. 344 [*reversing* 1 Abb. N. Cas. 318, 52 How. Pr. 41]; Loubat *v.* Le Roy, 15 Abb. N. Cas. 1; Olery *v.* Brown, 51 How. Pr. 92.

Pennsylvania.— Black, etc., Smiths' Soc. *v.* Vandyke, 2 Whart. 309, 30 Am. Dec. 263.

England.— Dawkins *v.* Antrobus, 17 Ch. D. 615, 44 L. T. Rep. N. S. 557, 29 Wkly. Rep. 511.

15. Compelling Members to Submit Disputes to Arbitration. Upon like grounds it has been held that a by-law of an incorporated merchants' exchange which compelled its members to submit their disputes to arbitration is unreasonable and void, since it has the effect of contracting away the right which every person has of seeking redress of grievances in the judicial courts, according to the law of the land.[19]

16. Establishing Quorum of Board of Directors. It seems that in the absence of a provision in the charter, governing statute, or articles of incorporation, it is competent to provide by a by-law what shall constitute a quorum of the board of directors.[20]

17. By-Laws Valid in Part and Void in Part. Like a statute a by-law may be valid in part and void in part, where the good and the bad portions of it are so far disassociated that the good might have been enacted without the bad,[21] but not where the sense is entire.[22]

D. Penalties For Enforcement — 1. By-Laws May Be Enforced by Reasonable Fines and Penalties — a. Rule Stated. In general it may be said that corporations have the power to enforce their by-laws by pecuniary fines, provided the fines are certain and not unreasonable, and do not amount to a forfeiture of property.[23]

b. Cannot Be Enforced by Forfeiture — (I) *Of Property.* An exception to the foregoing rule is that a corporate by-law cannot be enforced by a forfeiture of the property of a defaulting member.[24] A by-law of an incorporated society of tradesmen to the effect that every freeman using or not using said art, mystery, or trade should pay yearly to the company eight shillings, to be paid quarterly, and that every journeyman of the company should pay to the company four

If, however, the by-laws of the society make no provision for a tribunal to decide controversies arising between the society and its members, and a member is injured by the failure of the society to fulfil its contract to pay benefits, he may maintain an action at law against it for a redress of the injury. Dolan *v.* Court Good Samaritan, No. 5,910 A. O. of F., 128 Mass. 437.

19. State *v.* Union Merchants' Exch., 2 Mo. App. 96; Middleton's Case, Dyer 333*a*. Therefore a private agreement to submit to arbitration is revocable. Heath *v.* New York Gold Exch., 7 Abb. Pr. N. S. (N. Y.) 251, 38 How. Pr. (N. Y.) 168. And see Savannah Cotton Exch. *v.* State, 54 Ga. 668.

20. Hoyt *v.* Thompson, 19 N. Y. 207; Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267.

21. Shelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143; Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray (Mass.) 596; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; Cleve *v.* Financial Corp., L. R. 16 Eq. 363, 43 L. J. Ch. 54, 29 L. T. Rep. N. S. 89, 26 Wkly. Rep. 839.

22. London *v.* Salisbury, Comb. 221, per Lord Holt, C. J.

For the same principle with regard to private contracts see Friend *v.* Pettingill, 116 Mass. 515; Haynes *v.* Nice, 100 Mass. 327, 1 Am. Rep. 109; Allen *v.* Leonard, 16 Gray (Mass.) 202; Eastern R. Co. *v.* Benedict, 15 Gray (Mass.) 289; Page *v.* Monks, 5 Gray (Mass.) 492; Rand *v.* Mather, 11 Cush. (Mass.) 1, 59 Am. Dec. 131; Wood *v.* Benson, 2 Cromp. & J. 94, 1 L. J. Exch. 18, 1 Price P. C. 169, 2 Tyrw. 93; Howe *v.* Synge, 15 East 440; Wigg *v.* Shuttleworth, 13 East 87; Gaskell *v.* King, 11 East 165, 10 Rev. Rep. 462; Kerrison *v.* Cole, 8 East 231; Norton *v.* Simmes, Hob. 18; Australasia Bank *v.* Breillat, 12 Jur. 189, 6 Moore P. C. 152, 13 Eng. Reprint 642; Bishop of Chester *v.* Freeland, Ley 71; Doe *v.* Pitcher, 2 Marsh. 61, 3 M. & S. 407, 6 Taunt. 359, 1 E. C. L. 653; Greenwood *v.* London, 1 Marsh. 292, 5 Taunt. 727, 15 Rev. Rep. 627, 1 E. C. L. 373; Newman *v.* Newman, 4 M. & S. 66, 1 Stark. 101, 16 Rev. Rep. 386, 2 E. C. L. 47; Mouys *v.* Leake, 8 T. R. 411.

For applications of same principle to cases affected by statute of frauds see note in 1 Thompson Corp. pp. 843, 844.

23. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; *In re* Chamberlain of London Case, 5 Coke 62*b*; Bosworth *v.* Budgen, 7 Mod. 459; Leathley *v.* Webster, Sayer 251; Angell & A. Corp. § 360. In *In re* London Case, 8 Coke 121*b*, 127*b*, 3 Leon. 265, a similar doctrine is laid down. "A constitution cannot be made on pain or imprisonment; and the case cited before, of Trin. 41 Eliz. *inter* Waltham and Austen, that a constitution cannot be made on pain of forfeiture of goods; therefore it ought to be on a reasonable pecuniary pain, or not at all." To the same effect see Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441. In Rex *v.* Newdigate, Comb. 10, it was "resolved, That the City of London cannot set a Fine, &c. for Non-performance of a By-law." But this doctrine was overthrown, as above seen, and has never been the law in this country.

24. Kirk *v.* Nowill, 1 T. R. 118, 1 Rev. Rep. 160. *Compare* Stuyvesant *v.* New York, 7 Cow. (N. Y.) 588; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462; New York *v.* Ordrenan, 12 Johns. (N. Y.) 122.

shillings, to be paid quarterly, and that every person refusing so to pay should forfeit twice the sum named, has been held bad, inasmuch as it did not appear that any rightful expenditure of the company required such a contribution.[25]

(II) *Of Shares*—(A) *Rule Stated.* On the same principle it is not competent for a corporation, unless the power is expressly given in its charter, to enforce a by-law by the penalty of a forfeiture of the shares of a member.[26] A by-law providing that the shares of a member shall be forfeited to the corporation for his default in the payment of assessments or calls is therefore void.[27] But where the articles of association empower the directors to provide for the cancellation of the shares of a member upon his failure to pay the annual dues imposed upon him, and to make by-laws not inconsistent with law or with the articles of association, the enactment by them of a by-law imposing an annual due upon each shareholder is valid.[28]

(B) *Exception Where Power Expressly Conferred by Charter or Statute.* The above rule does not apply where the corporation has been by charter or statute invested with the power to enforce the payment of assessments or calls upon its shares by a forfeiture of them.[29]

2. Fine or Penalty Must Be Certain. On this subject it has been said "that the penalty must be a sum certain, and not left to the arbitrary assessment of the governing board of the company under the circumstances of the particular case, even though the utmost limit of the same be fixed; for this would be allowing a party to assess his own damages.[30] But in the case of municipal corporations the practice is believed to be universal for the by-law to prescribe, as in the case of a statute, the maximum fine or penalty for its violation, leaving to the police magistrate the discretion to reduce it by assessing a smaller sum, according to the merits of the case; and no legal objection to this practice exists.[31] Nor is there any objection to the application of the same principle in the case of private corporations.[32]

3. Making Corporation Judge in Its Own Case. Nor is it a sound view that vesting in the judicatory of the corporation the power to make such a fine or pen-

25. London, etc., Tobacco Pipe Makers Co. *v.* Woodroffe, 7 B. & C. 838, 14 E. C. L. 374.

Accordingly that a municipal corporation cannot ordain the seizure and sale of a falling warehouse constituting an obstruction in a public river see Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165, per Edmonds, Senator.

An exception to the above statement is found in the power of municipal corporations, when thereto authorized by the legislature, to destroy private property for the purpose of abating nuisances injurious to the public health — a subject with which this article is not concerned. Another exception exists in the case of by-laws of mutual insurance and mutual benefit societies, which provide for a forfeiture of membership and of the right to benefits in case default is made in the payment of assessments for a stated period of time; this condition being good because it derives its force from a mutual consent of the parties and is not *in invitum.* Beadle *v.* Chenango County Mut. Ins. Co., 3 Hill (N. Y.) 161. See also Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

26. That a by-law of a corporation cannot impose a forfeiture of shares of stock or of goods, or of any corporate interest as a penalty for its breach, was held in Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. (N. Y.) 495; Master Stevedores' Assoc. *v.* Walsh, 2 Daly (N. Y.) 1; *In re* Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

27. *In re* Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

28. Omaha Law Library Assoc. *v.* Connell, 55 Nebr. 396, 75 N. W. 837. *Compare infra,* VI, O, 1, a, (v), (c).

29. Cases construing this power where conferred by statute. Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638; Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Jenkins *v.* Union Turnpike Road Co., 1 Cai. Cas. (N. Y.) 86 [*reversing* 1 Cai. (N. Y.) 381].

30. Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441; Wood *v.* Searl, J. Bridgm. 139; Scarning's Case, 3 Leon. 7; Angell & A. Corp. § 360.

31. Huntsville *v.* Phelps, 27 Ala. 55 [*overruling* on this point Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441].

32. Piper *v.* Chappell, 9 Jur. 601, 14 M. & W. 624, 649 [*explaining* Wood *v.* Searl, J. Bridgm. 139]. In the case in J. Bridgman the penalty assessed by the by-law was a sum not exceeding forty shillings, and it was held to be bad; but Baron Parke pointed out, in

alty within the maximum amount prescribed by the by-law has the effect of making the corporation a judge in its own case; since all corporations, not only municipal corporations but also mutual benefit societies, religious societies, merchants' exchanges, social clubs, and many other private corporations and societies must necessarily have the power to enforce, through their constituted judicatories, their valid rules and regulations, subject to the superintendence of the judicial courts.[33]

4. INVALIDITY OF BY-LAWS IMPOSING EXCESSIVE FINES. A by-law imposing an excessive fine for its infraction will be set aside as unreasonable.[34]

5. DERELICTIONS FOR WHICH FINES MAY OR MAY NOT BE IMPOSED. Under the old law, a by-law imposing a fine for refusing to accept a corporate office was valid;[35] and so was a by-law imposing a fine for the non-attendance at corporate meetings.[36] But a by-law of a corporation engaged in the manufacture of dairy products, requiring each shareholder to furnish twenty pounds of milk per day for each share owned by him, and imposing a pecuniary fine for its violation, was held invalid, on the ground that corporations have no right, without express legislative authority, to impose fines for violations of by-laws, for which the shareholder may be sued and amerced in his property.[37]

6. BY-LAWS PRESUMPTIVELY VALID. The presumption of law is that a corporation exercises its powers according to law. Its by-laws are hence presumptively valid, and the burden of overthrowing them is upon the party who asserts their invalidity.[38]

VI. CAPITAL STOCK AND SUBSCRIPTIONS THERETO.

A. Nature of Capital Stock and Shares in General — 1. PROPRIETY AND NECESSITY OF SHARE OWNERSHIP. A corporation aggregate may exist without share ownership even where it is organized for business purposes, in the absence of any prohibition in its charter or governing statute, as where the members agree that, instead of issuing shares their rights in the capital stock shall pass with the corporate property and privileges; and such a corporation is not, like a partnership, dissolved by the death of its original members.[39]

2. DEFINITION OF CAPITAL STOCK. Strictly the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise.[40]

3. DISTINCTION BETWEEN CAPITAL OWNERSHIP AND SHARE OWNERSHIP. Capital and shares are species of property distinct from each other. The capital or capital

Piper *v.* Chappell, 9 Jur. 601, 14 M. & W. 624, that it might have been held bad upon other objections.

Within the meaning of this principle a by-law of a trades-union to the effect that if any member, after an investigation by a committee, should be found guilty of working for less than the price fixed, he should forfeit to the association twenty-five per cent of the amount of such bill as fixed by the association, which penalty might be collected in the name of the corporation by due process of law, was not void for uncertainty. Nor did it denounce a forfeiture, but a pecuniary penalty merely, which was sufficiently certain. Master Stevedores' Assoc. *v.* Walsh, 2 Daly (N. Y.) 1.

33. Huntsville *v.* Phelps, 27 Ala. 55.

34. Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186; Lynn *v.* Freemansburg Bldg., etc., Assoc., 117 Pa. St. 1, 11 Atl. 537, 2 Am. St. Rep. 639.

35. London, etc., Tobacco Pipe Makers Co. *v.* Woodroffe, 7 B. & C. 838, 14 E. C. L. 374 [*overruling* Oxford *v.* Wildgoose, 3 Lev. 293]; Rex *v.* Larwood, Carth. 306. See also London City *v.* Vanacker, Carth. 480.

36. London, etc., Tobacco Pipe Makers Co. *v.* Woodroffe, 7 B. & C. 838, 14 E. C. L. 374.

37. Monroe Dairy Assoc. *v.* Webb, 40 N. Y. App. Div. 49, 57 N. Y. Suppl. 572.

38. International Bldg., etc., Assoc. No. 2 *v.* Wall, 153 Ind. 554, 55 N. E. 431.

39. McGinty *v.* Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510. On the other hand in England the articles of a company limited by guaranty, and not having a capital divided into shares, may provide for a division of the interests of the members into transmissible shares. Malleson *v.* General Mineral Patents Syndicate, [1894] 3 Ch. 538, 63 L. J. Ch. 868, 71 L. T. Rep. N. S. 476, 13 Reports 144, 43 Wkly. Rep. 41.

40. Andrews, J., in Christensen *v.* Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429. See also CAPITAL STOCK, 6 Cyc. 348.

stock belongs to the corporation considered as a legal person or entity; the shares are the property of the individual shareholders according to their several holdings, and in the absence of restraint imposed upon them by a valid statute they have the absolute right to dispose of them without any restraint from the corporation.[41]

4. Distinction Between Actual and Potential Stock. Actual stock is stock which has been subscribed for and either paid in, or subject, under legal compulsion, to be paid in; while potential stock is merely the power under the charter or governing statute to acquire a capital stock;[42] and the meaning of the words "capital stock," when employed in statutes, is usually, although not always, stock which has been paid up or which is subject to be paid up.[43]

5. Distinction Between Capital Stock and Tangible Property. The term "capital stock," in an act of incorporation, is said to mean the amount contributed or advanced by the shareholders as members of the company, and does not refer to the tangible property of the corporation.[44]

6. When Capital Deemed to Include Profits and Surplus. The profits and surplus funds of a bank, whenever they may have accrued, are, until separated from the capital by the declaration of a dividend, a part of the stock itself, and will pass with the stock under that name in a transfer or bequest.[45]

7. Distinction Between Shares in Partnership and in Incorporated Company. Sir Nathaniel Lindley, in his work on Partnership,[46] points out this distinction in the following language: "What is meant by the share of a partner is his proportion of the partnership assets after they have all been realized upon and converted into money, and all the debts and liabilities have been paid and discharged.[47] This it is, and this only, which on the death of a partner passes to his represen-

41. Bent *v.* Hart, 10 Mo. App. 143; Union Bank *v.* State, 9 Yerg. (Tenn.) 489; Brightwell *v.* Mallory [*cited* in 10 Yerg. (Tenn.) 196].

This distinction, although subtle, is important. For example a taxation of capital is a different thing from a taxation of the shares in a corporation; different exemptions attend such taxation, both in favor of the corporation and in favor of the shareholder. Van Allen *v.* Assessors, 3 Wall. (U. S.) 573, 18 L. ed. 229.

Shares inappropriately called "stock."— American judges and writers frequently designate shares in a corporation by calling it "stock"; and one court has thought this designation not inappropriate. People *v.* Tax Com'rs, 23 N. Y. 192.

42. Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 1 Biss. 246.

43. Pratt *v.* Munson, 17 Hun (N. Y.) 475; Com. *v.* Lehigh Ave. R. Co., 129 Pa. St. 405, 18 Atl. 414, 498, 24 Wkly. Notes Cas. (Pa.) 530, 5 L. R. A. 367.

44. State *v.* Morristown F. Assoc., 23 N. J. L. 195. See also Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280. *Compare* State *v.* Hannibal, etc., R. Co., 37 Mo. 265, where the court, construing a statute relating to revenue, seems to have lost sight of this distinction.

45. Phelps *v.* Farmers', etc., Bank, 26 Conn. 269.

46. 2 Lindley Partn. (4th ed.) 661, 662.

47. In support of this proposition he cites the following cases, all of which support his text: Darby *v.* Darby, 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Wkly. Rep. 413; Croft *v.* Pyke, 3 P. Wms. 180, 24 Eng. Reprint 1020; Doddington *v.* Hallet, 1 Ves. 497, 27 Eng. Reprint 1165; West *v.* Skip, 1 Ves. 239, 27 Eng. Reprint 1006; Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77; Crawshay *v.* Collins, 15 Ves. Jr. 218, 10 Rev. Rep. 61; Taylor *v.* Fields, 4 Ves. Jr. 396. To which the learned American editor, Dr. Ewell, has added the following citations of American cases which seem equally applicable:

Connecticut.— Filley *v.* Phelps, 18 Conn. 294.

Illinois.— Simpson *v.* Leech, 86 Ill. 286; Carter *v.* Bradley, 58 Ill. 101.

Indiana.— Smith *v.* Evans, 37 Ind. 526.

Iowa.— Mayer *v.* Garber, 53 Iowa 689, 6 N. W. 63.

Louisiana.— Perry *v.* Holloway, 6 La. Ann. 265.

Maine.— Douglas *v.* Winslow, 20 Me. 89.

Maryland.— Hall *v.* Clagett, 48 Md. 223; Conkling *v.* Washington University, 2 Md. Ch. 497.

Minnesota.— Schalck *v.* Harmon, 6 Minn. 265.

New Jersey.— Hill *v.* Beach, 12 N. J. Eq. 31.

New York.— Staats *v.* Bristow, 73 N. Y. 264; Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683.

United States.— *In re* Corbett, 6 Fed. Cas. No. 3,220, 5 Sawy. 206.

See also Taft *v.* Schwamb, 80 Ill. 289; Chase *v.* Scott, 33 Iowa 309.

tatives or to a legatee of his share;[48] which under the old law was considered as *bona notabilia*;[49] which on his bankruptcy passes to his trustee;[50] and which the sheriff can dispose of under a fieri facias issued at the suit of a separate creditor,[51] or under an extent at the suit of the Crown.[52] . . . Speaking generally, a share in a company signifies a definite portion of its capital. When a company is formed, a sum of money is fixed upon and is called its capital; this sum is divided into a number of equal portions; each of these portions is a share, and whether the sum fixed upon is ever all subscribed or not, and whether what is subscribed is employed profitably or to the contrary, a share retains its original meaning. A share in a company, like a share in a partnership, is in truth a definite portion of a joint estate after it has been turned into money and applied, as far as may be necessary, in payment of the joint debts." [53]

8. CAPITAL STOCK LIABILITY OF CORPORATION AND NOT DEBT OF SHAREHOLDERS TO CORPORATION. Capital stock which has been paid up is a liability of the corporation to the shareholder; since on winding up the shareholder is entitled to his ratable share in the distribution of the assets of the corporation after the claims of its creditors have been satisfied, for which reason if a shareholder sells his shares while the corporation is insolvent, neither the corporation nor its legal representative can maintain an action against the shareholder for the money which he has received for them.[54]

9. SHARES OF STOCK ARE PERSONAL PROPERTY. Contrary to early opinion,[55] it is now generally agreed that shares of stock in corporations are personal property,

48. Citing Farquhar *v.* Hadden, L. R. 7 Ch. 1, 41 L. J. Ch. 260, 25 L. T. Rep. N. S. 717.

49. Citing Atty.-Gen. *v.* Higgins, 2 H. & N. 339, 26 L. J. Exch. 403; Ekins *v.* Brown, 1 Spinks 400.

50. Citing Smith *v.* Stokes, 1 East 363.

51. *Alabama.*—Wilson *v.* Strobach, 59 Ala. 488.

California.— Jones *v.* Thompson, 12 Cal. 191.

Connecticut.— Filley *v.* Phelps, 18 Conn. 294; Witter *v.* Richards, 10 Conn. 37; Brewster *v.* Hammet, 4 Conn. 540.

Illinois.— White *v.* Jones, 38 Ill. 159; James *v.* Stratton, 32 Ill. 202; Newhall *v.* Buckingham, 14 Ill. 405.

Louisiana.— Choppin *v.* Wilson, 27 La. Ann. 444; Marston *v.* Dewberry, 21 La. Ann. 518; Thomas *v.* Lusk, 13 La. Ann. 277; Lee *v.* Bullard, 3 La. Ann. 462; Nelson *v.* Conner, 3 La. Ann. 456.

Maryland.— People's Bank *v.* Shryock, 48 Md. 427, 30 Am. Rep. 476.

Massachusetts.— Fisk *v.* Herrick, 6 Mass. 271; Pierce *v.* Jackson, 6 Mass. 242.

Mississippi.— Williams *v.* Gage, 49 Miss. 777; Sitler *v.* Walker, Freem. 77.

Missouri.— Wiles *v.* Maddox, 26 Mo. 77.

New Hampshire.— Dow *v.* Sayward, 12 N. H. 271, 14 N. H. 9; Gibson *v.* Stevens, 7 N. H. 352; Tappan *v.* Blaisdell, 5 N. H. 190.

New York.— Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Phillips *v.* Cook, 24 Wend. 389.

Ohio.— Nixon *v.* Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Place *v.* Sweetzer, 16 Ohio 142.

Pennsylvania.— Morgan *v.* Watmough, 5 Whart. 125; Knox *v.* Summers, 4 Yeates 477; McCarty *v.* Emlen, 2 Yeates 190.

South Carolina.— Knox *v.* Schepler, 2 Hill 595.

Tennessee.—Saunders *v.* Bartlett, 12 Heisk. 316; White *v.* Dougherty, Mart. & Y. 308, 17 Am. Dec. 802.

Texas.— Weaver *v.* Ashcroft, 50 Tex. 427.

United States.—Lyndon *v.* Gorham, 15 Fed. Cas. No. 8,640, 1 Gall. 367; Merrill *v.* Rinker, 17 Fed. Cas. No. 9,471, Baldw. 528; U. S. *v.* Williams, 28 Fed. Cas. No. 16,719, 4 McLean 236.

England.— Holmes *v.* Mentz, 4 A. & E. 127, 4 Dowl. P. C. 300, 1 Hurl. & W. 608, 5 L. J. K. B. 62, 5 N. & M. 563, 31 E. C. L. 74; Johnson *v.* Evans, 1 D. & L. 935, 13 L. J. C. P. 117, 7 M. & G. 240, 7 Scott N. R. 1035, 49 E. C. L. 240; Matter of Wait, 1 Jac. & W. 605; Skipp *v.* Harwood, 2 Swanst. 586.

52. Citing Spears *v.* Murray, 6 Cl. & F. 180, 7 Eng. Reprint 665; Rex *v.* Hodge, 12 Price 537; Rex *v.* Pock, 2 Price 198; Rex *v.* Sanderson, Wightw. 50, 12 Rev. Rep. 713.

53. Citing Sparling *v.* Parker, 9 Beav. 450, 10 Jur. 448; Watson *v.* Spratley, 2 C. L. R. 1434, 10 Exch. 222, 24 L. J. Exch. 53, 2 Wkly. Rep. 627.

As to nature of share ownership in unincorporated joint-stock companies under Scottish law see Dove *v.* Young, 7 Macph. 304.

54. Bent *v.* Hart, 73 Mo. 641 [*affirming* 10 Mo. App. 143].

55. Welles *v.* Cowles, 2 Conn. 567, 4 Conn. 182, 10 Am. Dec. 115; Copeland *v.* Copeland, 7 Bush (Ky.) 349; Price *v.* Price, 6 Dana (Ky.) 107; Meason's Estate, 4 Watts (Pa.) 341; Townsend *v.* Ash, 3 Atk. 336, 26 Eng. Reprint 995; Vincent *v.* Stansfeld, 4 Bro. Ch. 353, 2 Ves. Jr. 226, 29 Eng. Reprint 931; Rex *v.* Chipping-Norton, 5 East 239, Drybutter *v.* Bartholomew, 2 P. Wms. 127, 24

whether they are declared to be such by statute or not, and whether the property of the corporation itself is real or personal.[56]

Eng. Reprint 668; Buckeridge *v.* Ingram, 2 Ves. Jr. 652.

56. *California.*— Tregear *v.* Etiwanda Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. Rep. 245.

Georgia.— Southwestern R. Co. *v.* Thomason, 40 Ga. 408.

Indiana.— Seward *v.* Rising Sun, 79 Ind. 351.

Iowa.— Allen *v.* Pegram, 16 Iowa 163.

Massachusetts.—Tippets *v.* Walker, 4 Mass. 595, per Parsons, C. J.

Ohio.— Johns *v.* Johns, 1 Ohio St. 350.

Rhode Island.— Arnold *v.* Ruggles, 1 R. I. 165.

England.— Russell *v.* Temple, 3 Dane Abr. 108; Edwards *v.* Hall, 6 De G. M. & G. 74, 1 Jur. N. S. 1189, 25 L. J. Ch. 82, 4 Wkly. Rep. 111, 55 Eng. Ch. 58 [*following* Myers *v.* Perigal, 2 De G. M. & G. 599, 17 Jur. 145, 22 L. J. Ch. 431, 1 Wkly. Rep. 57, 51 Eng. Ch. 468 (where the same was held with respect of shares of an unincorporated joint-stock company), and *overruling* Ware *v.* Cumberlege, 20 Beav. 503, 1 Jur. N. S. 745, 3 Wkly. Rep. 437, 24 L. J. Ch. 630]; Bradley *v.* Holdsworth, 1 H. & H. 156, 7 L. J. Exch. 153, 3 M. & W. 422; Bligh *v.* Brent, 6 L. J. Exch. Eq. 58, 2 Y. & C. Exch. 268; Duncuft *v.* Albrecht, 12 Sim. 189, 35 Eng. Ch. 162.

See 12 Cent. Dig. tit. "Corporations," § 166.

Subject to law of domicile of owner.— Shares of stock in a corporation, being personal property, are for most, although not for all, purposes, and especially not for the purpose of taxation, governed by the law of the domicile of the owner of the shares. Lowndes *v.* Cooch, 87 Md. 478, 39 Atl. 1045, 40 L. R. A. 380.

Shares in unincorporated joint-stock companies are also personal property.— It is now settled in England that shares in joint-stock companies, whether incorporated or unincorporated, are, like shares in a partnership, personal property. Thus it has been held that shares in railroad companies (Linley *v.* Taylor, 1 Giff. 67 [*reversed* in 2 De G. F. & J. 84, 28 L. J. Ch. 686, 7 Wkly. Rep. 639, 63 Eng. Ch. 66]), canal companies (Edwards *v.* Hall, 6 De G. M. & G. 74, 1 Jur. N. S. 1189, 25 L. J. Ch. 82, 4 Wkly. Rep. 111, 55 Eng. Ch. 58), cost-book mining companies (Hayter *v.* Tucker, 4 Kay & J. 243), foreign mining companies (Baker *v.* Sutton, 1 Keen 224, 5 L. J. Ch. 264, 15 Eng. Ch. 224), and insurance companies (March *v.* Atty.-Gen., 5 Beav. 433, 6 Jur. 82, 12 L. J. Ch. 31) are not interests in land within the mortmain acts. So it has been held that shares in water-works companies (Bligh *v.* Brent, 6 L. J. Exch. 58, 2 Y. & C. Exch. 268; Weekley *v.* Weekley, 2 Y. & C. Exch. 281 note), cost-book mining companies (Walker *v.* Bartlett, 18 C. B. 845, 2 Jur. N. S. 643, 25 L. J. C. P. 263, 4 Wkly. Rep. 681, 86 E. C. L. 845; Powell *v.* Jessopp, 18 C. B. 336, 25 L. J. C. P. 199, 4 Wkly. Rep. 465, 86 E. C. L. 336; Watson *v.* Spratley, 2 C. L. R. 1434, 10 Exch. 222, 24 L. J. Exch. 53, 2 Wkly. Rep. 627. *Contra* and *overruled* Boyce *v.* Greene, Batty 608; Vice *v.* Anson, 7 B. & C. 409, 14 E. C. L. 187, 3 C. & P. 19, 14 E. C. L. 429, 6 L. J. K. B. O. S. 24, 1 M. & R. 183), banking companies (Humble *v.* Mitchell, 11 A. & E. 205, 9 L. J. Q. B. 29, 3 P. & D. 141, 2 R. & Can. Cas. 70, 39 E. C. L. 130), and railway companies (Bradley *v.* Holdsworth, 1 H. & H. 156, 7 L. J. Exch. 153, 3 M. & W. 422; Duncuft *v.* Albrecht, 12 Sim. 189, 35 Eng. Ch. 162) are not interests in land within the meaning of the fourth section of the statute of frauds.

Shares of stock not goods, wares, and merchandise.— Neither are shares of joint-stock companies goods, wares, or merchandise within the seventeenth section of the English statute of frauds. Watson *v.* Spratley, 2 C. L. R. 1434, 10 Exch. 222, 24 L. J. Exch. 53, 2 Wkly. Rep. 627. See Colt *v.* Nettervill, 2 P. Wms. 304, 24 Eng. Reprint 741. It has been so held with respect of banking companies (Humble *v.* Mitchell, 11 A. & E. 205, 9 L. J. Q. B. 29, 3 P. & D. 141, 2 R. & Can. Cas. 70, 39 E. C. L. 130), railway companies (Bowlby *v.* Bell, 3 C. B. 284, 16 L. J. C. P. 18, 54 E. C. L. 284; Tempest *v.* Kilner, 2 C. B. 300, 3 D. & L. 407, 15 L. J. C. P. 10, 52 E. C. L. 300; Duncuft *v.* Albrecht, 12 Sim. 189, 35 Eng. Ch. 162), and stock-book mining companies (Watson *v.* Spratley, 2 C. L. R. 1434, 10 Exch. 222, 24 L. J. Exch. 53, 2 Wkly. Rep. 627). Nor are such shares within the exception in the English stamp acts, exempting agreements relating to the sale of goods, wares, and merchandise from stamp duty. Knight *v.* Barber, 2 C. & K. 333, 10 Jur. 929, 16 L. J. Exch. 18, 1 M. & W. 66, 61 E. C. L. 333. Modern American cases are met with which hold that shares of corporate stock are goods, wares, and merchandise, within the meaning of the statute of frauds, so as to require a note or memorandum in writing to validate a sale thereof. Bernhardt *v.* Walls, 29 Mo. App. 206; Fine *v.* Hornsby, 2 Mo. App. 61. But this does not of course impugn the well-known rule that shares may be transferred by the delivery of the share certificate, which is the symbol of share ownership. See *infra*, VII, D, 3, a, (I), (C).

Not "moneys."— Shares of stock have been held not to be "moneys" within the meaning of a clause in a will creating a specific bequest. Collins *v.* Collins, L. R. 12 Eq. 455, 40 L. J. Ch. 541, 24 L. T. Rep. N. S. 780, 19 Wkly. Rep. 971.

Are choses in action.— Judicial opinion has characterized corporate shares as choses in action.

Alabama.— Planters', etc., Bank *v.* Leavens, 4 Ala. 753.

B. Power to Create a Share Capital. The power of an association of individuals to create a share capital, to divide their interests in the common venture into shares, and to distribute those shares among themselves in proportion to their several interests is not a franchise, but exists as of common right; and therefore numerous unincorporated joint-stock companies exist, both in America and in England, the members of which are liable for the debts of the concern as partners. But an exemption from this liability as partners is in the nature of a franchise, and does not exist unless it has been conferred by the state. The powers granted to corporations are strictly construed in favor of the state and against the grantees; and therefore it is supposed that incorporated companies cannot create a capital stock as individuals can, without the sanction of the legislature.[57]

C. Power of Corporations With Respect to Unissued Shares — 1. Power of Corporation to Mortgage or Pledge — a. Unissued Shares. The power of a corporation to mortgage or pledge its unissued shares, except where the power has been expressly granted by statute, has been denied[58] and affirmed.[59] But it has been held that a corporation, although expressly prohibited by charter or statute from issuing its shares for less than par, will be estopped to deny the validity of a pledge of its unissued shares, after having reaped the benefit of the transaction.[60] A charter power to pledge, by mortgage or otherwise, the capital stock of a particular corporation has been construed as referring to actual and not to potential stock.[61]

b. Uncalled Capital. This question has been several times considered in England, as stated in the note.[62] The true rule seems to be that while a valid assessment and call upon unpaid shares may be the subject of an assignment, because it then becomes a debt presently due and payable,[63] yet, unless a share subscription in terms imposes an absolute promise to pay the amount subscribed without any call, it is not the subject of a pledge or assignment, because the effect of such an assignment would be to delegate to a third person the discretion of making an assessment, which the law has vested in the directors.[64] But this view has not always prevailed. A deed of trust made by an insolvent corporation, expressly assigning its unpaid share subscriptions, but giving no power to make calls for the unpaid balances due thereon has been upheld; and it has been further held that in such a case upon the failure of the president and directors to make

Massachusetts.— Stanwood *v.* Stanwood, 17 Mass. 57.

New York.— Denton *v.* Livingston, 9 Johns. 96, 6 Am. Dec. 264.

Pennsylvania.— Slaymaker *v.* Gettysburg Bank, 10 Pa. St. 373.

Rhode Island.— Arnold *v.* Ruggles, 1 R. I. 165.

57. It has been so held with respect to a corporation created for the purpose of establishing a cemetery, nor does the power in the act of incorporation "generally [to] do all such other matters and things as are incident to a corporation" confer upon such a corporation this power. Cooke *v.* Marshall, 196 Pa. St. 200, 46 Atl. 447 [*affirming* 191 Pa. St. 315, 43 Atl. 314, 44 Wkly. Notes Cas. (Pa.) 159].

58. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237, opinion by Rhodes, J. *Compare* Combination Trust Co. *v.* Weed, 2 Fed. 24.

59. Union Sav. Assoc. *v.* Seligman, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776 [*reversing* 11 Mo. App. 142, *overruling* Griswold *v.* Seligman, 72 Mo. 110, and *following* Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359 (Hough, C. J., and Sherwood, J., dissenting)]; Guest *v.* Worcester, etc., R. Co., L. R. 4 C. P. 9, 38 L. J. C. P. 23; Ashworth *v.* Bristol, etc., R. Co., 15 L. T. Rep. N. S. 561.

60. Peterborough R. Co. *v.* Nashua, etc., R. Co., 59 N. H. 385; Gasquet *v.* Crescent City Brewing Co., 49 Fed. 496.

61. Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 1 Biss. 246.

62. This power has been affirmed in respect of a company organized under the Companies Act 1862 (*In re* Pyle Works, 44 Ch. D. 534, 59 L. J. Ch. 489, 62 L. T. Rep. N. S. 887, 20 Neg. C. R. 83, 38 Wkly. Rep. 674), under articles of association broad enough to confer it (Newton *v.* Anglo-Australian, etc., Invest. Co., [1895] A. C. 244, 64 L. J. P. C. 57); but has more recently been denied under section 5 of the Companies Act 1879 (*In re* Mayfair Property Co., [1898] 2 Ch. 28, 67 L. J. Ch. 337, 78 L. T. Rep. N. S. 302, 5 Manson 126, 46 Wkly. Rep. 465 [*affirming* 77 L. T. Rep. N. S. 652]).

63. Morris *v.* Cheney, 51 Ill. 451. See also Smith *v.* Hollett, 34 Ind. 519.

64. Shultz *v.* Sutter, 3 Mo. App. 137.

the proper assessment a court of chancery will supply the remedy by making them.[65]

c. Voting Power of Its Shares. It has been held that a corporation has the power to pledge the voting power of its unissued shares, as additional security for the payment of its bonds, and that such a pledge is not opposed to a sound public policy.[66]

2. Power to Create Preferred Stock and Issue Preferred Shares — a. In General. In organizing a corporation, the adventurers may classify its stock and provide for a preference of one class over another in respect of both capital and dividends, in the absence of a prohibition in the charter or governing statute.[67] But where the common shares have been subscribed and the rights of the common shareholders have become fixed, then, in the absence of a preëxisting statute authorizing it, preferred stock cannot be issued, so as to prejudice the common shareholders or to postpone their right to dividends, without unanimous consent.[68] Although the charter or governing statute may not confer in express terms the power to issue preferred stock, yet where it has been issued by unanimous consent, that is, by the original authority or consent of the shareholders, or where, without such original authority or consent, its issue has been ratified by them by long acquiescence or otherwise, it will be deemed a valid issue.[69] Where a corporation whose stock is divided into common and preferred shares is authorized by statute to increase its capital, and the statute is silent as to the class to which the increased stock shall belong, it will be presumed that the legislature meant that it was to be common stock.[70] In England a limited company, having no authority under its memorandum or articles of association to create any preference between different classes of shares may, by special resolution, alter its articles so as to authorize the issue of preferred shares by way of an increase of capital.[71]

65. Vanderwerken *v.* Glenn, 85 Va. 9, 6 S. E. 806.

66. U. S. Water Works Co. *v.* Omaha Water Co., 21 Misc. (N. Y.) 594, 48 N. Y. Suppl. 817 [*affirmed* in 20 N. Y. App. Div. 630, 52 N. Y. Suppl. 1151]. *Compare, supra,* IV, F, 10, a.

67. McGregor *v.* Home Ins. Co., 33 N. J. Eq. 181; Gordon *v.* Richmond, etc., R. Co., 78 Va. 501; Toledo R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155 [*rehearing denied* in 96 Fed. 784, 37 C. C. A. 587 (*modifying* 82 Fed. 642, 86 Fed. 929)]; Hamlin *v.* Toledo, etc., R. Co., 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; *In re* Bangor, etc., State, etc., Co., L. R. 20 Eq. 59, 32 L. T. Rep. N. S. 339, 23 Wkly. Rep. 785. Instance under which it was held that a clause in certificates of preferred shares giving the shares a lien upon the railroad would not be stricken out after an acquiescence of ten years. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155.

As to the right to issue preferred stock see Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362; Campbell *v.* American Zylonite Co., 122 N. Y. 455, 25 N. E. 853, 34 N. Y. St. 38, 11 L. R. A. 596; Eichbaum *v.* Chicago Grain Elevators, [1891] 3 Ch. 459, 61 L. J. Ch. 28, 40 Wkly. Rep. 153; *In re* Dicido Pier Co., [1891] 2 Ch. 354, 64 L. T. Rep. N. S. 695, 39 Wkly. Rep. 486; *In re* Bridgewater Nav. Co., 39 Ch. Div. 1, 57 L. J. Ch. 809, 58 L. T. Rep. N. S. 476, 36 Wkly. Rep. 769.

68. Ernst *v.* Elmira Municipal Improv. Co., 24 Misc. (N. Y.) 583, 54 N. Y. Suppl. 116. It has been held that a corporation, the promoters of which have voluntarily surrendered their right to preferred stock under an agreement with the corporation, without any arrangement for other stock or compensation, will not be required to turn over ordinary stock as an equivalent of the preferred stock. Dillon *v.* Commercial Cable Co., 87 Hun (N. Y.) 444, 34 N. Y. Suppl. 370, 68 N. Y. St. 449.

Nature of preferred stock see *infra,* VII, C. For the nature of preferred stock under a particular statute of Maryland, creating a lien in favor of the holders of preferred shares on the company's franchises and property, with priority over subsequent mortgages and other encumbrances, see Heller *v.* National Mar. Bank, 89 Md. 602, 43 Atl. 800, 73 Am. St. Rep. 212, 45 L. R. A. 438.

69. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

70. Jones *v.* Concord, etc., R. Co., 67 N. H. 234, 30 Atl. 614, 68 Am. St. Rep. 650.

71. Andrews *v.* Gas Meter Co., [1897] 1 Ch. 361, 66 L. J. Ch. 246, 76 L. T. Rep. N. S. 132, 45 Wkly. Rep. 321 [*overruling* Hutton *v.* Scarborough Cliff Hotel Co., 2 Dr. & Sm. 521, 11 Jur. N. S. 849, 13 L. T. Rep. N. S. 57, 13 Wkly. Rep. 1059]. This decision seems to overrule Andrews *v.* Gas Meter Co., 75 L. T. Rep. N. S. 267, and *Re* Hyderabad Co., 3 Manson 242, 75 L. T. Rep. N. S. 23, which follow Hutton *v.* Scarborough Cliff Hotel Co., 2 Dr. & Sm. 521, 11 Jur. N. S. 849, 13 L. T.

b. Corporation Cannot Make Its Shares a Lien Upon Its Property Without Statutory Authority. The power to issue preferred shares does not include the power to make such shares a lien upon its property; the true conception of preferred shares being that they merely create a preference in the declaration and payment of dividends out of the income.[72] For the creation of a lien upon the property of the corporation in favor of any one class of its shares there must be a direct statutory authorization. Nor can an agreement between the shareholders and a subscriber to other shares of the corporation make such shares a lien on its property, as against any parties in interest except the shareholders themselves. Such an agreement does not affect the rights of bondholders or general creditors, without notice of it at the time when their relations to the corporation were assumed.[73]

D. Distribution of Share Capital — 1. Principles Governing Distribution. In the first place, it is to be observed that a joint-stock corporation may have a legal existence before any shares have been issued and distributed, as where there is no statute making the incorporation of the company dependent upon the subscription of its stock and the payment thereof; but there is a proviso that the corporate existence shall date from the filing of its charter in the office of the secretary of state, and by another statute the charter so filed is required to state only the amount of the capital and the number of shares into which it is divided.[74] In the second place, after the corporation has been regularly organized, it acquires an inherent right to admit new members; and where a corporation is organized under a charter granted to certain individuals "and their associates," the right, after an organization has been effected, to admit new members is not confined to the original charter members, but extends also to those who become members by participating in the organization.[75] In the third place, where the corporation possesses a joint stock, and a part of its organized capital stock remains untaken at the time of its incorporation, the right to issue the remainder of it is a corporate franchise, held by the corporation in trust for the corporators, and it must be disposed of for the equal benefit of all. And it has been held that if the directors dispose of it to the corporators unequally, and in violation of the rights of any, each corporator injured by their act may have his remedy in assumpsit against the corporation.[76] And where a board of directors was elected by means of votes represented by shares so illegally issued, an injunction was granted restraining them from taking possession of the corporate property or assuming to act as directors.[77] Moreover it has been held that a resolution of the directors, carried into effect, distributing such shares of stock among all the shareholders who are not in arrears on the shares already taken by them, and excluding those who are, is an unlawful imposition of a penalty on those in arrears, and a violation of the equal rights of a corporator who was ready and offered to take his proportion of the new shares.[78] But where the original corporators, to whom the charter is granted, stand ready to subscribe for more shares than the amount authorized, and in the scramble for precedence the total amount is subscribed for by some of them while others are ignored, the latter, according to one doubtful holding, have no remedy against the company, in the absence of

Rep. N. S. 57, 13 Wkly. Rep. 1059. A provision in certificates of "preferred, non-voting capital stock" that if the holder fails to avail himself of the privilege of converting it into common stock, within a specified time, it shall "become converted 4 per cent. non-cumulative stock" does not show that it was not preferred stock before the rejection of the option. Hamlin *v.* Toledo, etc., R. Co., 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826.

72. 2 Thompson Corp. § 2262.

73. Continental Trust Co. *v.* Toledo, etc., R. Co., 72 Fed. 92.

74. Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101.

75. State *v.* Sibley, 25 Minn. 387.

76. Reese *v.* Montgomery County Bank, 31 Pa. St. 78, 72 Am. Dec. 726.

77. Humboldt Driving Park Assoc. *v.* Stevens, 34 Nebr. 528, 52 N. W. 568, 33 Am. St. Rep. 654.

78. Reese *v.* Montgomery County Bank, 31 Pa. St. 78, 72 Am. Dec. 726.

fraud or bad faith.[79] But it would seem to be in its very nature illegal and oppressive for some of the coadventurers to whom the franchise has been granted to shut out the others from participating in the enterprise, after the legislative grant has been procured.[80]

2. RIGHTS IN DISTRIBUTION. No discrimination can be made between *bona fide* purchasers of the shares of a corporation which are on sale in open market as to the right to perfect their title to the shares, when no discretionary power is reserved to that effect.[81] If for any valid reason the corporation cannot issue shares which have been subscribed for, so that the subscriber cannot have a decree for specific performance, the subscriber may have alternative relief by way of damages for the value of the shares and the dividends which they have earned.[82] A purchaser of stock in a corporation to be formed is not restricted, upon failure to issue the shares after payment therefor because the corporation is enjoined against it, to an action for damages for breach of the contract; but he may, after the expiration of a reasonable time, demand and recover back the money paid with interest.[83] One who contracts with the officers of a corporation in their individual capacity to do work for the corporation, in payment for which he is to receive a specified amount of the corporate stock, must look solely to such officers, and cannot compel the corporation to issue such shares.[84] A subscription for shares payable to a railroad company, "its associates, successors or assigns," entitles the subscriber, in case of a valid sale by such company of its property and franchises to another company, upon payment of the subscription, to receive shares in the successor company.[85] A corporation organized for the purpose of affording terminal and depot facilities to the railroads entering a city and required by its charter to refrain from discrimination, whose stock is held by the railroads availing themselves of its privileges, will be required to issue a proportionate share of its stock at par to a new railroad company desiring to enter the city, and not at a price proportionate to the enhanced value of its property and franchises; and in case it has not sufficient unissued shares, the several shareholders will be required to surrender or sell a portion of the shares held by them.[86] A corporation may authorize its president to make a contract in the name of the corporation to pay an agreed commission for selling its shares, or may ratify it after he has

79. Brown *v.* Florida Southern R. Co., 19 Fla. 472.

80. In Massachusetts a shareholder who has taken his proportion of new shares of stock in a corporation, issued under Mass. Stat. (1877), c. 230, § 3, is deprived of any right to a premium obtained on a sale thereof pursuant to a vote of the shareholders, unless the vote in terms so provides. Mason *v.* Davol Mills, 132 Mass. 76.

81. Rice *v.* Rockefeller, 134 N. Y. 174, 31 N. E. 907, 47 N. Y. St. 542, 29 Abb. N. Cas. (N. Y.) 120, 30 Am. St. Rep. 658, 17 L. R. A. 237.

82 Birmingham Nat. Bank *v.* Roden, 97 Ala. 404, 11 So. 883.

83. Rose *v.* Foord, 96 Cal. 152, 30 Pac. 1114.

84. Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428.

85. Chattanooga, etc., R. Co. *v.* Warthen, 98 Ga. 599, 25 S. E. 988.

86. St. Paul Union Depot Co. *v.* Minnesota, etc., R. Co., 47 Minn. 154, 49 N. W. 646, 13 L. R. A. 415.

As to corporations formed to afford terminal facilities to railway companies see further Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559; King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332, 15 N. Y. St. 996.

One whose name is included in a corporate charter without his authority, if to be regarded as a member of the company, must be allowed an opportunity of saying how many shares he will take. Halifax Carette Co. *v.* Moir, 28 Nova Scotia 45.

Circumstances under which a new company succeeding to the property and business of an old one will be compelled to issue shares to a member of one of the constituent companies, notwithstanding his indebtedness to other shareholders therein. Anthony *v.* American Glucose Co., 146 N. Y. 407, 41 N. E. 23.

No obligation to issue stock certificate delivered to the treasurer of the corporation upon a contract that the same should be delivered by him to certain contractors upon their completing certain work, when they fail to complete the work and become fugitives from justice; and such shares will be ordered to be surrendered up and canceled. Equity Gas Light Co. *v.* McKeige, 19 N. Y. Suppl. 914, 47 N. Y. St. 364 [*affirmed* in 139 N. Y. 237, 34 N. E. 898, 54 N. Y. St. 550].

Circumstances under which a corporation was adjudged to issue its shares in propor-

made such a contract.[87] Where subscriptions are obtained for more shares of stock than the corporation is authorized to issue, and no allotment of the stock is ever made, the subscribers are not liable for an assessment levied by the directors of the company on the shareholders; since, no apportionment having been made, the subscribers never became shareholders in the corporation.[88] The failure of a shareholder to attend the meetings of the shareholders or of the directors and claim his shares does not estop him from thereafter asserting his claim, and the statute of limitations, if it runs at all in favor of a corporation against the claim of a person to shares in a corporation, does not begin to run until the shareholder is notified by some act that his right to the stock is disputed.[89]

E. Illegal and Void Shares — 1. Legal Requisites of Valid Issue. It is essential to the validity of corporate stock that the conditions of its issue should substantially conform to the requirements of the charter or governing statutes.[90]

2. When Validity of Shares Not Subject to Question. The validity of shares which have been dealt in for thirty years as valid, and upon which annual dividends have been paid without any intimation that their validity will be challenged, cannot be questioned thereafter by reason of laches.[91] A contention that the capital stock or business feature of a certain religious corporation is of no effect, and may be disregarded because foreign to the object of its charter and contrary to the state constitution and laws governing such corporations, can be raised only by direct proceedings by the state, and not in a proceeding involving the validity of certain transfers of corporate shares by a shareholder to the corporation, alleged to have had the effect of defrauding the shareholder's creditors.[92]

tion to the amount subscribed by different subscribers, there not being enough to go around. Clark County *v.* Winchester, etc., R. Co., 43 S. W. 716, 19 Ky. L. Rep. 1435.

Certificate in one corporation offered in lieu of certificate in another.— That a certificate of stock signed by one elected president of a Connecticut corporation, the charter of which provides for succession to the functions of a West Virginia corporation previously incorporated, but not for amalgamation with it, is not a certificate of the latter corporation which one who has contracted for such a certificate can be compelled to take see Craig Silver Co. *v.* Smith, 163 Mass. 262, 39 N. E. 1116.

87. Patterson *v.* Ongley Electric Co., 87 Hun (N. Y.) 462, 34 N. Y. Suppl. 209, 68 N. Y. St. 58.

88. Bristol Creamery Co. *v.* Tilton, 70 N. H. 239, 47 Atl. 591.

89. Owingsville, etc., Turnpike Road Co. *v.* Bondurant, 54 S. W. 718, 21 Ky. L. Rep. 1219.

90. Thus, under a provision in the charter "that the president and directors shall cause a written or printed certificate to be given to each subscriber for every share by him subscribed, signed by the president and directors, and countersigned by the treasurer; which certificates shall be transferable by an assignment made thereof, on the books of the company, by the owner in person, or by an attorney in fact," the court held that certificates signed by the president and countersigned by the treasurer, and delivered to one who never subscribed for such stock, without consideration, and without being entered on the books, were void; and when afterward transferred, not on the books of the company, to one for a valuable consideration, still conveyed no stock, as they were issued by the president alone, and to one who was never a subscriber, and therefore issued without authority. Holbrook *v.* Fauquier, etc., Turnpike Co., 12 Fed. Cas. No. 6,591, 3 Cranch C. C. 425. So an instrument whereby the president and manager of a corporation, as such, agrees to "refund" to a person named a specified sum at one year's notice, and which provides that "this money shall draw what interest it makes in proportion to all the shares in the institution," is not a certificate of stock, but an obligation of the corporation upon which the holder can maintain an action against a shareholder. Jones *v.* Woolley, 2 Ida. 790, 792, 26 Pac. 120. It has been held that corporate shares, issued to pay for patents to enable the corporation to engage in business in territory outside the limits authorized by the articles of incorporation, without the consent of the shareholders, are void. Kimball *v.* New England Roller Grate Co., 69 N. H. 485, 45 Atl. 253.

For a bill in equity against a corporation to recover for shares gratuitously received by it, which failed to state a cause of action, where it alleged that the shares were received as being paid up, when it stated that their delivery was part consideration for the building of a street railway, see Doak *v.* Stahlman, (Tenn. Ch. App. 1899) 58 S. W. 741.

"Special stock" in Massachusetts.— As to "special stock" under various statutes of Massachusetts see American Tube Works *v.* Boston Mach. Co., 139 Mass. 5, 29 N. E. 63; Williams *v.* Parker, 136 Mass. 204.

91. Foster *v.* Belcher's Sugar Refining Co., 118 Mo. 238, 24 S. W. 63.

92. St. George's Church Soc. *v.* Branch, 120 Mo. 226, 25 S. W. 218.

3. Right of Holder of Invalid or Illegal Shares to Rescind. Where the issue of shares is illegal for the want of power of the company to issue them, where the shares cannot legally exist, the person taking them cannot, by estoppel or otherwise, become a member in respect to them. Hence, being open to repudiation by the corporation itself, or by dissenting shareholders, the person taking them has a right to rescind the contract under which the stock was taken and be restored to his original position. Where a corporation illegally issued stock to a creditor, paid him successive dividends, and failed at two meetings to cure the illegal issue, a notice of rescission by the creditor twenty-seven months after the first issue of stock, offering to return the shares, tendering the dividends, and demanding redelivery of the considerations given by him, was exercised in sufficient time to entitle him to prove his claim against the insolvent estate of the corporation.[93]

4. Liability of Corporation For Overissue of Shares. Where the charter or other governing statute, or the articles of association or other constating instrument, fixes the amount of capital which the corporation may have, and the number or aggregate amount of shares which it may issue, and this amount is filled up by valid issues, any further issues are illegal, and the purchasers do not acquire the rights of shareholders. They cannot compel the corporation to register them or their nominees as shareholders on its books; they cannot vote at corporate elections; they cannot participate in corporate dividends; and they are not liable as shareholders for corporate debts. But on principles elsewhere stated[94] they have an action for damages against the corporation for the wrong thereby done to them.[95]

5. Motive of Valid Issue of Shares Not Examinable. If an issue of its shares by a corporation is valid under the terms of its governing statute, it is plain that the object which the directors or some of them may have in view in selling it will not be judicially inquired into, as where they issue it to enable the sharetaker to vote in a certain manner at a coming election.[96]

F. Status of Shareholders — 1. Shareholders Are Not Tenants in Common or Coöwners of Corporate Property — a. Rule Stated. Shareholders are not tenants in common or coöwners of the property of the corporation in any sense; but the title thereto rests in the legal entity called the corporation.[97]

b. No Execution Against Their Interest. It follows that a shareholder's interest in the property of the corporation cannot be seized and sold under judicial process, as can the interest of a partner or tenant in common,[98] although his shares, considered as distinct property, can be.[99]

2. Shareholders Have No Agency For Corporation, Cannot Act For It, Bind It by Admissions, Etc. — a. Rule Stated. Shareholders of a corporation have not, by the mere fact of being shareholders, any agency for the corporation or any authority to act for it, or to bind it by admissions; nor have they any duty to perform with respect to contracts entered into by it.[1]

93. American Tube Works *v.* Boston Mach. Co., 139 Mass. 5, 29 N. E. 63.

94. See *infra*, VI, K, 5, c, (II), (A).

95. Allen *v.* South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716.

Analogous cases are: Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586; Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Tomkinson *v.* Balkis Consol. Co., [1891] 2 Q. B. 614.

Otherwise where the taking is not a *bona fide* purchase. Farrington *v.* South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 15 Am. St. Rep. 222, 5 L. R. A. 849.

96. State *v.* Smith, 48 Vt. 266.

97. Williamson *v.* Smoot, 7 Mart. (La.) 31, 12 Am. Dec. 494; Spurlock *v.* Missouri Pac. R. Co., 90 Mo. 199, 2 S. W. 219; Burrall *v.* Bushwick R. Co., 75 N. Y. 211; Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

98. Williamson *v.* Smoot, 7 Mart. (La.) 31, 12 Am. Dec. 494.

99. 2 Thompson Corp. § 2765.

1. Fox *v.* Mackay, 125 Cal. 57, 57 Pac. 670; Shay *v.* Tuolumne County Water Co., 6 Cal. 73; McCoy Lime Co. *v.* McCoy, 16 Montg. Co. Rep. (Pa.) 32; Colorado Springs Co. *v.* American Pub. Co., 97 Fed. 843, 38 C. C. A. 433 (this case qualifies the rule with the statement, unless such action is taken at a meeting where all the shareholders are present or are represented).

b. Cannot Convey Corporate Property, Although All Join in Deed. Another consequence of this doctrine is that the shareholders of a corporation cannot convey its property, although all join in the deed, unless through formal action of the corporation they are constituted its agents to that end.[2]

3. Shareholders Not in Trust Relation Toward Corporation — a. Rule Stated. The relation of trustee and *cestui que trust*, of debtor and creditor, or of partners does not exist between the shareholders of an incorporated company and the corporation itself.[3] But the corporation and the individual shareholder may deal with each other at arm's length the same as two strangers may, and a shareholder may contract with his corporation and sue or be sued on his contracts.[4] A shareholder may become a creditor of the corporation by entering into a contract with it;[5] and on the other hand the corporation is regarded as a trustee for the shareholder for the limited purpose of registering a transfer of his shares on the corporate books.[6]

b. May Purchase Corporate Property at Judicial Sale. A mere shareholder may therefore lawfully purchase at a public sale the property of the corporation, provided he does it openly and fairly.[7]

4. Shareholders Not Responsible For Debts or Torts of Corporation. The corporation being in theory of law a person distinct from each and all of its shareholders, neither a shareholder singly, nor all the shareholders collectively, are responsible for the debts of the corporation, unless made so by agreement or by statute,[8] or for the torts of the corporation, in the absence of such active participation as would make them responsible for the torts of an individual.[9]

5. Shareholders Not Bound by Fraudulent Representations of Corporation's Agents. The agent of the corporation is not the agent of the shareholder, and he will not therefore be bound by the fraudulent representations of the former.[10]

6. Shareholders Not in Privity With Each Other. Nor are shareholders in privity with each other; nor do they, in the absence of special engagements, occupy any trust relation toward each other; but they may deal with each other at arm's

He cannot therefore release a debt due to the corporation. Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372. *Compare* Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. Suppl. 836, 21 N. Y. St. 439.

That there is no distinction in this respect between joint-stock corporations and unincorporated joint-stock companies see Watson *v.* Spratley, 2 C. L. R. 1434, 10 Exch. 222, 24 L. J. Exch. 53, 2 Wkly. Rep. 627. See also *supra*, VI, A, 9.

2. Wheelock *v.* Moulton, 15 Vt. 519; De la Vergne Refrigerating Mach. Co. *v.* German Sav. Inst., 175 U. S. 40, 20 S. Ct. 20, 44 L. ed. 65. The same has been held in England in respect of the shares of an unincorporated joint-stock company. Myers *v.* Perigal, 2 De G. M. & G. 599, 17 Jur. 145, 22 L. J. Ch. 431, 1 Wkly. Rep. 57, 51 Eng. Ch. 468 [*approved* in Edwards *v.* Hall, 6 De G. M. & G. 74, 1 Jur. N. S. 1189, 25 L. J. Ch. 82, 4 Wkly. Rep. 111, 55 Eng. Ch. 58].

3. Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 84.

4. Farmers' L. & T. Co. *v.* New York, etc., R. Co., 78 Hun (N. Y.) 213, 28 N. Y. Suppl. 933, 60 N. Y. St. 217 [*reversed* in 150 N. Y. 410, 44 N. E. 1043]; Bird Coal, etc., Co. *v.* Humes, 157 Pa St. 278, 27 Atl. 750, 33 Wkly. Notes Cas. (Pa.) 174, 37 Am. St. Rep. 727; Rio Grande R. Co. *v.* Armendia, 5 Tex. Civ. App. 449, 23 S. W. 568; Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517; Culbertson *v.* Wabash Nav. Co., 6 Fed. Cas. No. 3,464, 4 McLean 544.

This is not incompatible with the principle that a majority of the shareholders will not be allowed to exercise their powers unfairly toward the minority. Farmers' L. & T. Co. *v.* New York, etc., R. Co., 78 Hun (N. Y.) 213, 28 N. Y. Suppl. 933, 60 N. Y. St. 217 [*citing* Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 9 L. R. A. 527].

5. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

6. See *infra*, VII, D, 10, a.

7. Accordingly a sale of the entire property of a corporation, whose business is a failure, to one holding a majority of the shares, at open vendue, after a postponement in the hope of securing bidders, has been held not invalid, although the price bid was much less than the cost of the property. Price *v.* Holcomb, 89 Iowa 123, 56 N. W. 407.

8. See *infra*, VIII, A, 1.

9. Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 23 Pac. 151, 19 Am. St. Rep. 129, 7 L. R. A. 414; Norton *v.* Hodges, 100 Mass. 241; Poley *v.* Lacert, 35 Oreg. 166, 58 Pac. 37.

10. The fraudulent representations of an agent of the corporation concerning the value

length, just as they may deal with the corporation.[11] Therefore the unauthorized acts of one shareholder will not, in the absence of special circumstances, be imputed to the others or bind them in any manner to their detriment.[12] A shareholder is hence not personally responsible for a conversion of property by the corporation pursuant to a fraudulent conspiracy between the corporation and certain shareholders to hinder, delay, and defraud the creditors of one of them, unless he was a party to the conspiracy; and he cannot be found personally guilty of an actual and intended fraud because he had imputed or constructive notice thereof.[13]

7. Shareholders Not Necessarily Parties to Suits Involving Corporate Rights. For the same reason shareholders cannot sue individually at law for the conversion of property of the corporation;[14] nor can they maintain a suit in equity to vindicate a right of the corporation, although as hereafter seen under particular circumstances a court of equity will open its doors to him where the corporation will not sue.[15] With these, and with possible statutory exceptions, he is not a proper party to a suit whether by or against the corporation.[16]

8. Shareholders Not Necessarily Affected With Notice of Corporate Affairs. A shareholder is not, simply as such, bound to know the rules and regulations which the directors may prescribe for the transaction of the business of the corporation with the public generally, merely because they appear recorded on the minute books of the corporation.[17] Nor is notice to an officer of the corporation notice to a shareholder, in such a sense as to affect his rights.[18] But it has been held that subscribers for stock in a corporation must be presumed to know the provisions of its charter.[19]

9. To What Extent in Privity With Corporation. But for certain purposes he is in privity with the corporation as much as though it were a partnership and he were a member of it. Thus, as respects his liability to answer ultimately for the debts of the corporation, a judgment against the corporation, in the view taken by several of the courts, concludes him as much as though he were a party to the record,[20] although the rule seems to be otherwise in New York.[21]

10. Distinct Corporations May Have Same Officers and Shareholders. Different and distinct corporations may have the same officers and shareholders, and this community of officers and of members does not have the effect of merging the two corporations into each other.[22]

of the stock will not vitiate a sale of stock by a shareholder who has no notice of the fraud. Moffat *v.* Winslow, 7 Paige (N. Y.) 124.

11. Gillett *v.* Bowen, 23 Fed. 625.

12. Western Min., etc., Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 406.

13. Benton *v.* Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 N. W. 265.

14. Tomlinson *v.* Bricklayers Union No. 1, 87 Ind. 308; Langdon *v.* Hillside Coal, etc., Co., 41 Fed. 609.

15. See *infra*, XI, B, 7.

16. A shareholder in a corporation is no party in a suit against it, although his individual property is attached in the suit and a copy of the writ is left with him; and he may impeach the judgment recovered therein, when introduced against him. Whitman *v.* Cox, 26 Me. 335. It has been held in one jurisdiction that a shareholder cannot sue in the corporate name to vindicate his individual rights, without the assent of a majority of the corporation, or carry on such a suit by certiorari. Silk Mfg. Co. *v.* Campbell, 27 N. J. L. 539.

17. Pearsall *v.* Western Union Tel. Co., 44 Hun (N. Y.) 532, 9 N. Y. St. 132.

18. Wells *v.* Robb, 43 Kan. 201, 23 Pac. 148.

19. Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

20. *Iowa.*—Donworth *v.* Coolbaugh, 5 Iowa 300.

Kansas.— Grund *v.* Tucker, 5 Kan. 70.

Maine.— Milliken *v.* Whitehouse, 49 Me. 527; Came *v.* Brigham, 39 Me. 35; Merrill *v.* Suffolk Bank, 31 Me. 57, 1 Am. Rep. 649.

New York.— Belmont *v.* Coleman, 1 Bosw. 188; Moss *v.* Oakley, 2 Hill 265; Slee *v.* Bloom, 20 Johns. 669.

Pennsylvania.— Wilson *v.* Pittsburgh, etc., Coal Co., 43 Pa. St. 424.

21. McMahon *v.* Macy, 51 N. Y. 155; Miller *v.* White, 50 N. Y. 137; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Moss *v.* McCullough, 5 Hill (N. Y.) 131. See Hampson *v.* Weare, 4 Iowa 13, 66 Am. Dec. 116; Belmont *v.* Coleman, 21 N. Y. 96 [*affirming* 1 Bosw. (N. Y.) 188]; Moss *v.* Averell, 10 N. Y. 449.

As to whether such judgment is conclusive or merely prima facie against shareholder see *infra*, VIII, Q, 1, a.

22. Missouri Pac. R. Co. *v.* Bolling, (Ark. 1898) 48 S. W. 806.

11. To What Extent Corporation Is Trustee For Shareholders. As already stated, a joint-stock corporation is in general a trustee for its shareholders only so far as may be necessary for the protection of their several rights of property in their several shares;[23] but this principle does not apply to all corporations or in all cases.[24]

12. "One-Man" Corporations. It often happens that in the case of joint-stock corporations all the shares fall into the hands of one man. This it seems does not operate to dissolve the corporation or to deprive him of his personal immunity from liability for its debts; but the corporate funds or properties remain so liable, while his individual estate is exonerated.[25]

G. Who May Become Shareholders in Corporations — 1. In General. Any person capable of contracting and of holding personal property in the state or country under whose laws the corporation is created may become a shareholder. This will include alien friends;[26] ambassadors of foreign states, although by reason of his immunity as an ambassador he cannot be sued for assessments;[27] infants, subject to the right to repudiate the relation either during infancy or within a reasonable time after coming of age,[28] but subject to the liability to pay calls while he stands in the relation of shareholder;[29] and married women where they have been emancipated in any way from the disabilities of the common law, so as to make them liable to pay calls and to exonerate their husbands.[30]

2. Private Corporations — a. General Rule That One Corporation Cannot Become Shareholder in Another. The general rule, subject to local exceptions, and to exceptions founded on special considerations, is that one corporation cannot become a shareholder in another, unless thereto specially empowered by its

23. See *supra*, VI, F, 3, a.

24. A corporation owning and operating an irrigating ditch under the Colorado statute becomes a trustee for its shareholders, and is bound to protect their interests. Farmers' Independent Ditch Co. *v.* Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444, 55 Am. St. Rep. 149.

25. Louisville Banking Co. *v.* Eisenman, 21 S. W. 531, 14 Ky. L. Rep. 705, 19 L. R. A. 684 [*rehearing denied* in 21 S. W. 1049, 14 Ky. L. Rep. 710].

26. Reg. *v.* Arnaud, 9 Q. B. 806, 16 L. J. Q. B. 50, 58 E. C. L. 806.

Alien enemies.—That an alien enemy domiciled in his own country cannot become a shareholder in a corporation because this involves the making of a contract across lines of belligerent occupation see Lamar *v.* Browne, 92 U. S. 187, 23 L. ed. 650; The Flying Scud *v.* U. S., 6 Wall. (U. S.) 263, 18 L. ed. 755; The Peterhoff *v.* U. S., 5 Wall. (U. S.) 28, 18 L. ed. 564; U. S. *v.* Alexander, 2 Wall. (U. S.) 404, 17 L. ed. 915; Jecker *v.* Montgomery, 18 How. (U. S.) 110, 15 L. ed. 311; Houriet *v.* Morris, 3 Camph. 303; Willison *v.* Patteson, 1 Moore C. P. 133, 7 Taunt. 439, 18 Rev. Rep. 525, 2 E. C. L. 436; Bell *v.* Reid, 1 M. & S. 726, 14 Rev. Rep. 557; Potts *v.* Bell, 8 T. R. 548, 5 Rev. Rep. 452; Albretcht *v.* Sussmann, 2 Ves. & B. 323, 13 Rev. Rep. 110; *Ex p.* Boussmaker, 13 Ves. Jr. 71, 9 Rev. Rep. 142. But to what extent this principle will operate upon the status of such alien enemies who become shareholders prior to the outbreak of hostilities may not be clear. 1 Thompson Corp. § 1094.

27. Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94, 105 E. C. L. 94.

28. Dublin, etc., R. Co. *v.* Black, 8 Exch. 181, 22 L. J. Exch. 94, 7 R. & Can. Cas. 434; North Western R. Co. *v.* McMichael, 5 Exch. 114, 15 Jur. 132, 20 L. J. Exch. 97; Newry, etc., R. Co. *v.* Coombe, 3 Exch. 565, 18 L. J. Exch. 325, 5 R. & Can. Cas. 633; Coke Litt. 380*b*; Lindley Comp. L. (5th ed.) p. 39.

29. Cork, etc., R. Co. *v.* Cazenove, 10 Q. B. 935, 11 Jur. 802, 59 E. C. L. 935; Leeds, etc., R. Co. *v.* Fearnley, 7 D. & L. 68, 4 Exch. 26, 18 L. J. Exch. 330, 5 R. & Can. Cas. 644; North Western R. Co. *v.* McMichael, 5 Exch. 114, 15 Jur. 132, 20 L. J. Exch. 97; Lindley Comp. L. (5th ed.) p. 39.

If an infant signs the memorandum of association in England, he thereby becomes a member until he elects to disaffirm. *In re* Nassau Phosphate Co., 2 Ch. D. 610, 45 L. J. Ch. 584, 24 Wkly. Rep. 692.

While, in case of a transfer of shares being made to an infant, the directors have the power to reject him as a shareholder by reason of his infancy (*In re* Asiatic Banking Corp., L. R. 5 Ch. 298, 39 L. J. Ch. 461, 22 L. T. Rep. N. S. 217, 18 Wkly. Rep. 366), yet until they do this the transfer is good (*In re* Blakely Ordnance Co., L. R. 4 Ch. 31, 17 Wkly. Rep. 65).

30. 1 Thompson Corp. §§ 1096, 1097.

As to the liability of a husband for calls in respect of his wife's shares held by her before marriage see Lindley Comp. L. (5th ed.) 42 [*citing In re* West of England Bank, 12 Ch. D. 284, 48 L. J. Ch. 723, 41 L. T. Rep. N. S. 181, 27 Wkly. Rep. 907; *In re* Northumberland, etc., Banking Co., 1 De G. F. & J. 533, 6 Jur. N. S. 331, 29 L. J. Ch. 269, 8 Wkly. Rep. 297, 62 Eng. Ch. 413; Matter of Vale of Neath Brewery Co., 3 De G. & Sm.

charter or governing statute; otherwise one corporation might, by purchasing the shares of another corporation, embark its capital in the business of such other corporation and deflect it from the purposes designated in its own charter.[31] Although such a power may be possessed, under its charter, by a foreign corporation, it cannot be exercised within the limits of the domestic state, if its constitutional or legislative policy prohibits the exercise of it by domestic corporations.[32]

210; White's Case, 3 De G. & Sm. 157, 14 Jur. 454, 19 L. J. Ch. 497; Matter of North England Joint-Stock Banking Co., 3 De G. & Sm. 36, 13 Jur. 674, 18 L. J. Ch. 251; Matter of North England Joint-Stock Banking Co., 3 De G. & Sm. 18, 13 Jur. 849, 18 L. J. Ch. 250]. As to his liability for such calls where he has in fact obtained by marriage the property of his wife see Lindley Comp. L. (5th ed.) 42; Bell *v.* Victoria, 4 App. Cas. 560; *In re* West of England Bank, 12 Ch. D. 284, 48 L. J. Ch. 723, 41 L. T. Rep. N. S. 181, 27 Wkly. Rep. 907.

31. *California.*— Knowles *v.* Sandercock, 107 Cal. 629, 40 Pac. 1047, under California constitution.

Connecticut.— Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Meriden Agency Co., 24 Conn. 159.

Georgia.— Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13; Central R. Co. *v.* Collins, 40 Ga. 582.

Illinois.— People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497; McCoy *v.* World's Columbian Exposition, 87 Ill. App. 605 [*affirmed* in 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288, holding that a corporation, when sued on its subscription to the capital stock of another corporation, may raise the defense of *ultra vires*, in the absence of an estoppel]; People *v.* Pullman Palace Car Co., 27 Chic. Leg. N. 349, 10 Nat. Corp. Rep. 347.

Maine.— Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9.

Maryland.— Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50; Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418.

Massachusetts.— Com. *v.* Boston, etc., R. Co., 142 Mass. 146, 7 N. E. 716.

Missouri.— West-End Narrow Gauge R. Co. *v.* Dameron, 4 Mo. App. 414.

New Jersey.— Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

New York.— Columbus City Bank *v.* Bruce, 17 N. Y. 507; Talmage *v.* Pell, 7 N. Y. 328; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co. 41 Barb. 9; Berry *v.* Yates, 24 Barb. 199; White *v.* Syracuse, etc., R. Co., 14 Barb. 559; New York Exch. Co. *v.* De Wolf, 5 Bosw. 593; Rogers *v.* Phelps, 9 N. Y. Suppl. 886, 31 N. Y. St. 872 (land scrip); Milbank *v.* New York, etc., R. Co., 64 How. Pr. 20.

Ohio.— Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; Coppin *v.* Greenlees, etc., Co., 38 Ohio St. 275, 43 Am. Rep. 425; Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594 (opinion by Boynton, J.).

Pennsylvania.— McMillan *v.* Carson Hill Union Min. Co., 12 Phila. 404, 35 Leg. Int. 163.

Rhode Island.— Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

Tennessee.— Herring *v.* Ruskin Co-Operative Assoc., (Ch. App. 1899) 52 S. W. 327.

United States.— Zabriskie *v.* Cleveland, etc., Co., 23 How. 381, 16 L. ed. 488; Marbury *v.* Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393 (unless its charter confers the power in express terms, or there is something particular in the powers expressly conferred upon it from which such power can be fairly implied); Holt *v.* Winfield Bank, 25 Fed. 812; Sumner *v.* Marcy, 23 Fed. Cas. No. 13,609, 3 Woodb. & M. 105.

England.— See Lindley Comp. (5th ed.) p. 43; *In re* Barned's Banking Co., L. R. 3 Ch. 105, 37 L. J. Ch. 81, 17 L. T. Rep. N. S. 269, 16 Wkly. Rep. 193; *In re* European Soc. Arbitration Acts, 8 Ch. D. 679, 48 L. J. Ch. 118, 39 L. T. Rep. N. S. 136, 27 Wkly. Rep. 88 (where it was held that a society to which shares in another society had been transferred by an act *ultra vires* could not be placed on the list of contributories of that society); Great Western R. Co. *v.* Metropolitan R. Co., 9 Jur. N. S. 562, 32 L. J. Ch. 382, 8 L. T. Rep. N. S. 556, 11 Wkly. Rep. 706. *Compare In re* Asiatic Banking Co., L. R. 4 Ch. 252, 19 L. T. Rep. N. S. 805, 17 Wkly. Rep. 359; *In re* Barned's Banking Co., L. R. 3 Ch. 105, 37 L. J. Ch. 81, 17 L. T. Rep. N. S. 269, 16 Wkly. Rep. 193; Great Western R. Co. *v.* Metropolitan R. Co., 9 Jur. N. S. 562, 32 L. J. Ch. 382, 8 L. T. Rep. N. S. 556, 11 Wkly. Rep. 706.

See 12 Cent. Dig. tit. "Corporations," § 1531.

This principle applies so as to prevent a corporation from investing in the shares of a mutual benefit building society. Dobinson *v.* Hawks, 12 Jur. 1037, 16 Sim. 407, 39 Eng. Ch. 407.

Distinction between subscribing and purchasing.— A distinction has been taken between the power of a corporation to become an original subscriber to the shares of another corporation which is being organized, and from purchasing its shares after it has been organized. Smith *v.* Newark, etc., R. Co., 8 Ohio Cir. Ct. 583, 4 Ohio Cir. Dec. 356, holding that a corporation, in the absence of a clause in its charter prohibiting it, may invest in or own stock in another corporation, and will be liable for assessments thereon as an individual holder, although it cannot aid in the formation of a new corporation by subscribing to its capital stock.

32. Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683.

b. Limited View That One Corporation Can Invest in Shares of Another — (I) *Statement of Doctrine.* A few decisions are met with where the view is taken that a corporation may invest in the stock of other corporations as well as in any other funds, provided it be done *bona fide* and with no sinister or unlawful purpose, and there be nothing in its charter or in the nature of its business that forbids it.[33] The theory of these cases seems to be that such a purchase is not necessarily void;[34] and it has been held that there is no presumption that a corporation is incapable of purchasing and holding shares of the stock of another corporation, it not appearing under what circumstances it was acquired or held.[35] The leading principle which restrains one corporation from investing in the shares of another is that it is *ultra vires* for a corporation to employ its funds in a manner not permitted by its charter or governing statute. The principle consequently does not apply where the two corporations are created for a similar purpose.[36] According to this view an insurance company may purchase the shares of a bank;[37] and a land company with power to build a railroad to afford access to its lands may subscribe to the shares of a corporation created for that purpose.[38]

(II) *Consequences Which Flow From This View.* Where the view obtains that one corporation may rightfully purchase and hold the shares of stock of another, the ordinary liabilities of a shareholder attach to the corporation which so acts.[39] But it seems that a corporation cannot, by merely purchasing

33. Booth *v.* Robinson, 55 Md. 419.

34. Hill *v.* Nisbet, 100 Ind. 341.

35. Evans *v.* Bailey, 66 Cal. 112, 4 Pac. 1089.

36. Electric Securities Co. *v.* Louisiana Electric Light Co., 68 Fed. 673; *In re* Asiatic Banking Corp., L. R. 4 Ch. 252, 19 L. T. Rep. N. S. 805, 17 Wkly. Rep. 359 [*affirming* L. R. 7 Eq. 91, 19 L. T. Rep. N. S. 444]; *In re* Barnard's Banking Co., L. R. 3 Ch. 105, 37 L. J. Ch. 81, 17 L. T. Rep. N. S. 269, 16 Wkly. Rep. 193. But see Lindley Comp. (5th ed.) 43.

37. State *v.* Butler, 86 Tenn. 614. Circumstances under which a purchase by a life-insurance company of the stock of a fire-insurance company will not be set aside because fully executed see Alexander *v.* Jones, 8 Mo. App. 589.

38. Watts' Appeal, 78 Pa. St. 370.

Many statutes and charters, both in England and in this country, recognize or confer power upon one corporation to hold shares in another. See for example N. J. Laws (1888), c. 269, p. 385; Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683; the Companies Act (1862), § 23; the Industrial and Prov. Soc. Act, 39 & 40 Vict. c. 45, § 12; 7 Wm. IV & 1 Vict. c. 73, §§ 6, 10; 7 & 8 Vict. c. 110, §§ 3, 7, 50.

The New York Stock Corporation Law of 1892, § 40, is construed in Rafferty *v.* Buffalo City Gas Co., 37 N. Y. App. Div. 618, 56 N. Y. Suppl. 288, holding that a court cannot place any limitation upon the amount of stock and bonds which under the statute one corporation may acquire of another in New York for its own stock and bonds.

The charter of a trust company of Georgia is construed in Georgia Trust Co. *v.* State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520, with the conclusion that this corporation has authority to buy the shares of any other corporation, provided that in so doing it does not violate the constitution of the state. But a constitutional provision in that state prohibits the legislature from authorizing any corporation to buy shares in any other corporation in that state or elsewhere. Ga. Const. art. 4, § 2, par. 4. See also Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683; Hamilton *v.* Savannah, etc., R. Co., 49 Fed. 412; Langdon *v.* Branch, 37 Fed. 449, 2 L. R. A. 120.

Statute of Kansas under which a railroad company has the power to purchase and hold the stock of any other railroad company, the line of whose railroad, constructed or being constructed, connects with its own. Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 23 Pac. 151, 19 Am. St. Rep. 129, 7 L. R. A. 414; Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 10 Pac. 526; Atchison, etc., R. Co. *v.* Davis, 34 Kan. 209, 8 Pac. 530. *Compare* Pullman Palace Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587, 6 S. Ct. 194, 29 L. ed. 499.

Under the statute law of Tennessee the shares of one corporation may be acquired and voted by another. Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517.

A statute forbidding one corporation to subscribe for and purchase the bonds or stock of another corporation except in payment of a *bona fide* debt is held not to preclude advances made on bonds and stock made as collateral security. Taylor County Ct. *v.* Baltimore, etc., R. Co., 35 Fed. 161.

39. Thus where a banking firm purchased in their own name shares of stock of a customer, which they treated as their own, and so made it appear on the books of the corporation issuing the stock, it was held that they assumed the liability of shareholders as between themselves and the corporations. McKim *v.* Glenn, 66 Md. 479, 8 Atl. 130.

the shares of another corporation, and thereby acquiring control of it, succeed to its special franchises.[40]

c. Such Purchases Not Disturbed When Executed. Purchases by one corporation of the shares of another corporation will not be disturbed when fully executed on one side. Thus a corporation cannot sue to cancel an agreement made in its behalf for the purchase of stock of another company, although such contract is *ultra vires*, where it has been fully executed.[41] Although a corporation may not possess the power to deal in the shares of another corporation, yet one who has purchased from a corporation the shares of another corporation will not be allowed to escape the payment of the purchase-money by setting up such want of power.[42] So where a corporation, although prohibited by its charter, purchases stock in another corporation, and the contract is executed by the delivery of the stock and the payment of the price, it cannot recover back the purchase-money upon the ground alone that the contract was *ultra vires*.[43] This is especially true where the rights of innocent third persons are involved;[44] and where there has been laches,[45] or where the other party to the contract cannot be put *in statu quo*.[46]

3. Municipal Corporations. The question of the power of municipal corporations to render aid to private corporations created for public objects, such as railroad companies, canal companies, and the like, by subscribing for the shares of such corporations, will not be discussed in this article, because the subject relates to the powers of municipal,[47] and not to those of private, corporations; and for the further reason that the question has been considered to some extent.[48] Generally speaking such aid may be given where not prohibited by the constitution or statute law of the state, in cases where the private corporation is organized to promote public objects, as in the case of railroad companies,[49] turnpike companies,[50] plank-road companies, and the like;[51] but not in case of strictly private corporations, such as manufacturing companies, although the public may incidentally derive a benefit from assisting such companies.[52] It may be added that the tendency of recent state constitutions seems to be to deprive the state legislatures of the power to grant such aid either by subscribing to the shares of corporations[53] or in any other mode,[54] although the recent constitution of one state affirms such

40. Thus it is held in Massachusetts that the fact that one corporation has purchased the property and most of the capital stock of another corporation does not necessarily authorize the purchasing corporation to do that which, under a special act, the other corporation is authorized to do, but which the general law prohibits. French *v.* Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. 113.

41. Cincinnati, etc., R. Co. *v.* McKeen, 64 Fed. 36, 12 C. C. A. 14. Similarly see Peterborough R. Co. *v.* Nashua, etc., R. Co., 59 N. H. 385.

42. Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 53 Hun (N. Y.) 52, 5 N. Y. Suppl. 937, 23 N. Y. St. 538.

43. McCoy Lime Co. *v.* Kane, 16 Montg. Co. Rep. (Pa.) 19.

44. Marbury *v.* Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393.

45. Leathers *v.* Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661 (as where the shareholders postpone their complaint for a length of time extending from seven to fourteen years); Boston, etc., R. Corp. *v.* New York, etc., R. Co., 13 R. I. 260.

46. Terry *v.* Eagle Lock Co., 47 Conn. 141.

47. See, generally, Municipal Corporations.

48. See *supra*, I, I, 1.

49. *Ex p.* Selma, etc., R. Co., 45 Ala. 696, 6 Am. Rep. 722; Leavenworth County *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425 (and numerous cases there quoted by the great industry of Valentine, J.).

50. Com *v.* McWilliams, 11 Pa. St. 61.

51. Wetumpka *v.* Winter, 29 Ala. 651.

52. *Maine.*— Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185.

Massachusetts.— Jenkins *v.* Andover, 103 Mass. 94.

Michigan.— People *v.* Salem Tp. Bd., 20 Mich. 452, 4 Am. Rep. 400.

New York.— Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586.

Wisconsin.— Whiting *v.* Sheboygan, etc., R. Co., 25 Wis. 167, 3 Am. Rep. 30.

United States.— Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. 655, 22 L. ed. 455; Olcott *v.* Fond du Lac County, 16 Wall. 678, 21 L. ed. 382.

53. Fla. Const. (1887), art. 9, § 10; Miss. Const. (1890), § 183.

54. N. Y. Const. (1894), art. 8, §§ 9, 10; Wyo. Const. (1889), art. 10, § 5 (not to

power.[55] A distinction has sometimes been taken between the power of a state legislature to authorize taxation for the purpose of making a mere donation to a railroad company, and to make a subscription to its shares;[56] but as this question does not relate to the powers of private corporations with reference to their share capital, it will not be further pursued in this article.

4. SUBSCRIPTIONS BY SOVEREIGN STATE. Subscriptions to the shares of private corporations may be and have been made[57] by states of the American Union, where their constitutions permitted such action on the part of their legislatures. But as a sovereign state cannot be sued without its consent, and as the making of such a subscription has not been regarded as tantamount to giving such consent, no action can be maintained against the shareholding state to compel the payment of its subscription or of assessments thereon.[58] Indeed the view has been taken that such a subscription is tantamount to a bonus granted by the state to the corporation, and that it consequently does not make the state liable for contributions like an ordinary shareholder.[59] The mere fact that the state owns all the shares of the stock of an incorporated bank does not make a debt due to the bank a debt due to the state.[60]

H. Contract of Subscription For Shares — 1. RELATION OF SHAREHOLDER TO CORPORATION RESTS IN CONTRACT. The relation of shareholders to the corporation whose stock they hold is that of contract, and the rights and duties of both parties grow out of contract, expressed or implied, in a subscription for stock, construed by the provisions of the charter or articles of incorporation.[61]

2. CHARTER OR GOVERNING STATUTE ENTERS INTO AND FORMS PART OF CONTRACT. Whether the corporation is organized under a special charter granted by the legislature, or under a general enabling statute, the charter or governing statute is deemed to enter into, and to form a part of, the contract of subscription.[62] Such subscriber is chargeable with knowledge of the fact of the organization of the corporation, of the powers which it possesses with respect to the creating of a share capital and the issuing of shares, and of the control which it may have over its shares.[63]

3. WHAT MAKES SUBSCRIBER A SHAREHOLDER — a. Unconditional Subscription to Shares. As a general rule, applicable to all American schemes of incorporation, although not always assented to by the courts,[64] whoever subscribes to an unconditional agreement to take a given number of shares becomes thereby a shareholder in the corporation in respect of that number, subject to any valid conditions named in the subscription paper and to those imposed by the general law.[65] The act of subscribing for a stated number of shares fixes the liability of the subscriber to creditors of the corporation as a shareholder, although he has

apply to obligations contracted before the adoption of the constitution).

55. La. Const. (1898), art. 270, municipal aid to railroads permitted.

56. People *v.* Salem Tp. Bd., 20 Mich. 452, 4 Am. Rep. 400; Sweet *v.* Hulbert, 51 Barb. (N. Y.) 312; Whiting *v.* Sheboygan, etc., R. Co., 25 Wis. 167, 3 Am. Rep. 30. The case of Hanson *v.* Vernon, 27 Iowa 28, 1 Am. Rep. 215, was subsequently overruled in the same state by Stewart *v.* Polk County, 30 Iowa 9, 1 Am. Rep. 238.

57. Baltimore, etc., R. Co. *v.* State, 36 Md. 519; Atty.-Gen. *v.* Cape Fear Nav. Co., 37 N. C. 444.

58. Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273.

59. Consolidated Bank *v.* State, 5 La. Ann. 44.

60. State Bank *v.* Dibrell, 3 Sneed (Tenn.) 378.

61. Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586, opinion by Macon, C.

62. Hoagland *v.* Cincinnati, etc., R. Co., 18 Ind. 452; Rensselaer, etc., Plank Road Co. *v.* Barton, 16 N. Y. 457 note; Small *v.* Herkimer Mfg., etc., Co., 2 N. Y. 330.

63. McClure *v.* Central Trust Co., 28 N. Y. App. Div. 433, 53 N. Y. Suppl. 188.

64. That in some states an express promise to pay is necessary in order to make a subscriber a shareholder see *infra*, VI, H, 4, b, (I).

65. *Alabama.*—Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

Connecticut.—Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499.

Maine.—Kennebec, etc., R. Co. *v.* Palmer, 34 Me. 366.

Massachusetts.—Brigham *v.* Mead, 10 Allen 245.

not paid into the treasury of the corporation any part of his subscription, or done any act whatever in his character as a shareholder.[66]

b. Unconditional Subscription to Articles of Incorporation or Deed of Settlement. Speaking generally again, every person who signs the articles of association, or of incorporation, as they are called in America, or the deed of settlement, as the instrument is called in England, agreeing at the same time to take a stated number of shares, thereby acquires the advantages and subjects himself to the liabilities of a shareholder;[67] and this is the more clear where the governing statute declares that those signing such articles shall be deemed a body corporate.[68]

4. Necessity of Promise to Pay — a. Doctrine That Express Promise Is Not Necessary — (I) *From What Promise to Pay Implied* — (A) *From Subscription to Shares.* If a person orders goods to be delivered to him, a promise is implied that he will pay for them, which ripens into a fixed liability when the goods are delivered. So if a person subscribes for shares in a corporation, a promise is implied that he will pay for them,[69] although in some jurisdictions the seemingly mistaken doctrine is applied that the subscription paper must contain an express promise to pay.[70]

(B) *From Acceptance of Share Certificate.* In like manner an acceptance of a certificate of a stated number of shares of the stock of a corporation issued to the person who accepts it implies a promise that he will pay for the shares, as much as though he had signed a formal contract to pay for them;[71] although, in order to constitute one a shareholder, it is not necessary that a share certificate should have been issued to him.[72] Under this doctrine the subscriber stands liable to pay assessments lawfully laid upon the shares, in the mode prescribed by the charter, governing statute, or by-laws, although he has not made in the subscription paper any express promise so to do; and this, although the charter or governing statute also gives to the corporation a remedy by forfeiture or sale of the shares; the theory of the courts being that this remedy is cumulative merely.[73] Under the operation of this rule the obligation of actual payment is created in

Missouri.— Pickering *v.* Templeton, 2 Mo. App. 424.

New York.— Dayton *v.* Borst, 31 N. Y. 435; Seymour *v.* Sturgess, 26 N. Y. 134; Burr *v.* Wilcox, 22 N. Y. 551; Rensselaer, etc., Plank Road Co. *v.* Barton, 16 N. Y. 457; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Strong *v.* Wheaton, 38 Barb. 616; Northern R. Co. *v.* Miller, 10 Barb. 260; Hartford, etc., R. Co. *v.* Croswell, 5 Hill 383, 40 Am. Dec. 354; Spear *v.* Crawford, 14 Wend. 20, 28 Am. Dec. 513; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459; Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Union Turnpike Road Co. *v.* Jenkins, 1 Cai. 381; Sagory *v.* Dubois, 3 Sandf. Ch. 466.

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

United States.— Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

Compare Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350.

66. Spear *v.* Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

67. Cole *v.* Ryan, 52 Barb. (N. Y.) 168; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466.

68. Strong *v.* Wheaton, 38 Barb. (N. Y.) 616.

69. Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499; Klein *v.* Alton, etc., R. Co., 13 Ill. 514; Banet *v.* Alton, etc., R. Co., 13 Ill. 504; Fry *v.* Lexington, etc., R. Co., 2 Metc. (Ky.) 314; Spear *v.* Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

70. See *infra*, VI, H, 4, b, (I).

71. Brigham *v.* Mead, 10 Allen (Mass.) 245; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203. And this is so although the certificate contains a promise on the part of the corporation to pay interest thereon until the happening of a certain specified event. McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 100.

Making and mailing a certificate is regarded as the issuing of it. Jones *v.* Terre Haute, etc., R. Co., 17 How. Pr. (N. Y.) 529.

72. *Indiana.*— Beckett *v.* Houston, 32 Ind. 393.

Maine.— Chaffin *v.* Cummings, 37 Me. 76.

Massachusetts.— Chase *v.* Merrimack Bank, 19 Pick. 564, 31 Am. Dec. 163.

Missouri.— Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248.

New York.— Burr *v.* Wilcox, 22 N. Y. 551. See also *infra*, VI, H, 7, a.

73. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

Connecticut.— Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435; Mann *v.* Cooke, 20 Conn.

all cases by the subscription, unless the terms of the subscription are such as plainly to exclude it.[74] Where there is an unconditional subscription, even without an express promise to pay, a right on the part of the directors to make a call carries with it a corresponding duty on the part of the shareholder to pay it.[75]

(II) *How Implied Promise Enforceable*—(A) *By Action at Law.* This implied promise is enforceable by assumpsit or by other appropriate action at law.[76]

(B) *In Equity For Benefit of Creditors After Insolvency of Corporation.* This implied promise is enforceable after the insolvency of the corporation by a court of equity or of bankruptcy, through a suit by a receiver or an assignee or trustee in bankruptcy, or by other appropriate means.[77]

(III) *Circumstances From Which Law Implies Consideration.* From the privileges and advantages flowing to the subscriber in consequence of his sub-

178; Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499. See also Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Indiana.— Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51.

Iowa.— Waukon, etc., R. Co. *v.* Dwyer, 49 Iowa 121.

Kentucky.— Fry *v.* Lexington, etc., R. Co., 2 Metc. 314; Instone *v.* Frankfort Bridge Co., 2 Bibb 576, 5 Am. Dec. 638.

Maine.— Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Buckfield Branch R. Co. *v.* Irish, 39 Me. 44; Kennebec, etc., R. Co. *v.* Jarvis, 34 Me. 360.

Maryland.— Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350; Hughes *v.* Antietam Mfg. Co., 34 Md. 316.

Massachusetts.— Worcester City Hotel *v.* Dickinson, 6 Gray 586.

Michigan.— Merrimac Min. Co. *v.* Bagley, 14 Mich. 501; Carson *v.* Arctic Min. Co., 5 Mich. 288; Dexter, etc., Plankroad Co. *v.* Millerd, 3 Mich. 91.

Mississippi.— Freeman *v.* Winchester, 10 Sm. & M. 577.

Missouri.— Joy *v.* Manion, 28 Mo. App. 55.

New York.— Davton *v.* Borst, 31 N. Y. 435; Rensselaer, etc., Plank Road Co. *v.* Barton, 16 N. Y. 457; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Small *v.* Herkimer Mfg., etc., Co., 2 N. Y. 330; Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. 541; Rensselaer, etc., Plank Road Co. *v.* Wetsel, 21 Barb. 56; Troy, etc., R. Co. *v.* Tibbits, 18 Barb. 297; Troy, etc., R. Co. *v.* Kerr, 17 Barb. 581; Ft. Edward, etc., Plank Road Co. *v.* Payne, 17 Barb. 567; Northern R. Co. *v.* Miller, 10 Barb. 260; Hartford, etc., R. Co. *v.* Croswell, 5 Hill 383, 40 Am. Dec. 354; Troy Turnpike, etc., Co. *v.* McChesney, 21 Wend. 296; Herkimer Mfg., etc., Co. *v.* Small, 21 Wend. 273; Spear *v.* Crawford, 14 Wend. 20, 28 Am. Dec. 513; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459; Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. 217, 6 Am. Dec. 273.

Pennsylvania.— Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 677.

Tennessee.— East Tennessee, etc., R. Co. *v.* Gammon, 5 Sneed 567; Stokes *v.* Lebanon, etc., Turnpike Co., 6 Humphr. 241.

United States.— Hawley *v.* Upton, 102 U. S. 314, 26 L. ed. 179; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203; Frost *v.* Frostburg Coal Co., 24 How. 278, 16 L. ed. 637.

Compare Robertson *v.* Sibley, 10 Minn. 323.

See 12 Cent. Dig. tit. "Corporations," §§ 219, 220.

74. Elysville Mfg. Co. *v.* Okisko Co., 5 Md. 152; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161; Spear *v.* Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

75. Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697. It has been held that a subscription agreement to the effect that the subscribers will take the number of shares set opposite their names, "and thereon pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed," implies a promise to pay the full sum subscribed upon such demands or calls which shall be made therefor by the corporation, and the *videlicet* does not limit their liability to the ten per cent. Ventura, etc., R. Co. *v.* Collins, (Cal. 1896) 46 Pac. 287.

76. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

Kentucky.— Instone *v.* Frankfort Bridge Co., 2 Bibb 576, 5 Am. Dec. 638.

Massachusetts.— Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39.

New York.— Harlem Canal Co. *v.* Seixas, 2 Hall 504; Spear *v.* Crawford, 14 Wend. 20, 28 Am. Dec. 513; Dutchess Cotton Manufactory Co. *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459; Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Union Turnpike Road Co. *v.* Jenkins, 1 Cai. 381 [*reversing* 1 Cai. Cas. 86].

North Carolina.— Tar River Nav. Co. *v.* Neal, 10 N. C. 520.

Pennsylvania.— Delaware, etc., Canal Nav. Co. *v.* Sansom, 1 Binn. 70.

Tennessee.— West Nashville Planing-mill Co. *v.* Nashville Sav. Bank, 86 Tenn. 252, 6 S. W. 340, 6 Am. St. Rep. 835, per Lurton, J.

United States.— Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220.

77. 1 Thompson Corp. § 1138.

scription, and from its acceptance by the other associates or by the corporation, the law implies a consideration sufficient to support the contract.[78]

b. Limited Doctrine That Express Promise to Pay Is Necessary — (I) *Statement of Doctrine.* In a few American jurisdictions a doctrine prevails that unless an express promise is made by the subscriber to pay for the shares for which he subscribes, his obligation cannot be enforced by an action against him, but that the only remedy of the corporation is to forfeit the shares and sell them to someone else if it can.[79]

(II) *Rule Where Contract of Subscription Contains Express Promise to Pay.* But where the contract of subscription does contain an express promise to pay the assessments, and the conditions of the subscription have been performed, then by all the authorities an action of assumpsit or other like action can be maintained in the first instance, without a proceeding to forfeit the shares, or a declaration of forfeiture, sale of them, or other equivalent act.[80]

5. Necessity of Acceptance of Subscription — **a. Doctrine That Acceptance Is Necessary** — (I) *In General.* Except where the subscription is made by signing the original articles or memorandum of association,[81] where the corporation has not yet been called into existence,[82] and where the subscription takes the effect of the form of a proposal by the corporation and an acceptance by the subscriber, the English and Canadian rule seems to be that in order to make the contract to take shares complete there must be an application for the shares, an allotment of the shares to the applicant, and a communication to him of notice of the allotment.[83] The American doctrine seems to be that the subscription must be accepted in terms, or else that it must be acted

78. Kennebec, etc., R. Co. *v.* Palmer, 34 Me. 366; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Union Turnpike Road Co. *v.* Jenkins, 1 Cai. (N. Y.) 381.

79. *California.*— West *v.* Crawford, 80 Cal. 19, 21 Pac. 1123 [*followed* in West *v.* Belding, (1889) 21 Pac. 1136; West *v.* Hitchcock, (1889) 21 Pac. 1136].

Colorado.— Arkansas River Land, etc., Co. *v.* Farmers' L. & T. Co., 13 Colo. 587, 22 Pac. 954.

Delaware.— Odd Fellows' Hall Co. *v.* Glazier, 5 Harr. 172.

Maine.— Belfast, etc., R. Co. *v.* Moore, 60 Me. 561; Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470.

Massachusetts.— Katama Land Co. *v.* Jernegan, 126 Mass. 155; Mechanics' Foundry, etc., Co. *v.* Hall, 121 Mass. 272; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128; Franklin Glass Co. *v.* White, 14 Mass. 286; New Bedford, etc., Turnpike Corp. *v.* Adams, 8 Mass. 138, 5 Am. Dec. 81; Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39.

New Hampshire.— New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300; Franklin Glass Co. *v.* Alexander, 2 N. H. 380, 9 Am. Dec. 92 (per Woodbury, J.).

New York.— Departing from earlier holdings in that state, the court of appeals of New York now hold that a subscription to corporate shares is not an agreement to pay in money the par value of the shares, unless it is so expressed in the contract, but that it is merely a contract to enter into the relation of shareholder. Rochester, etc., Land Co. *v.* Raymond, 158 N. Y. 576, 53 N. E. 507, 47 L. R. A. 246 [*affirming* 4 N. Y. App. Div. 600, 39 N. Y. Suppl. 145].

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181; Essex Bridge Co. *v.* Tuttle, 2 Vt. 393.

See 12 Cent. Dig. tit. "Corporations," § 219.

80. South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23; Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39; Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 479; Townsend *v.* Goewey, 19 Wend. (N. Y.) 424, 32 Am. Dec. 514; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459.

81. See *infra*, VI, H, 6, c.

82. That this exception is not admitted by many courts see *infra*, VI, H, 6, d, (VII).

83. Common *v.* Matthews, 8 Quebec Q. B. 138; Rogers' Case, L. R. 3 Ch. 634, 18 L. T. Rep. N. S. 779, 16 Wkly. Rep. 556; *In re* Richmond Hill Hotel Co., L. R. 2 Ch. 527, 36 L. J. Ch. 613, 16 L. T. Rep. N. S. 442, per Lord Cairns, L. J. [*distinguishing* Matter of New Theatre Co., 33 Beav. 529 (*affirmed* in 4 De G. J. & S. 447, 33 L. J. Ch. 574, 10 L. T. Rep. N. S. 772, 12 Wkly. Rep. 995, 69 Eng. Cn. 343)]; Spitzel *v.* Chinese Corp., 6 Manson 355, 80 L. T. Rep. N. S. 347.

In the province of Quebec, the doctrine is said to be that one who signs a request for shares of the stock of a corporation becomes

upon, which conduct is tantamount to an acceptance, and this within a reasonable time.[84]

(II) *Where Corporation in Existence.* Unless the case is such that the subscription takes the form of a proposal by the corporation, and an acceptance by the subscriber,[85] then, as in the case of a proposition for any other contract, there is no contract until the proposition has been accepted.[86]

(III) *Rule Not Applicable Where There Are No Shares to Allot.* The foregoing rule does not of course apply where there are no shares available for allotment.[87]

b. Manner in Which Acceptance of Subscription Manifested. It is said by an approved writer that, although "no particular form of acceptance is essential in order to constitute this proposition to become a shareholder a binding contract, . . . there must be some unequivocal act on the part of the agents having the authority to accept the offer, so that there can be no doubt as to the obligation of the corporation as well as of the subscriber."[88] Very often there will be no formal writing, speech, or act of acceptance. This will often happen where the corporation is one not having a joint stock; as for instance a religious, educational, or other charitable corporation. Here the usual form of acceptance will be the incurring of expense on the faith of the subscription; and this may be shown by parol evidence.[89]

c. Distinction Between Cases Where Proposition Comes From Company and Where It Is Made to Company. In respect of the time when the contract of subscription is deemed to be complete, a distinction exists between cases where the proposition for the subscription comes from the company to the subscriber, and where it comes from the subscriber to the company. In the former case a proposition by or on behalf of the company, and an assent thereto by the subscriber, render the contract complete.[90] But where the proposition comes from the subscriber, there must obviously be an assent on the part of the company; otherwise it remains merely unilateral.[91] In either case, however, it is not doubted that

a shareholder only when the corporation has accepted his request and assigned the shares to him. Common *v.* Matthews, 8 Quebec Q. B. 138.

84. Northern Cent. Michigan R. Co. *v.* Eslow, 40 Mich. 222; Galt *v.* Swain, 9 Gratt. (Va.) 633, 60 Am. Dec. 311.

85. See *infra*, VI, H, 5, c.

86. Northern Cent. Michigan R. Co. *v.* Eslow, 40 Mich. 222; Parker *v.* Northern Cent. Michigan R. Co., 33 Mich. 23; Carlisle *v.* Saginaw Valley, etc., R. Co., 27 Mich. 315; St. Paul, etc., R. Co. *v.* Robbins, 23 Minn. 439 (holding that a subscription to preferred shares does not make the subscriber a shareholder until accepted, although it may oblige the company to issue the shares). See also Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350, holding that the mere fact of subscribing does not constitute the subscriber a shareholder, without acceptance by the corporation, although it may put it in his power to become a shareholder by compelling acceptance.

87. *In re* Tal y Drws Slate Co., 1 Ch. D. 247, 45 L. J. Ch. 158, 33 L. T. Rep. N. S. 460, 24 Wkly. Rep. 92, person signed memorandum of association, but took no part in management, was never treated as a shareholder, was never entered on the register, and all the shares were allotted to other persons — no liability as a contributory. Otherwise, in another case, where all the shares in the first instance had been allotted to other persons, yet some of the allotments had never been confirmed in the manner required by the memorandum of association, and there were consequently shares subject to allotment — the signer of the memorandum being put on the list of contributories. *In re* London, etc., Exch. Bank, L. R. 2 Ch. 427, 36 L. J. Ch. 501, 16 L. T. Rep. N. S. 253, 15 Wkly. Rep. 543.

88. 1 Morawetz Priv. Corp. (2d ed.) § 48. See also Northern Cent. Michigan R. Co. *v.* Eslow, 40 Mich. 222; Parker *v.* Northern Cent. Michigan R. Co., 33 Mich. 23.

89. Jones *v.* Florence Wesleyan University, 46 Ala. 626.

Filing of certificate of incorporation.— One court has held that in case of a subscription to the shares of a projected corporation an acceptance takes effect upon the filing of the certificate of incorporation. Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294.

90. European, etc., R. Co. *v.* McLeod, 16 N. Brunsw. 3.

91. Wilkinson *v.* Anglo-Californian Gold Min. Co., 18 Q. B. 728, 17 Jur. 257, 21 L. J. Q. B. 327, 83 E. C. L. 728; *In re* Universal Banking Corp., L. R. 3 Ch. 40, 37 L. J. Ch. 40, 16 Wkly. Rep. 97; *In re* Richmond Hill Hotel Co., L. R. 2 Ch. 527, 36 L. J. Ch. 613, 16 L. T. Rep. N. S. 442; British, etc., Tel. Co. *v.* Colson, L. R. 6 Exch. 108, 40 L. J. Exch.

until there is a meeting of the minds of both parties no binding contract exists.[92] Where the transaction is regarded as taking the form of a continuing offer by the company to issue its shares to persons who might subscribe therefor, a person who does so subscribe, and who on the faith of his own subscription induces others to subscribe, will not be permitted to withdraw his subscription by mutilating the subscription book and cutting it out before it is returned to the corporation; but he will be held to his contract of subscription precisely as though the subscription book had been lost without his fault.[93]

d. Circumstances of Estoppel Which Take Place of Formal Application, Allotment, and Notice. Numerous circumstances of estoppel have been shown in various cases which have been held to take the place of a formal acceptance, allotment, and notice to the subscriber,[94] a subject reserved for future consideration.[95]

e. Revocation of Subscription to Take Shares Before Acceptance. Where the subscription is made with a view to the formation of a future corporation, there is considerable authority to the effect that, disregarding the fact that others may have subscribed on the faith of the subscription of the particular person, yet, until the corporation actually comes into existence, and accepts the proposal embodied in his subscription, he may withdraw it at his pleasure.[96]

6. Doctrine That Subscription to Shares of Corporation Not Formed Creates No Liability Even After Corporation Is Formed — a. Statement of Doctrine. This doctrine, which cannot be regarded as settled in American law, is that one who signs a subscription paper, but nothing more, whereby he agrees to take a certain number of shares in a corporation thereafter to be formed, does not become liable as a shareholder even after the corporation is formed, and the corporation cannot maintain an action against him upon the subscription paper for an assessment made upon the shares.[97]

b. Distinction Between Formal Subscription and Tentative Agreement to Subscribe. This calls up a distinction taken in some of the cases between a contract

97, 23 L. T. Rep. N. S. 868; European, etc., R. Co. *v.* McLeod, 16 N. Brunsw. 3.

92. Routledge *v.* Grant, 4 Bing. 653, 13 E. C. L. 678, 3 C. & P. 267, 14 E. C. L. 560, 6 L. J. C. P. O. S. 166, 1 M. & P. 717, 29 Rev. Rep. 672; Cooke *v.* Oxley, 3 T. R. 653; Payne *v.* Cave, 3 T. R. 148, 1 Rev. Rep. 679.

93. Greer *v.* Chartiers R. Co., 96 Pa. St. 391, 42 Am. Rep. 548, where the person thus attempting to withdraw from the obligation assumed by his subscription was an agent of an existing corporation, to procure subscribers for its shares, and the subscription book belonged to the corporation.

94. *In re* International Contract Co., L. R. 3 Ch. 36, 17 L. T. Rep. N. S. 337, 16 Wkly. Rep. 95.

95. See *infra*, VI, P, 7, a, (I) *et seq.*

96. See Goff *v.* Winchester College, 6 Bush (Ky.) 443; Greer *v.* Chartiers R. Co., 96 Pa. St. 391, 42 Am. Rep. 548 (per Trunkey, J.); Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146; Morawetz Priv. Corp. (2d ed.) § 50.

Under this doctrine it has been held that a subscriber to articles of association, having the articles in his possession, may, at any time before they have been filed with the secretary of state, alter and reduce his subscription to any extent he pleases. Burt *v.* Farrar, 24 Barb. (N. Y.) 518.

97. McClure *v.* Peoples' Freight Co., 90 Pa. St. 269; Hedge's Appeal, 63 Pa. St. 273; Strasburg R. Co. *v.* Echternacht, 21 Pa. St. 220, 60 Am. Dec. 49. The same view was taken by Campbell, J., in his dissenting opinion in Peninsular R. Co. *v.* Duncan, 28 Mich. 130. The tendency of the courts in Pennsylvania to depart from this holding is illustrated by Shober *v.* Lancaster County Park Assoc., 68 Pa. St. 429, where it was held that a subscription which positively promises to pay a certain sum of money to accomplish a specified object is binding. This case followed the decision in Edinboro Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421, where an action at law for an assessment was sustained after the incorporation of the company on a subscription made before its incorporation. In Steamship Co. *v.* Murphy, 6 Phila. (Pa.) 224, 24 Leg. Int. (Pa.) 228, Sharswood, P. J., regarded the case of Strasburg R. Co. *v.* Echternacht, 21 Pa. St. 220, 60 Am. Dec. 49, where this doctrine was sprung, as being overruled in Edinboro Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421, except in so far as it denied relief in equity. The case of Strasburg R. Co. *v.* Echternacht, 21 Pa. St. 220, 60 Am. Dec. 49, is referred to in Talcott *v.* Pine Grove, 23 Fed. Cas. No. 13,735, 1 Flipp. 120, on the proposition that the promoters and launchers of a corporation cannot bind it in any way, although all are shareholders. See also Phillips Limerick Academy *v.* Davis, 11 Mass.

of subscription to the shares of a corporation, formally made, in pursuance of the statute or other governing instrument, and a mere tentative agreement to subscribe for such shares. The theory of these cases seems to be that if a number of coadventurers mutually agree to subscribe for shares in a corporation thereafter to be formed, this does not amount to an irrevocable contract to become shareholders when the corporation is formed; but they must perform the additional act of executing the statutory contract of membership by signing and acknowledging the articles of association where the corporation is unformed, or by entering their names on its stock-book where it is formed. This theory is that until this additional act is performed there is no offer which the corporation, when formed, or even if already formed, can accept, and that the subscribers do not therefore become shareholders and liable to be charged as such, unless they choose to carry out their agreement by subscribing for the shares.[98] This doctrine, which treats preliminary share subscribers to corporations not yet formed with the utmost levity, which ignores the principle, hereafter explained, that such subscriptions are mutual promises among the subscribers as toward each other, that this mutuality of promise constitutes a sufficient consideration for such a subscription, and that it is none the less so because the promise is made to a third person, the corporation, which is not yet *in esse*, has been taken up and adopted by a good many modern courts.[99] Other courts, not going quite so far, hold that a subscriber to the shares of an intended corporation has the right to withdraw his subscription before organization and acceptance, and before any expense or liability has been incurred.[1]

c. Rule Requires Subscription to Articles of Association or of Incorporation. This rule proceeds upon the narrow and strict ground that a contract, such as will bind the intending obligors, must be tendered to the other contracting party, to an artificial being not yet *in esse*, and in the precise statutory mode, or not at all.[2] Under this view, in cases where corporations are organized under general statutes, several courts have held that the mere signing of a provisional subscription paper, before or without a formal execution and signing of the articles of association or of incorporation, by whatever name called, does not make a signer a shareholder,

113, 6 Am. Dec. 162; and *compare* Shibley *v.* Angle, 37 N. Y. 626; Chambers *v.* Calhoun, 18 Pa. St. 13, 55 Am. Dec. 583.

98. See Thrasher *v.* Pike County R. Co., 25 Ill. 393; Lake Ontario Shore R. Co. *v.* Curtiss, 80 N. Y. 219; Morawetz Priv. Corp. (2d ed.) § 49. *Compare* Quick *v.* Lemon, 105 Ill. 578; Mt. Sterling Coalroad Co. *v.* Little, 14 Bush (Ky.) 429.

99. *Kansas.*— Nemaha Coal, etc., Co. *v.* Settle, 54 Kan. 424, 38 Pac. 483.

Maine.— Bryant's Pond Steam Mill Co. *v.* Felt, 87 Me. 234, 32 Atl. 888, 47 Am. St. Rep. 323, 33 L. R. A. 593.

Massachusetts.— Hudson Real Estate Co. *v.* Tower, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434.

Michigan.— International Fair, etc., Assoc. *v.* Walker, 88 Mich. 62, 49 N. W. 1086; Plank's Tavern Co. *v.* Burkhard, 87 Mich. 182, 49 N. W. 562.

Pennsylvania.— Muncy Traction Engine Co. *v.* De la Green, 143 Pa. St. 269, 13 Atl. 747; Auburn Bolt, etc., Works *v.* Shultz, 143 Pa. St. 256, 22 Atl. 904. Language and circumstances under which an agreement to subscribe to an enterprise entitled "South West Pennsylvania Fair" was held not enforceable as a subscription to capital stock. South West Pennsylvnia Fair Assoc. *v.* Greer, 11 Pa. Super. Ct. 103.

West Virginia.— Greenbrier Industrial Exposition *v.* Rodes, 37 W. Va. 738, 17 S. E. 305.

Canada.— Halifax Carette Co. *v.* Moir, 28 Nova Scotia 45; Halifax St. Carette Co. *v.* McManus, 27 Nova Scotia 173.

Compare White *v.* Kahn, 103 Ala. 308, 15 So. 595, where the subscription was said to have been designed merely as a test of what might be done.

See 12 Cent. Dig. tit. "Corporations," § 329.

1. Lewis *v.* Hillsboro Roller-Mill Co., (Tex. Civ. App. 1893) 23 S. W. 338; Patty *v.* Hillsboro Roller-Mill Co., 4 Tex. Civ. App. 224, 23 S. W. 336.

2. "The fact," said Mr. Commissioner Martin, "that informal papers and circular letters are commonly signed and published as a part of the enterprise and zeal which gives birth to such corporations, can make no difference as long as the statute fails to recognize them among the necessary and prescribed legal steps to be taken by the incorporators to create the body corporate." Sedalia, etc., R. Co. *v.* Wilkerson, 83 Mo. 235, 242, 243 [*citing* and *following* Poughkeepsie, etc., Plank Road Co. *v.* Griffin, 24 N. Y. 150; Troy, etc., R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297, and *distin-*

and as such liable.[3] Under this theory the liability of shareholders at the date of filing the articles is limited to those named therein, and to the amounts named therein.[4] This rule has been regarded as possessing special force, where the preliminary subscription paper binds the subscribers to take the number of shares set opposite their respective names, on conditions therein named. The annexing of conditions is regarded as placing the instrument in the category of mere tentative or provisional undertakings.[5]

d. Consequences of Rule — (I) *Subscription Not Binding Unless Corporation Is Formed.* The incorporation of a proposed company, to the capital stock of which one has subscribed, is a condition precedent to his liability upon the subscription contract; but upon the performance of such condition his liability becomes absolute.[6]

(II) *No Contract if Subscriber Dies Before Corporation Formed.* One of the consequences of this rule is that there is no contract if the subscriber to the preliminary agreement dies before the corporation is formed.[7]

(III) *Effect of Annexing Subscription to Articles of Incorporation or Entering Subscriber's Name in Stock-Book.* Other consequences of this rule are that the subscriber to the provisional paper is not bound where it is annexed to the articles of association without his consent;[8] or where the secretary of the corporation, after its formation, has, without authority from the provisional subscribers, placed their names on the list of shareholders in the stock-book;[9] and that in the absence of a statute authorizing such a provisional subscription to be made it will not be treated as an evidentiary document.[10]

(IV) *When Subscription Invalid Before Adoption of By-Laws.* Another consequence of this rule is that where the governing statute enacts that the persons subscribing the original articles, and those who subscribe to the stock in the manner to be provided by the by-laws, shall be a body corporate, there can be no operative subscription to the shares outside of subscriptions to the articles, until by-laws directing the mode of subscribing have been framed; so that a subscrip-

guishing Peninsular R. Co. *v.* Duncan, 28 Mich. 130; also *distinguishing* the following cases as being cases "in which the act of incorporation, either general or special, had been passed, and the defendants were held liable as stockholders by reason of subscriptions within the peculiar meaning and terms of the acts; or because the acts, unlike the one before us, failed to prescribe any particular method of subscription by which a person might acquire the rights and be subject to the responsibilities of a stockholder:" Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499; Johnston *v.* Ewing Female University, 35 Ill. 518; Tonica, etc., R. Co. *v.* McNeely, 21 Ill. 71; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Kennebec, etc., R. Co. *v.* Palmer, 34 Me. 366; Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Athol Music Hall Co. *v.* Cary, 116 Mass. 471; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336]. See also Parker *v.* Northern Cent. Michigan R. Co., 33 Mich. 23.

3. Coppage *v.* Hutton, 124 Ind. 401, 24 N. E. 112. 7 L. R. A. 591, under Ind. Rev. Stat. § 3851.

4. Monterey, etc., R. Co. *v.* Hildreth, 53 Cal. 123; Sedalia, etc., R. Co. *v.* Wilkerson, 83 Mo. 235; Troy, etc., R. Co. *v.* Warren, 18 Barb. (N. Y.) 310; Troy, etc., R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297.

5. Chase *v.* Sycamore, etc., R. Co., 38 Ill. 215; Thrasher *v.* Pike County R. Co., 25 Ill. 393; Troy, etc., R. Co. *v.* Warren, 18 Barb. (N. Y.) 310; Troy, etc., R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297.

Rule not applicable where there has been an agreement for the consolidation of existing companies.— Where three existing railroad companies were consolidated and a subscription was made after the agreement for consolidation, but before it was filed in the office of the secretary of the commonwealth, it was held that the filing of the agreement in the office of the secretary was not necessary to validate the subscription. McClure *v.* Peoples' Freight R. Co., 90 Pa. St. 269.

6. Keating Land Co. *v.* Wettengell, 30 Pittsb. L. J. N. S. 78.

7. Sedalia, etc., R. Co. *v.* Wilkerson, 83 Mo. 235. See also Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708, a subscription to an unincorporated religious society to build a church, where it was held otherwise, if the object of the subscription is acted upon, that is, if the building of the church is begun before the death of the subscriber.

8. Bucher *v.* Dillsburg, etc., R. Co., 76 Pa. St. 306.

9. Coyote Gold, etc., Min. Co. *v.* Ruble, 8 Oreg. 284.

10. Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581.

tion before the adoption of by-laws does not create either the rights or the liabilities of membership.[11]

(v) *Subscription and Payment of Deposit.* A subscription for a stated number of shares, accompanied with a payment of the deposit required by the charter or governing statute, makes the subscriber a shareholder in respect of that number of shares.[12]

(vi) *Subscription Before, but Delivery On, Day of Organization.* Another road has been found out of this difficulty by reasoning that, although the underwriting of a subscription paper may have preceded in point of time the day of the meeting at which the corporation was organized, yet if it were actually delivered to the corporation on that day, the difficulty is obviated and the logical symmetry of the law preserved, and this without reference to the inquiry whether its delivery actually antedated, in point of time, the organization of the corporation; since the law will so arrange the acts performed in one day, and relating to the same subject-matter, as to render them conformable to the intentions of the parties, without regarding which was in fact first produced or executed.[13]

(vii) *Doctrine That Subscriptions Made Before Organization and Accepted Afterward Are Good.* Many courts, expressing their reasoning in various ways, have reached the conclusion that a subscription to corporate shares made before the corporation comes into existence, but accepted by the corporation after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder and by extending to him the rights which pertain to that relation, makes him a shareholder.[14] The subscription paper may be informal, yet if the intent of the subscription can be collected from it, as where it states the names and residences of the shareholders, and the number of shares taken by each, it constitutes a subscription to shares

11. Carlisle *v.* Saginaw Valley, etc., R. Co., 27 Mich. 315.

Subscriber failing to assent to number and names of directors.— Another supposed consequence of this rule was that although the signer of the provisional agreement afterward subscribed articles of association, which set forth, besides other requisites, the number of directors and their names, as required by the governing statute, he was not bound by his subscription, although it did not appear that he ever assented to the number or names of the directors. Reed *v.* Richmond St. R. Co., 50 Ind. 342.

Difficulty avoided by subsequent ratification.— Other courts, endeavoring to be severely logical, have discovered a way out of this difficulty on the theory of a ratification by the subscriber, taking place after the organization of the corporation; as where the corporation issues and the subscriber accepts certificates representing the number of shares for which he subscribed. In such a case the contract is deemed to be complete, and the corporation may maintain an action against him for assessments. Taunton, etc., Turnpike Corp. *v.* Whiting, 10 Mass. 327, 6 Am. Dec. 124; Inter-Mountain Pub. Co. *v.* Jack, 5 Mont. 568, 6 Pac. 20. *Compare* Gilmore *v.* Pope, 5 Mass. 491. Such a ratification has been held to take place where, after the organization of the corporation, the subscriber recognizes the obligation of his subscription by making a part payment upon it. This, it is reasoned, is a sufficient renewal of his promise to the corporation, to enable it to maintain assumpsit for the balance, and the partial execution of the purpose designed by the charter forms a sufficient consideration for such promise. Kennebec, etc., R. Co. *v.* Palmer, 34 Me. 366. The same consequences were held to follow where the subscriber had paid for one of his shares in full and transferred the others. Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

12. Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74; Hayne *v.* Beauchamp, 5 Sm. & M. (Miss.) 515.

13. Taunton, etc., Turnpike Corp. *v.* Whiting, 10 Mass. 327, 6 Am. Dec. 124.

14. *California.*— Mahan *v.* Wood, 44 Cal. 462.

District of Columbia.— Glenn *v.* Busey, 5 Mackey 233.

Illinois.— Johnston *v.* Ewing Female University, 35 Ill. 518; Tonica, etc., R. Co. *v.* McNeely, 21 Ill. 71; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54.

Indiana.— New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337.

Iowa.— Nulton *v.* Clayton, 54 Iowa 425, 6 N. W. 685, 37 Am. Rep. 213.

Maine.— Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Kennebec, etc., R. Co. *v.* Palmer, 34 Me. 366.

Massachusetts.— Thompson *v.* Page, 1 Metc. 565.

Michigan.— Michigan Midland, etc., R. Co. *v.* Bacon, 33 Mich. 466.

of the forthcoming corporation, and the corporation may maintain actions upon it against the signers.[15]

7. Certificate of Shares Not Necessary — a. In General. Unless the statute otherwise provides in express terms,[16] and except in the case of preferred stock, "it is not essential that a certificate should have issued, in order to create the relation of shareholder, provided a contract to take stock had been duly made, or provided the rights, privileges, and emoluments of a shareholder had been enjoyed with the consent of the corporation."[17] An owner of shares may vote at corporate elections,[18] hold office, and, in the character of its principal officer, assent to a mortgage of its property,[19] without a certificate being issued to him. Nor is it necessary that the corporation should have issued, or even tendered to him a certificate, in order to enable it to maintain an action against him for assessments upon his shares.[20] And for equal reasons a certificate is not necessary to make him liable to creditors for debts of the corporation.[21] The theory is that

Minnesota.— Red Wing Hotel Co. *v.* Friedrich, 26 Minn. 112, 1 N. W. 827.

New Hampshire.— Ashuelot Boot, etc., Co. *v.* Hoit, 56 N. H. 548.

New York.— Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Yonkers Gazette Co. *v.* Taylor, 30 N. Y. App. Div. 334, 51 N. Y. Suppl. 969; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. 157.

Pennsylvania.— Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

Tennessee.— Gleaves *v.* Brick Church Turnpike Co., 1 Sneed 491.

Texas.— Belton Compress Co. *v.* Saunders, 70 Tex. 699, 6 S. W. 134.

See 12 Cent. Dig. tit. "Corporations," § 215.

15. Nulton *v.* Clayton, 54 Iowa 425, 6 N. W. 685, 37 Am. Rep. 213.

Reasons in support of this doctrine may be collected from the following cases: Minneapolis Threshing Mach. Co. *v.* Davis, 40 Minn. 110, 41 N. W. 1026, 12 Am. St. Rep. 701, 3 L. R. A. 796; Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181. See also Townsend *v.* Alexander, 2 Ohio 18.

As to the nature of such an offer and acceptance see the reasoning of Stone, C. J., in Knox *v.* Childersburg Land Co., 86 Ala. 180, 5 So. 578 [*citing* Marseilles Land Co. *v.* Aldrich, 86 Ill. 504; Twin Creek, etc., Turnpike Road Co. *v.* Lancaster, 79 Ky. 552; Athol Music Hall Co. *v.* Carey, 116 Mass. 471; People's Ferry Co. *v.* Balch, 8 Gray (Mass.) 303; Inter-Mountain Pub. Co. *v.* Jack, 5 Mont. 568, 6 Pac. 20].

Instances where subscribers were held liable on preliminary subscriptions. Peninsular R. Co. *v.* Duncan, 28 Mich. 130. See also Athol Music Hall Co. *v.* Carey, 116 Mass. 471; Buffalo, etc., R. Co. *v.* Clark, 22 Hun (N. Y.) 359. *Compare* Mahan *v.* Wood, 44 Cal. 462, subscription to shares in a homestead association and promissory note given therefor.

Rights and liabilities of subscribers for a common purpose afterward incorporated.— See the opinion of the supreme court of Pennsylvania by Lowrie, C. J., in Edinboro Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421. As soon as the associates, who have subscribed, organize, the subscription is binding, and if they incorporate in regular form the corporation is authorized to collect the subscriptions (Shober *v.* Lancaster County Park Assoc., 68 Pa. St. 429); and a subscriber is liable, although the mode of organization is without his direct and express assent (Hedge's Appeal, 63 Pa. St. 273; Robinson *v.* Edinboro Academy, 3 Grant (Pa.) 107).

16. Courtright *v.* Deeds, 37 Iowa 503.

17. Rogers *v.* Burr, 105 Ga. 432, 31 S. E. 438, 70 Am. St. Rep. 50; Butler University *v.* Scoonover, 114 Ind. 381, 16 N. E. 642, 5 Am. St. Rep. 627; Chaffin *v.* Cummings, 37 Me. 76; Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564, 31 Am. Dec. 163; Farrar *v.* Walker, 8 Fed. Cas. No. 4,679, 3 Dill. 506 note. It follows that it is not necessary that the fact should appear on the books of the corporation. It may be proved by parol. Chaffin *v.* Cummings, 37 Me. 76. See also *supra*, VI, H, 4, a, (I), (B), note 72.

18. Beckett *v.* Houston, 32 Ind. 393.

19. McComb *v.* Cordova Apartment Assoc., 10 N. Y. Suppl. 552, 31 N. Y. St. 334; McComb *v.* Barcelona Apartment Assoc., 10 N. Y. Suppl. 546, 31 N. Y. St. 325.

20. *California.*— See Mitchell *v.* Beckman, 64 Cal. 117, 28 Pac. 110.

Georgia.— South Georgia, etc., R. Co. *v.* Ayres, 56 Ga. 230; Fulgam *v.* Macon, etc., R. Co., 44 Ga. 597.

Indiana.— Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Hardy *v.* Merriweather, 14 Ind. 203; Vawter *v.* Ohio, etc., R. Co., 14 Ind. 174; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337. See also Slipher *v.* Earhart, 83 Ind. 173; Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51.

Kentucky.—Shelbyville *v.* Shelbyville, etc., Turnpike Co., 1 Metc. 54.

Massachusetts.—Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Missouri.— Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248.

New York.— Burr *v.* Wilcox, 22 N. Y. 551.

See 12 Cent. Dig. tit. "Corporations," § 230.

21. *Maine.*— Chaffin *v.* Cummings, 37 Me. 76.

it is the act of subscribing, or the registry of the shareholder's name upon the stock-book of the company opposite the number of shares for which he has subscribed, which gives him his title thereto, and that the certificate neither constitutes his title nor is necessary to it, but is only a memorial or evidence of it, which he is entitled to demand from the corporation whenever he may desire it.[22] It is further reasoned that a subscription for stock does not stand on the same footing as a contract of sale, so that the company, like the vendor, must offer to deliver before demanding the price. Whenever the subscriber pays, or obligates himself to pay, he is the owner of stock in the company. It is the payment, or the obligation to pay, that makes him a shareholder, with all the rights of one, if the certificate were not issued at all.[23]

b. Exception in Case of Preferred Shares. Preferred stock being something more than a mere evidence of a shareholder's right to participate in the management of the affairs of the company and to receive dividends, but being in the nature of an interest-bearing security, it has been held that the implied promise of the company to issue such stock and of the subscriber to pay for it, where the subscription is to stock of this kind, are concurrent and dependent, and that an action by the company upon such a subscription cannot be maintained until it has issued or tendered the stock.[24]

8. When Contract of Subscription Not Necessary. No formal contract of subscription for a stated number of shares is necessary, where the corporation issues certificates for that number of shares and tenders them to the person, who accepts them.[25]

9. If No Certificate Issued, Then Written Agreement Necessary — a. In General. On the other hand, if no certificate of stock has been issued to and accepted by the person sought to be charged, a written contract of subscription is ordinarily necessary to bind him as a shareholder.[26] The word "subscription" by its etymology imports a writing; and most of the courts take the view that a contract to become a shareholder in a corporation must be in writing and cannot be established by parol evidence.[27] In conformity to the same view, it has been

Massachusetts.—Chase *v.* Merrimack Bank, 19 Pick. 564, 31 Am. Dec. 163; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Missouri.—Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248.

New Hampshire.—Haynes *v.* Brown, 36 N. H. 545; Chesley *v.* Pierce, 32 N. H. 388.

New York.—Burr *v.* Wilcox, 22 N. Y. 551 [*affirming* 6 Bosw. 198]; Spear *v.* Crawford, 14 Wend. 20, 28 Am. Dec. 513.

United States.—Hawley *v.* Upton, 102 U. S. 314, 26 L. ed. 179; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

See 12 Cent. Dig. tit. "Corporations," § 945.

22. Lincoln *v.* State, 36 Ind. 161; Beaver *v.* Hartsville University, 34 Ind. 245; Cincinnati, etc., R. Co. *v.* Pearce, 28 Ind. 502; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337. And see Chandler *v.* Northern Cross R. Co., 18 Ill. 190. For the same reason the failure of the corporation to issue to defendant, who is a shareholder therein, certificates for his shares, is no defense by him when sued by the corporation for money loaned. Hazelett *v.* Butler University, 84 Ind. 230.

23. Fulgam *v.* Macon, etc., R. Co., 44 Ga. 597.

24. St. Paul, etc., R. Co. *v.* Robbins, 23 Minn. 439.

25. Walter *v.* Merced Academy Assoc., 126 Cal. 582, 59 Pac. 136; Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499; Jackson *v.* Traer, 64 Iowa 469, 20 N. W. 764, 52 Am. Rep. 449; Nulton *v.* Clayton, 54 Iowa 425, 6 N. W. 685, 37 Am. Rep. 213; Dayton *v.* Borst, 31 N. Y. 435; Rensselaer, etc., Plank Road Co. *v.* Barton, 16 N. Y. 457 note; Spear *v.* Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

26. Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146.

That a contract of subscription in some form is necessary, and that it is not created by the mere recitals in a bond given by a person to a corporation as security for supposed shares, which were never issued to the obligor in the bond, see the doubtful case of Butler University *v.* Scoonover, 114 Ind. 381, 16 N. E. 642, 5 Am. St. Rep. 627, opinion by Mitchell, C. J.

27. Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188; Fanning *v.* Hibernia Ins. Co., 37 Ohio St. 339, 41 Am. Rep. 517; Pittsburgh, etc., R. Co. *v.* Gazzam, 32 Pa. St. 340; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146; Thames Tunnel Co. *v.* Sheldon, 6 B. & C. 341, 9 D. & R. 278, 5 L. J. K. B. O. S. 157, 13 E. C. L. 161.

held that the title of a transferee of shares can be established only by evidence of the same dignity.[28] This view, no doubt, had its origin in the fact that nearly all special charters and general statutes establishing schemes of corporate organization provide for the receiving of subscriptions to the capital stock, either in books open for that purpose, or upon the articles of association by which the corporation is established, or otherwise.[29]

b. Oral Promise and Note Given For Shares. It has been held that an oral promise pending the organization of a corporation to take a stated number of its shares does not constitute the promisor a shareholder or member, and will not furnish a consideration to support a note given by him to pay for the shares, in the absence of evidence that the promisor received the share certificates or performed any acts creating an estoppel.[30] Another court has held that where a person gives his promissory note to a corporation and receives a receipt for the same, which also states that the note, when paid, will be in full for a certain number of shares of the capital stock, he does not become a shareholder until the note matures and is paid, and a stock certificate is issued.[31]

c. Doctrine That Writing Is Not in Strictness Necessary. Corporate shares not being goods, wares, or merchandise within the meaning of the statute of frauds,[32] it would seem to follow that in strictness of law it is neither necessary that there should be a contract in writing to take and pay for shares nor an actual receipt of them — or what is tantamount, a receipt of their symbol, the stock certificate — in order to constitute one a shareholder. It has accordingly been held that a person may become a shareholder without signing the stock-book or any written agreement to take shares;[33] and that a parol agreement made with the directors of a corporation to take stock may be enforced, when neither the governing statute nor the charter requires such contracts to be in writing.[34]

10. Written Subscription Not Varied by Parol Evidence — a. Statement of Rule. The general rule which excludes parol evidence to vary writings applies to subscriptions to the capital stock of corporations. Such a subscription cannot therefore be varied by parol evidence of a special agreement made prior to or concurrently with it,[35] as to show that the subscription was made upon a condition not expressed in the instrument.[36]

b. When Explainable by Parol. No reason is perceived why the rule which

28. Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146.

29. Thus under a statute of Oregon (Oreg. Stat. 525, §§ 4–7) defining the duties of directors and the rights of shareholders, it is held that all original shareholders are only made liable on their subscriptions for stock by a writing, and are all equal before the law, and there is no estoppel between them. Coyote Gold, etc., Min. Co. *v.* Ruble, 8 Oreg. 284.

30. Fanning *v.* Hibernia Ins. Co., 37 Ohio St. 339, 41 Am. Rep. 517.

31. Tracy *v.* Yates, 18 Barb. (N. Y.) 152. But the soundness of these decisions is doubtful.

32. See *supra*, VI, A, 9.

33. *Re* Canada Cent. Bank, 25 Can. L. J. N. S. 238; *Re* Standard F. Ins. Co., 12 Ont. App. 486.

34. Colfax Hotel Co. *v.* Lyon, 69 Iowa 683, 29 N. W. 780. See also the observations of Osler, J., in Union F. Ins. Co. *v.* O'Gara, 4 Ont. 359.

35. *Alabama.*— Smith *v.* Tallassee Branch Cent. Plank Road Co., 30 Ala. 650.

Connecticut.— Ridgefield, etc., R. Co. *v.* Brush, 43 Conn. 86.

Florida.—Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713.

Indiana.— Evansville, etc., R. Co. *v.* Posey, 12 Ind. 363; New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187.

Mississippi.— Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

New Hampshire.— Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

Pennsylvania.—McClure *v.* People's Freight R. Co., 90 Pa. St. 269.

Tennessee.—Cunningham *v.* Edgefield, etc., R. Co., 2 Head 22; East Tennessee, etc., R. Co. *v.* Gammon, 5 Sneed 567.

36. *Connecticut.*— Fairfield County Turnpike Corp. *v.* Thorp, 13 Conn. 173.

Kentucky.— Wight *v.* Shelby R. Co., 16 B. Mon. 4, 63 Am. Dec. 522.

Maine.— Kennebec, etc., R. Co. *v.* Waters, 34 Me. 369.

North Carolina.— North Carolina R. Co. *v.* Leach, 49 N. C. 340.

Pennsylvania.— Miller *v.* Hanover Junction, etc., R. Co., 87 Pa. St. 95, 30 Am. Rep. 349.

lets in parol evidence to explain ambiguities in written contracts should not apply to contracts of this kind; and there are decisions which support this view.[37] The modern doctrine is that the acts of corporations may be proved in the same manner as the acts of individuals, and that if there be no record of their acts they may be proved by parol evidence.[38] Accordingly it has been held that in a suit on a subscription to the stock of an incorporated company it was competent for defendant to show by oral testimony, in the absence of record evidence, that the subscription list upon which defendant's name appeared was annulled and abandoned, and that another subscription was subsequently opened and made the basis of the organization by the shareholders.[39]

11. FORM OF SUBSCRIPTION — a. In General. It seems that the form of the subscription is immaterial, so that the intention of the parties can be collected from the writing,[40] unless the charter or governing statute requires it to be made in a particular form or manner, in which case, according to one view, the requirement of the statute must be pursued or the subscription will not be binding.[41]

b. Unsubstantial Variances From Statutory Form Disregarded. Unsubstantial variances from the form prescribed by the statute will not, however, prevent the subscription from being operative.[42]

c. In What Kind of Book. Unless the charter or governing statute so provides, it is not necessary to the validity of the subscription that it should be originally made in a book prepared for that purpose. And although the statute requires books to be opened, the use of subscription papers in the first instance instead of a book does not make the subscription void.[43] Subscriptions made on a loose sheet of paper, which were afterward put in a bound book used as a record of the company, were held sufficient, where the contents of this paper, with the names of the subscribers and the amounts subscribed, were entered in the book by the commissioners who were appointed to open books of subscription.[44] Where the subscription was made in a small blank book before the regular stock-book for subscriptions was opened, and was afterward accepted by the corporation, it was regarded as unnecessary, in order to a right of action for assessments, that it should be transferred to the stock-book of the company.[45]

d. Subscription Paper Signed in Blank. A signature to an incomplete subscription paper wanting or left in blank in any substantial particular will not be binding upon the signer without a further assent on his part to the

As to subscriptions made upon parol conditions see *infra*, VI, J, 1, d, (IV).

37. Johnson *v.* Wabash, etc., Plank Road Co., 16 Ind. 389; Sodus Bay, etc., R. Co. *v.* Hamlin, 24 Hun (N. Y.) 390.

38. See *infra*, XII, F, 3.

39. Southern Hotel Co. *v.* Newman, 30 Mo. 118.

40. Monterey, etc., R. Co. *v.* Hildreth, 53 Cal. 123; Nulton *v.* Clayton, 54 Iowa 425, 6 N. W. 685, 37 Am. Rep. 213; Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294; 1 Morawetz Priv. Corp. (2d ed.) § 69.

41. Northern Cent. Michigan R. Co. *v.* Eslow, 40 Mich. 222; Parker *v.* Northern Cent. Michigan R. Co., 33 Mich. 23; Carlisle *v.* Saginaw Valley, etc., R. Co., 27 Mich. 315; Shurtz *v.* Schoolcraft, etc., R. Co., 9 Mich. 269.

42. Thus, where the legislature provided that the form of the subscription should be payable to the "president, managers, and company," the contract was held valid, although the word "president" was omitted, and it was made payable to the managers and company. The court found enough in the other expressions of the instrument to describe the corporation intended and to effectuate the contract. Hager's Town Turnpike Road Co. *v.* Creeger, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495.

43. *Indiana.*— Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68.

New York.— Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. 157.

Ohio.— Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328.

Tennessee.— Mobile, etc., R. Co. *v.* Yandal, 5 Sneed 294.

Virginia.— Stuart *v.* Valley R. Co., 32 Gratt. 146.

See 12 Cent. Dig. tit. "Corporations," § 205.

44. Woodruff *v.* McDonald, 33 Ark. 97.

45. Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68.

Although other accounts are written therein a book may be a good stock subscription book as required by the statute. Samuel *v.* Swanger, 7 Del. Co. (Pa.) 446.

completion of the instrument, as where the names of the directors are left in blank.[46]

e. Effect of Erasure in Subscription Paper. The erasure of a subscription for stock does not *per se* prevent suit upon it, but explanatory parol evidence is admissible.[47]

f. Effect of Annexing Explanatory Memorandum. Where an explanatory memorandum is annexed to the subscription paper, the legal presumption is that it was there when the subscription was made, in the absence of evidence to the contrary.[48]

g. Effect of Receipt Written on Margin of Subscription Book. A mere receipt for a certificate of stock, written in the margin of the subscription book, has been held a sufficient subscription for stock.[49]

h. Subscription Signed by Partnership Name. A subscription by a partnership name is a sufficient compliance with a statute which requires that a subscriber to the articles of incorporation shall subscribe thereto "his name, place of residence, and amount by him subscribed."[50]

i. Instances of Sufficient Subscriptions. A subscription of stock "subject always to the by-laws, rules and articles of incorporation," one of which was that the stock should be paid for after five hundred shares had been subscribed, and that ten per cent should be payable on the fifteenth of each month, has been held to render the subscriber a shareholder, and to make the instalments become due even if no assessments were made.[51]

12. Theories as to Consideration of Contract — a. Various Theories. These will be dismissed briefly, since they are only theories. They include the interest acquired by the subscriber;[52] the obligation of the corporation to issue the shares or to admit the subscriber to its management and its profits;[53] the franchises granted by the charter, inuring to the benefit of the subscriber;[54] the failure of the commissioners to reject the subscription where they have the power to do so;[55] labor or money expended on the faith of the promise;[56] and

46. Dutchess, etc., R. Co. *v.* Mabbett, 58 N. Y. 397. But where certain persons signed the subscription book of a corporation, leaving the amounts in blank, intending that they should be represented as subscribers for the purpose of influencing others to subscribe, it was held, in an action by the creditors of the corporation, seeking to compel payment of unpaid subscriptions, that the signers impliedly authorized the filling up of the blanks by thus taking subscriptions. Jewell *v.* Rock River Paper Co., 101 Ill. 57.

47. Bordentown, etc., Turnpike Co. *v.* Imlay, 4 N. J. L. 327.

48. Robinson *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 334, 72 Am. Dec. 792.

49. Lohman *v.* New York, etc., R. Co., 2 Sandf. (N. Y.) 39. See also Clements *v.* Todd, 1 Exch. 268, 17 L. J. Exch. 31, 5 R. & Can. Cas. 132; Carrick's case, 15 Jur. 645, 20 L. J. Ch. 670, 1 Sim. N. S. 505.

Instances of insufficient subscriptions may be discovered in California Sugar Mfg. Co. *v.* Schafer, 57 Cal. 396 (construing Cal. Civ. Code, §§ 343, 344); Troy, etc., R. Co. *v.* Warren, 18 Barb. (N. Y.) 310; York *v.* Passaic Rolling-Mill Co., 30 Fed. 471.

50. Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. (N. Y.) 541.

51. Waukon, etc., R. Co. *v.* Dwyer, 49 Iowa 121.

Other instances of sufficient subscriptions. — Cole *v.* Ryan, 52 Barb. (N. Y.) 168; Eastern Plank Road Co. *v.* Vaughan, 20 Barb. (N. Y.) 155; Grangers' Market Co. *v.* Vinson, 6 Oreg. 172.

Acts which amount to a contract to take shares.— Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Scott *v.* Berkeley, 3 C. B. 925, 11 Jur. 242, 16 L. J. C. P. 107, 5 R. & Can. Cas. 51, 54 E. C. L. 925; *In re* Licensed Victuallers Mut. Trading Assoc., 42 Ch. D. 1, 58 L. J. Ch. 467, 60 L. T. Rep. N. S. 684, 1 Meg. 180, 37 Wkly. Rep. 674; Matter of Amazon L. Assur., etc., Co., 8 De G. M. & G. 177, 3 Drew. 409, 4 Wkly. Rep. 420, 57 Eng. Ch. 138; Gordon's Case, 3 De G. & Sm. 249.

52. Kennebec, etc., R. Co. *v.* Jarvis, 34 Me. 360; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157; East Tennessee, etc., R. Co. *v.* Gammon, 5 Sneed (Tenn.) 567.

53. St. Paul, etc., R. Co. *v.* Robbins, 23 Minn. 439; Richmondville Union Seminary *v.* McDonald, 34 N. Y. 379.

54. Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

55. Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

56. Galt *v.* Swain, 9 Gratt. (Va.) 633, 60 Am. Dec. 311.

Where work is done or expense incurred under a promise, the liability is not disputed by

the use of the words "value received" in the subscription paper, these importing a consideration.[57]

b. Mutuality of Promise Among Subscribers. Other courts have found in the act of the particular subscriber in subscribing with others, a mutuality of promise which obliges him to make good his promise to the corporation after it comes into its existence.[58] "It follows from this," says Sir Nathaniel Lindley, "that no subscriber to a projected company can recover back his money on the ground that the consideration for his subscription has failed, until the formation of the company, upon the terms assented to by him,[59] has been abandoned or has become impracticable."[60]

c. Consideration Where Corporation Is in Existence. Where the corporation is in existence at the time when the subscription is made no room is left for these speculations, since there is a mutuality of promise on the part of each of the parties;[61] but even here the courts have discovered a consideration in additional circumstances.[62]

d. Subscription Good Consideration For Other Undertakings. A subscription for stock of a company, being a legal obligation, which can be enforced by action and by forfeiture for non-payment, is therefore a good consideration for a mortgage to secure the payment of the amount subscribed.[63] On a principle already considered,[64] such a subscription is a good consideration for a promise on the part of other persons to pay money toward the undertaking.[65]

e. Subsequent Failure of Consideration. No doubt a failure to form the projected company on terms named in the subscription paper, or in the memorandum to which it refers, will constitute a failure of consideration, so that the subscriber

any authority. Underwood *v.* Waldron, 12 Mich. 73, opinion by Campbell, J.

Labor performed and money spent to secure the location of a railroad depot are a sufficient consideration to support a promise contained in a subscription to pay money for that object. Workman *v.* Campbell, 46 Mo. 305. See also the following cases:

Illinois.— Illiopolis M. E. Church *v.* Garvey, 53 Ill. 401, 5 Am. Rep. 51; Thompson *v.* Mercer County, 40 Ill. 379.

Indiana.— Cook *v.* McNaughton, 128 Ind. 410, 24 N. E. 361, 28 N. E. 74.

Massachusetts.— Farmington Academy *v.* Allen, 14 Mass. 172, 7 Am. Dec. 201.

Missouri.— Koch *v.* Lay, 38 Mo. 147.

New York.—Barnes *v.* Perine, 12 N. Y. 18; McAuley *v.* Billenger, 20 Johns. 89.

Oregon.— Philomath College *v.* Hartless, 6 Oreg. 158, 25 Am. Rep. 510.

Vermont.— State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626.

Compare Carpenter *v.* Mather, 4 Ill. 374; State University *v.* Buell, 2 Vt. 48.

57. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546 [*affirming* 20 Barb. (N. Y.) 155].

To the contrary where the subscription paper does not authorize the formation of a corporation to carry out its purposes, and where it cannot be construed as a request on the part of the subscriber, express or implied, to have the labor or money expended see Machias Hotel Co. *v.* Coyle, 35 Me. 405, 58 Am. Dec. 712.

58. *California.*—West *v.* Crawford, 80 Cal. 19, 21 Pac. 1123.

Massachusetts.—Pembroke Second Precinct Church *v.* Stetson, 5 Pick. 506.

Missouri.— New Lindell Hotel Co. *v.* Smith, 13 Mo. App. 7.

Pennsylvania.— Jeannette Bottle Works *v.* Schall, 13 Pa. Super. Ct. 96.

Texas.— Belton Compress Co. *v.* Saunders, 70 Tex. 699, 6 S. W. 134.

England.— Baird *v.* Ross, 2 Macq. 61. See also Burnes *v.* Pennell, 2 H. L. Cas. 497, 13 Jur. 597. *Compare* Kent *v.* Jackson, 14 Beav. 367, 2 De G. M. & G. 49, 51 Eng. Ch. 36.

59. Citing Johnson *v.* Goslett, 3 C. B. N. S. 569, 4 Jur. N. S. 50, 27 L. J. C. P. 122, 6 Wkly. Rep. 127, 91 E. C. L. 569. And see also Wilson *v.* Church, 13 Ch. D. 1; s. c. *sub nom.* National Bolivian Nav. Co. *v.* Wilson, 5 App. Cas. 176, 43 L. T. Rep. N. S. 60.

60. Lindley Comp. L. (5th ed.) 29, 30.

Decisions denying this principle.—Decisions are not wanting which either deny this principle or hold it inapplicable; but they seem on examination to be cases where no payee is named or designated, or where the one designated is either incapable of action or does not assume and is not bound to act. Phillips Limerick Academy *v.* Davis, 11 Mass. 113, 6 Am. Dec. 162; Boutell *v.* Cowdin, 9 Mass. 254. *Compare* Farmington Academy *v.* Allen, 14 Mass. 172, 7 Am. Dec. 201.

61. Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

62. See for example Union Turnpike Road Co. *v.* Jenkins, 1 Cai. (N. Y.) 381.

63. Battershall *v.* Davis, 31 Barb. (N. Y.) 323.

64. See *supra*, VI, H, 12, a, note 56.

65. Ashuelot Boot, etc., Co. *v.* Hoit, 56 N. H. 548.

may recover back the money which he has paid;[66] and the same must be true where the enterprise has been wholly abandoned or where it has become impracticable.[67] But where payment for the shares has been secured by a mortgage, the neglect or omission of the company to issue to the mortgagor scrip for his shares before payment will not amount to a failure of the consideration, especially where it appears that by so doing the officers of the company will make themselves personally liable to the creditors of the company.[68] Moreover such a consideration does not fail in the theory of the law, because of the failure of the corporation, at the time when the action is brought to enforce the contract, to construct their works in accordance with the declarations of the promoters of the corporation, on the faith of which the promise of the subscriber was made; since the very object of the subscription is to assist in affording the means to construct their works. The agreement to construct remains a sufficient consideration for the subscription.[69]

f. No Consideration Where Company and Not Subscriber Gets Shares. One court has rendered a decision which is tantamount to holding that where a subscriber gets no direct personal benefit from his subscription — more briefly, where he does not get the shares — there is no consideration for the promise, as where the subscription contract, not under seal, of a mining company, was conditioned that two thousand of the capital shares should be paid to trustees, to be by them held for the benefit and subject to the direction of the company. Here it was held that the trustees being *pro hac vice* the servants of the company, and their possession its possession, the consideration was too shadowy to support a contract.[70]

13. Necessity of Paying Statutory Deposit — a. In General. Where the charter or governing statute requires the payment in cash of a certain percentage of the amount subscribed, at the time of making the subscription, there is a division of judicial opinion upon the question whether this payment is necessary to give binding force to the contract. Many of the courts hold that it is necessary where the subscription is made before organization.[71] Under this theory, until the statutory deposit is paid, there is no contract which binds either party, or through which either party can derive any rights against the other.[72] The subscriber cannot demand any rights in the corporation; the corporation

66. Johnson *v.* Goslett, 3 C. B. N. S. 569, 4 Jur. N. S. 50, 27 L. J. C. P. 122, 6 Wkly. Rep. 127, 91 E. C. L. 569. See also Wilson *v.* Church, 13 Ch. D. 1; s. c. *sub nom.* National Bolivian Nav. Co. *v.* Wilson, 5 App. Cas. 176, 43 L. T. Rep. N. S. 60.

67. Lindley Comp. L. (5th ed.) 29, 30.

68. Battershall *v.* Davis, 31 Barb. (N. Y.) 323.

69. Cedar Rapids First Nat. Bank *v.* Hurford, 29 Iowa 579.

70. New York, etc., Gold Min. Co. *v.* Martin, 13 Minn. 417.

71. *California.*— People *v.* Chambers, 42 Cal. 201.

Georgia.— Wood *v.* Coosa, etc., R. Co., 32 Ga. 273.

Maryland.— Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760.

Mississippi.—Fisher *v.* Mississippi, etc., R. Co., 32 Miss. 359.

New York.— Perry *v.* Hoadley, 19 Abb. N. Cas. 76; Jenkins *v.* Union Turnpike Road Co., 1 Cai. Cas. 86 [*recognized* in Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. 217, 6 Am. Dec. 273]; Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459. These three last decisions state that this was the ground on which the case of Jenkins *v.* Union Turnpike Co., 1 Cai. 86, was finally determined in the court of errors. But as hereafter seen they no longer express the law of New York on the subject. See *infra*, VI, H, 13, c.

Pennsylvania.— The same view was taken of the necessity of complying with the charter provision requiring the payment of a deposit in Hibernia Turnpike Road Co. *v.* Henderson, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593; and this decision was reaffirmed in Leighty *v.* Susquehanna Turnpike Co., 14 Serg. & R. (Pa.) 434. *Compare* Hanover Junction, etc., R. Co. *v.* Grubb, 82 Pa. St. 36; Erie, etc., Plank Road Co. *v.* Brown, 25 Pa. St. 156.

South Carolina.— Charlotte, etc., R. Co. *v.* Blakeley, 3 Strobh. 245.

United States.— Missouri State Ins. Co. *v.* Redmond, 3 Fed. 764, 1 McCrary 308.

See 12 Cent. Dig. tit. "Corporations," § 208.

72. Reasoning in Perry *v.* Hoadley, 19 Abb. N. Cas. (N. Y.) 76, and cases cited below.

cannot maintain an action against him to enforce his subscription,[73] nor can the creditors of the corporation enforce their demands against him.[74] The reason in support of this theory is that statutes creating corporations are to be strictly pursued; that the payment of the statutory deposit is a condition precedent to the subscriber becoming a shareholder, so that his subscription can become a basis for the organization of the corporation; and that the payment of this deposit is necessary to prevent fictitious subscriptions, which are a fraud upon honest subscribers and upon the law.[75]

b. Rule That Payment of Deposit Must Be Made in Specie or Its Equivalent — (I) *Statement of Rule.* Under this strict rule the theory of several courts was that only specie or its equivalent, current bills of specie-paying banks, could be received in payment of the sum required to be paid at the time of subscribing the stock.[76]

(II) *Effect of Giving Note* — (A) *View That Statute Is Not Complied With.* The courts which take this view hold that the giving of a promissory note for the amount required to be paid is not a payment, or a sufficient compliance with a statute which requires payment in cash; and where such a payment was attempted the subscription was void and imposed no obligation on the subscriber.[77]

(B) *Contrary View.* Other courts take the view that the statutory deposit may be paid by the giving of his promissory note by the subscriber, if the corporation is willing to accept it as money, and to give a receipt for it as money.[78] It

73. Wood *v.* Coosa, etc., R. Co., 32 Ga. 273; Excelsior Grain Binder Co. *v.* Stayner, 58 How. Pr. (N. Y.) 273; Highland Turnpike Co. *v.* McKean, 11 Johns. (N. Y.) 98; Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169; Hibernia Turnpike Road Co. *v.* Henderson, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593.

74. Perry *v.* Hoadley, 19 Abb. N. Cas. (N. Y.) 76.

75. "A corporation," said one court, "being the mere creature of law, can act in no other manner than the law prescribes, and cannot be permitted to enter into a contest with the legislature, concerning the policy or expediency of the terms which have been dictated." Hibernia Turnpike Road Co. *v.* Henderson, 8 Serg. & R. (Pa.) 219, 221, 11 Am. Dec. 593, opinion by Tilghmann, C. J. The learned judge referred to Mitchell *v.* Smith, 1 Binn. (Pa.) 110, 2 Am. Dec. 417, and Mabin *v.* Coulon, 4 Dall. (U. S.) 298, 1 L. ed. 841, as settling the point that a contract made in violation of an act of the legislature cannot be enforced in a court of justice. That legislatures have sometimes been obliged to pass curative acts to validate subscriptions thus made and to prevent the subscribers from taking advantage of their own wrong see Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.) 364. In the leading case in Pennsylvania, Chief Justice Gibson (he was not chief justice at the time of this decision), whose opinions have always been held in high respect by the profession, expressed the view that the design of this provision of the statute was to prevent the subscription list being filled by fictitious subscribers, who should be favorites of the commissioners, or the creatures of other interested persons. He reasoned that it would be a fraud on the law and on the fair subscriber to admit to equal participation in the administration of the corporate affairs men who had not paid the required deposit with men who had. See his opinion in Hibernia Turnpike Road Co. *v.* Henderson, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593. These views were quoted with approval by the court of appeals of Maryland in Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760, where the authorities on the subject are reviewed at considerable length.

76. People *v.* Troy House Co., 44 Barb. (N. Y.) 625; Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; Neuse River Nav. Co. *v.* Newbern, 52 N. C. 275; McRae *v.* Russell, 34 N. C. 224; Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187.

77. Hayne *v.* Beauchamp, 5 Sm. & M. (Miss.) 515; McRae *v.* Russell, 34 N. C. 224; Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169; Leighty *v.* Susquehanna, etc., Turnpike Co., 14 Serg. & R. (Pa.) 434.

That a simulated payment of the deposit by a note with a secret agreement that the note shall not be paid is immoral and against public policy and that the maker of the note has no equity to be relieved against its payment see McRae *v.* Atlantic, etc., R. Co., 58 N. C. 395.

78. Greenville, etc., R. Co. *v.* Woodsides, 5 Rich. (S. C.) 145, 55 Am. Dec. 708. *Compare* Clark *v.* Farrington, 11 Wis. 306, where this case is cited.

It has been held a good payment of this deposit that it was settled in a draft maturing in thirty days (Napier *v.* Poe, 12 Ga. 170), or in a note maturing at a future time, even where the charter required the payment to be made in cash at the time of subscrip-

is a necessary part of this doctrine that such a note is given upon a good consideration, and is enforceable in an action at law brought by the corporation.[79]

(III) *Effect of Giving Check on Bank or Banker*—(A) *In General.* The extreme view which requires the payment of this deposit to be made in cash rejects a payment made by a check drawn against funds in the hands of a bank or banker;[80] but this conception, which ignores the settled habits of business, cannot be regarded as expressing the law. On the contrary a payment made by a check drawn against sufficient funds in the hands of a banker, which check would be paid by the banker on presentation is a good payment;[81] and so is a check drawn upon a solvent banker and certified by him as good, where the custom prevails of regarding certified checks as equivalent to money.[82]

(B) *Simulated Payment by Giving Checks Which Are Not Collected.* Simulated payments, made to fill out the necessary amount to organize the corporation under its charter or governing statute, by giving checks with the understanding that they shall not be collected, or that if collected the money shall be refunded, are not such payments of the statutory deposit as complies with the charter.[83]

(IV) *May Be Made by Third Person if Ratified by Subscriber.* As in any other case of payment, the payment of this statutory deposit may be made for the subscriber by a third person, even though acting officiously, provided his act is afterward ratified by the subscriber.[84]

(V) *Payment in Services.* It has been held that the payment of this statutory deposit may be made in services, such as the corporation, under its charter, has power to contract for, at a fair valuation.[85]

c. View That Non-Payment of Statutory Deposit Does Not Render Subscription Void—(I) *Statement of Doctrine.* Other courts take the view that, although the charter or governing statute provides that a certain percentage of the sum subscribed, or a certain round sum, shall be paid by the subscriber at the time of the subscription, the non-payment of this instalment or deposit does not render the subscription void;[86] but that subsequent payment will operate as a waiver of the condition, and the party making it will be considered as recognizing

tion, and declared that the subscription should be void if it were not so paid (McRae *v.* Russell, 34 N. C. 224).

79. McRae *v.* Russell, 34 N. C. 224; Vermont Cent. R. Co. *v.* Clayes, 21 Vt. 30.

80. Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

81. People *v.* Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178.

82. Matter of Staten Island Rapid Transit R. Co., 37 Hun (N. Y.) 422. *Compare* Thorp *v.* Woodhull, 1 Sandf. Ch. (N. Y.) 411.

83. People *v.* Chambers, 42 Cal. 201; Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242; Excelsior Grain Binding Co. *v.* Stayner, 25 Hun (N. Y.) 91, 61 How. Pr. (N. Y.) 456; State *v.* Jefferson Turnpike Co., 3 Humphr. (Tenn.) 304.

Invalidity of such secret agreements.—On grounds hereafter discussed (see *infra*, VI, J, 1, d, [v]) if the subscriber to the shares gives his check for the statutory deposit, with a secret understanding between himself and the agent soliciting subscriptions that he shall neither be required to pay the check nor to pay for the shares, the law discharges the secret corrupt agreement and holds him to the liability which he has ostensibly assumed, so that the corporation can maintain an action upon the check (Syracuse, etc., R. Co. *v.* Gere, 4 Hun (N. Y.) 392, 6 Thomps. & C. (N. Y.) 636. *Compare* Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228).

84. Mississippi, etc., R. Co. *v.* Harris, 36 Miss. 17. *Compare* Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. (N. Y.) 541.

85. Beach *v.* Smith, 30 N. Y. 116 [*affirming* 28 Barb. (N. Y.) 254], where the services consisted in procuring subscriptions and right of way for a railway corporation.

As to payment of shares in property or services see *infra*, VI, M, 2.

86. *Alabama.*—Smith *v.* Tallassee Branch Cent. Plank-Road Co., 30 Ala. 650; Hall *v.* Selma, etc., R. Co., 6 Ala. 741.

Georgia.—Mitchell *v.* Rome R. Co., 17 Ga. 574.

Illinois.—Illinois River R. Co. *v.* Zimmer, 20 Ill. 654.

Louisiana.—Vicksburg, etc., R. Co. *v.* McKean, 12 La. Ann. 638.

Maine.—Chaffin *v.* Cummings, 37 Me. 76.

Maryland.—Webb *v.* Baltimore, etc., R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396.

Minnesota.—Minneapolis, etc., R. Co. *v.* Bassett, 20 Minn. 535, 18 Am. Rep. 376.

New Hampshire.—Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; Haynes *v.* Brown, 36 N. H. 545; Chesley *v.* Pierce, 32 N. H. 388.

his original liability.[87] According to this view the non-payment of the statutory deposit cannot be set up by the subscriber as a defense to an action for calls upon his subscription.[88]

(11) *Subscription Valid Although Payment Made at Subsequent Time.* Where this theory prevails, the payment need not be contemporaneous with the subscription; but if the subscriber pay the deposit before the subscription books are closed he will be held to the payment of the residue, although he did not pay the deposit at the time of subscribing.[89] Where the statute in terms recited that the subscription should be *bona fide* and required the commissioners to receive ten per cent thereof in gold or silver, but designated no time for the payment of

New York.— Black River, etc., R. Co. *v.* Clarke, 25 N. Y. 208; Rensselaer, etc., Plank Road Co. *v.* Barton, 16 N. Y. 457 note; Lake Ontario, etc., Co. *v.* Mason, 16 N. Y. 451; Beach *v.* Smith, 28 Barb. 254; Abbott *v.* Aspinwall, 26 Barb. 202; Spear *v.* Crawford, 14 Wend. 20, 28 Am. Dec. 513; Union Turnpike Road Co. *v.* Jenkins, 1 Cai. 381; Thorp *v.* Woodhull, 1 Sandf. Ch. 411.

North Carolina.— Haywood, etc., Plank Road Co. *v.* Bryan, 51 N. C. 82.

Ohio.— Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225; Henry *v.* Vermillion, etc, R. Co., 17 Ohio 187.

Vermont.—Vermont Cent. R. Co. *v.* Clayes, 21 Vt. 30.

England.— Where the act of parliament creating a company provided that the company should not "issue" any share under the authority of that act, nor should any share "vest" in the person accepting the same, until one fifth of the amount of the share was paid up, it was held that the word "issue" referred to the issuing of certificates of shares, and the word "vest" to the vesting of shares, so as to be property and capable of transfer; but that the section did not make the payment of one fifth a condition precedent to the liability, as a shareholder, of the person accepting the share. McEuen *v.* West London Wharves, etc., Co., L. R. 6 Ch. 655, 40 L. J. Ch. 471, 25 L. T. Rep. N. S. 143, 19 Wkly. Rep. 837; East Gloucestershire R. Co. *v.* Bartholomew, L. R. 3 Exch. 15, 37 L. J. Exch. 17, 17 L. T. Rep. N. S. 256; *Re* West London Wharves, etc., Co., 16 Wkly. Rep. 660.

See 12 Cent. Dig. tit. "Corporations," § 208.

87. *Alabama.*— Hall *v.* Selma, etc., R. Co., 6 Ala. 741.

Georgia.— Mitchell *v.* Rome R. Co., 17 Ga. 574.

Illinois.— Klein *v.* Alton, etc., R. Co., 13 Ill. 514. It has been held that if the subscriber is also one of the persons to whom the subscription is to be paid its non-payment does not render it void. Ryder *v.* Alton, etc., R. Co., 13 Ill. 516.

Kentucky.— Wight *v.* Shelby R. Co., 16 B. Mon. 4, 63 Am. Dec. 522.

Mississippi.— Barrington *v.* Mississippi Cent. R. Co., 32 Miss. 370; Fiser *v.* Mississippi, etc., R. Co., 32 Miss. 359.

New York.— Black River, etc., R. Co. *v.* Clarke, 25 N. Y. 208 [*affirming* 31 Barb. 258]; Beach *v.* Smith, 28 Barb. 254; Eastern Plank Road Co. *v.* Vaughan, 20 Barb. 155. *Compare* Magee *v.* Badger, 30 Barb. 246.

North Carolina.— Haywood, etc., Plank Road Co. *v.* Bryan, 51 N. C. 82.

Texas.— Blair *v.* Rutherford, 31 Tex. 465.

West Virginia.— Pittsburgh, etc., R. Co. *v.* Applegate, 21 W. Va. 172.

Canada.— A provision in the charter of a corporation that it shall not "commence operations" until fifty per cent of its capital stock is subscribed, and twenty-five per cent of such subscription paid up, does not prevent the corporation from making calls on stock subscribed for, or prevent the board of provisional directors of the corporation created by the charter from doing any acts in the name of the corporation within their power, so long as they are not what may properly be termed "commencing operations." North Sidney Min., etc., Co. *v.* Green, 31 Nova Scotia 41. It has been held also that, although a statutory provision requiring payment of ten per cent by the shareholder within thirty days after his subscription is a part of his contract to take the shares, it is competent for the parties to waive it; and that where the money has been paid to and accepted by the corporation and stock certificates have been issued recognizing the party as a shareholder, and dividends on the shares have been paid to him, both parties (the corporation and the shareholder) are thereby estopped from denying that he is a shareholder in the corporation. *Re* Canada Cent. Bank, 25 Can. L. J. N. S. 238, opinion by Hodgins, Master-in-Ordinary, citing and following Day's case, decided by the same judicial officer and afterward affirmed on appeal. *Compare* Union F. Ins. Co. *v.* O'Gara, 4 Ont. 359; Port Whitby, etc., R. Co. *v.* Jones, 31 U. C. Q. B. 170.

88. Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

89. Hall *v.* Selma, etc., R. Co., 6 Ala. 741 (a recovery of judgment for the statutory deposit and satisfaction prevents the subscriber from raising the defense that he did not pay the statutory deposit in actions for subsequent assessments); Klein *v.* Alton, etc., R. Co., 13 Ill. 514; Barrington *v.* Mississippi Cent. R. Co., 32 Miss. 370 (subsequent payment and affirmance of the previous act of subscription).

such deposit, it was held that the commissioners had discretion to allow a reasonable time.[90]

d. Subscriptions, Although Void Because of Non-Payment of Statutory Deposit, May Be Made Good By Estoppel. The doctrine of many courts is that subscriptions, although void by reason of the non-payment of the statutory deposit, may be made good by subsequent acts which estop the subscriber from denying the relation which he has assumed, as where, without paying the deposit, he acts as a corporator;[91] or subsequently pays a much larger percentage in pursuance of his contract of subscription;[92] or where he gives his negotiable promissory note in settlement of the deposit and the company disposes of it before maturity to an innocent taker without notice;[93] or where, having subscribed a provisional paper, he suffers his name to remain thereon until the articles are filed.[94]

e. Where Subscription Made After Organization Payment May Be Waived by Corporation. As the payment of this statutory deposit is presumably for the benefit of the corporation, where the subscription is made after the organization of the corporation, its payment may, according to some holdings, be waived by the corporation, so that the subscription will be valid and the subscriber liable thereon.[95] This is especially true where the obligation to pay the deposit is not declared by the charter or governing statute, but is declared by a by-law of the organization merely, in which case the failure to pay it does not *ipso facto* avoid the subscription, but renders it voidable merely at the election of the corporation. The corporation may waive the by-law and elect to treat the subscription as valid; and upon its so doing the subscriber will be bound.[96]

f. Effect of Statutes Requiring Certain Amount to Be Paid in Before Commencing Business. Statutes requiring a certain amount of the capital stock of a corporation to be paid in before it shall commence business stand on a similar footing to those requiring the payment by subscribers of a certain percentage of their subscriptions at the time when their subscriptions are made. The non-compliance with such a charter or statutory provision cannot be set up, either by the corporation or by the shareholders, to avoid a liability resting upon them.[97]

14. Doctrine That Full Amount of Capital Agreed to Be Raised Must Be Subscribed in Order to Liability of Subscribers — a. Statement of Doctrine. Where the act of incorporation,[98] the articles of association[99] or certificate of incorporation,[1] the subscription agreement,[2] or, in England, the prospectus which is pub-

90. Napier *v.* Poe, 12 Ga. 170.

91. Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Erie, etc., Plank Road Co. *v.* Brown, 25 Pa. St. 156; Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.) 364.

92. Black River, etc., R. Co. *v.* Clarke, 25 N. Y. 208.

93. Ogdensburgh, etc., R. Co. *v.* Wooley, 3 Abb. Dec. (N. Y.) 398, 1 Keyes (N. Y.) 118, 34 How. Pr. (N. Y.) 54.

94. Garrett *v.* Dillsburg, etc., R. Co., 78 Pa. St. 465.

95. Minneapolis, etc., R. Co. *v.* Bassett, 20 Minn. 535, 18 Am. Rep. 376. This was conceded by the court of appeals of Maryland in Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760. See also *Re* Canada Cent. Bank, 25 Can. L. J. N. S. 238, opinion by Hodgins, Master-in-Ordinary, citing and following Day's case, decided by the same judicial officer and afterward affirmed on appeal. *Compare* Union F. Ins. Co. *v.* O'Gara, 4 Ont. 359; Port Whitby, etc., R. Co. *v.* Jones, 31 U. C. Q. B. 170.

96. Smith *v.* Tallassee Branch Cent. Plank-Road Co., 30 Ala. 650; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; McRea *v.* Russell, 34 N. C. 224; Blair *v.* Rutherford, 31 Tex. 465.

97. Johnston *v.* Southwestern Railroad Bank, 3 Strobh. Eq. (S. C.) 263. *Compare* Patterson *v.* Wyomissing Mfg. Co., 40 Pa. St. 117.

98. *Illinois.*— People *v.* National Sav. Bank, 129 Ill. 618, 22 N. E. 288.

Minnesota.— Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716.

Nebraska.— Macfarland *v.* West Side Imp. Assoc., 53 Nebr. 417, 73 N. W. 736 [*affirmed* in 56 Nebr. 277, 76 N. W. 584].

New Hampshire.— Contoocook Valley R. Co. *v.* Barker, 32 N. H. 363.

Oregon.— Fairview R. Co. *v.* Spillman, 23 Oreg. 587, 32 Pac. 688.

99. Allman *v.* Havana, etc., R. Co., 88 Ill. 521; Rockland, etc., Steam-Boat Co. *v.* Sewall, 78 Me. 167, 3 Atl. 181; Bray *v.* Farwell, 81 N. Y. 600 [*overruling* it seems Rensselaer Plank Road Co. *v.* Wetsel, 21 Barb. (N. Y.) 56].

1. Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481.

2. Santa Cruz R. Co. *v.* Schwartz, 53 Cal. 106; Rockland, etc., Steam-Boat Co. *v.* Sewall,

lished to induce subscriptions to the stock of the projected company,[3] fix its capital at a certain sum, divided into shares of a specified amount, a subscriber cannot be required to pay assessments until the amount so fixed has been fully and *bona fide* subscribed, unless, by taking part in the organization of the corporation or otherwise, he has waived his rights in the premises or estopped himself from setting up this defense.[4] Until then his subscription is deemed to be conditional merely.[5]

b. Subscriptions by Insolvents, Persons Non Sui Juris, Etc. The foregoing doctrine necessarily implies that the subscriptions shall be made and taken in good faith, by persons apparently solvent, and answerable for their engagements, although it may turn out that they are not so answerable.[6] Subscriptions by town paupers and idiots would not be a compliance with the statute.[7]

c. Taking Subscriptions in Property at Grossly Excessive Valuations. A just principle would seem to avoid the *bona fide* subscriptions taken where those in charge of the subscription list fraudulently accept subscriptions in specific property at grossly excessive valuations;[8] although in the era of early railroad build-

78 Me. 167, 3 Atl. 181; People's Ferry Co. *v.* Balch, 8 Gray (Mass.) 303. It has been held no defense to an action for calls that the full amount of capital stock contemplated in the agreement of subscription has not been subscribed, provided the amount required by the governing statute has been so subscribed. Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157.

3. Galvanized Iron Co. *v.* Westoby, 8 Exch. 17, 16 Jur. 892, 21 L. J. Exch. 302, 7 R. & Can. Cas. 318; Martin, B., in Howbeach Coal Co. *v.* Teague, 5 H. & N. 151, 6 Jur. N. S. 275, 29 L. J. Exch. 137, 2 L. T. Rep. N. S. 187, 8 Wkly. Rep. 264; Pitchford *v.* Davis, 8 L. J. Exch. 157, 5 M. & W. 2; European, etc., R. Co. *v.* McLeod, 16 N. Brunsw. 3 (per Weldon, J.).

4. Temple *v.* Lemon, 112 Ill. 51; Hale *v.* Sanborn, 16 Nebr. 1, 20 N. W. 97. *Compare* Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257; Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340. The general statutes of Minnesota abrogate this rule. Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716.

5. The rule has been held otherwise where the question arose collaterally, and under a charter couched in such terms as not to disclose a clear legislative intention to make the subscription of the whole capital stock a condition to the corporate existence. Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

For a good illustration of the doctrine of the above text where the subscriber was held not bound see People's Ferry Co. *v.* Balch, 8 Gray (Mass.) 303.

For an example of a faulty instruction submitting this question to a jury in an action for an assessment see Selma, etc., R. Co. *v.* Anderson, 51 Miss. 829.

Effect of fact that corporation exists de facto.— The fact that a corporation whose attempted organization was made before the required amount of its capital stock had been subscribed is a corporation *de facto*, so that its existence cannot be questioned collaterally, will not enable it to recover against a subscriber to its capital stock, where the conditions upon which his subscription was made have not been complied with or waived by him. Fairview R. Co. *v.* Spillman, 23 Oreg. 587, 32 Pac. 688.

6. Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654.

7. Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257. One court has, however, held that it is not a good defense to an action by creditors that some of those who were accepted as subscribers were notoriously insolvent. Jewell *v.* Rock River Paper Co., 101 Ill. 57. Another court regarded it as not a good defense to such an action that certain small subscriptions were void because made by married women, defendants having subscribed after these married women and with a knowledge of their subscriptions. Cornell's Appeal, 114 Pa. St. 153, 6 Atl. 258.

The reputation or fact of pecuniary inability would, it seems, be an evidentiary fact as bearing on the question of good faith, in making and receiving the subscription. Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257.

The subsequent declaration of a subscriber to the effect that his subscription was colorable and not made in good faith will not be admitted, in an action against another subscriber for calls, for the purpose of showing that such was the fact, in order to create a defense within the rule stated in the text. Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257.

Conclusiveness of commissioners' views.— View that the judgment of the commissioners as to when the subscription has been properly filled up is conclusive. Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181. The theory on which this view rests is well stated by Lord Tenterden in Rex *v.* London, 3 B. & Ad. 271, 23 E. C. L. 119. See in support of the same doctrine Walker *v.* Devereaux, 4 Paige (N. Y.) 229; Clarke *v.* Brooklyn Bank, 1 Edw. (N. Y.) 361.

8. See *infra*, VI, M, 2, b.

ing, when some of the western courts seem to have been strangely affected in favor of the railroad companies, even this was held to be no defense.[9]

d. Subscriber May Waive Right to Avoid Subscription by Acts of Estoppel. Upon principles hereafter dealt with,[10] it may be concluded that any acts done by him, either as a corporator or as a director, which evince a willingness on his part that the corporation should enter upon its business with no more stock than that already subscribed, will amount to a waiver of the condition that payment of his subscription cannot be required until the whole capital stock is subscribed.[11] So if a corporation has already commenced business at the time when the subscription is made, and the subscriber knows this fact, and also knows that its whole capital stock has not been taken, a like waiver on his part may be inferred.[12]

15. What Agents or Commissioners Can Receive Subscriptions. Where commissioners have been appointed under the charter to take subscriptions, after the corporation is organized and a board of directors elected, the functions of the commissioners cease, and the directors alone have the power to receive further subscriptions to the stock of the company. But of course they may appoint an agent to receive subscriptions, and subscriptions so received will be binding.[13] This of course assumes that the stock is not all filled up. The theory here invoked is that receiving subscriptions to the capital stock of a corporation is a ministerial act, under a statute authorizing commissioners to take such subscriptions and subsequently to distribute the stock, and that such act may therefore be performed by an agent or deputy, or by any one without authority whose act is afterward ratified by the commissioners.[14] But where the governing statute provides for the organization of a corporation and nominates a particular agent, official, or board of commissioners to receive subscriptions to its stock, subscriptions can be received only by such agent, official, or board of commissioners, or they will not be binding. The reason is that the statutory direction must be pursued. Thus, if the power of allotting shares to applicants is conferred by the governing statute upon the board of directors, they cannot delegate it to a committee of their number, and no valid allotment can be made by such a committee.[15] So if a statute providing for the organization of railroad companies provides that certain commissioners, to be named in the articles of association, shall, after the corporation is organized, open books for subscriptions, and keep the same open until the capital has been subscribed, and, in case of an excess of subscriptions, make a distribution among the subscribers, subscriptions received by an agent appointed by the directors will not be binding.[16] The theory is that the commissioners, under such a statute,[17] act as a statutory board, and derive their powers

9. Hornaday *v.* Indiana, etc., R. Co., 9 Ind. 263; Maccoun *v.* Indiana, etc., R. Co., 9 Ind. 262, in neither of which cases was any opinion written.

10. See *infra*, VI, P, 6, a, (I), (D).

11. Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716.

12. Musgrave *v.* Morrison, 54 Md. 161. See also Goff *v.* Hawkeye Pump, etc., Co., 62 Iowa 691, 18 N. W. 307.

Who may question validity of agreement.— The validity of an agreement that a subscription for corporate stock is not to be binding on the subscriber until signed by a specified number of persons cannot be questioned by one who is a creditor of the corporation at the time of the subscription. Gilman *v.* Gross, 97 Wis. 224, 72 N. W. 885 [*citing* Hospes *v.* Northwestern Mfg. Co., 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470; Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227; Coit *v.* North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 S. Ct. 231, 30 L. ed. 420].

13. Lohman *v.* New York, etc., R. Co., 2 Sandf. (N. Y.) 39.

14. Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

15. *In re* Leeds Banking Co., L. R. 1 Ch. 561, 14 L. T. Rep. N. S. 742, 14 Wkly. Rep. 992.

16. Shurtz *v.* Schoolcraft, etc., R. Co., 9 Mich. 269. See also Essex Turnpike Co. *v.* Collins, 8 Mass. 292; Northern Cent. Michigan R. Co. *v.* Eslow, 40 Mich. 222; Parker *v.* Northern Cent. Michigan R. Co., 33 Mich. 23. *Contra*, Northern R. Co. *v.* Rodrigues, 10 Rich. (S. C.) 278. See also the cases cited in the notes to 1 Morawetz Priv. Corp. (3d ed.) § 65.

17. Here the general railroad law of Michigan.

from the law, and not from the corporation; and since it is the intent of the law to enable all persons to subscribe equally, any subscription not made through them, acting regularly in the discharge of their duty, is void for want of mutuality.[18] Therefore subscriptions taken by an agent appointed by the directors, not being binding, did not operate to prevent other parties from taking the entire amount not subscribed by the original articles, whenever the commissioners should see fit to proceed and perform their duty.[19] But here, as in other cases, although the subscription may not be binding, because procured by an agent having no authority, yet the infirmity of the contract may be cured by a subsequent ratification.[20]

16. SUBSCRIPTIONS VOID AFTER ALL SHARES HAVE BEEN TAKEN. A corporation cannot increase its stock at will, in any manner or to any extent, unless it is authorized so to do by its charter or governing statute, and then only in the manner prescribed.[21] When a corporation has issued valid shares to the full extent of all the shares which, by its constitution or by the general law, it is empowered to issue, no court can order it to issue others, because in that respect its powers have been exhausted.[22] When all the stock of a corporation is once subscribed for and taken, the corporation cannot issue any more unless it shall get back a portion of that which has been taken, by forfeiture or otherwise;[23] and no person can then become a shareholder, and as such liable to creditors of the corporation, except by purchase from the original subscriber, or his assignee, and by having the stock transferred to him.[24] It was hence held, where all the stock of a corpora-

18. Shurtz *v.* Schoolcraft, etc., R. Co., 9 Mich. 269.

19. Shurtz *v.* Schoolcraft, etc., R. Co., 9 Mich. 269. It has been held, contrary to the principle on which this case proceeds, that a subscription to the capital stock of a railroad company is valid, although made to one who was not a commissioner to receive subscriptions, and although made by the subscriber under a mistaken belief that he might forfeit his stock at pleasure. Northeastern R. Co. *v.* Rodrigues, 10 Rich. (S. C.) 278.

20. Walker *v.* Mobile, etc., R. Co., 34 Miss. 245; Mobile, etc., R. Co. *v.* Yandal, 5 Sneed (Tenn.) 294.

Allotment and apportionment of shares by public commissioners.—The procuring of subscriptions to the shares of incorporated companies, and the apportionment and distribution of such shares were, under former schemes of incorporation, committed to public commissioners, appointed under the provisions of special charters. These modes of organizing corporations have in general gone out of vogue; and hence brief reference only will be made to the decisions touching the powers and duties of such commissioners, few of which decisions will be found to be recent ones. As in the case of other public officers, the subscriber must look to the source of the authority of the commissioners. Nippenose Mfg. Co. *v.* Stadon, 68 Pa. St. 256. See also Napier *v.* Poe, 12 Ga. 170; Shurtz *v.* Schoolcraft, etc., R. Co., 9 Mich. 269. As to apportionment of shares by such commissioners, and the extent to which their discretion would be controlled by the judicial courts, with a variety of other considerations see Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; Walker *v.* Devereaux, 4 Paige (N. Y.) 229; Meads *v.* Walker, Hopk. (N. Y.) 587; Clark *v.* Brooklyn Bank, 1 Edw. (N. Y.) 361; State *v.* Lehre, 7 Rich. (S. C.) 234. As to the proportion of shares allowed to the commissioners themselves see Walker *v.* Devereaux, 4 Paige (N. Y.) 229; Meads *v.* Walker, Hopk. (N. Y.) 587; Clarke *v.* Brooklyn Bank, 1 Edw. (N. Y.) 361.

Remedy of subscriber for the refusal to issue shares to him for which he has subscribed. — Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350; Miller *v.* Illinois Cent. R. Co., 24 Barb. (N. Y.) 312; Meads *v.* Walker, Hopk. (N. Y.) 587; Wilson *v.* Montgomery County Bank, 29 Pa. St. 537; Dousman *v.* Wisconsin, etc., Min. Co., 40 Wis. 418; Smith *v.* Chicago, etc., R. Co., 18 Wis. 17.

Apportionment of shares on the incorporating of a mining property held by several persons in common. Bates *v.* Wilson, 14 Colo. 140, 24 Pac. 99.

Limit of option to take shares on the reorganization of a corporation see Postlethwaite *v.* Port Phillip, etc., Gold Min. Co., 43 Ch. D. 452, 59 L. J. Ch. 201, 62 L. T. Rep. N. S. 60, 2 Meg. 10, 38 Wkly. Rep. 246. See also *supra*, II, B.

Legality of stock issued pursuant to N. Y. Laws (1874), c. 430, authorizing the reorganization of railroad corporations sold in foreclosure, etc. Matter of Brooklyn El. R. Co., 11 N. Y. Suppl. 161, 32 N. Y. St. 1065.

21. Lathrop *v.* Kneeland, 46 Barb. (N. Y.) 432.

22. Smith *v.* North American Min. Co., 1 Nev. 423; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599.

23. See *In re* London, etc., Exch. Bank, L. R. 2 Ch. 427, 36 L. J. Ch. 501, 16 L. T. Rep. N. S. 253, 15 Wkly. Rep. 543.

24. Lathrop *v.* Kneeland, 46 Barb. (N. Y.) 432.

tion was subscribed for and taken at the time the articles of incorporation were filed, and the certificate of incorporation, made and filed as required by law, specified the names of all the shareholders, and there was no evidence that the corporation had come into possession of any of its stock by forfeiture or otherwise, that no subsequent subscribers, by merely writing their names in the corporation book and affixing a number of shares to their respective names, could acquire a right to any share of its stock, or become by such act shareholders of the corporation, and as such liable for its debts. Nor does such a subscription for stock, where there is none to issue, estop the subscriber, when proceeded against by creditors of the corporation, from denying the relation of shareholder.[25] The foregoing observations have no reference to the case where the commissioners appointed by and under an act of incorporation are empowered to apportion the shares among the subscribers; although it will manifestly apply after the apportionment has been made and the stock has thus been filled up with valid subscriptions which have been accepted by the commissioners.[26]

17. SUBSCRIPTIONS DELIVERED IN ESCROW. A subscription cannot be delivered to the commissioners appointed to receive subscriptions as an escrow, to take effect only on the happening of a specified event, because they are the opposite parties to the contract; but when so delivered it takes effect immediately and unconditionally.[27] It has been held that a good delivery in escrow may be made to a single director,[28] to a committee appointed by the inhabitants of a town,[29] or even to the president of a corporation,[30] in which case it would not become operative until the designated condition has been performed.

18. TAKING SHARES TO QUALIFY AS DIRECTOR. Where the governing statute or the instrument of incorporation provides that a director must be the holder of a certain number of shares, then it seems that, while the mere fact that a person accepts the office of director does not make him a shareholder in respect of the necessary number of qualification shares, yet it implies an agreement on his part that he will qualify himself within a reasonable time by acquiring the necessary shares, which he may do by purchasing from other members, or from the company where there are more shares to issue.[31] The true result to be drawn

25. Lathrop *v.* Kneeland, 46 Barb. (N. Y.) 432. To the same effect is *In re* Tal y Drws Slate Co., 1 Ch. D. 247, 45 L. J. Ch. 158, 33 L. T. Rep. N. S. 460, 24 Wkly. Rep. 92.

26. A subscriber to the stock of an insurance company, the paper subscribed referring to a previous subscription of forty thousand dollars, not then paid in, as being part of the full sum of three hundred thousand dollars, to be subscribed, thereby has notice of such fact, and also of the fact that such sum of forty thousand dollars is to be taken as part of the full subscription. New York Exch. Co. *v.* De Wolf, 5 Bosw. (N. Y.) 593.

27. Wright *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

28. Ottawa, etc., R. Co. *v.* Hall, 1 Ill. App. 612.

29. Beloit, etc., R. Co. *v.* Palmer, 19 Wis. 574.

30. Gilman *v.* Gross, 97 Wis. 224, 72 N. W. 885.

31. *In re* Metropolitan Public Carriage, etc., Co., L. R. 9 Ch. 102, 107, 43 L. J. Ch. 153, 29 L. T. Rep. N. S. 562, 22 Wkly. Rep. 171; *In re* Pelotas Coffee Co., L. R. 20 Eq. 506, 44 L. J. Ch. 622; *In re* East Norfolk Tramways Co., 5 Ch. D. 963, 26 Wkly. Rep. 3; *In re* Percy, etc., Nickel, etc., Iron Min. Co., 5 Ch. D. 705, 46 L. J. Ch. 543, 37 L. T. Rep. N. S. 349, 25 Wkly. Rep. 600; *In re* National Ins., etc., Assoc., 4 De G. F. & J. 78, 8 Jur. N. S. 951, 31 L. J. Ch. 828, 10 Wkly. Rep. 548, 65 Eng. Ch. 62. See also *In re* Anglo-Moravian Hungarian Junction R. Co., L. R. 8 Ch. 768, 42 L. J. Ch. 857; *In re* La Mancha Irr., etc., Co., L. R. 8 Ch. 548, 42 L. J. Ch. 465, 28 L. T. Rep. N. S. 652, 21 Wkly. Rep. 518; *In re* General International Agency Co., L. R. 2 Eq. 567, 14 L. T. Rep. N. S. 752; *Re* Hereford, etc., Junction R. Co., 3 Giff. 28; Lindley Comp. L. 794 (where other authorities are reviewed). *Compare* *In re* Llanharry Hematite Iron Co., L. R. 1 Ch. 85, 11 Jur. N. S. 1009, 35 L. J. Ch. 120, 13 L. T. Rep. N. S. 485, 14 Wkly. Rep. 153, and *In re* Peninsular, etc., Bank, L. R. 2 Eq. 435, 15 L. T. Rep. N. S. 140, 14 Wkly. Rep. 1010 (where under the circumstances the director was held not to be a contributory with respect to the necessary number of qualification shares). See also *In re* La Mancha Irr., etc., Co., L. R. 8 Ch. 548, 42 L. J. Ch. 465, 28 L. T. Rep. N. S. 652, 21 Wkly. Rep. 518; *In re* British, etc., Tel. Co., L. R. 14 Eq. 316, 42 L. J. Ch. 9, 27 L. T. Rep. N. S. 748, 21 Wkly. Rep. 37; *In re* Great Oceanic Tel. Co., L. R. 13 Eq. 30, 41 L. J. Ch. 283, 25 L. T. Rep. N. S. 690, 20 Wkly. Rep. 84; *In re* British Colonial, etc.,

from the English authorities, as stated by Lord Selborne, is, "that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification."[32] A mere colorable device, the effect of which is that the company itself furnishes the money necessary to purchase and pay for the qualifying shares of a board of directors, will be set aside in equity; such shares will be deemed not to have been paid for, and the directors will be put upon the list of contributories accordingly.[33]

19. EACH SUBSCRIPTION SEVERAL AND NOT JOINT. Each subscription to the capital stock of a corporation is an independent undertaking, and is in no way affected by the terms of other subscriptions;[34] and the obligation of each of several subscribers to the same agreement of subscription is several and not joint,[35] and each subscriber is liable only for the amount set opposite his own name.[36]

20. SUBSCRIPTIONS CONSTRUED BY COURT — a. In General. As in the case of all other written instruments,[37] the subscription is interpreted by the court, and not by the jury, unless in cases where parol evidence is admitted, to explain latent ambiguities therein.[38]

b. By What Law Governed. Such subscriptions are construed according to the law of the domicile of the corporation, it being a reasonable implication that the parties intended to be governed by that law.[39]

21. DISTINCTION BETWEEN SUBSCRIPTION TO SHARES AND PURCHASE OF SHARES FROM THIRD PERSON. This distinction is obvious. In case of a purchase of shares from a third person until the agreement is executed in the mode prescribed by the charter, governing statute, or by-laws, by transferring the shares on the books of the corporation to the vendee, he is not a shareholder with respect to the corporation. A contract between two persons, whereby one is to take the shares which the other holds in a corporation will not, until the execution of the usual power of attorney, authorize the entry of the name of the former on the books of the corporation as a shareholder, or entitle the corporation to treat him as such or charge him with liability as such.[40] A distinction has also been taken between a subscription to the capital stock of a corporation and a purchase of its shares from the corporation.[41] Thus where a contractor agreed to build a railroad and to

Ins. Corp., 45 L. J. Ch. 488. In one case it was said to be "indelible" that a man who serves as a director becomes liable as a shareholder to the extent of the necessary qualification shares. *In re* British, etc., Tel. Co., L. R. 14 Eq. 316, 42 L. J. Ch. 9, 27 L. T. Rep. N. S. 748, 21 Wkly. Rep. 37.

For a case where the provisional directors on the formation of a company were held to have continued themselves as permanent directors by making default in appointing permanent directors, and so to have become liable as shareholders for the necessary qualification shares, see Matter of Great Northern, etc., Coal Co., 3 De G. J. & S. 367, 32 L. J. Ch. 421, 8 L. T. Rep. N. S. 472, 68 Eng. Ch. 278.

32. *In re* Metropolitan Public Carriage, etc., Co., L. R. 9 Ch. 102, 107, 43 L. J. Ch. 153, 29 L. T. Rep. N. S. 562, 22 Wkly. Rep. 171.

33. *In re* Disderi, L. R. 11 Eq. 242, 40 L. J. Ch. 248, 23 L. T. Rep. N. S. 694, 19 Wkly. Rep. 175.

34. Erie, etc., R. Co. *v.* Patrick, 2 Abb. Dec. (N. Y.) 72, 2 Keyes (N. Y.) 256; Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

35. Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137; Herron *v.* Vance, 17 Ind. 595.

36. Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137; Erie, etc., R. Co. *v.* Patrick, 2 Abb. Dec. (N. Y.) 72, 2 Keyes (N. Y.) 256.

As to joinder in equity see Herron *v.* Vance, 17 Ind. 595.

37. 1 Thompson Tr. § 1065 *et seq.*

38. Monadnock R. Co. *v.* Felt, 52 N. H. 379.

39. Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.) 244, 71 Am. Dec. 753; Merrick *v.* Van Santvoord, 34 N. Y. 208; Seymour *v.* Sturgess, 26 N. Y. 134; McDonough *v.* Phelps, 15 How. Pr. (N. Y.) 372; *Ex p.* Van Riper, 20 Wend. (N. Y.) 614; Payson *v.* Withers, 19 Fed. Cas. No. 10,864, 5 Biss. 269.

40. Sigua Iron Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477.

41. 1 Morawetz Priv. Corp. (2d ed.) § 61.

accept in payment a certain amount of its capital stock, the agreement was a purchase, and not a subscription.[42] A contract to take shares of a company is not discharged by purchasing the same number of paid-up shares of another member; for this is taking shares from another member and not from the company.[43]

I. Alterations in Contract of Association and Release of Dissenting Subscribers For Shares — 1. What Alterations Release Dissenting Subscribers — a. General Statement. A subscriber to the shares of a proposed corporation having a named purpose, character, amount of capital, etc., cannot be held to his contract of subscription if, without his assent and without any circumstances of estoppel against him, the corporation as organized is for a different purpose, or of a different character, or has a different capital, or is in any essential particular different from the corporation as described in the subscription paper;[44] as where the subscription paper calls for a capital stock of fifty thousand dollars, and the corporation as organized has a capital of one hundred thousand dollars, and names as the purposes of the corporation other objects than those named in the original paper.[45]

b. Breach by Corporation of Contract With Subscriber. Where the contract of subscription contains interdependent covenants, a substantial breach of its conditions by the corporation will, where the rights of third persons are not concerned, release the subscriber.[46] The usual application of this rule obtains, in England, where the prospectus of a joint-stock company holds out certain promises to subscribers, on the faith of which they put down their names, and the memorandum, when drawn up, so far departs from the prospectus as to make substantially a different contract.[47]

c. Making Radical Changes in Purposes of Corporation. If, as hereafter seen,[48] the legislature cannot change the contract of the subscriber without his consent, for stronger reasons, the directors, the executive committee, or the other shareholders will not be permitted to make a radical change in the business of the corporation which shall bind a dissenting subscriber, as by selling its entire property,[49] by exchanging its assets upon dissolution for stock in another company,[50] by consolidating the corporation with another to form a new corporation,[51] in case of a railroad company, by departing substantially from the route marked out in its charter,[52] or, in case of a plank-road company, by extending the road and increasing the capital stock without complying with the provisions of the charter on that point.[53]

d. Abandoning Original Certificate Under Which Subscription Was Taken and Organizing Under New and Different Certificate. If the certificate of incorporation, prescribed by the governing statute, which was originally executed, is abandoned by the coadventurers, and a new and different certificate executed, and the organization takes place under the latter, the association cannot hold the subscriber under the provisions of the former;[54] for this is a contract to which he had not agreed.

42. New York, etc., R. Co. *v.* Hunt, 39 Conn. 75. *Compare* Ridgefield, etc., R. Co. *v.* Brush, 43 Conn. 86.

43. *In re* South Blackpool Hotel Co., L. R. 4 Eq. 238, 36 L. J. Ch. 531, 16 L. T. Rep. N. S. 271, 15 Wkly. Rep. 731. The same ruling was made on similar facts in *In re* Heyford Ironworks Co., L. R. 5 Ch. 270, 39 L. J. Ch. 422, 22 L. T. Rep. N. S. 187, 18 Wkly. Rep. 302.

44. Norwich Lock Mfg. Co. *v.* Hockaday, 89 Va. 557, 16 S. E. 877.

45. Baker *v.* Ft. Worth Bd. of Trade, 8 Tex. Civ. App. 560, 28 S. W. 403.

46. Hartford, etc., R. Co. *v.* Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354.

47. Lindley Comp. L. (5th ed.) 19.

48. See *infra*, VI, I, 1, f.

49. Abbot *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578, 11 Abb. Pr. (N. Y.) 204, 20 How. Pr. (N. Y.) 199; 21 How. Pr. (N. Y.) 193.

50. Frothingham *v.* Barney, 6 Hun (N. Y.) 366.

51. Blatchford *v.* Ross, 54 Barb. (N. Y.) 42, 5 Abb. Pr. N. S. (N. Y.) 434, 37 How. Pr. (N. Y.) 110; Ferguson *v.* Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604.

52. Buffalo, etc., R. Co. *v.* Pottle, 23 Barb. (N. Y.) 21.

53. Macedon, etc., Plank Road Co. *v.* Lapham, 18 Barb. (N. Y.) 312.

54. Burrows *v.* Smith, 10 N. Y. 550, Seld. Notes (N. Y.) 115.

e. Abandoning Enterprise For Which Corporation Was Organized. Abandonment of the enterprise for which the corporation was organized, as by failing to commence the undertaking within the time prescribed by its charter and refunding some of the subscriptions;[55] or, in case of a railroad company, locating the road on an entirely different route,[56] will discharge the shareholder. But the mere fact that the work on the corporate undertaking has been suspended is not such evidence of an abandonment of the enterprise as will discharge a subscriber from his obligation of payment, since the refusal of the subscribers to pay according to their contracts may be the very cause of the suspension, and the very object of the attempt to enforce their contracts may be to get money to revive or continue the prosecution of the work.[57]

f. Legislative Alteration of Contract in Material Particular. The general rule is that the relation between a corporation and a shareholder being one of contract, any legislative enactment which without his assent authorizes a material or fundamental change in the powers or purposes of the corporation, not in aid of the original object, if acted upon by the corporation, is not binding upon him.[58]

g. Increasing Capital Stock. Of this nature, as already seen,[59] according to the general course of decisions, are amendments increasing the capital stock.[60] But where, in addition to an amendment authorizing an increase of its capital stock, the legislature authorizes another fundamental change, such as changing the termini of a railroad, this may release the subscriber.[61]

h. Reducing Capital Stock. And it would seem that the same must be affirmed of an amendment reducing the capital stock of the corporation, and thereby rendering the success of the enterprise more doubtful.[62] Accordingly it was held that a dissenting shareholder was released by an amendment of the charter of an insurance association, providing that the stock notes should be reduced by a credit of certain net profits.[63]

i. Enlarging Powers and Privileges and Adding New Responsibilities. On principle any amendment which enlarges the undertaking, so as to entail new responsibilities or new hazards upon the corporation, will release dissenting shareholders.[64]

j. Changing Nature of Enterprise. An amendment to the charter of a railway company, adopted without the consent of one who has previously become a

55. McCully *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 25.

56. Winter *v.* Muscogee R. Co., 11 Ga. 438; Champion *v.* Memphis, etc., R. Co., 35 Miss. 692; Hester *v.* Memphis, etc., R. Co., 32 Miss. 378; Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13.

57. See in illustration of this Buffalo, etc., R. Co. *v.* Gifford, 87 N. Y. 294; Buffalo, etc., R. Co. *v.* Clark, 22 Hun (N. Y.) 359. *Compare* Four Mile Valley R. Co. *v.* Bailey, 18 Ohio St. 208.

58. McCray *v.* Junction R. Co., 9 Ind. 358; Charlotte First Nat. Bank *v.* Charlotte, 85 N. C. 433.

59. See *supra*, I, K, 2, c.

60. Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Norwich Lock Mfg. Co. *v.* Hockaday, 89 Va. 557, 16 S. E. 877.

61. Where a railroad company obtains authority from the legislature to change one of its termini and to increase its capital stock without the consent of a subscriber to stock under the original charter, the latter is released from his subscription, although at the time thereof the general law, under which the first charter was obtained, authorized amendments increasing the capital stock, and changing the route, as such law did not authorize a change in the termini. Youngblood *v.* Georgia Imp. Co., 83 Ga. 797, 10 S. E. 124; Snook *v.* Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104; Katama Land Co. *v.* Jernegan, 126 Mass. 155; Bery *v.* Marietta, etc., R. Co., 26 Ohio St. 673.

62. Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.

63. Hoey *v.* Henderson, 32 La. Ann. 1069. Another court has taken a middle ground by holding that such an amendment will operate to discharge the existing subscribers, *pro tanto*, from the obligation of payment in accordance with the terms of their subscriptions. If therefore the amendment reduces the capital one half, and before the passage of such an amendment they have paid one half, they will have nothing further to pay. Woodhouse *v.* Commonwealth Ins. Co., 54 Pa. St. 307.

64. Union Locks, etc. *v.* Towne, 1 N. H. 44, 8 Am. Dec. 32. As by adding to the powers of a railroad company the power to purchase steamboats. Hartford, etc., R. Co. *v.* Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec.

subscriber to its capital stock, which superadds to the original object of the incorporation an authority to establish a line of water communication in connection with the railroad, which will involve large additional expense, which amendment provides for an increase of the capital stock for that purpose, releases such shareholder from his subscription, although the amendment is accepted by the board of directors and also by a majority of the shareholders.[65] The same is true of an amendment to a life and accident insurance company, changing it to a life, accident, fire, marine, and inland insurance company.[66]

k. Changing Terminus or Termini of Railroad Which Corporation Was Chartered to Build. As already seen,[67] there is a conflict of judicial opinion upon the question whether an amendment of the charter or corporate action changing the terminus or the termini of the railroad which the corporation was created to build will have the effect of releasing dissenting subscribers, but as this branch of doctrine is special and peculiar to railroad companies it is not considered at length in this article.[68]

l. Consolidation With Another Company. The consolidation of the corporation, to whose shares one has subscribed, with another corporation, is a change of such a fundamental character as to discharge his contract of subscription, provided he does not assent thereto, unless at the time of the subscription there is a statute authorizing it,[69] or providing for the purchase of the shares of the dissenting shareholder.[70]

m. Alterations Material to Particular Subscriber. Qualifying its earlier holdings, the supreme court of Pennsylvania hold that an alteration departing from the terms of the contract may operate to discharge a particular subscriber, on the ground that it is, as to him and his interest, a material variation; as where the contract of subscription provided that the railroad should be built on a route which would bring it within five hundred feet of the subscriber's mill, and this was varied so as to adopt a route twelve hundred feet distant therefrom.[71]

354. *Compare* Chesapeake, etc., Canal Co. *v.* Robertson, 5 Fed. Cas. No. 2,652, 4 Cranch C. C. 291.

65. Hartford, etc., R. Co. *v.* Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354. To the same effect see Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; McCullough *v.* Moss, 5 Den. (N. Y.) 567; Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184.

66. Ashton *v.* Burbank, 2 Fed. Cas. No. 582, 2 Dill. 435.

67. See *supra*, I, K, 2, b *et seq.*

68. See, generally, RAILROADS.

That such changes will release a dissenting subscriber see Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463; Delaware, etc., R. Co. *v.* Irick, 23 N. J. L. 321; Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13. That a change of terminus and an enlargement of the project, as by authorizing the corporation to run a line of steamers beyond its original terminus, will have this effect see Marietta, etc., R. Co. *v.* Elliott, 10 Ohio St. 57. Or by authorizing it to increase its capital stock. Snook *v.* Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104.

That a change which authorizes the company to purchase stock in other railroad companies, even though the terminus of the road as originally chartered is thereby changed, will not release a dissenting subscriber see Terre Haute, etc., R. Co. *v.* Earp, 21 Ill. 291.

Doctrine that material changes in the location or route of a railway will release dissenting subscribers.— Champion *v.* Memphis, etc., R. Co., 35 Miss. 692; Hester *v.* Memphis, etc., R. Co., 32 Miss. 378; Buffalo, etc., R. Co. *v.* Pottle, 23 Barb. (N. Y.) 21; Noesen *v.* Port Washington, 37 Wis. 168. Weak distinction in this respect between locating and building it. Nashville, etc., R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574. Doctrine that subscriber is released by such a change, although he had as one of the directors petitioned the legislature for it, and although he had held offices in the corporation subsequently thereto — untenable decision. Middlesex Turnpike Corp. *v.* Swan, 10 Mass. 384, 6 Am. Dec. 139. See also Middlesex Turnpike Corp. *v.* Locke, 8 Mass. 268. That a material change from the route and termini named in the contract of subscription is evidence of an abandonment see Caley *v.* Philadelphia, etc., R. Co., 80 Pa. St. 363.

What changes of route made by directors will release a dissenting subscriber.— Nashville, etc., R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574.

69. Bish *v.* Johnson, 21 Ind. 299; Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30; Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369. *Compare* Hayworth *v.* Junction R. Co., 13 Ind. 348.

70. That it makes him a shareholder of the new company see Ridgway Tp. *v.* Griswold, 20 Fed. Cas. No. 11,819, 1 McCrary 151.

71. Moore *v.* Hanover Junction, etc., R. Co., 94 Pa. St. 324.

n. Selling Out or Leasing Entire Corporate Property. Selling the entire corporate property to another corporation, or what is in practical effect the same thing, leasing it for nine hundred and ninety-nine years, is such a fundamental change as releases a dissenting subscriber. If this cannot be done with the authority of the legislature so as to bind a dissenting shareholder, for stronger reasons it cannot be done without the authority of law.[72]

o. Changes Involving Material Departure From Governing Statutes. A principle hereafter explained,[73] which makes changes authorized by statutes existing at the time of the subscription no ground for discharging a dissenting subscriber, works the other way; so that a material departure from the terms of a statute existing at the time of a subscription discharges the contract if the subscriber so elects;[74] and the fact that the legislature possesses the constitutional power to alter or repeal acts of incorporation at its pleasure does not affect this principle.[75]

2. What Alterations Do Not Release Dissenting Subscribers — a. Only Material, Fundamental, or Radical Changes. The legislative change in the character of the enterprise which will thus release a subscriber has been often described as material, fundamental, or radical;[76] but it is more frequently described by the use of the word "fundamental."[77] If it vitally and radically affects rights established and fixed by charter it cannot be forced upon an unwilling shareholder.[78]

b. Immaterial Change in Articles of Incorporation. The rule stated in the subdivisions immediately preceding has reference to material changes only; the liability of a subscriber is not affected by immaterial changes in the articles of incorporation.[79]

c. Mere Mechanical Alteration of Subscription Paper. A mere mechanical alteration of the subscription paper, which does not have the effect of altering the contract of the subscriber, and which is not so intended, will not of course release him; as where printed forms of the contract of subscription, which had been circulated and signed separately, were cut from the rest of the papers, and all the written parts were attached to one of these printed forms, which was then filed in the office of the secretary of state for the purpose of organizing the corporation.[80]

d. Directors Departing From Charter or Failing to Carry Out Its Provisions. As shareholders have a remedy in equity against their unfaithful directors, for *ultra vires* conduct injurious to the corporation,[81] it follows that the failure of the directors of a corporation to carry out the purposes of the charter, or the doing by them of *ultra vires* acts not warranted by the charter, will not afford ground for releasing a dissenting shareholder from his contract of subscription. It has accordingly been held that a corporation cannot be enjoined from enforcing a judgment for a stock subscription on the ground of a departure from its charter in respect of matters not connected with the suit, or on the ground that the work of building a railroad which the corporation was chartered to build was not progressing in the manner prescribed in the charter, or that the company contemplated a departure from the route, or a change in the termini designated therein.[82] Nor will such shareholders of a corporation, created "to build and maintain a

72. South Georgia, etc., R. Co. *v.* Ayres, 56 Ga. 230.

73. See *infra*, VI, I, 2, k.

74. Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463.

75. Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13.

76. Snook *v.* Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104.

77. Nugent *v.* Putnam County, 19 Wall. (U. S.) 241, 22 L. ed. 83.

78. Hoey *v.* Henderson, 32 La. Ann. 1069.

79. Union Agricultural, etc., Assoc. *v.* Neill, 31 Iowa 95; Ferguson *v.* Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604.

80. Sodus Bay, etc., R. Co. *v.* Hamlin, 24 Hun (N. Y.) 390. See as to the effect upon the liability of a subscriber of altering the articles of association note in 19 Am. & Eng. Corp. Cas. 258.

81. See *infra*, XI, B, 9.

82. *Ex p.* Booker, 18 Ark. 338.

flouring mill," be so relieved because the corporation is expending its money in building a dam by means of which to obtain power to run its mill.[83]

e. Cessation of Work Not Amounting to Abandonment. In the case of a railroad company, while a total abandonment of the enterprise will release a subscriber to the shares of the corporation,[84] yet a mere cessation of work on a road within a very short distance of the terminus designated in the articles of incorporation, where the articles are not changed, and there is no resolution of the directors providing for a termination of the road at the point where the work is stopped, is not such a change as will work a release of the contract of a non-assenting shareholder.[85]

f. What Changes in Route or Location of Railroad Do Not Release Subscribers. Recurring to a former subdivision, and dealing briefly with a subject not directly within the scope of this article, it may be said that a slight change or deflection adopted by a railroad company from the route of its railroad as first selected does not absolve a subscriber to its shares who had not designated the route which he desired to be selected,[86] as where the road is made to pass through a county not named in the original articles of incorporation.[87]

g. Extending Time For Completing Corporate Enterprise. Additional holdings are found which support the proposition already stated,[88] that an extension by the legislature of the time allowed by the corporation to the railroad company in which to build its road will not release the subscribers to its stock,[89] although the obligation to construct it within the time first limited may have been, on the part of the subscriber, an essential inducement to the making of the contract.[90]

h. Enlarging Corporate Powers and Privileges and Adding New Responsibilities. This effect cannot be ascribed to an amendment of a charter or act of incorporation which merely enlarges the powers or privileges[91] of the corporation, without materially changing its original purposes,[92] or authorizing a material departure from original design,[93] as by conferring upon it the power of declaring forfeitures of its stock.[94]

83. Ginrich *v.* Patrons' Mill Co., 21 Kan. 61.

84. See *supra*, VI, I, 1, e.

85. Buffalo, etc., R. Co. *v.* Clark, 22 Hun (N. Y.) 359.

86. Greenville, etc., R. Co. *v.* Coleman, 5 Rich. (S. C.) 118. See White Hall, etc., R. Co. *v.* Myers, 16 Abb. Pr. N. S. (N. Y.) 34.

87. Armstrong *v.* Karshner, 47 Ohio St. 276, 24 N. E. 897; Jewett *v.* Valley R. Co., 34 Ohio St. 601. *Compare* Buffalo, etc., R. Co. *v.* Pottle, 23 Barb. (N. Y.) 21, where the road abandoned two counties through which it was to have been constructed, and it was held that the subscriber was released.

This subject may be further pursued by an examination of the following cases: Wilson *v.* Wills Valley R. Co., 33 Ga. 466; Banet *v.* Alton, etc., R. Co., 13 Ill. 504; Caley *v.* Philadelphia, etc., R. Co., 80 Pa. St. 363; Pittsburgh, etc., R. Co. *v.* Biggar, 34 Pa. St. 455; Pittsburg, etc., R. Co. *v.* Woodron, 3 Phila. (Pa.) 271, 15 Leg. Int. (Pa.) 357. That the directors have power to change the location in violation of a contract of subscription without releasing the subscriber was badly decided in Ellison *v.* Mobile, etc., R. Co., 36 Miss. 572. That a change of route which placed the road upon a cheaper basis and procured a large additional subscription to its stock furnished a reasonable probability that its business and profits would be considerably augmented did not exonerate dissenting subscribers was badly held in Fry *v.* Lexington, etc., R. Co., 2 Metc. (Ky.) 314.

88. See *supra*, I, K, 2, c.

89. Jacks *v.* Helena, 41 Ark. 213.

90. Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

91. Poughkeepsie, etc., Plank Road Co. *v.* Griffin, 21 Barb. (N. Y.) 454.

92. Peoria, etc., R. Co. *v.* Preston, 35 Iowa 115.

93. Pacific R. Co. *v.* Hughes, 22 Mo. 291, 64 Am. Dec. 265.

94. Peoria, etc., R. Co. *v.* Elting, 17 Ill. 429.

Other illustrations.— One court has asserted the doctrine that an enlargement by the legislature of the powers originally granted to a corporation, although such enlargement may embark the corporation in more expensive schemes which will require a greater capital, does not have the effect of discharging one who had subscribed to its capital stock before such enlargement. Such a grant of additional privileges to a corporation did not impair the obligation of previous contracts of subscription, within the meaning of the constitutional inhibition against the passage of laws impairing the obligation of contracts. That inhibition, the court reasoned, has reference to direct, and not to merely consequential invasions of con-

i. Changing Corporate Name. Changing the name of the corporation, as already seen,[95] is not such a material alteration as releases dissenting subscribers.[96] Where the name of the corporation was given in the preliminary subscription paper, but when the company was organized the words "Saint Louis" were added to the name, it was held that this was no defense to an action on the subscription.[97]

j. Changes Affecting Payment of Share Subscriptions. It has been held that a subscriber to the capital stock of a railroad company, who agrees to be subject to the rules and regulations which may from time to time be adopted by the directors, cannot avoid payment because the charter has been amended, reducing the number of days of notice to be given, if the amendment of the charter has been accepted.[98]

k. Changes Authorized by Existing Statutes. From what has already been said,[99] if the change which the subscriber sets up as releasing him from the obligation of his subscription is authorized by a statute existing at the time of the subscription, which may fairly be deemed to enter into the contract, to affect it and to form a part of it, it will not be deemed such a change as discharges his contract. He is deemed to have contracted with a view to the possibility of such a change being made by the will of the majority, and to have impliedly assented to it in advance.[1] If therefore a statute in force at the time a subscription to the capital stock of a railroad company is made authorizes an extension of the line of the road,[2] the sale of the whole or a part of its road,[3] or a consolidation with another company,[4] the exercise of this power will not affect the subscription.[5]

l. Other Changes in Corporate Character and Purposes Which Do Not Release Dissenting Subscribers. A subscriber to the capital stock of a corporation is not released by reason of a legislative amendment of the charter making radical and material changes, never accepted or acted upon by the company, and which by its own terms becomes inoperative;[6] nor because the corporation was organized under a somewhat different name from that used in the preliminary contract of subscription, where there was no material departure in its charter from its character and purposes as there described;[7] nor because of a sale, legally authorized, of all the property and franchises of the corporation to another company;[8] nor, where the rights of creditors have intervened, because the corporation, after its organization, entered upon illegal projects not called for by its articles of incorporation;[9] nor by reason of mere oral agreements among the promoters that

tracts. Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500. See also Pittsburgh, etc., R. Co. *v.* Biggar, 34 Pa. St. 455; Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339; Pittsburg, etc., R. Co. *v.* Woodrow, 3 Phila. (Pa.) 271, 15 Leg. Int. (Pa.) 357. As for example an amendment authorizing a railroad corporation to extend its road (Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Cross *v.* Peach Bottom R. Co., 90 Pa. St. 392) or to build a branch road (Hawkins *v.* Mississippi, etc., R. Co., 35 Miss. 688; Greenville, etc., R. Co. *v.* Coleman, 5 Rich. (S. C.) 118. *Contra*, Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545); or empowering a slack-water company to extend its dams and to incur additional expense (Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500).

95. See *supra*, I, K, 2, c.

96. Racine County Bank *v.* Ayers, 12 Wis. 512.

97. Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481.

98. Illinois River R. Co. *v.* Beers, 27 Ill. 185. See also Burlington, etc., R. Co. *v.* White, 5 Iowa 409.

Other changes in the internal arrangements of a corporation which do not release dissenting subscribers.— For a catalogue of such changes see Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339.

99. See *supra*, I, K, 3, a.

1. Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78.

2. Jewett *v.* Valley R. Co., 34 Ohio St. 601.

3. Armstrong *v.* Karshner, 47 Ohio St. 276, 24 N. E. 897.

4. See *supra*, II, C, 1, c.

5. Nugent *v.* Putnam County, 19 Wall. (U. S.) 241, 22 L. ed. 83.

6. Chattanooga, etc., R. Co. *v.* Warthen, 98 Ga. 599, 25 S. E. 988.

7. Joseph *v.* Davis, (Ala. 1892) 10 So. 830.

8. Chattanooga, etc., R. Co. *v.* Warthen, 98 Ga. 599, 25 S. E. 988.

9. U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58, 42 N. E. 403.

the corporation should be organized for another and different purpose from that named in the articles of incorporation.[10]

3. Burden on Subscriber to Show That Change Was Made Without His Consent. Of course the subscriber who seeks to avoid the payment of his subscription on the ground of a material change in the character or purposes of the corporation from that designated in the charter must show that the alteration was made without his concurrence or consent.[11] One court has, however, held that, where the alteration of the subscription paper is proved by the subscription, in an action for calls, the corporation must then prove that the alteration was made with his knowledge or consent; otherwise it cannot recover.[12]

J. Conditional Subscriptions For Shares — 1. Validity of Conditional Subscriptions — a. Conditions in Preliminary Subscription Papers. If, according to the tendency of modern American cases, preliminary subscription papers made prior to signing the articles of association or other document of incorporation are merely tentative and not enforceable as contracts, then it is quite immaterial upon what conditions such preliminary subscriptions may be made. Where the judicial theory is that such preliminary subscriptions mean something and are enforceable as contracts, the rule which applies to regular share subscriptions, which holds conditions annexed thereto to be nullities, which discharges such conditions and enforces the contract in disregard of them, does not apply; but any legal condition may be annexed thereto, so that until the condition is performed the engagement is not binding upon the subscriber.[13] It therefore seems to be the sound doctrine that a provisional subscription made with a view to the organization of a corporation may be qualified by any lawful condition which the subscriber chooses to annex thereto.[14] But the doctrine is necessarily limited to conditions which may be lawful, and excludes conditions which are, or may become, repugnant to the contract, such as a condition in a subscription to the shares of a railway company, undertaking to settle in advance the length of time the corporation shall remain in control of its road and the manner in which its business shall be conducted.[15]

b. Conditions Prescribed by Charter or Governing Statute Read Themselves Into Contract. Conditions prescribed by the legislature must be noticed by the subscribers; they are conclusively presumed to contract with reference to such conditions; and such conditions read themselves into the contract of subscription. When therefore a condition is imposed by charter or statute, and a time is fixed for its fulfilment, it must be fulfilled within that time or the subscriber is discharged.[16] Of this character was a provision in the charter of a railroad company requiring a certain amount of stock per mile to be subscribed before the company should go into operation.[17]

c. Doctrine That Conditions in Preliminary Subscriptions Are Void. As the charter or statute fixes the terms upon which alone shares can be issued, it must

10. Globe Sewer Pipe Co. *v.* Otis, 22 N. Y. Suppl. 411, 51 N. Y. St. 917. *Compare* U. S. Vinegar Co. *v.* Schlegel, 67 Hun (N. Y.) 356, 22 N. Y. Suppl. 407, 51 N. Y. St. 453 [*affirmed* in 143 N. Y. 537, 38 N. E. 729, 62 N. Y. St. 826].

11. North Carolina R. Co. *v.* Leach, 49 N. C. 340.

12. Southern Pennsylvania Iron, etc., Co. *v.* Stevens, 87 Pa. St. 190. And see Ireland *v.* Palestine, etc., Turnpike Co., 19 Ohio St. 369.

13. Fairview R. Co. *v.* Spillman, 23 Oreg. 587, 32 Pac. 688.

14. Fairview R. Co. *v.* Spillman, 23 Oreg. 587, 32 Pac. 688.

15. Russell *v.* Alabama Midland R. Co., 94 Ga. 510, 20 S. E. 350.

16. Union Hotel Co. *v.* Hersee, 15 Hun (N. Y.) 371.

17. Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389. But see Wood *v.* Coosa, etc., R. Co., 32 Ga. 273; Mitchell *v.* Rome R. Co., 17 Ga. 574. But where the charter of a railroad company provided that the construction of the railway should not be begun until three fourths of the estimated cost were subscribed for by responsible persons, it was held that the corporation would not be obliged to show a compliance with this provision in order to maintain an action against a subscriber for an assessment upon the stock. Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257, holding, where the terms of the subscription required that seventy-five per cent of the estimated cost of any section of the railroad should be subscribed for by responsible persons before commencing its construction, that if the subscription was obtained in good faith

follow as a general rule that conditions in preliminary subscriptions are void as against public policy, because attempting to vary what is prescribed by the law of the corporation;[18] and, as just stated, where the law disregards the preliminary subscriptions and treats them as being merely tentative, then any condition in such a subscription is void, because the chief proposition embodied therein is void. In Pennsylvania the distinction has been taken that subscriptions made before the corporation is organized must be unconditional, while those made afterward may be conditional.[19] The validity of such subscriptions has been denied on the further ground that the contract, in order to be binding, must be concurrent and obligatory on each at the same time.[20] This view has, however, been rejected by some of the courts,[21] and the view adopted in its stead that conditional subscriptions may be received by a corporation when not forbidden by its charter or governing statute, and that on the performance of the conditions they become absolute.[22]

d. Whether Whole Contract Void or Condition Merely — (I) *Where Condition Is Lawful There Is No Contract Unless It Is Performed or Waived.* A man cannot be forced into a contract which he does not choose to enter into. If therefore a man subscribes for shares in a corporation upon a condition which is lawful, and which consequently may be performed, unless that condition is performed, or its performance is waived by him, he cannot be held to make good his subscription.[23]

(II) *Rule Where Condition Is Illegal and Hence Cannot Be Performed* — (A) *Doctrine That Contract Is Void.* There is more difficulty in dealing with the question where the condition is illegal, but in such case the subscriber may cogently argue that as men do not always know the law, and that although he attached to his subscription a condition which the law does not sanction, yet, as he intended to enter into the contract upon those terms and none other, if the condition cannot be performed his whole contract is void; and some courts appear to have taken this view.[24]

(B) *Doctrine That Illegal Condition Will Be Discharged and Subscriber Held to Lawful Part of Contract.* Other courts, refusing to carry out the intent of the subscriber, proceed on the doctrine that the illegal condition will be discharged because incapable of performance, and that so much of the contract as is valid will be enforced;[25] in other words that the law will discharge the con-

assessments would be valid, although some of the subscriptions to make up that amount should turn out to be worthless.

18. Williams *v.* Evans, 87 Ala. 725, 6 So. 702, 6 L. R. A. 218; Roberts *v.* Mobile, etc., R. Co., 32 Miss. 373; Ft. Edward, etc., Plank Road Co. *v.* Payne, 15 N. Y. 583; Burrows *v.* Smith, 10 N. Y. 550; Macedon, etc., Plank Road Co. *v.* Snediker, 18 Barb. (N. Y.) 317; Macedon, etc., Plank Road Co. *v.* Lapham, 18 Barb. (N. Y.) 312; Butternuts, etc., Turnpike Co. *v.* North, 1 Hill (N. Y.) 518.

19. Caley *v.* Philadelphia, etc., R. Co., 80 Pa. St. 363; Pittsburgh, etc., R. Co. *v.* Stewart, 41 Pa. St. 54.

20. Macedon, etc., Plank Road Co. *v.* Snediker, 18 Barb. (N. Y.) 317. See to the principle Utica, etc., R. Co. *v.* Brinckerhoff, 21 Wend. (N. Y.) 139, 34 Am. Dec. 220.

21. *Arkansas.*— Jacks *v.* Helena, 41 Ark. 213.

Indiana.— Branham *v.* Record, 42 Ind. 181; Keller *v.* Johnson, 11 Ind. 337, 71 Am. Dec. 355; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337.

Kentucky.— Henderson, etc., R. Co. *v.* Leavell, 16 B. Mon. 358; McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. 218, 61 Am. Dec. 181.

Maryland.— Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760.

Oregon.— Coyote Gold, etc., Min. Co. *v.* Ruble, 8 Oreg. 284.

22. Franklin College *v.* Hurlburt, 28 Ind. 344; Topeka Bridge Co. *v.* Cummings, 3 Kan. 55; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225. *Compare* Pittsburgh, etc., R. Co. *v.* Plummer, 37 Pa. St. 413.

23. See *infra*, VI, J, 2, a.

24. Ft. Edward, etc., Plank Road Co. *v.* Payne, 15 N. Y. 583; Macedon, etc., Plank Road Co. *v.* Snediker, 18 Barb. (N. Y.) 317; Macedon, etc., Plank Road Co. *v.* Lapham, 18 Barb. (N. Y.) 312; Butternuts, etc., Turnpike Co. *v.* North, 1 Hill (N. Y.) 518.

25. Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169. That the subscription will be treated as an absolute one and the condition discharged as a fraud on the commonwealth see Caley *v.* Philadelphia, etc., R. Co., 80 Pa. St. 363; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Bavington *v.* Pittsburgh, etc., R. Co., 34 Pa. St. 358.

dition and enforce the subscription as an unconditional one, thus driving the subscriber into a contract which he never made.[26]

(III) *Rule Where Condition Is Fraud on the Law.* Where the condition annexed to the subscription is tainted with moral turpitude — where, from its very nature it is a fraud on the rights of other subscribers or upon the public — in other words, where it is such a subscription as has been termed a fraud on the law, the law will for sound reasons discharge the illegal condition and hold the subscriber to his agreement as though no such condition had been annexed to it.[27] This is well illustrated by the case of a subscription to which was annexed a condition that the subscriber was to receive back from the corporation its bonds secured by a mortgage upon its property, thus throwing the whole risk upon the public,[28] and by a condition in another subscription that the shares should be issued as fully paid stock after forty per cent only had been paid, in which case, notwithstanding the recitals of the share certificates, the subscriber was held liable for the additional sixty per cent.[29]

(IV) *Parol Conditions Void and Written Subscription Enforced.* Another principle is that parol conditions, varying the terms of the written subscription and not involving a fraud on the subscriber, are void, and the subscription stands as made,[30] such for instance as the condition that the payment should be made in land instead of money;[31] that the subscriber is not to pay for the stock, but that his subscription is to be canceled;[32] that it is not to become obligatory unless the railroad intended to be built by the corporation is located on a certain route[33] or completed to a certain point;[34] or fixing time for payment vari-

26. Pittsburgh, etc., R. Co. *v.* Biggar, 34 Pa. St. 455, a railroad company, on the ground that the road should be located on a special road.

27. Bavington *v.* Pittsburgh, etc., R. Co., 34 Pa. St. 358. See the very clear observations of Strong, J., in Putnam *v.* New Albany, etc., R. Co., 16 Wall. (U. S.) 390, 21 L. ed. 361, where, however, the principle was held inapplicable to the case in judgment, showing why subscriptions which are illegal in the sense of being a fraud on the law, and upon other shareholders, ought to be discharged and the subscriber held to his subscription as though it had been absolute and unconditional.

28. Morrow *v.* Nashville Iron, etc., Co., 87 Tenn. 262, 10 S. W. 495, 10 Am. St. Rep. 658, 3 L. R. A. 37.

29. Great Western Tel. Co. *v.* Gray, 122 Ill. 630, 14 N. E. 214.

30. *Alabama.*— Smith *v.* Tallassee Branch Cent. Plank Road Co., 30 Ala. 650.

Arkansas.— Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443.

Illinois.—Dill *v.* Wabash Valley R. Co., 21 Ill. 91; Great Western Tel. Co. *v.* Haight, 49 Ill. App. 633 (holding that a "stool pigeon" subscriber cannot withdraw his subscription under a secret agreement with the agent of the corporation, since such an act would be a fraud upon the *bona fide* subscribers).

Indiana.— Carlisle *v.* Evansville, etc., R. Co., 13 Ind. 477; Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404; Evansville, etc., R. Co. *v.* Posey, 12 Ind. 363; New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187; Clem *v.* Newcastle, etc., R. Co., 9 Ind. 488, 68 Am. Dec. 653.

Kansas.— Topeka Mfg. Co. *v.* Hale, 39 Kan. 23, 17 Pac. 601.

Kentucky.—Bullock *v.* Falmouth, etc., Turnpike Road Co., 85 Ky. 184, 3 S. W. 129, 8 Ky. L. Rep. 835.

Maine.— Kennebec, etc., R. Co. *v.* Waters, 34 Me. 369.

Maryland.— Scarlett *v.* Baltimore City Academy of Music, 46 Md. 132.

Minnesota.— Minneapolis Threshing Mach. Co. *v.* Davis, 40 Minn. 110, 41 N. W. 1026, 12 Am. St. Rep. 701, 3 L. R. A. 796.

Mississippi.— Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

New Hampshire.— Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

North Carolina.— North Carolina R. Co. *v.* Leach, 49 N. C. 340.

Pennsylvania.— Jeannette Bottle Works *v.* Schall, 13 Pa. Super. Ct. 96, parol conditions no defense against liability as shareholder without showing that all other subscribers assented or that all subscriptions were subject to the same parol condition.

Tennessee.— Cunningham *v.* Edgefield, etc., R. Co., 2 Head 22.

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181; Blodgett *v.* Morrill, 20 Vt. 509.

31. Baile *v.* Calvert College Educational Soc., 47 Md. 117.

32. Robinson *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 334, 72 Am. Dec. 792; Greenville, etc., R. Co. *v.* Coleman, 5 Rich. (S. C.) 118.

33. Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92; North Carolina R. Co. *v.* Leach, 49 N. C. 340; Callanan *v.* Judd, 23 Wis. 343.

34. Madison, etc., Plank Road Co. *v.* Stevens, 6 Ind. 379. In such a case it was said: "The subscribers might have annexed a condition to the terms of their subscriptions, if

ant from that fixed by the charter.[35] Nor is it a defense to an action for calls that the subscription was procured on the faith of another person taking stock in the company, unless such subscription was fraudulently procured, and the subscriber has not failed promptly to repudiate the fraud upon discovery of it.[36] The foregoing rule is founded on the principle which forbids the admission of parol evidence to vary or contradict written contracts.[37] It rests on the stronger ground that such conditions are in the nature of secret agreements with particular subscribers which are a fraud upon other subscribers and sometimes upon the public.[38]

(v) *Secret Agreements Annexing Conditions to Subscription* — (a) *Void as Between Corporation and Subscriber.* Upon this ground all secret agreements made with particular subscribers at the time of their subscription are discharged by the law, and in an action to enforce the contract of subscription evidence of such agreements is not admissible.[39]

(b) *May Be Enforced Against Promoters.* But where the promoters enter into a secret agreement with a person to induce him to subscribe, it may be valid and enforceable as against them, although invalid as against the corporation.[40]

(vi) *Promises by Agents of Corporation Annexing Unlawful Conditions Void.* Where such promises are made by agents of the corporation appointed to solicit stock subscriptions, and are contrary to the charter or governing statute, the courts have also held them void for want of power in such agents to make them.[41]

(vii) *Parol Conditions or Agreements Among Subscribers Rejected as Void and Subscription Treated as Absolute.* Neither is parol evidence of agreements with previous subscribers to the capital stock, made at or before their signing, and inconsistent with the written terms of their subscriptions, admissible in an action for assessments.[42]

they had thought proper to do so, and it would then have been with the commissioners to determine whether such conditional subscriptions of stock would be received; but not having done so, they cannot, according to the well established doctrine on the subject, allege or prove that the contract was different from that which is evidenced by the writing, unless they can establish fraud or mistake in its execution." Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, 6, 63 Am. Dec. 522. A railroad company cannot be enjoined from collecting instalments on subscriptions for stock, because the money may be expended in extending the road beyond the county in which the shareholders reside, unless the contract of subscription expressly stipulated that the money should be expended in such county. Dill *v.* Wabash Valley R. Co., 21 Ill. 91.

35. Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

36. Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 22.

37. Scarlett *v.* Baltimore City Academy of Music, 46 Md. 132; Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539; North Carolina R. Co. *v.* Leach, 49 N. C. 340; State Bank *v.* Littlejohn, 18 N. C. 563; Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 22. See article upon this subject by Hon. J. O. Pierce in 28 Am. L. Reg. N. S. 306.

38. Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Downie *v.* White, 12 Wis. 176, 78 Am. Dec. 731. Thus if the promoter of a corporation makes a secret agreement with a subscriber to purchase the stock subscribed, this is a fraud on other subscribers ignorant of it and the courts will not enforce it. Meyer *v.* Blair, 19 Abb. N. Cas. (N. Y.) 214.

39. Minneapolis Threshing-Mach. Co. *v.* Davis, 40 Minn. 110, 41 N. W. 1026, 12 Am. St. Rep. 701, 3 L. R. A. 796; Phœnix Warehousing Co. *v.* Badger, 6 Hun (N. Y.) 293.

An agreement by a corporation to return the amount subscribed for its stock in four semiannual dividends of twenty-five per cent is within the constitutional inhibition against a fictitious subscription to the capital stock of a corporation. Smith *v.* Alabama Fruit-Growing, etc., Assoc., (Ala. 1899) 26 So. 232.

40. See for illustration Morgan *v.* Struthers, 131 U. S. 246, 9 S. Ct. 726, 33 L. ed. 132. To the same effect see Meyer *v.* Blair, 109 N. Y. 600, 17 N. E. 228, 16 N. Y. St. 380, 4 Am. St. Rep. 500.

41. Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

Exception where parol representations or agreements operate as fraud upon subscriber. — An exception to this principle is that parol representations and agreements, made to induce a person to subscribe, may operate as a fraud upon him, so as to enable him to avoid his subscription, on principles discussed in a future subdivision. Scarlett *v.* Baltimore City Academy of Music, 46 Md. 132.

42. La Grange, etc., Plank Road Co. *v.* Mays, 29 Mo. 64; White Hall, etc., R. Co. *v.* Myers, 16 Abb. Pr. N. S. (N. Y.) 34.

(VIII) *Subscriptions For Collateral Purposes Treated as Valid and Subscriber Held Unconditionally.* Subscriptions made upon an agreement that they shall stand as subscriptions for collateral purposes merely, such as a subscription to make up a deficiency necessary to be filled up in order to the procuring of the charter,[43] or subscriptions made at the request of an agent of the corporation to induce others to subscribe,[44] but made on a promise that the subscriber will afterward be released,[45] are treated as absolute and binding subscriptions, and the unlawful agreement made between the corporation and the subscriber that he shall not be held bound thereby is discharged.

(IX) *Contemporaneous Parol Declarations of Officers of Corporation Inadmissible to Vary Contract of Subscription.* Upon like grounds parol declarations of officers of a company, made on public occasions, if admissible at all to invalidate a stock subscription, cannot avail a subscriber who does not show that such declarations amounted to fraud on the part of the company, inducing error on his part when he subscribed.[46]

(X) *Collateral Agreements Between Subscriber and Third Persons Void.* For stronger reasons, collateral agreements with third persons, whereby the subscriber is induced to become such, as an agreement to take his shares off his hands, will not afford ground of releasing him from his liability as a shareholder,[47] although evidence of such agreement may be admissible in an action for assessments for the purpose of showing fraud.[48]

(XI) *Impossible Conditions.* Impossible conditions in a share subscription, such as a condition providing for a forfeiture of the shares upon giving notice of an intention to forfeit them at or before a date which is prior to the date of the subscription, will be discharged and the rest of the subscription will be held binding.[49]

(XII) *Conditions as to Assessability of Shares.* As hereafter more fully shown when treating of the liability of shareholders, conditions as to the assessability of shares, for example, that the subscriptions shall be payable upon the call of the company, may be varied in case of the insolvency of the company, in which case a court of equity may step in and enforce the contract of subscription, although no call has been made.[50]

(XIII) *Stipulations For Payment of Interest on Stock Subscriptions.* A stipulation for the payment of interest on the amount paid in on a subscription

For reasons in support of this rule consult Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539; Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

43. Mangles *v.* Grand Collier Dock Co., 10 Sim. 519, 16 Eng. Ch. 519. And see Preston *v.* Grank Collier Dock Co., 2 R. & Can. Cas. 335.

44. *Connecticut.*—Litchfield Bank *v.* Church, 29 Conn. 137.

Missouri.— Pickering *v.* Templeton, 2 Mo. App. 424.

New Hampshire.— White Mountains R. Co. *v.* Eastman, 34 N. H. 124.

Vermont.— Blodgett *v.* Morrill, 20 Vt. 509.

Wisconsin.— Downie *v.* White, 12 Wis. 176, 78 Am. Dec. 731.

England.— *In re* General Provident Assur. Co., L. R. 9 Eq. 74; Matter of St. Marylebone Banking Co., 3 De G. & Sm. 21.

45. White Mountains R. Co. *v.* Eastman, 34 N. H. 124.

46. Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713; Vicksburg, etc., R. Co. *v.* McKean, 12 La. Ann. 638. *Compare* Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 22.

Especially where it is not shown that such declarations influenced the subscriber in making his subscription is this true. Smith *v.* Tallassee Branch Cent. Plank Road Co., 30 Ala. 650.

47. Stutz *v.* Handley, 41 Fed. 531.

48. Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435.

49. Racine County Bank *v.* Ayers, 12 Wis. 512.

Subscription contingent upon happening of event which never occurred.— A subscription to corporate stock which is not to become payable until the happening of an event which never occurred is not within a statute providing that the court shall compel each shareholder to pay the amount "due and remaining unpaid on the shares of stock held by him," and the event having never happened the subscription is not binding. Gilman *v.* Gross, 97 Wis. 224, 72 N. W. 885.

50. Curry *v.* Woodward, 53 Ala. 371. It

to the shares of a railway company, until the declaration of a dividend, does not invalidate the subscription.[51]

(XIV) *VALIDITY OF CONDITIONS AS AFFECTED BY STATUTE OF FRAUDS.* Where the attempt is made to avoid the contract of subscription under the statute of frauds, on the ground that it is based upon a condition not to be performed within one year, the principle will apply which takes the case out of the statute where the contract is capable of being performed within one year; nor will the subscriber be allowed to set up this defense where the condition has been performed, although not within one year.[52]

(XV) *CONDITIONAL SUBSCRIPTION DISTINGUISHED FROM CONDITIONAL SALE.* It seems that a distinction may be taken between a conditional subscription to shares and a conditional sale of its shares by a corporation *in esse*; so that if the condition is that the corporation shall at the option of the purchaser take the shares back, but no time is fixed within which this option must be exercised, a great delay in exercising it will forfeit the privilege.[53] An agreement for the purchase from a corporation of shares of its capital stock, providing that at the end of a certain time the purchaser may at his option return the shares and receive back the purchase-price, constitutes a conditional sale, with the option of the purchaser to revoke or to rescind, and is not *ultra vires*, but is enforceable between the original parties thereto, the rights of creditors not being involved.[54]

(XVI) *ALLOTMENT OF SHARES ON CONDITION TO BE PERFORMED BY SUBSCRIBER.* It seems that under English law a company may offer specified shares to a person on the terms that no title shall pass until a condition provided for in the contract shall have been fulfilled, and that after the allotment and registration of such shares the company may decline to treat the allottee as a shareholder if he has neglected to comply with the condition.[55]

(XVII) *SUBSCRIPTIONS DELIVERED IN ESCROW.* A subscription delivered to the soliciting agent of a company, in escrow, with directions not to deliver it to the company until the subscriber has had an opportunity to make further investigations into its character, and until a direction for its delivery shall be given, does not constitute an irrevocable contract of subscription where, after making the investigations, he directs the cancellation of the subscription, and is not thereafter for twenty years treated or recognized as a shareholder.[56]

(XVIII) *CONDITIONAL SUBSCRIPTION REVOKED BY UNREASONABLE DELAY IN PERFORMANCE OF CONDITION.* Where a share subscription is made on a valid condition, but no date is fixed within which the condition may be performed by the company, then it cannot be revoked unless there has been unreasonable delay in performing the condition;[57] but if there has been such an unreasonable delay then it can be.[58]

e. Condition That Subscription Shall Not Be Enforceable Until Full Amount Intended to Be Raised Shall Have Been Subscribed — (I) *IN GENERAL.* This condition is valid and enforceable because such is the implication of the law, where the condition is not expressed in the contract of subscription.[59] It is a

was so held where the contract of subscription and the stock certificate expressed the condition that a balance of eighty per cent unpaid on the stock was to be paid on the call of the directors, when ordered by a vote of a majority of the shareholders themselves. Upton *v.* Hansbrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417.

51. Racine County Bank *v.* Ayers, 12 Wis. 512. Similarly see Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536.

52. Straughan *v.* Indianapolis, etc., R. Co., 38 Ind. 185.

53. New Haven Trust Co. *v.* Gaffney, 73 Conn. 480, 47 Atl. 760.

54. Vent *v.* Duluth Coffee, etc., Co., 64 Minn. 307, 67 N. W. 70.

55. Spitzel *v.* Chinese Corp., 6 Manson 355, 80 L. T. Rep. N. S. 347.

56. Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. 318.

57. Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298.

58. Carter, etc., Co. *v.* Hazzard, 65 Minn. 432, 68 N. W. 74.

59. Cahot, etc., Bridge *v.* Chapin, 6 Cush. (Mass.) 50. *Compare* Franklin F. Ins. Co. *v.* Hart, 31 Md. 59; Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; Johnson *v.* Schar, 9 S. D. 536, 70 N. W. 838.

condition precedent which must be performed before an action upon the subscription can be maintained.[60]

(11) *Waiver of Condition.* Subscribers may waive this condition and may estop themselves by their conduct from setting up the invalidity of the incorporation by reason of the prescribed amount of capital stock not having been taken, as where they attend meetings of the company, coöperate in the votes for the expenditure of money, for the purchase of property, for the making of contracts, and for other acts which could properly be done only upon the assumption that the subscribers intended to proceed with the stock partially paid in.[61]

f. What Subscriptions Have Been Held Valid and Enforceable. A subscription to a fund to be donated to a railroad company — not being a subscription to its stock — provided it will build a bridge at a certain point.[62]

g. What Amounts to Acceptance by Corporation of Subscription Upon Condition. Unless the corporation proposes, by a prospectus, by the form of contract which it tenders to the subscribers, or otherwise, that the subscription shall

That a person who was afterward elected president "verbally guaranteed the subscription to be $50,000," the amount expressed in the condition, does not satisfy the condition, since such a guarantee is not a subscription. Branch *v.* Augusta Glass Works, 95 Ga. 573, 23 S. E. 128.

Where different subscription papers are circulated, and one of them contains an agreement that the total number of shares taken under the "terms" thereof shall be a stated number, and the other papers contain different terms and conditions, a subscriber to the former paper is not liable unless the stated number contained in the terms and conditions of that paper are subscribed for. It will not be enough that, taking this paper in connection with the others, the requisite number is made up. Johnson *v.* Schar, 9 S. D. 536, 70 N. W. 838.

Interpretation of a condition that a certain sum be subscribed by "citizens" of a certain place. Union Hotel Co. *v.* Hersee, 79 N. Y. 454, 35 Am. Rep. 536. Upon the question of the distinction between being a resident or an inhabitant of a certain place and being domiciled in that place the court cite *In re* Wrigley, 8 Wend. (N. Y.) 134; Rex *v.* North Curry, 4 B. & C. 953, 7 D. & R. 424, 4 L. J. K. B. O. S. 65, 10 E. C. L. 873; Rex *v.* Adlard, 4 B. & C. 772, 10 E. C. L. 795; Rex *v.* Nicholson, 12 East 330, 11 Rev. Rep. 398. The word "citizen" has been interpreted as meaning resident in exemption laws. McKenzie *v.* Murphy, 24 Ark. 155; Cobbs *v.* Coleman, 14 Tex. 594. Condition that not less than four thousand nor more than ten thousand shares shall be subscribed, but that no contract for building and completing the road shall be entered into until seven thousand shares have been subscribed, renders subscribers liable when four thousand shares have been subscribed. Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.) 244, 71 Am. Dec. 753.

60. Belfast, etc., R. Co. *v.* Cottrell, 66 Me. 185; Belfast, etc., R. Co. *v.* Moore, 60 Me. 561; Hager *v.* Cleveland, 36 Md. 476. *Compare* Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Hughes *v.* Antietam Mfg. Co., 34 Md. 316. See Ridgefield, etc., R. Co. *v.* Brush, 43 Conn. 86; Penobscot, etc., R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318.

61. Hager *v.* Cleveland, 36 Md. 476. See also Doak *v.* Stahlman, (Tenn. Ch. App. 1899) 58 S. W. 741, continuing to act as a shareholder knowing that a less amount has been subscribed.

62. Cumberland Valley R. Co. *v.* Baab, 9 Watts (Pa.) 458, 36 Am. Dec. 132.

Illustrations of good conditional subscriptions.— *Indiana.*— Fisher *v.* Evansville, etc., R. Co., 7 Ind. 407, condition not inconsistent with charter or common law.

Kansas.— Hinton *v.* Morris County Co-operative Soc., 21 Kan. 663, subscription to a "grange" with privilege of drawing the money out with thirty days' notice — held not to make it regular capital stock.

New York.— Burrows *v.* Smith, 10 N. Y. 550, corporation refused to perform the condition and hence there was no contract.

Pennsylvania.— Rhey *v.* Ebensburg, etc., Plank-Road Co., 27 Pa. St. 261, condition that plank road be located on a certain road.

United States.— Putnam *v.* New Albany, etc., R. Co., 16 Wall. 390, 21 L. ed. 361; New Albany *v.* Burke, 11 Wall. 96, 20 L. ed. 155; Rutland, etc., R. Co. *v.* Crocker, 21 Fed. Cas. No. 12,176, 4 Blatchf. 179 ("payable in cash, on the delivery of the last engine of twelve, from the Taunton Locomotive Manufactory" — validity explainable by parol).

Conditional agreements with promoters before creation of corporation upheld where the future corporation has received the benefit. Edwards *v.* Grand Junction R. Co., 6 L. J. Ch. 47, 1 Myl. & C. 650, 13 Eng. Ch. 650, 7 Sim. 337, 8 Eng. Ch. 337.

Illustrative English cases relating to conditional subscriptions. Matter of Direct Exeter, etc., R. Co., 3 De G. & Sm. 205, 14 Jur. 539 note, 6 R. & Can. Cas. 310 [*affirmed* in 1 Drew. 204, 2 Hall & T. 391, 16 Jur. 681, 19 L. J. Ch. 368, 2 Macn. & G. 192, 48 Eng. Ch. 148]; Mansfield's Case, 3 De G. & Sm. 58; Matter of Universal Salvage Co., 3 De G. & Sm. 49, 13 Jur. 723; Pitchford *v.* Davis, 8 L. J. Exch. 157, 5 M. & W. 2.

be on a certain condition, then a subscription with that condition annexed to it is a mere proposal for a contract, made by the intending subscriber to the corporation, and must be accepted by the corporation in order to make it a contract.[63]

2. Effect of Conditions in Subscriptions to Shares — a. No Contract Until Valid Condition Complied With. If the condition is expressed on the face of the subscription agreement, and is valid under rules and theories already discussed, the obligation of the subscriber does not become binding until the condition has been performed by the corporation or waived by the subscriber; until that time he cannot be held to the liabilities of a shareholder.[64] It is scarcely necessary to suggest that the corporation cannot elect to treat as unconditional a subscription which has been made upon a valid and expressed condition.[65] The English courts accordingly hold that if the application for shares is conditional there is no contract, although the allotment is unconditional.[66] Nor is it necessary, within the

63. Junction R. Co. *v.* Reeve, 15 Ind. 236.

Sufficiency of acceptance.— That such an acceptance must be by a formal act of the directors see Junction R. Co. *v.* Reeve, 15 Ind. 236. That an acceptance by an entry on the records of the corporation without notice to the subscriber is good was held in New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337, but the decision does not seem to be sound. That such an acceptance cannot take place by the act of some of the directors acting separately and not sitting as a board, especially where the number is not shown to have been enough to make a quorum, see Junction R. Co. *v.* Reeve, 15 Ind. 236. That such an acceptance may be shown by acts as well as by writings, as by the act of the subscriber in paying the required deposit and the act of the company in accepting it, see Nichols *v.* Burlington, etc., Plank Road Co., 4 Greene (Iowa) 42.

64. *Alabama.*— Hall *v.* Sims, 106 Ala. 561, 17 So. 534.

Florida.— Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713.

Georgia.— Brand *v.* Lawrenceville Branch R. Co., 77 Ga. 506, 1 S. E. 255.

Illinois.— Chase *v.* Sycamore, etc., R. Co., 38 Ill. 215; Thrasher *v.* Pike County R. Co., 25 Ill. 393; Wear *v.* Jacksonville, etc., R. Co., 24 Ill. 593.

Indiana.— Junction R. Co. *v.* Reeve, 15 Ind. 236; Jewett *v.* Lawrenceburgh, etc., R. Co., 10 Ind. 539; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337; Evansville, etc., R. Co. *v.* Shearer, 10 Ind. 244; Brookville, etc., Turnpike Co. *v.* McCarty, 8 Ind. 392, 65 Am. Dec. 768.

Iowa.— Burlington, etc., R. Co. *v.* Boestler, 15 Iowa 555.

Kansas.— Hunt *v.* Kansas, etc., Bridge Co., 11 Kan. 412.

Kentucky.— Lail *v.* Mt. Sterling Coal Road Co., 13 Bush 32; McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. 218, 61 Am. Dec. 181.

Maine.— Ticonic Water Power, etc., Co. *v.* Lang, 63 Me. 480; Penobscot, etc., R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587. *Compare* Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.

Massachusetts.— Troy, etc., R. Co. *v.* Newton, 8 Gray 596; People's Ferry Co. *v.* Balch, 8 Gray 303; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. 23.

Mississippi.— Roberts *v.* Mobile, etc., R. Co., 32 Miss. 373.

Nebraska.— Fremont Ferry, etc., Co. *v.* Fuhrman, 8 Nebr. 99.

New York.— Dorris *v.* Sweeney, 60 N. Y. 463; Burrows *v.* Smith, 10 N. Y. 550; Buffalo, etc., R. Co. *v.* Pottle, 23 Barb. 21; Macedon, etc., Plank-road Co. *v.* Lapham, 18 Barb. 312; Ft. Edward, etc., Plank Road Co. *v.* Payne, 17 Barb. 567.

Ohio.— Mansfield, etc., R. Co. *v.* Stout, 26 Ohio St. 241; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Dayton, etc., R. Co. *v.* Hatch, 1 Disn. 84, 12 Ohio Dec. (Reprint) 501.

Pennsylvania.— Hanover Junction, etc., R. Co. *v.* Grubb, 82 Pa. St. 36; Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318.

South Carolina.— Charlotte, etc., R. Co. *v.* Blakely, 3 Strobh. 245.

Texas.— Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

Virginia.— Galt *v.* Swain, 9 Gratt. 633, 60 Am. Dec. 311.

Wisconsin.— Milwaukee, etc., R. Co. *v.* Field, 12 Wis. 340.

United States.— Putnam *v.* New Albany, etc., R. Co., 16 Wall. 390, 21 L. ed. 361.

England.— Fox *v.* Clifton, 6 Bing. 776, 8 L. J. C. P. O. S. 257, 4 M. & P. 676, 31 Rev. Rep. 536, 19 E. C. L. 347; Matter of Sunken Vessels Recovery Co., 3 De G. & J. 85, 5 Jur. N. S. 1377, 28 L. J. Ch. 899, 2 L. T. Rep. N. S. 68, 60 Eng. Ch. 67; Matter of Direct Exeter, etc., R. Co., 3 De G. & Sm. 205, 14 Jur. 539 note, 6 R. & Can. Cas. 310; Pitchford *v.* Davis, 8 L. J. Exch. 157, 5 M. & W. 2.

See 12 Cent. Dig. tit. "Corporations," § 270.

Such subscriptions are not to be considered in determining whether sufficient stock has been subscribed to entitle the corporation to organize under its governing statute and articles of incorporation, without proof that the condition has been complied with. Oskaloosa Agricultural Works *v.* Parkhurst, 54 Iowa 357, 6 N. W. 547.

65. Brand *v.* Lawrenceville Branch R. Co., 77 Ga. 506, 1 S. E. 255.

66. Rogers' Case, L. R. 3 Ch. 634, 18 L. T. Rep. N. S. 779, 16 Wkly. Rep. 556; *In re* Ireland Rolling Stock Co., L. R. 1 Ch. 567,

meaning of this rule, that the expression of the condition should be in the same letter with the application for the shares, provided they reach the directors together.[67]

b. Right of Subscriber to Notice of Performance of Condition. The subscriber is entitled to notice of the performance of the condition before an action can be sustained against him on his contract,[68] unless the act be one that carries notice of itself.[69] He will, however, be affected by a general notice to the shareholders.[70]

c. Conditional Subscription Becomes Absolute When Condition Performed. Assuming again that the condition is valid under the rules and theories already discussed, it is to be added that it becomes absolute and binding upon the subscriber whenever it is performed by the corporation.[71] This must be especially true where the subscription is made after the organization of the corporation so that there is a contracting party in existence capable of assenting to the condition;[72] and it may be equally true where, at the time when the subscription is made, the corporation has not so far advanced in the process of its organization as to possess capacity to accept and receive it, but where such capacity is subsequently acquired, and it thereafter receives the subscription and assents to the condition.[73]

d. Waiver of Performance of Condition — (i) *In General.* Of course the subscriber may subseqently waive the condition and bind himself absolutely;[74] and it has been held that this is done by executing a promissory note for the amount for which he has subscribed,[75] or by delivering an absolute deed in payment where the subscription is payable in land.[76] So it has been held that the giving by the subscriber of his promissory note for an unpaid balance of his subscription, and his taking therefor the company's receipt, stipulating that when paid the amount of the note should be applied on his stock is *prima facie* a waiver of

12 Jur. N. S. 695, 35 L. J. Ch. 818, 14 L. T. Rep. N. S. 129, 14 Wkly. Rep. 1001.

67. Rogers' Case, L. R. 3 Ch. 634, 18 L. T. Rep. N. S. 779, 16 Wkly. Rep. 556.

68. Chase *v.* Sycamore, etc., R. Co., 38 Ill. 215; Wear *v.* Jacksonville, etc., R. Co., 24 Ill. 593; Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276; Banet *v.* Alton, etc., R. Co., 13 Ill. 504.

69. Chase *v.* Sycamore, etc., R. Co., 38 Ill. 215.

70. Nichols *v.* Burlington, etc., Plank Road Co., 4 Greene (Iowa) 42.

71. *California.*— Santa Cruz R. Co. *v.* Schwartz, 53 Cal. 106.

Illinois.— Banet *v.* Alton, etc., R. Co., 13 Ill. 504.

Indiana.— Indianapolis, etc., R. Co. *v.* Holmes, 101 Ind. 348; Franklin College *v.* Hurlburt, 28 Ind. 344; Junction R. Co. *v.* Reeve, 15 Ind. 236; Jewett *v.* Lawrenceburgh, etc., R. Co., 10 Ind. 539; Evansville, etc., R. Co. *v.* Shearer, 10 Ind. 244.

Iowa.— Merrill *v.* Gamble, 46 Iowa 615.

Kansas.— Topeka Bridge Co. *v.* Cummings, 3 Kan. 55.

Maine.— Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587.

Maryland.— Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760.

Massachusetts.— Central Turnpike Corp. *v.* Valentine, 10 Pick. 142.

Michigan.— Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

Missouri.— McGinnis *v.* Kortkamp, 24 Mo. App. 378; St. Charles Mfg. Co. *v.* Britton, 2 Mo. App. 290.

New York.— Dorris *v.* Sweeney, 60 N. Y. 463; Burrows *v.* Smith, 10 N. Y. 550; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. 157.

Ohio.— Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225.

South Carolina.— Spartanburg, etc., R. Co. *v.* De Graffenreid, 12 Rich. (S. C.) 675, 78 Am. Dec. 476.

Tennessee.— Lowe *v.* Edgefield, etc., R. Co., 1 Head 659.

72. Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760, opinion by Bowie, C. J.

73. Armstrong *v.* Karshner, 47 Ohio St. 276, 24 N. E. 897.

As to when a condition is complied with that a railroad shall pass through the corporate limits of a certain town see Chattanooga, etc., R. Co. *v.* Warthen, 98 Ga. 599, 25 S. E. 988.

74. Slipher *v.* Earhart, 83 Ind. 173; Evansville, etc., R. Co. *v.* Dunn, 17 Ind. 603. *Compare* Henderson, etc., R. Co. *v.* Moss, 2 Duv. (Ky.) 242.

75. O'Donald *v.* Evansville, etc., R. Co., 14 Ind. 259. *Compare* Miller *v.* White, 7 Blackf. (Ind.) 491.

76. Parks *v.* Evansville, etc., R. Co., 23 Ind. 567.

conditions precedent.[77] On the other hand it has been held that the giving by the subscriber of his promissory note for his subscription does not waive the condition subsequent thereon, unless such was the intention of the parties.[78]

(II) *By Acting as Shareholder.* If, prior to the time when the condition in the subscription is complied with, the subscriber acts as a shareholder, this will ordinarily be evidence of a waiver of his right to insist on the performance of the condition, on the principle of estoppel hereafter discussed. Thus, although a subscription paper be expressed to be upon condition that a specific sum shall be raised, yet if a subscriber coöperates in prosecuting the enterprise and incurring liabilities with knowledge that the full amount has not been subscribed this act operates as a waiver of the condition.[79]

e. Condition as to Completion of Corporate Enterprise. It is generally held that a condition as to the time of the completion of the enterprise will not be regarded as a condition precedent, to be performed by the company before it can collect the subscription, unless the contract says so in express terms. The reason is that the very object of the subscription is to raise funds for the carrying out of this enterprise, and hence such a construction of the contract would defeat its main purpose and make it nugatory.[80] But if the contract of subscription expressly stipulates that it is not payable until the enterprise is completed to a certain defined extent, then there can be no recovery upon it until the enterprise is so completed.[81]

77. Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225.

78. Parker *v.* Thomas, 19 Ind. 213, 81 Am. Dec. 385. *Compare* Taylor *v.* Fletcher, 15 Ind. 80; Kellar *v.* Johnson, 11 Ind. 337, 71 Am. Dec. 355. So if part of a conditional subscription has become due by performance of the condition, a postponement of its payment is sufficient consideration for a note given by the subscriber by which he promises unconditionally to pay the whole at a future day, and at a time before the residue would have been due by the original terms of the subscription. Henderson, etc., R. Co. *v.* Moss, 2 Duv. (Ky.) 242.

79. Hutchins *v.* Smith, 46 Barb. (N. Y.) 235; Reformed Protestant Dutch Church *v.* Brown, 17 How. Pr. (N. Y.) 287; Dayton, etc., R. Co. *v.* Hatch, 1 Disn. (Ohio) 84, 12 Ohio Dec. (Reprint) 501 (paid first instalment, voted at corporate elections, and acted as an officer of the company).

Other cases which exhibit circumstances on which such a waiver or estoppel was predicated.— *Connecticut.*— Lane *v.* Brainerd, 30 Conn. 565.

Massachusetts.— Mirick *v.* French, 2 Gray 420. *Compare* Converse *v.* Hood, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521.

North Carolina.— Wilmington, etc., R. Co. *v.* Robeson, 27 N. C. 391.

Pennsylvania.— Mack's Appeal, (1886) 7 Atl. 481; Bavington *v.* Pittsburgs, etc., R. Co., 34 Pa. St. 358.

Tennessee.— Morrow *v.* Nashville Iron, etc., Co., 87 Tenn. 262, 10 S. W. 495, 10 Am. St. Rep. 658, 3 L. R. A. 37.

See 12 Cent. Dig. tit. "Corporations," § 276.

No waiver where promissory note of subscriber in settlement of subscription was obtained by a fraudulent representation that the condition had been complied with. Taylor *v.* Fletcher, 15 Ind. 80.

That the subscriber cannot recover back from the corporation payments which he has voluntarily made before the condition had been complied with by the corporation see Davenport, etc., R. Co. *v.* Rogers, 39 Iowa 298. *Compare* and contrast Scarce *v.* Indiana, etc., R. Co., 17 Ind. 193.

Failure to carry out advertised projects made by the promoters or agents of a corporation does not have the effect of importing into the share subscriptions the condition that such projects shall be carried out. The failure to carry them out does not therefore release the subscriber, unless they amount to misrepresentations and fraud. Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. L. 363; Kelsey *v.* Northern Light Oil Co., 54 Barb. (N. Y.) 111.

80. Johnson *v.* Kessler, 76 Iowa 411, 41 N. W. 57; Armstrong *v.* Karshner, 47 Ohio St. 276, 24 N. E. 897. See for a statement of the principle McGinnis *v.* Kortkamp, 24 Mo. App. 378.

81. Hayes *v.* Branham, 36 Ind. 219. *Compare* Cedar Falls, etc., R. Co. *v.* Rich, 33 Iowa 113; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

Application of foregoing principle to railroad companies and railroad building.— The treatment of matters special and peculiar to railroad companies and to railroad building lies outside the scope of this article as planned. Therefore the applications of the doctrine relating to conditional share subscriptions, where those subscriptions were made to the shares of railway companies, will not be further pursued in this article in detail; but the writer will merely refer to another work of his and to the cases there collected, briefly indexing the subjects of them. 2 Thompson Corp. § 1349 *et seq.*

Validity of condition that railway be located on a certain route.— *Arkansas.*— Jacks *v.* Helena, 41 Ark. 213.

K. Effect of Fraud on Contract of Subscription to Shares — 1. General Principles — a. General Rule as to Right of Rescission For Such Frauds — (i) *Statement of Rule.* Where the rights of creditors or other innocent third

Florida.— Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713.

Indiana.— Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Jewett *v.* Lawrenceburgh, etc., R. Co., 10 Ind. 539; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337; Evansville, etc., R. Co. *v.* Shearer, 10 Ind. 244; and cases in next paragraph.

Kentucky.— McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. 218, 16 Am. Dec. 181.

New York.— Macedon, etc., Plank Road Co. *v.* Snediker, 18 Barb. 317.

Wisconsin.— Racine County Bank *v.* Ayers, 12 Wis. 512.

This condition complied with by "locating" without "constructing." McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; North Missouri R. Co. *v.* Winkler, 29 Mo. 318. *Compare* Johnson *v.* Georgia Midland R. Co., 81 Ga. 725, 8 S. E. 531; Smith *v.* Allison, 23 Ind. 366; Keller *v.* Johnson, 11 Ind. 337, 71 Am. Dec. 355; Burlington, etc., R. Co. *v.* Palmer, 42 Iowa 222; Memphis, etc., R. Co. *v.* Thompson, 24 Kan. 170; Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Miller *v.* Pittsburgh, etc., R. Co., 40 Pa. St. 237, 80 Am. Dec. 570.

Interpretation of conditions as to the construction of the road or works which the corporation was organized to build.

Georgia.— Johnson *v.* Georgia Midland R. Co., 81 Ga. 725, 8 S. E. 531.

Illinois.— Ogden *v.* Kirby, 79 Ill. 555.

Iowa.— Burlington, etc., R. Co. *v.* Boestler, 15 Iowa 555.

Michigan.— Stowell *v.* Stowell, 45 Mich. 364, 8 N. W. 70.

Texas.— Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Baxter, 32 Vt. 805.

That a subscription to the stock of a railroad corporation "when completed" to a certain place becomes final and absolute upon such completion, without other or further act of subscription, and is not subject to a condition in the heading of the subscription list providing for the payment of subscriptions in instalments as fast as any ten miles of the road should be completed, was held in Webb *v.* Baltimore, etc., R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396.

Interpretation of conditions as to establishment of depots at certain places.—Davenport, etc., R. Co. *v.* O'Connor, 40 Iowa 477; Davenport, etc., R. Co. *v.* Rogers, 39 Iowa 298; Courtwright *v.* Strickler, 37 Iowa 382; North Missouri R. Co. *v.* Miller, 31 Mo. 19; Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225; Paducah, etc., R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. 842.

Interpretation of conditions that prescribed route be taken.— Moore *v.* New Albany, etc., R. Co., 15 Ind. 78; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337; Detroit, etc., R. Co. *v.* Starnes, 38 Mich. 698; Spartanburg, etc., R. Co. *v.* De Graffenreid, 12 Rich. (S. C.) 675, 78 Am. Dec. 476. As to performance of the condition that "the road be built through the village of P" see Woonsocket Union R. Co. *v.* Sherman, 8 R. I. 564.

Conditions precedent generally in railway share subscriptions.— Lane *v.* Brainerd, 30 Conn. 565; Johnson *v.* Georgia Midland, etc., R. Co., 81 Ga. 725, 8 S. E. 531; Iowa Northern Cent. R. Co. *v.* Bliohenes, 41 Iowa 267; McGinnis *v.* Kortkamp, 24 Mo. App. 373; McGinnis *v.* Barnes, 23 Mo. App. 413. Facts under which it is held not a condition precedent to defendant's liability that plaintiff shall enter into a contract of a particular kind with the other corporation, and that in an action to enforce his subscription the subscriber cannot assail a contract thereafter made with such corporation, which has been ratified as provided. Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298.

Action of committee appointed by subscribers to see that the stipulations in their subscriptions are complied with, not conclusive upon the corporation, etc. Shaffner *v.* Jeffries, 18 Mo. 512. Action of such a committee in turning over to the corporation a subscription paper delivered to the committee in escrow not conclusive that the conditions therein imposed upon the corporation have been performed. Davenport, etc., R. Co. *v.* O'Connor, 40 Iowa 477.

When a subscription to a building fund of a college does not bind the subscribers until a permanent organization has been effected. Goff *v.* Winchester College, 6 Bush (Ky.) 443.

Interpretation of condition prescribing penalty in case of non-payment different from that imposed by charter.— Kirksey *v.* Florida, etc., Plank Road Co., 7 Fla. 23, 68 Am. Dec. 426.

Interpretation of particular conditions as to assessments.— Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Roberts *v.* Mobile, etc., R. Co., 32 Miss. 373.

Interpretation of an agreement to pay within thirty days of the organization of a corporation, with the conclusion that it means a corporation *de jure*, and is not satisfied by the organization of what may be regarded as a corporation *de facto*. Capps *v.* Hastings Prospecting Co., 40 Nebr. 470, 58 N. W. 956, 42 Am. St. Rep. 677, 24 L. R. A. 259.

Construction of an underwriting letter for shares, with the conclusion that a request by the promoters to the underwriter to apply for the shares, was a condition precedent to the obligation on his part to sign and lodge the application for the shares with a check for the deposit. *Re* Bultfontein Sun Diamond Mine, 75 L. T. Rep. N. S. 669. Construction

persons are not involved,[82] the general rule is that whenever the agent of a corporation, duly authorized by the corporation to procure subscriptions to its capital stock, induces persons to become subscribers to shares of such stock by fraudulent misrepresentations or concealments, the person so defrauded will be entitled to claim of the corporation a rescission of the contract, in the same manner as though the question had arisen between two natural persons.[83]

(II) *When Doctrine Applicable*—(A) *Applicable as Between Corporation and Subscriber For Shares.* These obvious rules of justice have received application in many cases where the company has brought an action to recover calls[84] on a stock subscription fraudulently obtained, or where the subscriber has exhibited a bill in equity to cancel such a subscription.[85]

of an underwriting letter for shares containing an agreement with the vendor and the company, with the conclusion that a request by the vendor to the underwriters to subscribe for or find responsible subscribers, was a condition precedent to their being treated as shareholders. *In re* Harvey's Oyster Co., [1894] 2 Ch. 474, 63 L. J. Ch. 578, 70 L. T. Rep. N. S. 795, 1 Manson 153, 8 Reports 715, 42 Wkly. Rep. 701.

82. See *infra*, VI, K, 1, a, (II), (B).

83. *New Jersey.*—Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188.

Pennsylvania.—Custar *v.* Titusville Gas, etc., Co., 63 Pa. St. 381.

Texas.—Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; Park *v.* Kribs, 24 Tex. Civ. App. 650, 60 S. W. 905 (an instruction to the jury in confirmation of this doctrine).

United States.—Upton *v.* Englehart, 28 Fed. Cas. No. 16,800, 3 Dill. 496.

England.—*In re* Reese Silver Mine Co., L. R. 2 Ch. 604; Smith *v.* Reese River Co., L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T. Rep. N. S. 283, 14 Wkly. Rep. 606; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821.

Former English doctrine on this subject.—The former English doctrine was that in order to avoid the contract the misrepresentation must be that of the whole company. *Ex p.* Nicol, 5 Jur. N. S. 205, 28 L. J. Ch. N. S. 257. It was conceded if acquiesced in at a general meeting. Ayre's Case, 25 Beav. 513, 4 Jur. N. S. 596, 27 L. J. Ch. 579, per Sir John Romilly, M. R. It was not conceded where it was the representation of a single director (Holt's Case, 22 Beav. 48. To the same effect see Matter of Leeds Banking Co., 3 De G. J. & S. 30, 34 L. J. Ch. 558, 12 L. T. Rep. N. S. 514, 13 Wkly. Rep. 826, 68 Eng. Ch. 23), or where it was the promise of a promoter which promise was not kept, the remedy being against the person making the promise (*In re* United Kingdom Ship Owning Co., 2 De G. J. & S. 456, 11 Jur. N. S. 52, 11 L. T. Rep. N. S. 613, 13 Wkly. Rep. 305, 67 Eng. Ch. 356).

Doctrine of Oakes v. Turquand.—The efforts of the English judges to arrive at a settled and just rule upon this subject culminated in the great case decided in the house of lords in 1867: Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201. The doctrine of this case was: (1) A contract induced by fraud is not void, but voidable; and therefore, although the persons who by their fraud induced it may not enforce it, yet other persons may, in consequence of it, acquire interests and rights which they may enforce against the party who has been so induced to enter into it. (2) When a person has been, by the fraudulent misrepresentations of directors, or by their fraudulent concealments of facts, drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, but he may rescind it. But he must do this within a reasonable time. He cannot, after a failure of the company, relieve himself from liability to contribute to the payment of its debts on the ground that he has been ignorant of something which with proper diligence he might have known. (3) The direct remedy of a creditor of an incorporated company is solely against the company, and not against its individual members, as upon a contract with them. But although, as between the company and the member, the member might have a good legal or equitable defense to a call upon himself, he may still be liable to contribute to the assets of the company for the purpose of satisfying the company's creditors. *Compare* Waterhouse *v.* Jamieson, L. R. 2 H. L. 29, where it is held that the official liquidator, representing creditors, proceeds against shareholders only in right of the company.

84. Wert *v.* Crawfordsville, etc., R. Co., 19 Ind. 242; McDermott *v.* Harrison, 9 N. Y. Suppl. 184, 30 N. Y. St. 324; Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 22; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116. See also Young *v.* Erie Iron Co., 65 Mich. 111, 31 N. W. 814, bill in equity by creditors.

85. Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188. See also Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821; Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237; New Brunswick, etc., R., etc., Co. *v.* Muggeridge, 1 D. & Sm. 363; National Exch. Co. *v.* Drew, 32 Eng. L. & Eq. 1.

(B) *Not Always Applicable Where Rights of Innocent Third Parties Are Involved.* The foregoing rule is not applicable in either of the two following cases: (1) Where the subscriber has been guilty of negligence in informing himself of the actual facts. (2) Where, in consequence of his delay in repudiating the contract, innocent third parties, shareholders, or creditors, have acquired rights which would be prejudiced by its rescission.[86]

b. Such Contracts Not Void but Merely Voidable at Election of Defrauded Shareholder — (I) *Statement of Rule.* Such contracts are not void by mere force of the law, but may be made good by ratification or acquiescence after knowledge, or after the truth should have been discovered in the exercise of reasonable diligence. Until then they are voidable only at the election of the defrauded sharetaker.[87] They subsist in full vigor until repudiated by him by some distinct act or expression, or until rescinded by the decree of a court of competent jurisdiction.[88]

(II) *What Requisite to Render Them Voidable* — (A) *In General.* They are not voidable unless the relation of principal and agent existed between the corporation and the person committing the fraud, or unless with knowledge the corporation ratified his conduct. The meaning of this is simply that the corporation will not be bound by the officious misrepresentations of third persons who have not authority from the corporation to make such representations; but will be bound where it acquires knowledge that the subscription was procured by such officious misrepresentations, and nevertheless elects to ratify the fraud by enforcing the subscription, in which case it makes the officious person its agent by relation.[89]

(B) *Authority of Agent to Commit Fraud.* Where, in making the fraudulent representations, the agent of the corporation acts within the general scope of his authority, as in cases of an agent sent out by the corporation to procure subscribers, then the corporation will be affected by his misrepresentations, although in point of fact he may have exceeded his special authority;[90] but this will not be so where the fraudulent misrepresentations or promises are such as to repel any reasonable presumption that they were made by authority of the corporation, as where they are plainly contrary to the duty and interest of the corporation, such as a promise that the subscription will be released, in which case the subscriber becomes in a sense *particeps criminis* with the fraudulent agent.[91]

86. *In re* Hop., etc., Exch., etc., Co., L. R. 1 Eq. 483, 35 Beav. 273, 12 Jur. N. S. 322, 35 L. J. Ch. 320, 14 L. T. Rep. N. S. 39; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821; Ellis *v.* Schmœck, 5 Bing. 521, 15 E. C. L. 702. See also *infra*, VI, K, 4.

87. State *v.* Jefferson Turnpike Co., 3 Humphr. (Tenn.) 304; Farrar *v.* Walker, 8 Fed. Cas. No. 4,679, 3 Dill. 506 note; Upton *v.* Englehart, 28 Fed. Cas. No. 16,800, 3 Dill. 496; Bwlch-y-Plwm Lead Min. Co. *v.* Baynes, L. R. 2 Exch. 324, 36 L. J. Exch. 183, 16 L. T. Rep. N. S. 597, 15 Wkly. Rep. 1108; Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024 [*affirming* L. R. 2 Ch. 604, L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T. Rep. N. S. 283, 14 Wkly. Rep. 606 (*reversing* 36 L. J. Ch. 385)]; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201; Matter of Joint-Stock Co.'s Winding Up Acts, 4 De G. & J. 575, 1 L. T. Rep. N. S. 19, 7 Wkly. Rep. 677, 61 Eng. Ch. 454.

88. These views are gathered from the remarks of Lord Hatherley, in Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024. They were adopted by Dillon, J., in Upton *v.* Englehart, 28 Fed. Cas. No. 16,800, 3 Dill. 496.

89. Walker *v.* Mobile, etc., R. Co., 34 Miss. 245. For the purposes of the rule of the above text, where it did not appear that the person securing the subscription had authority to do so, it was held that any fraud practised by him in securing it might be set up as a defense to an action to recover on the contract of subscription, since the bringing of the suit amounted to a ratification of the fraud. Anderson *v.* Scott, 70 N. H. 350, 47 Atl. 607, 49 Atl. 568.

90. Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92; Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

91. Custar *v.* Titusville Gas, etc., Co., 63 Pa. St. 381; Robinson *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 334, 72 Am. Dec. 792.

Rule as to fraudulent representations made by public commissioners in order to secure subscriptions to shares.— This inquiry will not be pursued, because this mode of organizing corporations has substantially gone out

c. Early American Decisions Denying Right of Rescission For Fraud. Early American decisions, many of them rendered in the era of railroad building by the aid of public subscriptions, and of special bank charters, are not wanting which might be quoted to the doctrine that there is no right of rescission of a share subscription on the ground of fraud at all.[92] These decisions would not perhaps be rendered by a court of our day unless bound by controlling decisions.[93]

d. Effect of Ignorance of Subscriber. It is no defense for the shareholder to show ignorance of the condition and circumstances of the company when his subscription was taken, and if the company is governed by the laws of a foreign state, a person who subscribes for shares of its stock is bound to know the law of such foreign state.[94] But if a promoter or an agent of the corporation takes advantage of the ignorance of a person, and by means of false representations which would not avail against an intelligent person induces him to subscribe he may claim a release on that ground.[95]

e. Doctrine That Subscriber Must Suspect Fraud and Discover It Beforehand in Order to Make It Available as a Defense. There are common-law authorities to the effect that one who has been drawn by fraudulent representations into the making of a subscription to the shares of a corporation cannot set up the fact that the fraud was practised upon him and that it induced him to enter into the contract, by way of defense to an action for the subscription, unless he shows that he used due diligence before signing the contract to discover whether or not the representations were true.[96]

f. Rule of Equity That Subscriber Need Not Make Inquiries Before Subscribing — (1) *In General.* But the rule of equity is that where there has been a fraudulent misrepresentation or wilful concealment of facts, by which a person has been induced to enter into a contract to subscribe for shares, it is, in theory of equity, no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry;[97] but that in the absence of circumstances

of vogue, further than to say that their fraudulent representations afforded in general no ground for a rescission of the subscription (Rutz *v.* Esler, etc., Mfg. Co., 3 Ill. App. 83; North Carolina R. Co. *v.* Leach, 49 N. C. 340), especially where the rights of subsequent *bona fide* purchasers to the shares were involved (Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47).

92. One court held that a subscription to a joint stock is not only an undertaking with the company, but with all other subscribers; and hence that, even if fraudulent as between the subscriber and the corporation, it is to be enforced for the benefit of the others in interest. Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489.

93. *Compare* the following cases: Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, 8 Abb. Pr. (N. Y.) 192; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581. It has been held that the shareholder will not be released on the ground that the agent of the corporation, procuring the subscription, made false statements as to the amount of stock subscribed, and as to the time when the railroad would be completed (Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Bish *v.* Bradford, 17 Ind. 490; Hardy *v.* Merriweather, 14 Ind. 203; Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169) or that he falsely represented that another railroad company would furnish the iron for the railroad proposed, or lend its credit for the purpose of obtaining it (Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280). Nor will a fraudulent representation, made by one of the company's officers at a public meeting and in the presence of a majority of the board of directors, but not made in pursuance of any authority from, or resolution of, the board, discharge a subscriber. Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336.

94. Payson *v.* Withers, 19 Fed. Cas. No. 10,864, 5 Biss. 269.

95. In an action by a turnpike company on a stock subscription, defendant answered that he could not read, and did not hear the articles of association read; but that a party to them, interested in obtaining subscriptions, induced him to subscribe by his false representation that the articles did not require the payment of subscriptions until twenty thousand dollars had been subscribed. It was held that these averments set up a sufficient ground of defense. Wert *v.* Crawfordsville, etc., Turnpike Co., 19 Ind. 242.

96. Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181. The poor doctrine of the common law that negligence can be made to offset fraud will be found in Ormrod *v.* Huth, 14 L. J. Exch. 366, 14 M. & W. 651, and in many other cases.

97. Upton *v.* Englehart, 28 Fed. Cas. No. 16,800, 3 Dill. 496; Smith *v.* Reese River Co., L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T.

tending to excite suspicion in the mind of a reasonable man he may rightfully rely upon the statements to which the other party to the contract, or the agent of such other party, has deliberately pledged his faith.[98] It is not incumbent upon him to institute inquiries and to suspect fraud, where all seems fair and conformable to the requirements of the statutes.[99] He need not for example examine the corporate books;[1] inquire at the office of the company, as invited to do by a fraudulent prospectus;[2] or inspect the engineer's reports, maps, plans, etc., at the office of the company, as similarly invited to do.[3]

(II) *Rule Where Statements in Prospectus Are Ambiguous.* If the statements in a prospectus are ambiguous but capable of an interpretation in conformity with the truth, then the purchaser cannot charge fraud upon the directors or promoters of the company, unless he avail himself of the means of inquiry open to him by examining the documents referred to in the prospectus.[4]

(III) *Subscriber Owes Duty of Inquiry to Innocent Third Persons.* With respect to innocent third persons, for example, creditors of the company who may have given it credit on the faith of his being a shareholder, the subscriber owes the duty of inquiry before entering into the contract of subscription.[5]

g. Waiver by Subscriber of Right to Rescission on Ground of Fraud — (I) *In General.* The principle hinted at in the preceding section, and more fully developed in the next section, is that one induced by fraud to purchase shares of stock in a corporation cannot avoid his purchase if, after becoming aware of the fraud, he acts as a shareholder or derives a benefit from his shares.[6] Nor can a shareholder set up by way of defense fraud practised by the corporation on him in its acts or organization, where he has stood by and interposed no objection while the corporation has contracted debts.[7] And while it is in general true that where a corporate charter has been obtained by means of fictitious subscriptions for a part of the stock, and fraud has been committed on a real subscriber by which he has sustained or might sustain damage, no action can be maintained against him by the corporation for the amount of his subscription; yet it is different where such subscriber has accepted the charter and by his own acts assisted in putting it into operation. In such a case he cannot avail himself, when sued by the corporation in respect of his subscription, of the defense that a part of such stock was fictitious.[8]

(II) *Acts of Ratification Which Amount to Waiver.* A contract to take shares induced by fraudulent misrepresentations or concealments is not only valid

Rep. N. S. 283, 14 Wkly. Rep. 606, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821; Waterhouse *v.* Jamieson, L. R. 2 H. L. Sc. 29; New Brunswick, etc., R., etc., Co. *v.* Muggeridge, 1 Dr. & Sm. 363.

Statements and applications of this principle will be found in Dobell *v.* Stevens, 3 B. & C. 623, 5 L. & R. 490, 3 L. J. K. B. O. S. 89, 10 E. C. L. 283; Attwood *v.* Small, 6 Cl. & F. 232, 2 Jur. 200, 7 Eng. Reprint 684.

98. Mead *v.* Bunn, 32 N. Y. 275, per Porter, J. To the same effect is Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377; McClellan *v.* Scott, 24 Wis. 81; Dobell *v.* Stevens, 3 B. & C. 623, 5 D. & R. 490, 3 L. J. K. B. O. S. 89, 10 E. C. L. 283; Attwood *v.* Small, 6 Cl. & F. 232, 2 Jur. 200, 7 Eng. Reprint 684.

99. Foreman *v.* Bigelow, 9 Fed. Cas. No. 4,934, 4 Cliff. 508; Waterhouse *v.* Jamieson, L. R. 2 H. L. Sc. 29.

1. Union Nat. Bank *v.* Hunt, 76 Mo. 439 [*reversing* 7 Mo. App. 42]. *Contra*, see Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481, per Brace, J.

2. Smith *v.* Reese River Co., L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T. Rep. N. S. 283, 14 Wkly. Rep. 606.

3. Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821.

4. Hallows *v.* Fernie, L. R. 3 Ch. 467, 18 L. T. Rep. N. S. 340, 16 Wkly. Rep. 873.

5. See Saffold *v.* Barnes, 39 Miss. 399; National Park Bank *v.* Nichols, 17 Fed. Cas. No. 10,047, 2 Biss. 146; Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201.

6. Macon City Bank *v.* Bartlett, 71 Ga. 797; National Park Bank *v.* Nichols, 17 Fed. Cas. No. 10,047, 2 Biss. 146.

7. Beck *v.* Henderson, 76 Ga. 360.

8. Centre, etc., Turnpike Road Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140.

until rescinded,[9] but it may become absolutely binding by acts of ratification. And here it may be stated generally that if a person who has been thus entrapped into the purchase of shares, after discovering the fraud, acts in a manner inconsistent with an intention to disaffirm the contract, this will preclude him from disaffirming it afterward.[10] This has been held to be the effect of the following acts: After discovering the real facts, placing his shares in the hands of a broker and instructing him to sell them;[11] after coming to the knowledge of the alleged fraudulent representations, paying a call and receiving a dividend;[12] knowingly suffering his name to appear on the books of the company as a shareholder so long that the rights of creditors would be prejudiced in case of withdrawal;[13] participating in the meetings of the company,[14] but not where he merely appeared for the purpose of demanding a rescission of his contract;[15] voting his shares by proxy;[16] paying calls;[17] serving as a director and participating generally in the business of the company;[18] demanding and suing for dividends;[19] promising to pay the instalments due on his shares;[20] and receiving dividends, where the question arose as between the shareholder and creditors.[21]

(III) *Rule Where Subscriber Has Sold Some Shares and Seeks Rescission as to Remainder.* The fact that a subscriber to shares in a corporation has sold some of the shares taken by him does not deprive him of the right to have the contract, it being severable, rescinded as to the remainder, for fraudulent misrepresentations in the company's prospectus, if he parted with the shares sold before discovering the fraud.[22]

9. Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024.

10. Scholey *v.* Venezuela Cent. R. Co., L. R. 9 Eq. 266 note.

11. *In re* Hop, etc., Exch., etc., Co., L. R. 1 Eq. 483, 35 Beav. 273, 12 Jur. N. S. 322, 35 L. J. Ch. 320, 14 L. T. Rep. N. S. 39, per Lord Romilly, M. R.

12. Scholey *v.* Venezuela Cent. R. Co., L. R. 9 Eq. 266 note.

13. *In re* Reciprocity Bank, 22 N. Y. 9; McHose *v.* Wheeler, 45 Pa. St. 32; Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128. Otherwise where one is so held out without his knowledge. Fox *v.* Clifton, 6 Bing. 776, 8 L. J. C. P. O. S. 257, 4 M. & P. 676, 31 Rev. Rep. 536, 19 E. C. L. 347.

14. Chaffin *v.* Cummings, 37 Me. 76; Dayton, etc., R. Co. *v.* Hatch, 1 Disn. (Ohio) 84, 12 Ohio Dec. (Reprint) 501; Harrison *v.* Heathorn, 12 L. J. C. P. 282, 6 M. & G. 81, 6 Scott N. R. 735, 46 E. C. L. 81.

15. Wontner *v.* Shairp, 4 C. B. 404, 56 E. C. L. 404.

16. McCully *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 25; Greenville, etc., R. Co. *v.* Coleman, 5 Rich. (S. C.) 118.

17. Frost *v.* Walker, 60 Me. 468; Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484; Mississippi, etc., R. Co. *v.* Harris, 36 Miss. 17; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Cromford, etc., R. Co. *v.* Lacey, 3 Y. & J. 80. But failing to pay calls does not of course imply that one is not a shareholder. Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248; McHose *v.* Wheeler, 45 Pa. St. 32. But see Fiser *v.* Mississippi, etc., R. Co., 32 Miss. 359; Lewis *v.* Robertson, 13 Sm. & M. (Miss.) 558; Hayne *v.* Beauchamp, 5 Sm. & M. (Miss.) 515.

18. Hager *v.* Cleveland, 36 Md. 476; Ruggles *v.* Brock, 6 Hun (N. Y.) 164; Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81.

19. Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128.

20. Mississippi, etc., R. Co. *v.* Harris, 36 Miss. 17.

21. Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Hoare's Case, 30 Beav. 225, 2 Johns. & H. 229; Matter of North of England Joint-Stock Banking Co., 3 De G. & Sm. 258. And see Berthold *v.* Goldsmith, 24 How. (U. S.) 536, 16 L. ed. 762; *In re* Francis, 9 Fed. Cas. No. 5,031, 2 Sawy. 286; Pott *v.* Eyton, 3 C. B. 32, 15 L. J. C. P. 257, 54 E. C. L. 32; Waugh *v.* Carver, 2 H. Bl. 235, 2 Smith Lead. Cas. 1178; Grace *v.* Smith, 2 W. Bl. 998; Wightman *v.* Townroe, 1 M. & S. 412, 14 Rev. Rep. 475. *Compare* Phœnix Ins. Co. *v.* Hamilton, 14 Wall. (U. S.) 504, 20 L. ed. 729; Winship *v.* U. S. Bank, 5 Pet. (U. S.) 529, 8 L. ed. 216; Bigelow *v.* Elliott, 3 Fed. Cas. No. 1,399, 1 Cliff. 28; Bowas *v.* Pioneer Tow Line, 3 Fed. Cas. No. 1,713, 2 Sawy. 21; The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448; Hazard *v.* Hazard, 11 Fed. Cas. No. 6,279, 1 Story 371. But when a husband receives dividends for his wife (Ness *v.* Angas, 6 D. & L. 645, 3 Exch. 805, 13 Jur. 874, 18 L. J. Exch. 470), or a trustee for his *cestui que trust* (Ness *v.* Armstrong, 7 D. & L. 73, 4 Exch. 21, 13 Jur. 874, 18 L. J. Exch. 473), the rule may be otherwise. See also Bosanquet *v.* Shortridge, 4 Exch. 698, 14 Jur. 71, 19 L. J. Exch. 221.

22. *Re* Mt. Morgan Gold Mine, 56 L. T. Rep. N. S. 622.

(iv) *Rule Where Subscription Is Settled by Negotiable Instrument.* If the subscription is settled by the giving of a negotiable instrument, e. g., a negotiable promissory note secured by a mortgage, and this is negotiated by the corporation to an innocent third party before maturity, on a rule of public policy which upholds the confidence of the business community in dealing in commercial paper, he takes it discharged of equities subsisting between the maker and the payee, and the maker cannot defend against his liability on it by showing that he was induced to subscribe for the shares by false and fraudulent representations of the corporation or its agents.[23]

h. Subscriptions Given in Consequence of Erroneous Representations Not Fraudulent but Founded on Mistake. If subscriptions to a corporation are induced by representations not in themselves fraudulent, but founded on an honest mistake on the part of those making such representations, the mistake does not according to one theory entitle the subscriber to avoid the contract;[24] but the better and modern opinion is that, although the representation may have been innocently made, yet if it was one on which the intending subscriber had a right to rely, and did rely, he will be entitled to relief from the contract.[25] The modern and approved doctrine is that the rule which entitles the deceived party to a rescission "applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty, they ought to have known, or if they had formerly known and ought to have remembered, the fact which negatives the representation made."[26]

2. What Frauds Will and What Will Not Avoid Contract of Subscription — a. Fraud Must Have Been Material Inducement to Contract. A fraud which will, where the rights of innocent third persons do not supervene, entitle a subscriber to shares to a rescission of his contract or to defend against actions for assessments, must have been a material inducement to the contract. "It must be a representation *dans locum contractui*, that is, a representation giving occasion to the contract: the proper interpretation of which appears to me to be, the assertion of a fact on which the person entering into the contract relied, and in the absence of which, it is reasonable to infer, that he would not have entered into it; or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether."[27] It must have been a proximate or immediate inducement to the purchase of the shares, but for which the purchase would not probably have been made, although other influences may have been at work to induce the subscription.[28] This is not to be established by impressions received from the fraudulent reports at some former period, however distant; but they should be clearly shown to have been in the mind of the person at the time of the negotiations for the purchase, and to have been one of the causes leading to the contract.[29] The material inducement to the

23. Andrews *v.* Hart, 17 Wis. 297.

24. Thus it has been held that where individuals, having a design to be incorporated for the purpose of creating a water-power, cause surveys and estimates to be made of the water-power which can be created, and thereupon represent it to be greater than it really is, but without any intention to deceive, persons who subscribe for stock in the corporation on the faith of such representations, and agree to be personally liable for assessments, cannot avoid the contract on the ground of the mistake. Salem Mill-Dam Corp. *v.* Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

25. Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 22.

26. Sir John Romilly, M. R., in Pulsford *v.* Richards, 17 Beav. 87, 94, 17 Jur. 865, 22 L. J. Ch. 562, 1 Wkly. Rep. 295, 19 Eng. L. & Eq. 387. See also Money *v.* Jorden, 21 L. J. Ch. 531, 11 Eng. L. & Eq. 182 [*affirmed* in 2 De G. M. & G. 318, 21 L. J. Ch. 893, 13 Eng. L. & Eq. 245, 51 Eng. Ch. 249]; Burrowes *v.* Lock, 10 Ves. Jr. 470, 8 Rev. Rep. 33, 856.

27. Sir John Romilly, M. R., in Pulsford *v.* Richards, 17 Beav. 87, 96, 17 Jur. 865, 22 L. J. Ch. 569, 1 Wkly. Rep. 295, 19 Eng. L. & Eq. 387, 391.

28. Lord Chanworth, in Matter of Royal British Bank, 3 De G. & J. 387, 5 Jur. N. S. 205, 28 L. J. Ch. 257, 7 Wkly. Rep. 217, 60 Eng. Ch. 301.

29. Lord Chanworth, in Scotland Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145.

subscription must have been the fraudulent prospectus, and not the subscriber's own knowledge.[30] In order to a rescission, it is not necessary for the subscriber to show that if the representations had not been made he would not have taken the shares, but it is sufficient that there is evidence to show that he was materially influenced by the misrepresentations.[31]

b. Fraud May Consist Either in Misrepresentation of a Fact or in Suppression of the Truth — (I) *In General.* The fraud which will entitle a subscriber to shares of a corporation or joint-stock company to a rescission may be either of a positive or negative kind. It may consist either in a suppression of what is true, or in an assertion of what is false.[32]

(II) *Mere Non-Disclosure as Ground of Rescission.* In order to render the mere non-disclosure of facts in a prospectus a ground for rescinding a contract to take shares made upon the faith of it, it must be, as it stands, misleading.[33] It has been held that a prospectus of a corporation which merely specifies the dates and names of the parties to contracts, in compliance with the governing statute,[34] is fraudulent, where it gives no further notice of circumstances contained in the contracts which are material to be known, so that the omission of them causes it to give a false impression.[35]

(III) *Illustrations of Fraudulent Assertion of Truth Which Will Avoid Contract.* Where the subscription was induced by representations that the entire proceeds of the capital stock would be used in payment for and in improvement of real estate, when in fact it had been agreed by the organizers that a part should be paid to the promoters, this entitled the subscriber to be released from his subscription, in the absence of clear evidence of a ratification after full knowledge of the falsity of the representations.[36]

c. Not Necessary For Purpose of Rescission That Fraudulent Representations Be Made With Wilful Intent to Deceive — (I) *In General.* The true rule, which ought not to be subject to doubt anywhere, is that if, in written proposals for a sale of stock in a company, representations are contained which are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, then the contract founded upon such representations is void, whether the vendor knew the representations to be false at the time they were made or not, and whether made with a fraudulent intent or not.[37]

30. Jennings *v.* Broughton, 17 Beav. 234, 17 Jur. 905, 22 L. J. Ch. 585, 1 Wkly. Rep. 441, 19 Eng. L. & Eq. 420. To the same effect is Salem Mill-Dam Corp. *v.* Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

31. *In re* London, etc., Bank, 56 L. J. Ch. 321, 56 L. T. Rep. N. S. 115, 35 Wkly. Rep. 344.

32. Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116; Upton *v.* Englehart, 28 Fed. Cas. No. 16,800, 3 Dill. 496; Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821; Pulsford *v.* Richards, 17 Beav. 87, 22 L. J. Ch. 559, 17 Jur. 865, 1 Wkly. Rep. 295, 19 Eng. L. & Eq. 387; New Brunswick, etc., R., etc., Co. *v.* Muggeridge, 1 Dr. & Sm. 363. See the charge of Drummond, J., in National Park Bank *v.* Nichols, 17 Fed. Cas. No. 10,047, 2 Biss. 146, as to the duty of persons soliciting such subscriptions to make full disclosures.

For illustrations of concealments which do not have the effect of avoiding the subscription see Walker *v.* Mobile, etc., R. Co., 34 Miss. 245; Pulsford *v.* Richards, 17 Beav. 87, 17 Jur. 865, 22 L. J. Ch. 559, 1 Wkly. Rep. 295, 19 Eng. L. & Eq. 387; Vane *v.* Cobbold, 1 Exch. 798, 12 Jur. 60, 17 L. J. Exch. 97.

33. McKeown *v.* Boudard-Peveril Gear Co., 65 L. J. Ch. 446, 74 L. T. Rep. N. S. 310 [*affirmed* in 65 L. J. Ch. 735, 74 L. T. Rep. N. S. 712].

34. English Companies Act (1867), § 38.

35. Aaron's Reefs *v.* Twiss, [1896] A. C. 273, 65 L. J. P. C. 54, 74 L. T. Rep. N. S. 794 [*affirming* [1895] 2 Ir. 207].

36. West End Real Estate Co. *v.* Claiborne, 97 Va. 734, 34 S. E. 900. *Compare* Pulsford *v.* Richards, 17 Beav. 87, 17 Jur. 865, 22 L. J. Ch. 569, 1 Wkly. Rep. 295, 19 Eng. L. & Eq. 387.

37. Crump *v.* U. S. Min. Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116. The court used the word "void" in the sense of voidable. Hunter *v.* French League Safety Cure Co., 96 Iowa 573, 578, 65 N. W. 828 [*quoting* from

(II) *Exception Where Action Is to Recover Damages For Deceit Against Person Committing Fraud.* A well-settled exception to the above rule exists in the case where the action is to recover damages for the deceit against the person or persons committing the fraud, in which case there must be evidence of a guilty knowledge and purpose, technically called a *scienter*.[38] This distinction is partly founded upon the consideration that the corporation, and not the person making the misrepresentation, gets the benefit of it.[39]

d. Misrepresentations Need Not Be Put Forth to Deceive Particular Person. The misrepresentations need not have been put forth for the purpose of deceiving the person seeking the rescission; but they must have been put forth either for the purpose of deceiving him or the general class of persons to which he belongs.[40] Within the meaning of this rule, a second vendee of shares will not be able to maintain an action for relief on the ground that his vendor was induced by the fraudulent representations to purchase the shares.[41] But a fraudulent prospectus or report concocted by the directors of a company for the purpose of deceiving the public generally as to its condition, with the view of inducing the public to purchase its shares, will, if seen, believed, and acted upon by any member of the public, afford ground for avoiding his contract of subscription.[42] On like grounds it has been held that a public advertisement, touching the allotment of shares in a joint-stock company, is presumed to have been communicated to all who were interested in the project. When therefore such an advertisement contained false statements, which inveigled a provisional subscriber for shares into paying an instalment of his subscription, he was entitled to recover the money from the promoters of the enterprise.[43] The writer conceives that there is no well-grounded exception to this principle, so far as the rights of the first subscriber or allottee are concerned;[44] but whether the principle extends to his vendee there is a difference of opinion, as we shall point out when discussing the liability of directors.[45]

e. Distinction Between Fraud and Failure of Consideration — (I) *In General.* If, on the faith of a projected corporation, a person subscribes for shares therein, and afterward, on inspecting the memorandum of association, finds that the undertaking is substantially different from that represented by the prospectus, he is entitled to a rescission of his contract of subscription, on the principal ground that the consideration of the contract has failed, in that the company does not propose to give him that which he agreed to take; he subscribed for shares in one kind of a venture and they tender him shares in another.[46]

Mohler *v.* Carder, 73 Iowa 582, 35 N. W. 647]. See also Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821.

Effect of agent's want of knowledge of falsity.— It has been held that a corporation cannot avoid responsibility for fraudulent representations made by agents to induce subscriptions to its capital stock, merely because the agent who made the representations was not aware of their falsity, and the other agent, who knew of the facts negativing the truth of such representations, was not aware that they had been made. Talmadge *v.* Sanitary Security Co., 31 N. Y. App. Div. 498, 52 N. Y. Suppl. 139.

38. Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328; Craig *v.* Phillips, 3 Ch. D. 722, 46 L. J. Ch. 49, 35 L. T. Rep. N. S. 198. For a good illustration of the principle see Weir *v.* Bell, 3 Ex. D. 238, 47 L. J. Exch. 704, 38 L. T. Rep. N. S. 929, 26 Wkly. Rep. 746.

39. Weir *v.* Bell, 3 Ex. D. 238, 47 L. J. Exch. 704, 38 L. T. Rep. N. S. 929, 26 Wkly. Rep. 746.

40. *In re* Hop, etc., Exch., etc., Co., L. R. 1 Eq. 483, 35 Beav. 273, 12 Jur. N. S. 322, 35 L. J. Ch. 320, 14 L. T. Rep. N. S. 39; *In re* National Patent Steam Fuel Co., 4 Drew. 529, 5 Jur. N. S. 504, 28 L. J. Ch. 589, 7 Wkly. Rep. 281.

41. *In re* Hop, etc., Exch., etc., Co., L. R. 1 Eq. 483, 35 Beav. 273, 12 Jur. N. S. 322, 35 L. J. Ch. 320, 14 L. T. Rep. N. S. 39; *In re* National Patent Steam Fuel Co., 4 Drew. 529, 5 Jur. N. S. 504, 28 L. J. Ch. 589, 7 Wkly. Rep. 281.

42. *Dicta* in Cross *v.* Sackett, 2 Bosw. (N. Y.) 617; Ayre's Case, 25 Beav. 513, 4 Jur. N. S. 596, 27 L. J. Ch. 579.

43. Wontner *v.* Shairp, 4 C. B. 404, 56 E. C. L. 404.

44. This was conceded in the great case of Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29.

45. See *infra*, IX, G, 11 *et seq.*

46. Downes *v.* Ship, L. R. 3 H. L. 343, 37 L. J. Ch. 642, 19 L. T. Rep. N. S. 74, 17

(II) *Cases Where Principle Does Not Apply.* The variance must be substantially different. The obligations incurred in the memorandum or other instrument of association must substantially differ from those represented in the prospectus.[47] Moreover, the representation must not relate to his collateral or incidental advantage, such as the building of a railroad through the property of the subscriber.[48] Nor will such a contract be rescinded, when obtained in good faith, from the mere fact that it turns out to be less valuable for the reason that certain things, not conditions precedent, have not been done as represented.[49]

f. Puffing and Exaggeration. Mere puffing and exaggeration as to the value of the property possessed by the corporation, or as to its future prospects, do not afford any ground for the rescission of a share subscription, provided there was no misstatement of a material existing fact.[50]

g. Statements as to Matters of Opinion, Belief, Motive, Future Prospects, Etc. Upon the same ground rest parol statements of matters of opinion, intention, and belief,[51] such as the time within which the proposed railroad will be built;[52] the probable expense of the improvement undertaken by the corporation;[53] the prospective value of its stock;[54] the profits to be derived from it, and the amount which the subscribers will be required to pay in;[55] things to be done in the future by some other person or corporation, as that another corporation will aid the one which is being organized;[56] and parol representations that the person proposing to equip the railroad of the proposed company is able to do it without any advance from the company,[57] or that the company has stock enough to fit out the road in a given length of time,[58] and only desires defendant's subscription, and that of others along the line of the road, as an evidence of their friendly disposition toward the road.[59] So where a prospectus stated that a certain inven-

Wkly. Rep. 34; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201; *In re* Russian Ironworks Co., L. R. 2 Eq. 741, 14 L. T. Rep. N. S. 728; Matter of Scottish, etc., Finance Bank, 2 De G. J. & S. 544, 11 Jur. N. S. 331, 12 L. T. Rep. N. S. 256, 13 Wkly. Rep. 599, 67 Eng. Ch. 426.

47. Downes *v.* Ship, L. R. 3 H. L. 343, 37 L. J. Ch. 642, 19 L. T. Rep. N. S. 74, 17 Wkly. Rep. 34; Kennedy *v.* Panama, etc., Boyd Mail Co., L. R. 2 Q. B. 580, 8 B. & S. 571, 36 L. J. Q. B. 260, 17 L. T. Rep. N. S. 62, 15 Wkly. Rep. 1039 (prospectus stated that the company had a contract with the government of New Zealand for carrying its mails — contract repudiated by a subsequent ministry — shareholder held bound).

48. Parker *v.* Thomas, 19 Ind. 213, 81 Am. Dec. 385; Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Bish *v.* Bradford, 17 Ind. 490.

49. Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654.

This does not apply where there has been fraud as well as a failure of consideration.— This principle does not it seems apply where there have been fraudulent representations as to any part of that which induced the subscriber to enter into the contract. Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655, opinion by Chalmers, J. *Compare* Cook *v.* Whitfield, 41 Miss. 541. And see Morrison *v.* Ives, 4 Sm. & M. (Miss.) 652.

50. Union Nat. Bank *v.* Hunt, 76 Mo. 439 [*affirming* on this point 7 Mo. App. 42]; Denton *v.* Macneil, L. R. 2 Eq. 352; Kisch *v.* Venezuela Cent. R. Co., 34 L. J. Ch. 545 (per Turner, L. J.). See also Gordon *v.* Parmelee, 2 Allen (Mass.) 212; Brown *v.* Castles, 11 Cush. (Mass.) 348.

The folly of placing reliance on the statements of the agents sent out to procure subscriptions to shares of corporate stock is illustrated by the case of Thornburgh *v.* Newcastle, etc., R. Co., 14 Ind. 499, as well as by those cited in the next section.

51. New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187; Clem *v.* Newcastle, etc., R. Co., 9 Ind. 488, 68 Am. Dec. 653; Yonkers Gazette Co. *v.* Jones, 30 N. Y. App. Div. 316, 51 N. Y. Suppl. 973; North Carolina R. Co. *v.* Leach, 49 N. C. 340; Armstrong *v.* Karshner, 47 Ohio St. 276, 24 N. E. 897.

52. Parker *v.* Thomas, 19 Ind. 213, 81 Am. Dec. 385; Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Hardy *v.* Merriweather, 14 Ind. 203; Walker *v.* Mobile, etc., R. Co., 34 Miss. 245.

This application of the rule is forcibly denied in Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

53. Crossman *v.* Penrose Ferry Bridge Co., 26 Pa. St. 69.

54. Vawter *v.* Ohio, etc., R. Co., 14 Ind. 174.

55. Walker *v.* Mobile, etc., R. Co., 34 Miss. 245.

56. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280; Shattuck *v.* Robbins, 68 N. H. 565, 44 Atl. 694.

57. Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169.

58. Dynes *v.* Shaffer, 19 Ind. 165; Bish *v.* Bradford, 17 Ind. 490; Hardy *v.* Merriweather, 14 Ind. 203.

59. Bish *v.* Bradford, 17 Ind. 490.

tion which it was the object of the company to work had been tested, and that according to the experiments the material could be produced at a certain specified cost, but that it was the intention to test the invention further, and after some further testing the invention turned out to be worthless, it was held that this was not such a misrepresentation as would avoid the contract.[60] The mere holding out by an agent of flattering prospects is no ground for avoidance.[61]

h. Fraudulent Promises of Something Unlawful — Ignorance of Law — (I) *In General.* The fraudulent promise of something unlawful, although assented to by the subscriber in ignorance of the law, will not relieve him, since every person — even a judge — is conclusively presumed to know the law,[62] and this principle applies in proceedings of equity as well as in proceedings at law.[63] On this ground a fraudulent representation that the shares were non-assessable was no defense against creditors of the corporation.[64] Nor were false representations by the commissioners, as to matters fixed by the charter, any ground for avoiding the subscription.[65] The same was held with regard to representations made by an agent sent out to solicit share subscriptions, that the proposed railroad would be aided by another railroad company; since the representation involved the question of the power of the other company to grant such aid.[66]

(II) *Misrepresentations or Concealments Regarding Facts Disclosed by Charter.* Misrepresentations or concealments regarding facts disclosed by the charter, such as the powers assumed by the corporation, will not have the effect of relieving the subscriber; and this for the further reason that they are in the nature of misrepresentations concerning matters of law.[67]

i. Parol Representations Varying Written Contract — (I) *In General.* On familiar grounds parol representations made for the purpose of inducing a person to take shares in the stock of a company cannot be urged in avoidance of the contract, where such representations varied or contradicted the terms of the contract itself.[68] Thus a representation that the proposed railroad would be built to a cer-

60. Denton *v.* Macneil, L. R. 2 Eq. 352. See further as to misrepresentation of matters of intention McAllister *v.* Indianapolis, etc., R. Co., 15 Ind. 11.

61. Hughes *v.* Antietam Mfg. Co., 34 Md. 316.

Illustrative failure of title of prospective lands.— A good illustration of the above text is presented in a case where the prospectus mentioned several pieces of property which the company was to purchase for the prosecution of the enterprise, and the fact that the company failed to acquire one of these pieces (a very inconsiderable portion in proportion to the whole), through a defect in the title thereto, was not deemed a circumstance sufficient to invalidate a subscription made on the faith of such prospectus, in the absence of fraud or misrepresentation. Kelsey *v.* Northern Light Oil Co., 54 Barb. (N. Y.) 111.

62. Parker *v.* Thomas, 19 Ind. 213, 81 Am. Dec. 385; Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280; Oil City Land, etc., Co. *v.* Porter, 99 Ky. 254, 35 S. W. 643, 18 Ky. L. Rep. 151; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

63. Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Mellish *v.* Robertson, 25 Vt. 603; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203; U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 9 L. ed. 989; Hunt *v.* Rousmanier, 1 Pet. (U. S.) 1, 7 L. ed. 27.

64. Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

65. Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

66. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280.

There is technical propriety, but often gross injustice, in the rule which holds an ignorant man to a knowledge of the statute law, which even the lawyers and judges do not understand; and the sounder and juster conception is that if, in the absence of collusion, the corporation, in order to obtain the stock subscription, promises something which is unlawful, and which it hence cannot perform, there is no contract. Zelaya Min. Co. *v.* Meyer, 8 N. Y. Suppl. 487, 28 N. Y. St. 759.

67. Oil City Land, etc., Co. *v.* Porter, 99 Ky. 254, 35 S. W. 643, 18 Ky. L. Rep. 151. For example, a subscriber to the capital stock of a railway company, chartered under the general law of Georgia, cannot avoid payment on the ground of fraudulent representations regarding a construction company, its resources, and the value of its stock, which the railway company has agreed to deliver to its shareholders, since he is chargeable with notice that the railway company had no power to issue such stock. Russell *v.* Alabama Midland R. Co., 94 Ga. 510, 20 S. E. 350.

68. *Alabama.*— Smith *v.* Tallassee Branch Cent. Plank Road Co., 30 Ala. 650.

tain point,[69] the agreement of subscription stating otherwise, or leaving it in the discretion of the directors whether it should be built to that point or not;[70] or that the subscriber might pay for his subscription in ties at a certain rate,[71] or in land and labor,[72] the contract itself calling for payment in cash, will not relieve the subscriber.

(II) *Equity Will Not Reform Contract of Subscription on This Ground.* Nor will equity reform a contract of subscription to the capital stock of a corporation by inserting therein a contemporaneous parol agreement making the subscription conditional upon the corporation doing a certain thing, such as locating its railroad on a particular route.[73]

(III) *Contemporaneous Parol Agreements Cannot Be Set up to Prove Failure of Consideration.* Nor can such an agreement be set up as a defense under a plea of failure of consideration; for while it is competent to show by extrinsic evidence the absence, failure, or illegality of a contract in writing, or that the consideration is greater or less than that specified, yet it is not competent to show a consideration adverse to the one expressed on the face of the instrument.[74]

(IV) *Application of Principle Where Registered Corporation's Registered Certificate Shows Amount of Shares, Amount Paid, Etc.* This principle is of particular application where, under the governing statute, the memorandum or articles of incorporation are registered, showing the amount of share capital and the amount which has been subscribed, the amount which has been paid in, etc. Here the public are entitled to look to and to confide in a registered document, and hence it will not be competent for subscribers to the shares, where the registered contract shows an absolute subscription, to avoid it on the ground that the subscription was made for some purpose shown by a con-

Arkansas.— Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443.

Florida.— Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713.

Illinois.— Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

Indiana.— McAllister *v.* Indianapolis, etc., R. Co., 15 Ind. 11; Vawter *v.* Ohio, etc., R. Co., 14 Ind. 174; Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169; Carlisle *v.* Evansville, etc., R. Co., 13 Ind. 477; Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404; Evansville, etc., R. Co. *v.* Posey, 12 Ind. 363.

Louisiana.— Vicksburg, etc., R. Co. *v.* McKean, 12 La. Ann. 638.

Massachusetts.— Salem Mill-Dam Corp. *v.* Ropes, 9 Pick. 187, 19 Am. Dec. 363.

New Hampshire.— Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

North Carolina.— North Carolina R. Co. *v.* Leach, 49 N. C. 340.

Tennessee.— East Tennessee, etc., R. Co. *v.* Gammon, 5 Sneed 567.

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

United States.— Ogilvie *v.* Knox Ins. Co., 22 How. 380, 16 L. ed. 349.

69. Evansville, etc., R. Co. *v.* Posey, 12 Ind. 363.

70. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280; Miller *v.* Hanover Junction, etc., R. Co., 87 Pa. St. 95, 30 Am. Rep. 349. *Compare* Hester *v.* Memphis, etc., R. Co., 32 Miss. 378.

71. Thornburgh *v.* Newcastle, etc., R. Co., 14 Ind. 499.

72. Walker *v.* Mobile, etc., R. Co., 34 Miss. 245.

This principle has been applied in cases of promises made in public speeches by the president of the company. Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443. And it has been held that where A tells the agent sent out by the corporation to solicit subscriptions, that he will not subscribe unless B subscribes, whereupon the agent, without authority, enters B's name on the subscription book, this will not avoid the subscription of A, since it is no part of the written contract. Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 22, ignoring the consideration that it may be a fraud upon A. But see Centre, etc., Turnpike Road Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140. That the subscriber cannot avoid his subscription on the ground of false representations made by the agent as to what the subscription paper contained see Thornburgh *v.* Newcastle, etc., R. Co., 14 Ind. 499. That fraudulent representations made in the most public manner and with the apparent sanction of a majority of the directors will not avoid the subscription, unless it be shown that authority to make them had been conferred by the directors, acting as a board, so that the company can keep the fruits of the fraud and repudiate the means by which those fruits were obtained see Buffalo, etc., R. Co., *v.* Dudley, 14 N. Y. 336.

73. Gelpcke *v.* Blake, 15 Iowa 387, 83 Am. Dec. 418. *Compare* Gelpcke *v.* Blake, 19 Iowa 263, same case on second appeal.

74. Gelpcke *v.* Blake, 19 Iowa 263.

temporaneous unrecorded agreement; as for example that the unpaid balance shown by the recorded document represented shares subscribed for by the shareholders as agents, to be sold by it when in need of funds.[75]

j. Ambiguous Statements. Ambiguous statements made in a prospectus, or by the agent soliciting the subscription, will not afford a ground for avoiding it, where the means of ascertaining the truth were open to the subscriber.[76]

k. Misstatements as to Names of Directors — Holding Out Prominent Names as Decoys. For the promoters of a corporation to induce men of character and financial standing to consent to lend the use of their names as directors of the company upon a promise of indemnity from responsibility is a gross fraud upon the public, and will avoid the subscription of one who has been thereafter induced to take the shares of the company;[77] but this will not be so in the case of a director who attends but one meeting of the board and then retires, in the absence of evidence that his name was used as a decoy.[78]

l. Fraud in Which Subscriber Seeking Relief Participated — (i) *In General.* If the shareholder who seeks relief from his contract on the ground of fraud himself knowingly participated in organizing the company and in putting forth the fraudulent representations he will of course be estopped by his own conduct from claiming a rescission.[79]

(ii) *Charter Fraudulently Procured — Corporation Illegally Organized.* On similar grounds it has been held that a shareholder who has accepted the charter of a corporation and assisted in putting it in operation cannot show, when proceeded against by one of its creditors, that its charter was obtained by fraud.[80] Neither can a person who assisted in the organization of the company escape liability as a subscriber for its stock, on the ground that the corporation was not organized according to law.[81]

(iii) *Secret Agreements With Subscriber Prejudicial to Corporation.* Hence it will be no defense to an action to enforce the subscription that the subscription was colorable merely, not intended to be paid, and that there was a secret agreement that it should not be paid, but that it was intended merely to enable the corporation to get sufficient stock subscribed to enable it to become incorporated under the law,[82] to induce others to subscribe for shares,[83] or to give credit to the concern.[84] The rule extends so far as to avoid all secret conditions[85] annexed to the contract of particular subscribers, by which their engagement is rendered more onerous to the corporation, more favorable to them, or in any respect different from that named in the written contract and in the governing statute; and to hold the subscriber liable to the obligations of a *bona fide* shareholder; and this is illustrated by a variety of decisions cited here and elsewhere.[86]

75. Allibone *v.* Hager, 46 Pa. St. 48.

76. Hallows *v.* Fernie, L. R. 3 Ch. 467, 18 L. T. Rep. N. S. 340, 16 Wkly. Rep. 873 [*affirming* L. R. 3 Eq. 520].

77. *Re* Life Assoc. of England, 34 Beav. 639, 643, 11 Jur. N. S. 359, 34 L. J. Ch. 278, 12 L. T. Rep. N. S. 43, 13 Wkly. Rep. 486, Sir John Romilly, M. R., saying: "It is obvious that a more gross misrepresentation can hardly be made, than holding out to the world that responsible persons, who have nothing at all to do with the company, are directors of it."

78. Hallows *v.* Fernie, L. R. 3 Ch. 467, 18 L. T. Rep. N. S. 340, 16 Wkly. Rep. 873 [*affirming* L. R. 3 Eq. 520].

79. Litchfield Bank *v.* Church, 29 Conn. 137; Southern Plank-Road Co. *v.* Hixon, 5 Ind. 165; Centre, etc., Turnpike Road Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140.

80. Smith *v.* Heidecker, 39 Mo. 157.

81. Central Plankroad Co. *v.* Clemens, 16 Mo. 359; Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205.

82. Litchfield Bank *v.* Church, 29 Conn. 137; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Centre Turnpike Road Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140.

83. White Mountains R. Co. *v.* Eastman, 34 N. H. 124; Custar *v.* Titusville, etc., Gas Co., 63 Pa. St. 381. See also Miller *v.* Hanover Junction, etc., R. Co., 87 Pa. St. 95, 30 Am. Rep. 349.

84. Litchfield Bank *v.* Church, 29 Conn. 137.

85. See *supra*, VI, J, 1, d, (iv).

86. *Connecticut.*—Litchfield Bank *v.* Church, 29 Conn. 137; Mann *v.* Cooke, 20 Conn. 178.

Indiana.— New Albany, etc., R. Co. *v.* Slaughter, 10 Ind. 218; New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187.

The reason is said to be that such contracts are contracts among the subscribers, as well as contracts between the subscriber and the corporation; so that, to allow them to operate to release the subscription of the particular subscriber, would operate as a fraud on the others.[87] It has, however, been held that a subscriber to the shares of a corporation cannot avoid liability on his subscription on the ground that subscriptions made by others, which induced him to subscribe, were simply colorable and decoys to induce other subscriptions, and made with the secret understanding that no liability should attach to them; since in such cases the law discharges the secret understanding and holds them liable to their subscription as written, for which reason it could not operate as a fraud upon other subscribers.[88]

m. Separate Agreements Among Shareholders as to Future Disposition of Shares Enforceable, Although Not as Against Corporation. Such an agreement is valid and enforceable as between the shareholders, although not as against the corporation or its creditors. Thus an agreement by one who subscribes to the stock of a corporation and other shareholders, who hold a majority of its stock and have consequently a controlling interest in it, that the latter will, after the lapse of a given time, if the subscriber shall desire to sell his shares, purchase them from him at the price at which he buys them from the corporation, with lawful interest, is a valid and enforceable contract.[89]

n. Right of Rescission For Fraud of Promoters, Members of Syndicates, Etc., Before Organization. When a corporation, with knowledge, adopts a contract procured in its behalf through fraud, it adopts the fraud, as much so as though the fraud had been committed by its authorized agent with the knowledge of its managing board of officers. For example one who is induced through fraud to subscribe to the capital stock of a proposed land company, by a promoter thereof

Mississippi.— Saffold *v.* Barnes, 39 Miss. 399.

Missouri.— Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286.

New York.— Yonkers Gazette Co. *v.* Jones, 30 N. Y. App. Div. 316, 51 N. Y. Suppl. 973.

Pennsylvania.— Custar *v.* Titusville Gas, etc., Co., 63 Pa. St. 381; Robinson *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 334, 72 Am. Dec. 792.

Vermont.— Blodgett *v.* Morrill, 20 Vt. 509.

Wisconsin.— Downie *v.* White, 12 Wis. 176, 78 Am. Dec. 731.

Agreement for part payment in work.— Of this nature is a private agreement with the directors that the subscribers are to be allowed to make part payment in work. Ridgefield, etc., R. Co. *v.* Brush, 43 Conn. 86.

87. La Grange, etc., Plank Road Co. *v.* Mays, 29 Mo. 64; Gordon, J., in Miller *v.* Hanover Junction, etc., R. Co., 87 Pa. St. 95, 30 Am. Rep. 349; Woodward, J., in Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489.

88. Bach *v.* Tuch, 126 N. Y. 53, 26 N. E. 1019, 36 N. Y. St. 663; Wilson *v.* Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837; Campbell *v.* Fleming, 1 A. & E. 40, 3 L. J. K. B. 136, 3 N. & M. 834, 28 E. C. L. 44. See also Armstrong *v.* Danahy, 75 Hun (N. Y.) 405, 27 N. Y. Suppl. 60, 56 N. Y. St. 743; Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181. *Compare* Blodgett *v.* Morrill, 20 Vt. 509. See also Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286. Especially is it no defense unless the subscriber make it appear that he was misled by the fraud. Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

For similar reasons it has been held that if one having possession of a paper containing an agreement to take shares in the capital stock of a corporation, after subscribing in good faith for shares of such stock, induces another to subscribe on the faith of his subscription, and then alters the paper by reducing the number of shares taken by himself, and delivers the instrument in this condition to the secretary, who is also a director of the company, this will not affect the liability of one thus induced to subscribe, although at the time of such delivery the person making the alteration explains the same to the secretary, who makes no objection thereto. The reason is that such an alteration, made without the consent of the other shareholders, is a mere nullity, does not release the subscriber who so attempts to secure his release, and therefore does not affect the corresponding obligations of other subscribers. Jewett *v.* Valley R. Co., 34 Ohio St. 601. *Compare* Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359], where a multilateral contract of compromise between the debtor and his creditors, void as to some, was held void as to all.

89. Meyer *v.* Blair, 109 N. Y. 600, 17 N. E. 228, 16 N. Y. St. 380, 4 Am. St. Rep. 500. See also Winston *v.* Dorsett Pipe, etc., Co., 129 Ill. 64, 21 N. E. 514, 4 L. R. A. 507. *Compare Re* Canada Cent. Bank, 25 Can. L. J. N. S. 238.

who represents that it will be a first-class investment, and that he has no other interest in the lands proposed to be purchased than that of a mere shareholder, whereas he in fact holds an option for the purchase of such lands, may repudiate the contract of subscription at his option; and upon his doing so the land company cannot recover unpaid assessments on the stock subscribed for by him.[90] So if the promoters of a corporation attach to the prospectus issued before its formation a list of members of the council of administration, this is a representation that the persons named have authorized the publication of their names as members, and not of their mere willingness to join; and if untrue entitles one who has subscribed in reliance thereon to rescind the contract of subscription and recover back the money paid thereon.[91] Some courts have been unable to reach this salutary principle, holding, on a state of facts like those just referred to, that the remedy of the defrauded sharetaker is not against the corporation for a rescission of the contract of subscription, because it has been guilty of no fraud, although it has obtained the fruits of the fraud, but remanding the injured party to an action against the fraudulent promoters for an accounting.[92] Another court has gone so far in the opposite direction as to hold that the fact that the defrauded sharetaker settles with the promoters for their conversion to their own use of the money paid by him for the shares, knowing of the conversion, does not affect his right, as between himself and the corporation, to rescind the contract on the ground that he was induced to make it through false representations, he having no knowledge of the false representations at the time when he made the settlement.[93] But where the fraud is entirely disconnected from the corporation, and the corporation is entirely innocent of it, clearly it cannot be made responsible for it in any proceeding. For example where a corporation, being in difficulties, sold its property to an incorporated "syndicate" for a round sum, and a subscriber to the shares of the syndicate was induced by the frauds of other members of the syndicate, but not by any fraud of the corporation, to subscribe for shares — not of the vendor corporation, but of the syndicate — and to give his notes for the purchase-price of such shares, which notes went into the hands of the vendor corporation as a part of the purchase-price of its properties, the maker of the notes could not have them delivered up and canceled, on the ground that he had been induced to give them through the fraud of his coadventurers in the syndicate.[94]

o. What False Prospectuses, Representations, Concealments, Etc., Afford Ground For Rescission. The following false statements, concealments, etc., have been held sufficient ground to rescind a contract of share subscription induced thereby, provided the right of rescission has not been lost by laches, acquiescence, lapse of time, or other circumstances elsewhere stated: A statement by an agent, authorized to sell the shares of the corporation, to the effect that none of its shares had been sold for less than a stated sum per share, whereas some of them had in fact been sold for one fifth of that sum;[95] an erroneous representation made by the president of the corporation, through whom the shares were purchased, to the effect that all the shares had been purchased, but that he could purchase shares from original subscribers at a premium, where some of the stock transferred had been previously surrendered to the corporation, and it received

90. Virginia Land Co. *v.* Haupt, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939.

91. *In re* Metropolitan Coal Consumers' Assoc., [1892] 3 Ch. 1, 61 L. J. Ch. 741, 66 L. T. Rep. N. S. 700 [*citing In re* Metropolitan Coal Consumers' Assoc., 59 L. J. Ch. 281, 62 L. T. Rep. N. S. 30, 1 Meg. 463 (*affirmed* in 63 L. T. Rep. N. S. 429)].

92. Getty *v.* Devlin, 70 N. Y. 504, 54 N. Y. 403; U. S. Vinegar Co. *v.* Schlegel, 67 Hun (N. Y.) 356, 22 N. Y. Suppl. 407, 51 N. Y. St. 453 [*affirmed* in 143 N. Y. 537, 38 N. E. 731]; Franey *v.* Warner, 96 Wis. 222, 71 N. W. 81.

93. Hunter *v.* French League Safety Cure Co., 96 Iowa 573, 65 N. W. 828.

94. Tradesmen's Nat. Bank *v.* Looney, 99 Tenn. 278, 42 S. W. 149, 63 Am. St. Rep. 830, 38 L. R. A. 837.

95. Wenstrom Consol. Dynamo, etc., Co. *v.* Purnell, 75 Md. 113, 23 Atl. 134, per Alvey, C. J.

the premium allowed for such stock;[96] where a person applied for membership in a corporation under the belief that it was an old society of which he had taken steps to become a member, which belief was known to and fostered by the person obtaining his application, and where, in response to subsequent inquiries made of the new company, false statements were made to him which resulted in confirming his error. Here there was not merely a voidable contract, but no contract at all.[97]

p. What Misrepresentations, Etc., Not Sufficient Ground For Rescission. It is almost needless to repeat that false statements in a prospectus are not ground for rescission of a contract to take shares in a company, where the subscriber is not misled thereby,[98] as where the prospectus was issued after the subscription had been made.[99] It has been held that relief cannot be granted to one who has subscribed for stock in a corporation, upon a prayer for rescission on the ground of false representations in the prospectus, merely because some of the stock was issued to directors who did not pay therefor, to secure them against loss for indorsements of corporate paper, of which nothing was said in the prospectus.[1] In an action by a receiver to recover amounts subscribed to the capital stock of the corporation, it has been held that defendant cannot prove false representations made to him by the person who solicited his subscription, where the subscription papers signed showed such representations to be untrue, and when they neither affect the value of the stock, nor is it shown that the other snbscribers were privy to or had notice of them.[2] Another court has gone further, and in its official syllabus has stated a proposition which would prevent every written contract from being assailed on the ground that it was imposed upon the party seeking relief from it by fraudulent representations, unless the misrepresentations were embodied in the contract itself, by holding that where a contract by which a person becomes a member of a corporation is unambiguous, and contains no reference to circulars containing false statements, which such person claims induced him to become a member, such statements are no defense to an action on such contract with the corporation.[3] A subscriber to shares in a corporation cannot be relieved from his subscription on the ground of fraud, because, after he made his subscription, it was falsely announced that the stock was all subscribed for, and a meeting held at which all the stock was voted, since acts occurring after his subscription cannot be said to have induced him to subscribe.[4]

q. Effect of Forfeiture of Shares of One Induced to Subscribe Through Fraud. One induced by a fraudulent prospectus to apply for an allotment of shares in a corporation, which are afterward forfeited by his failure to pay calls, ceases to be a shareholder and becomes a mere debtor to the company, and if he

96. McDoel *v.* Ohio Valley Imp., etc., Co., 36 S. W. 175, 18 Ky. L. Rep. 294.

97. *In re* International Auctioneers, etc., Soc., [1898] 1 Ch. 110, 67 L. J. Ch. 81, 77 L. T. Rep. N. S. 523, 4 Manson 393, 46 Wkly. Rep. 187. As to the right of rescission of share subscriptions for fraud see Fear *v.* Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721, and the learned note appended thereto.

That fraud may be a good defense to an action for the subscription price of shares see French *v.* Ryan, 104 Mich. 625, 62 N. W. 1016; Provincial Ins. Co. *v.* Brown, 9 U. C. C. P. 286. Where the evidence tended to show that one soliciting subscriptions for stock in a publishing company falsely represented that a certain newspaper had been purchased for the company and press reports secured, in an action on the subscription it was error to direct a verdict for plaintiffs, since the jury might have found that the statements were fraudulent, as material statements of past occurrences, known to be false, or not known to be true, by the maker, and not within defendant's knowledge. Anderson *v.* Scott, 70 N. H. 350, 47 Atl. 607, 49 Atl. 568.

98. McKeown *v.* Boudard-Peveril Gear Co., 65 L. J. Ch. 735, 74 L. T. Rep. N. S. 712, 45 Wkly. Rep. 152 [*affirming* 65 L. J. Ch. N. S. 446, 74 L. T. Rep. N. S. 310].

99. Negley *v.* Hagerstown Mfg., etc., Co., 86 Md. 692, 39 Atl. 506.

1. Bartol *v.* Walton, etc., Co., 92 Fed. 13.

2. Wood Harvester Co. *v.* Jefferson, 71 Minn. 367, 74 N. W. 149.

3. Smith *v.* Southern Bldg., etc., Assoc., 111 Ga. 811, 35 S. E. 707. This cannot possibly be the law.

4. Bartol *v.* Walton, etc., Co., 92 Fed. 13.

has done nothing to affirm the contract he may in an action for calls repudiate the obligation on the ground of the fraud.[5]

3. Remedies of Defrauded Shareholder Against Company — a. In General. It may be stated generally that any misrepresentations or concealments of facts which materially affect the success of the undertaking will, as between the company and the person who, on the faith of such misrepresentations or concealments, has been induced to take shares, entitle him to a rescission of the contract;[6] will be a defense to suits for calls,[7] or to a suit for specific performance of the contract of subscription;[8] and will entitle him to an injunction against suits for calls.[9]

5. Aaron's Reefs *v.* Twiss, [1896] A. C. 273, 65 L. J. P. C. 54, 74 L. T. Rep. N. S. 794 [*affirming* [1895] 2 Ir. 207].

Instances under the foregoing rules — Shareholder released on ground of fraud. — See 2 Thompson Corp. §§ 1408–1413, setting forth the facts of the following cases which were held not sufficient to afford ground for relieving subscribers to the shares of corporations from the obligations of their subscriptions.

Indiana. — Wert *v.* Crawfordsville, etc., Turnpike Co., 19 Ind. 242.

Missouri. — Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205.

New York. — Kelsey *v.* Northern Light Oil Co., 54 Barb. 111.

Tennessee. — State *v.* Jefferson Turnpike Co., 3 Humphr. 304.

Wisconsin. — Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575.

England. — Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821; *In re* Warren's Blacking Co., L. R. 4 Ch. 178, 39 L. J. Ch. 8, 20 L. T. Rep. N. S. 50, 17 Wkly. Rep. 267; Ross *v.* Estates Invest. Co., L. R. 3 Ch. 682, 37 L. J. Ch. 873, 19 L. T. Rep. N. S. 61, 16 Wkly. Rep. 1151; Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328; *In re* Canadian Native Oil Co., L. R. 5 Eq. 118, 37 L. J. Ch. 257; Smith *v.* Reese River Co., L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T. Rep. N. S. 283, 14 Wkly. Rep. 606; Bell's Case, 22 Beav. 35, 2 Jur. N. S. 844, 26 L. J. Ch. 137; *Ex p.* Ginger, 5 Ir. Ch. N. S. 174.

Other instances under foregoing rules — Shareholder not released. — See 2 Thompson Corp. §§ 1414–1418, setting forth the facts of the following cases: Bates *v.* Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521; Lohman *v.* New York, etc., R. Co., 2 Sandf. (N. Y.) 39; Jackson *v.* Turquand, L. R. 4 H. L. 305, 39 L. J. Ch. 11; Matter of Royal British Bank, 3 De G. & J. 387, 5 Jur. N. S. 205, 28 L. J. Ch. 257, 7 Wkly. Rep. 217, 60 Eng. Ch. 301; Matter of Hull, etc., L. Assur. Co., 2 De G. & J. 275, 4 Jur. N. S. 1005, 6 Wkly. Rep. 384, 59 Eng. Ch. 219; Matter of North of England Joint Stock Banking Co., 5 De G. & Sm. 283, 16 Jur. 810, 21 L. J. Ch. 468; Dodgson's Case, 3 De G. & Sm. 85, 14 Jur. 386; Matter of Direct London, etc., R. Co., 3 De G. & Sm. 43, 13 Jur. 725; *In re* Athenæum L. Assur. Soc., Johns. 451, 5 Jur. N. S. 216.

6. Grangers' Ins. Co. *v.* Turner, 61 Ga. 561; Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821. See also Ashmead *v.* Colby, 26 Conn. 287; State *v.* Jefferson Turnpike Co., 3 Humphr. (Tenn.) 304; Ross *v.* Estates Invest. Co., L. R. 3 Ch. 682, 37 L. J. Ch. 873, 19 L. T. Rep. N. S. 61, 16 Wkly. Rep. 1151 [*affirming* L. R. 3 Eq. 122]; Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328; Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237.

7. *Alabama.* — Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92.

Iowa. — Davis *v.* Dumont, 37 Iowa 47.

Mississippi. — Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655.

Missouri. — Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205.

Virginia. — Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

England. — Bwlch-Y-Plwm Lead Min. Co. *v.* Baynes, L. R. 2 Exch. 324, 36 L. J. Exch. 183, 16 L. T. Rep. N. S. 597, 15 Wkly. Rep. 1108; Glamorganshire Iron, etc., Co. *v.* Irvine, 4 F. & F. 947.

8. New Brunswick, etc., R., etc., Co. *v.* Muggeridge, 1 Dr. & Sm. 363.

9. Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328; Smith *v.* Reese River Co., L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024 [*affirmed* in L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T. Rep. N. S. 283, 14 Wkly. Rep. 606]; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821.

Practice in such cases. — Thorpe *v.* Hughes, 3 Myl. & C. 742, 14 Eng. Ch. 742 (where an injunction was denied); *In re* Ruby Consol. Min. Co., L. R. 9 Ch. 664, 43 L. J. Ch. 633, 31 L. T. Rep. N. S. 55, 22 Wkly. Rep. 833 (where the shares having been fully paid up, it was ruled that the merits ought to be tried at law, in an action to recover back the purchase-money, and not by a motion in chancery, under Companies Act (1862), § 35, to have plaintiff's name excluded from the list of shareholders).

A court of equity has power to change or to set aside the stock in a corporation, in case of fraud as well as mistake. Bailey *v.*

b. Scope of Remedy in Equity — (I) *In General.* It is well settled that these courts will entertain jurisdiction in such cases of a bill which seeks a repayment of the moneys received from the complainant under such a fraudulent contract, for the reimbursement of his costs and charges, and for an account of the same.[10]

(II) *No Relief in Equity to One Who Was Party to Fraud.* A discharge from a subscription on the ground of fraud cannot be obtained by one who was himself a party to the fraud.[11] But a shareholder who has purchased the shares in good faith is not estopped from maintaining a suit to annul stock fraudulently issued before his purchase, because the prior holder of his shares has barred his right to relief by participation in the fraudulent transaction.[12]

c. Necessary Elements of Plea of Fraud to Action For Calls. To an action by a company against a shareholder, to recover the amount of a call made by the directors on his shares of stock, the following may be stated as the necessary elements of a plea of fraud: (1) A distinct allegation of the matter in which the fraudulent representation or concealment consisted.[13] A general charge that the subscription was procured through fraud, it is supposed, would be bad for want of sufficient particularity of statement; it would not apprise the opposite party of the nature of the defense. (2) That he used reasonable diligence to make himself acquainted with the matters of fact in respect of which the fraud is charged, and that, within a reasonable time after discovering the facts, he repudiated his contract and offered to surrender his certificate.[14] In other words he must show that he did all that could have been done under the circumstances to free himself from liability.[15]

Champlain Min., etc., Co., 77 Wis. 453, 46 N. W. 539.

10. Hill *v.* Lane, L. R. 11 Eq. 215, 40 L. J. Ch. 41, 23 L. T. Rep. N. S. 547, 19 Wkly. Rep. 194; Ramshire *v.* Bolton, L. R. 8 Eq. 294, 38 L. J. Ch. 594, 21 L. T. Rep. N. S. 51, 17 Wkly. Rep. 986; Slim *v.* Croucher, 1 De G. F. & J. 518, 6 Jur. N. S. 437, 29 L. J. Ch. 273, 8 Wkly. Rep. 347, 62 Eng. Ch. 401; Green *v.* Barrett, 5 L. J. Ch. O. S. 6, 1 Sim. 45, 2 Eng. Ch. 45; Colt *v.* Woollaston, 2 P. Wms. 154, 24 Eng. Reprint 679; Burrowes *v.* Lock, 10 Ves. Jr. 470, 8 Rev. Rep. 33, 856; Evans *v.* Bicknell, 6 Ves. Jr. 174, 5 Rev. Rep. 245. A decision of Lord Chancellor Cairns, in Ogilvie *v.* Currie, 37 L. J. Ch. 541, 18 L. T. Rep. N. S. 593, 16 Wkly. Rep. 769, gives countenance to a contrary doctrine; but in Hill *v.* Lane, L. R. 11 Eq. 215, 40 L. J. Ch. 41, 23 L. T. Rep. N. S. 547, 19 Wkly. Rep. 194, Vice-Chancellor Stuart said that the doctrine was so well settled that it would be a misfortune to the public if there were any sufficient grounds for considering the jurisdiction doubtful.

Necessary to allege and prove that the particular representations were a material inducement to the purchase of the shares. Hallows *v.* Fernie, L. R. 3 Ch. 467, 18 L. T. Rep. N. S. 340, 16 Wkly. Rep. 873, per Lord Chelmsford, L. C. [*affirming* L. R. 3 Eq. 520].

When prayers for different kinds of relief in such a bill do not render it multifarious. Ashmead *v.* Colby, 26 Conn. 287.

Cancellation of the subscription where the misrepresentation was unknown to the subscriber at the time when the cancellation was ordered — subscriber not restored to list of contributories. *In re* London, etc., Bank, L. R. 7 Ch. 55, 41 L. J. Ch. 1, 25 L. T. Rep. N. S. 471, 20 Wkly. Rep. 45 [*reversing* L. R. 12 Eq. 331].

11. Litchfield Bank *v.* Church, 29 Conn. 137; Southern Plank Road Co. *v.* Hixon, 5 Ind. 165; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489. And see Smith *v.* Heidecker, 39 Mo. 157; and *supra*, VI, J, 1, d, (III).

12. Parsons *v.* Joseph, 92 Ala. 403, 8 So. 788.

Applying this principle it has been held that persons who agree with the promoter of a company, in consideration of an allotment of fully paid shares, to circulate among their clients the prospectus of the company, accompanied by a letter recommending subscription for shares, but who fail to make any inquiry except from the promoter as to the truth of the statements contained in the prospectus, will not be granted relief under the English Companies Act of 1898, for liability on their shares, where they prove to be not fully paid. *In re* Roxburghe Press, [1899] 1 Ch. 210, 68 L. J. Ch. 111, 80 L. T. Rep. N. S. 280, 6 Manson 57, 47 Wkly. Rep. 281.

13. Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

14. Upton *v.* Englehart, 28 Fed. Cas. No. 16,800, 3 Dill. 496; Bwlch-Y-Plwm Lead Min. Co. *v.* Baynes, L. R. 2 Exch. 324, 36 L. J. Exch. 183, 16 L. T. Rep. N. S. 597, 15 Wkly. Rep. 1108.

15. Deposit, etc., Assur. Co. *v.* Ayscough, 6 E. & B. 761, 2 Jur. N. S. 812, 4 Wkly. Rep. 611, 88 E. C. L. 761. To an action by the

4. Within What Time Rescission Must Be Claimed — a. Within Shortest Possible Time After Discovering Fraud or After It Might Have Been Discovered by Reasonable Diligence. A subscription to shares in a corporation which has been obtained by fraudulent representations may be annulled by the subscriber, if he rescinds promptly, and before the rights of creditors or shareholders subsequently joining have accrued.[16] He owes to innocent third persons, creditors, and other shareholders, the duty of inquiring whether there were any misrepresentations or not, inducing him to subscribe and entitling him to a rescission;[17] and he must claim a rescission within the shortest limit of time which is fairly possible in the particular case.[18] He will not be permitted to play fast and loose and to remain with the company if it is successful and leave it if it fails.[19]

b. General Doctrine in England and in Canada — (i) *Statement of Doctrine.* With respect to the time within which a person who has been induced by fraud to take shares in a corporation must claim a rescission of his contract in order to be entitled to it, the question is to be considered in two aspects:

company against a shareholder for calls, defendant pleaded that he was induced to become a shareholder by the fraud of plaintiffs; that he had never recognized, since notice of the fraud, any rights or liabilities in himself as such shareholder, or received any benefit from his shares; and that within a reasonable time after notice of the fraud he had repudiated the shares and given notice to plaintiffs of his repudiation. This was held a good plea to such an action at common law. Bwlch-Y-Plwm Lead Min. Co. *v.* Baynes, L. R. 2 Exch. 324, 36 L. J. Exch. 183, 16 L. T. Rep. N. S. 597, 15 Wkly. Rep. 1108.

Manner of pleading fraud as a defense to actions for assessments in particular jurisdictions.

Illinois.— Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; White *v.* Watkins, 23 Ill. 426.

Indiana.— Reeder *v.* Maranda, 66 Ind. 485; Thornburgh *v.* Newcastle, etc., R. Co., 14 Ind. 499.

Missouri.— Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205, defendant may set up that he was induced by false and fraudulent representations to subscribe for shares in an illegal and pretended corporation.

Ohio.— Wheeler *v.* Faurot, 37 Ohio St. 26.

England.— Waterford, etc., R. Co. *v.* Logan, 14 Jur. 346.

Evidence in support of defense of fraud in actions for assessments.— Representations made by an agent of the corporation are admissible. Custar *v.* Titusville Gas Co., etc., 33 Pa. St. 381. Declarations of the shareholders made long after the organization of the corporation are not admissible to show that the corporation acted in bad faith in filling up the quota of its shares with fictitious subscriptions. Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257.

Instructing the jury in such actions.— For a good precedent of an instruction to a jury in an action for calls where the defense is fraud see Glamorganshire Iron, etc., Co. *v.* Irvine, 4 F. & F. 947.

16. McDermott *v.* Harrison, 9 N. Y. Suppl. 184, 30 N. Y. St. 324; *In re* Estates Invest. Co., L. R. 4 Ch. 497, 38 L. J. Ch. 412, 17 Wkly. Rep. 599 (where one proceeded, and ten by agreement abided the result, and were not cut off by a winding-up decree); Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201.

17. Lord Romilly, M. R., in *In re* Estates Invest Co., L. R. 9 Eq. 263, 39 L. J. Ch. 354, 22 L. T. Rep. N. S. 83, 18 Wkly. Rep. 395. In another case the same learned judge expressed the opinion that a delay of four months after becoming acquainted with all the facts before filing a bill for a rescission would interpose a serious difficulty; but the cass went off on its merits. Heymann *v.* European Cent. R. Co., L. R. 7 Eq. 154. See also *In re* Barned's Banking Co., L. R. 2 Ch. 674, 36 L. J. Ch. 757, 16 L. T. Rep. N. S. 780, 15 Wkly. Rep. 1100; Downes *v.* Ship, L. R. 3 H. L. 343, 37 L. J. Ch. 642, 19 L. T. Rep. N. S. 74, 17 Wkly. Rep. 34; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201.

18. Lord Cairns' judgment in Scholey *v.* Venezuela Cent. R. Co., L. R. 9 Eq. 266 note.

19. Lord Romilly, M. R., in *In re* Estates Invest. Co., L. R. 9 Eq. 263, 39 L. J. Ch. 354, 22 L. T. Rep. N. S. 83, 18 Wkly. Rep. 395.

Illustrations of the doctrine that a shareholder must use diligence in discovering the fraud and in proceeding to rescind may be drawn from the following among many other cases: *In re* Estates Invest. Co., L. R. 4 Ch. 497, 38 L. J. Ch. 412, 17 Wkly. Rep. 599; *In re* Estates Invest. Co., L. R. 9 Eq. 263, 39 L. J. Ch. 354, 22 L. T. Rep. N. S. 83, 18 Wkly. Rep. 395. Cases where the proceeding to rescind was commenced in time. *In re* Estates Invest. Co., L. R. 10 Eq. 503, 39 L. J. Ch. 822, 23 L. T. Rep. N. S. 297, 18 Wkly. Rep. 1102, 1126; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821.

Rescission for variance between prospectus and memorandum.— The doctrine that the shareholder must proceed with diligence, and before the commencement of winding-up proceedings, to claim a rescission because of a variance between the prospectus and memorandum may be gathered from the following

(1) Where it affects the rights of other shareholders merely, the company being solvent or a "going concern," and (2) where it affects the rights of creditors, the company having stopped payment, or winding-up proceedings having commenced. The authorities appear to justify the following statements: (1) The claim for rescission, in order to have any standing in court, must be made in the shortest possible time after discovery of the fraud, or after the person seeking the rescission might, by a fair exercise of his opportunities of knowledge, have discovered it.[20] (2) It will not be entertained in any event in the English and Canadian courts of equity, after winding-up proceedings have been commenced.[21] (3) Neither will it be entertained after the company has stopped payment and the directors have called an extraordinary general meeting of the shareholders for the purpose of passing a resolution to wind up the company.[22] (4) It seems also clear, upon principle, that it will not be entertained after the company has stopped payment by reason of insolvency;[23] but a recent holding in England is to the effect that the mere circumstance that the company is insolvent at the time when he takes proceedings to rescind does not, in the absence of countervailing equities, deprive him of his right of rescission.[24]

(II) *No Rescission After Company Ceases to Be Going Concern and After Rights of Creditors Have Attached*—(A) *Statement of Rule.* After the corporation has ceased to be a going concern, so that the rights of creditors supervene, the shareholder will not be permitted to rescind his contract of subscription and to escape from his liability to creditors of the corporation, any more than a member of a simple partnership would be permitted to do so under like circumstances and for like reasons.[25]

among other cases: *In re* Barned's Banking Co., L. R. 2 Ch. 674, 36 L. J. Ch. 757, 16 L. T. Rep. N. S. 780, 15 Wkly. Rep. 1100; *In re* Madrid Bank, L. R. 2 Ch. 536, 36 L. J. Ch. 489, 15 Wkly. Rep. 499; Kincaid's Case, L. R. 2 Ch. 426; *In re* Cachar Co., L. R. 2 Ch. 412, 36 L. J. Ch. 499, 16 L. T. Rep. N. S. 222, 15 Wkly. Rep. 571; *In re* Russian Iron-works Co., L. R. 3 Eq. 795, 36 L. J. Ch. 475, 16 L. T. Rep. N. S. 343, 15 Wkly. Rep. 891; *In re* Russian Ironworks Co., L. R. 3 Eq. 790, 15 Wkly. Rep. 891; Downes *v.* Ship, L. R. 3 H. L. 343, 37 L. J. Ch. 642, 19 L. T. Rep. N. S. 74, 17 Wkly. Rep. 34; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201. Notice to a shareholder of such variance: *In re* Barned's Banking Co., L. R. 2 Ch. 674, 36 L. J. Ch. 757, 16 L. T. Rep. N. S. 780, 15 Wkly. Rep. 1100; *In re* Russian Iron Works Co., L. R. 1 Ch. 574, 12 Jur. N. S. 755, 35 L. J. Ch. 738, 14 L. T. Rep. N. S. 817, 659, 14 Wkly. Rep. 943; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201; Matter of Scottish, etc., Finance Bank, 2 De G. J. & S. 544, 11 Jur. N. S. 331, 12 L. T. Rep. N. S. 256, 13 Wkly. Rep. 599, 67 Eng. Ch. 426.

20. As to the time within which a suit in equity must be brought to restrain an action for calls and the diligence with which such a suit must be prosecuted see the remarks of Lord Cottenham in Thorpe *v.* Hughes, 3 Myl. & C. 742, 14 Eng. Ch. 742.

21. Kent *v.* Freehold Land, etc., Co., L. R. 3 Ch. 493, 37 L. J. Ch. 653, 16 Wkly. Rep. 990 [*reversing* L. R. 4 Eq. 588]; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201; *In re* Hull, etc., Bank, 15 Ch. D. 507, 49 L. J. Ch. 541, 43 L. T. Rep. N. S. 45, 28 Wkly. Rep. 792; Stone *v.* City, etc., Bank, 3 C. P. D. 282, 47 L. J. C. P. 681, 38 L. T. Rep. N. S. 9; *Re* Canada Cent. Bank, 25 Can. L. J. N. S. 238. It has been quaintly observed that the question then to be considered is, not who is the person who is the owner of the shares, but who is liable in respect of the legal tenancy at the time the tree was cut down. Lord Westbury, in Matter of Joint-Stock Co.'s Act, 4 De G. J. & S. 416, 10 Jur. N. S. 711, 10 L. T. Rep. N. S. 594, 12 Wkly. Rep. 925, 69 Eng. Ch. 320.

22. Tennent *v.* Glasgow Bank, 4 App. Cas. 615.

23. See the reasoning of Earl Cairns, L. C., in Tennent *v.* Glasgow Bank, 4 App. Cas. 615.

24. *In re* London, etc., Bank, 56 L. J. Ch. 321, 56 L. T. Rep. N. S. 115, 35 Wkly. Rep. 344. See also *Re* London, etc., Electric Lighting, etc., Co., 55 L. T. Rep. N. S. 670.

25. Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201; Powis *v.* Harding, 1 C. B. N. S. 533, 3 Jur. N. S. 139, 26 L. J. C. P. 107, 87 E. C. L. 533; Dossett *v.* Harding, 1 C. B. N. S. 524, 87 E. C. L. 524; Henderson *v.* Royal British Bank, 7 E. & B. 356, 1 H. & N. 685 note, 3 Jur. N. S. 111, 26 L. J. Q. B. 112, 5 Wkly. Rep. 286, 90 E. C. L. 356 (statutory proceeding against a particular shareholder); Daniell *v.* Royal British Bank, 1 H. & N. 681, 3 Jur. N. S. 119. In Deposit, etc., Assur. Co. *v.* Ayscough, 6 E. & B. 761, 2 Jur. N. S. 812, 4 Wkly. Rep. 611, 88 E. C. L. 761, determined in the queen's bench in 1856, before Lord Campbell, C. J., a plea to an action for calls, that the subscription was in-

(B) *Applications of Rule.* If the shareholder has repudiated the contract within a reasonable time, and has commenced proceedings to obtain a rescission before the commencement of the winding-up proceedings, his right to a rescission will not be cut off by the fact that winding-up proceedings intervene before his suit for a rescission comes to a hearing.[26] Neither can a shareholder sustain an action at law on this ground against the company, to recover back the amount which he has paid on account of his subscription, after winding-up proceedings have commenced, although he has repudiated his contract within a reasonable time after he has discovered the fraud, so that his action, but for the intervention of the winding-up proceedings, would have been in time.[27] The rule is applicable to a voluntary winding-up, as well as to a compulsory winding-up, the object of both proceedings being the same, namely, to realize the assets of the company for distribution among its creditors, which assets include uncalled capital.[28]

c. American Rule That There Can Be No Rescission For Fraud After Bankruptcy or Insolvency. The American rule is the same in principle as the English rule already explained, although the application of it is different in particular cases, growing out of the fact that there is in this country in general no public registration of shareholders in corporations, such as corresponds to what is called in England "Register." With this difference in application, the rule in America, shown by numerous cases, many of which include various elements of estoppel, is that after the insolvency of a corporation, or after proceedings in bankruptcy with respect to it have supervened, no shareholder can withdraw from that relation and escape liability to creditors on the ground that his share subscription was the result of a fraud practised upon him.[29] As in England,[30] so in America, the fact that a shareholder was induced to take the shares by false representations will afford no defense to an action by creditors of the corporation to enforce his statutory liability.[31] Nor can a person who has been induced to become a share-

duced by the fraud of plaintiff, was held bad for not averring that defendant had repudiated the contract, and had done nothing under it to make him liable as a shareholder. See also *In re* London, etc., Bank, L. R. 7 Ch. 55, 41 L. J. Ch. 1, 25 L. T. Rep. N. S. 471, 20 Wkly. Rep. 45; *In re* Hercules Ins. Co., L. R. 13 Eq. 566, 41 L. J. Ch. 580, 26 L. T. Rep. N. S. 274; Stone *v.* City, etc., Bank, 3 C. P. D. 307, 47 L. J. C. P. 681, 38 L. T. Rep. N. S. 9.

26. Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024 [*affirming* L. R. 2 Ch. 604, L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T. Rep. N. S. 283, 14 Wkly. Rep. 606 (*reversing* 36 L. J. Ch. 385), and *reaffirmed* by Lord Cairns, L. C., in Kent *v.* Freehold Land, etc., Co., L. R. 3 Ch. 493, 37 L. J. Ch. 653, 16 Wkly. Rep. 990].

27. Stone *v.* City, etc., Bank, 3 C. P. D. 282, 47 L. J. C. P. 681, 38 L. T. Rep. N. S. 9.

28. Stone *v.* City, etc., Bank, 3 C. P. D. 282, 47 L. J. C. P. 681, 38 L. T. Rep. N. S. 9 [*overruling* Hall *v.* Old Talargoch Lead Min. Co., 3 Ch. D. 749, 45 L. J. Ch. 775, 34 L. T. Rep. N. S. 901].

29. Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203, where Miller, J., with whom concurred Waite, C. J., and Bradley, J., dissented from the result, but not from the doctrine before stated, and Hunt, J., who delivered the opinion of the court, cited Buford *v.* Brown, 6 B. Mon. (Ky.) 553; *In re* Barned's Banking Co., L. R. 2 Ch. 674, 36 L. J. Ch. 757, 16 L. T. Rep. N. S. 780, 15 Wkly. Rep. 1100; *In re* Reese Silver Min. Co., L. R. 2 Ch. 604; Denton *v.* Macneil, L. R. 2 Eq. 352; Jones *v.* Turberville, 4 Bro. Ch. 115, 2 Ves. Jr. 11, 29 Eng. Reprint 806; Beaufort *v.* Neeld, 12 Cl. & F. 248, 9 Jur. 813, 8 Eng. Reprint 1399; Beckford *v.* Wade, 17 Ves. Jr. 87, 11 Rev. Rep. 20. See also as supporting the doctrine of the above text Ruggles *v.* Brock, 6 Hun (N. Y.) 164 (no defense on the ground of fraud when sued by the receiver for an unpaid balance on subscription); Clarke *v.* Thomas, 34 Ohio St. 46 (no rescission after insolvency); Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349; Farrar *v.* Walker, 8 Fed. Cas. No. 4,679, 3 Dill. 506 note (before Miller, J., at circuit); Michener *v.* Payson, 17 Fed. Cas. No. 9,524; Upton *v.* Englehart, 28 Fed. Cas. No. 16,800, 3 Dill. 496.

Doctrine that a rescission must be claimed before liabilities have been incurred by the corporation on the faith of the contract of subscription. Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 22.

Where the corporation has no creditors defrauded shareholder may have relief in equity. Ashmead *v.* Colby, 26 Conn. 287.

30. Henderson *v.* Royal British Bank, 7 E. & B. 356, 1 H. & N. 685 note, 3 Jur. N. S. 111, 26 L. J. Q. B. 112, 5 Wkly. Rep. 286, 90 E. C. L. 356.

31. Briggs *v.* Cornwell, 9 Daly (N. Y.) 436.

holder in a corporation by fraudulent representations recover the amount paid by him on his subscription, after the corporation has become insolvent, until the claims of its creditors are satisfied.[32]

d. Laches Complicated With Circumstances of Estoppel. Outside of this doctrine, a shareholder who has been induced to become such by fraudulent representations will be estopped, both at law and in equity, by consenting to remain a shareholder after acquiring knowledge of the fraud practised upon him, for such a lapse of time as may be presumed sufficient for the rights of innocent third parties to supervene. Under such circumstances he cannot come into a court of law and recover back his deposit or the calls which he may have paid, on the ground of his not really being a member by reason of the fraud practised upon him.[33] Nor could a subscriber maintain a suit in equity against a receiver, after the insolvency of the corporation, to rescind his contract of subscription and to establish a claim against the assets of the corporation for the amount paid by him thereunder, on the ground of false and fraudulent representations made by the president of the company as to its financial condition and the issue of its shares, when, after acquiring the shares plaintiff had acquired information as to the financial condition of the company and the issue of its shares sufficient to disclose the falsity of the representations or to put him on inquiry, but took no steps to repudiate the purchase until nearly three years later.[34] It should be stated in this connection that mere lapse of time may be sufficient to afford the defense of acquiescence on the part of the subscriber without reference to the attending circumstances. Thus where, after seven years, a subscriber sought to avoid his subscription on the ground of fraud of the company's soliciting agent, and no excuse was shown for the delay, it was held that the presumption was against the subscriber's right to avail himself of these facts till he had accounted for his delay.[35] On the other hand where the directors and other agents of a corporation have for many years acquiesced in a subscription of stock, made by a person in the names of his children or others, who have exercised acts of ownership over it, and voted on it without objection as their own, the corporation will not afterward be allowed to treat the subscription as if it were a fraudulent use, by the original subscriber, of mere names, to secure a greater number of votes than he would be entitled to if the stock stood in his own name.[36]

e. Recent Expressions of Doctrine as to Effect of Delay in Claiming Rescission. A shareholder cannot rescind his subscription on the ground of fraud of the corporation in procuring it, after the rights of *bona fide* creditors have intervened and the corporation has stopped payment and become actually insolvent, unless he has been diligent in discovering the fraud and repudiating his subscription after such discovery.[37] But if he has been diligent in discovering the fraud

32. Turner *v.* Grangers' L., etc., Ins. Co., 65 Ga. 649, 38 Am. Rep. 801. See also Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

33. So stated by the Lord Chancellor, in Matter of Hull, etc., L. Assur. Co., 2 De G. & J. 275, 4 Jur. N. S. 1005, 6 Wkly. Rep. 384, 59 Eng. Ch. 219.

34. Tierney *v.* Parker, 58 N. J. Eq. 117, 44 Atl. 151.

35. Dynes *v.* Shaffer, 19 Ind. 165. *Compare* Deposit, etc., Assur. Co. *v.* Ayscough, 6 E. & B. 761, 2 Jur. N. S. 812, 4 Wkly. Rep. 611, 88 E. C. L. 761.

36. Creed *v.* Lancaster Bank, 1 Ohio St. 1.

Shareholder not estopped.— Where, in an action for calls, it appeared that defendant subscribed for corporate stock on a promoter's false representation that there was no promoters' fund, and that the entire capital was to be used for the business of the company, and in an action for his subscription defendant denied liability because of such false representations, and it appeared that after their falsity was known to him the corporation arranged to eliminate such promoter's interest, defendant was not precluded from such defense by his failure promptly to repudiate his contract on learning of the falsity of such representations. West-End Real Estate Co. *v.* Claiborne, 97 Va. 734, 34 S. E. 900.

Corporation estopped by acquiescence in *ultra vires* rescission. McDermott *v.* Harrison, 9 N. Y. Suppl. 184, 30 N. Y. St. 324.

37. Martin *v.* South Salem Land Co., 94 Va. 28, 26 S. E. 591.

and prompt to repudiate his subscription by reason of it, the mere insolvency of the corporation will not cut off his right of rescission.[38] Other American courts still adhere to the English rule that there can be no disaffirmance after the rights of creditors have supervened through the insolvency of the corporation.[39] The doctrine may be comprehensively stated, without much fear of inaccuracy, thus: One induced to become a subscriber to the capital stock of a corporation by the fraud of the corporation, who, within a reasonable time after discovering the same, repudiates his subscription before proceedings of insolvency, voluntary or involuntary, have been instituted against the corporation, or some act done that in law is regarded as an act of insolvency, is relieved of all liability on account of his subscription.[40] That he must act with promptness after discovering the fraud has always been the doctrine on this subject.[41] Accordingly a right of rescission was denied where the defrauded sharetaker acted three years as a director, and took an active part in the management of the corporation with knowledge of its business methods and financial condition;[42] and also where the sharetaker, after repudiating his subscription on the ground of having been misled by the prospectus, subsequently paid further sums on account of his shares with the idea of getting back the money originally paid, as his want of promptness may have affected the rights of others.[43] The subscriber is not entitled to a rescission where, after discovering the fraud, he refrains from acting until the corporation becomes hopelessly insolvent, in reliance upon a promise which is not fulfilled that a large dividend will be declared.[44] On the other hand one who has been induced to purchase the shares of a national bank by false representations made by its president and cashier of its condition, who rescinds the contract and tenders back the shares, duly assigned, to the president of the bank, and calls upon him to return the consideration, and brings a suit for rescission of the contract, cannot be held liable in a suit by a receiver of the bank to recover an assessment upon such stock.[45]

5. Fraudulent Issues and Overissues — a. Constitutional and Statutory Provisions Against Issuing Stock or Bonds Except For Labor Done, Services Performed, Money Actually Received, Etc. — (i) *In General.* Constitutional provisions exist in several states to the effect that no corporation shall issue stocks or bonds, except for labor done, services performed, or money or property actually received, and that all fictitious increase of stock or indebtedness shall be void.[46] Many statutory provisions of the same nature have been enacted. Under such a

38. Beal *v.* Dillon, 5 Kan. App. 27, 47 Pac. 317; Stufflebeam *v.* De Lashmutt, 83 Fed. 449; Newton Nat. Bank *v.* Newbegin, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727.

39. Bosley *v.* National Mach. Co., 123 N. Y. 550, 25 N. E. 990, 34 N. Y. St. 277; Moosbrugger *v.* Walsh, 89 Hun (N. Y.) 564, 35 N. Y. Suppl. 550, 70 N. Y. St. 117 [*citing* McDermott *v.* Harrison, 9 N. Y. Suppl. 184, 30 N. Y. St. 324].

40. Fear *v.* Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721.

41. Aaron's Reefs *v.* Twiss, [1896] A. C. 273, 65 L. J. P. C. 54, 74 L. T. Rep. N. S. 794, and cases cited.

42. American Bldg., etc., Assoc. *v.* Rainbolt, 48 Nebr. 434, 67 N. W. 493.

43. *In re* Dunlop-Truffault Cycle, etc., Mfg. Co., 66 L. J. Ch. 25, 75 L. T. Rep. N. S. 385.

44. Weisiger *v.* Richmond Ice Mach. Co., 90 Va. 795, 20 S. E. 361.

45. Stufflebeam *v.* De Lashmutt, 83 Fed. 449 [*distinguishing* Pauly *v.* State L. & T. Co., 165 U. S. 606, 17 S. Ct. 465, 41 L. ed. 844; Waite *v.* Dowley, 94 U. S. 527, 24 L. ed. 181]. That a subscriber who is entitled by right to repudiate his subscription immediately upon discovering the fraud does not affirm it by giving his check to a director of the corporation, accompanied by the statement that he will never give another dollar toward his subscription to the stock, and that the check is given to save the money already paid therein, see Fear *v.* Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721. That fraud is not available as a defense to a member of a mutual insurance company who has had the benefit of the insurance, as against the rights of creditors of the corporation, see Mansfield *v.* Woods, 9 Ohio Dec. (Reprint) 761, 29 Cinc. L. Bul. 111. That a delay of two years and a half in disaffirming cuts off the right where an assignment for the benefit of creditors has supervened see Painsville Nat. Bank *v.* King Varnish Co., 1 Toledo Leg. News 304.

46. See for example Colo. Const. art. 15, § 9, which has been embodied in Colo. Gen. Stat. §§ 251, 340; Ida. Const. (1889), art. 11, § 9; Mont. Const. (1889), art. 15, § 10; Wash. Const. (1889–1890), art. 12, § 6.

statute[47] a certificate of shares issued by a corporation after a reduction of the price of its shares, for the purpose of giving purchasers of the shares at the former price the benefit of the reduction, without any other consideration, is void, and the parties receiving the same do not thereby become shareholders, or make themselves liable to creditors as for an unpaid subscription.[48]

(II) *Gratuitous Donees of Fictitious Stock Not Shareholders.* Under such a constitutional provision persons to whom corporate shares are issued, for which they do not pay or agree to pay anything, do not thereby become shareholders of the corporation in any sense, and cannot sue as such.[49]

b. Illegal Issues of Shares Do Not Confer Rights of Shareholders. The possession of share certificates issued without authority of the board of directors will convey no rights as against the corporation, in the absence of an estoppel, upon one who is not a purchaser of them in good faith and for value.[50]

c. Subscribers to Fraudulent Overissues Are Not Shareholders — (I) *In General.* After all the authorized shares of a corporation have been issued, any further issues are merely void, and the takers of them, although innocent, do not acquire the status or rights of shareholders.[51] Such a subscriber is not liable on his subscription;[52] and although the president and directors may have power to authorize an additional issue, yet, until they exercise this power, any issue after the original limit has been filled is void.[53]

(II) *Remedy of Innocent Subscriber to Fraudulent Overissue Against Corporation* — (A) *In General.* It does not follow from this that the innocent subscriber to shares thus fraudulently overissued is without remedy. If he has paid out money on the faith of the certificates being lawfully issued, he may maintain an action against the corporation for reimbursement.[54] In other words a corporation whose officers, authorized to issue share certificates, have fraudulently overissued such certificates, is liable in damages to an innocent holder for the value of the overissued shares.[55] It is liable in damages to any one purchasing for value, and without notice, its spurious stock, issued by reason of its neglect to observe care in the issue of the certificates and to supervise its agent charged with the performance of such duty.[56] The reason of the rule is said to be that share certificates, issued by a corporation, although spurious, are a continuing affirmation by the corporation to the public that the person named therein is the owner of the number of shares of the corporation therein stated, upon which affirmation an intending purchaser of such shares has a right to rely, in the absence of knowledge to the contrary.[57] The liability of a corporation for selling

47. Cal. Civ. Code, § 359.

48. Kellerman *v.* Maier, 116 Cal. 416, 48 Pac. 377.

49. Arkansas River Land, etc., Co. *v.* Farmers' L. & T. Co., 13 Colo. 587, 22 Pac. 954.

50. Ryder *v.* Bushwick R. Co., 134 N. Y. 83, 31 N. E. 251, 45 N. Y. St. 388.

51. New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30.

52. Clark *v.* Turner, 73 Ga. 1.

53. McCord *v.* Ohio, etc., R. Co., 13 Ind. 220.

54. Titus *v.* Great Western Turnpike Road Co., 61 N. Y. 237 (spurious certificate); New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. (Pa.) 446, 14 Am. St. Rep. 868; Willis *v.* Fry, 13 Phila. (Pa.) 33, 36 Leg. Int. (Pa.) 47. *Compare* Fifth Ave. Bank *v.* Forty-Second St., etc., Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 50 N. Y. St. 712, 33 Am. St. Rep. 712, 19 L. R. A. 331; New York Mut. L. Ins. Co. *v.* Forty-Second St., etc., Ferry R. Co., 74 Hun (N. Y.) 505, 26 N. Y. Suppl. 545, 57 N. Y. St. 215; Cartwright *v.* Dickinson, 88 Tenn. 476, 12 S. W. 1030, 17 Am. St. Rep. 910, 7 L. R. A. 706. An innocent purchaser for value, without notice, of shares issued to increase the capital stock of a corporation is protected, and his title to the shares is good, under a statute providing that no increase of capital stock shall be valid until the whole amount of the increase proposed is paid in cash, where such increase is paid for by the president of the corporation with funds stolen from the corporation. Dunn *v.* Minneapolis State Bank, 59 Minn. 221, 61 N. W. 27.

55. Archer *v.* Dunham, 89 Hun (N. Y.) 387, 35 N. Y. Suppl. 387, 69 N. Y. St. 773.

56. Cincinnati, etc., R. Co. *v.* Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777.

57. Keller *v.* Eureka Brick Mach. Mfg. Co., 43 Mo. App. 84, 11 L. R. A. 472; Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. (Pa.) 446, 14 Am. St. Rep. 868.

such pretended shares to an innocent purchaser has also been put upon the ground of a breach of warranty. The proposition is that a sale by a corporation of stock having no legal existence because of non-compliance with the statutory prerequisites and mode of procedure prescribed for its issue, and the delivery of a certificate therefor to an innocent third person, who pays cash therefor, violates the vendor's warranty of the existence and validity of the thing sold, and entitles the vendee to recover the price which he has paid.[58]

(B) *Distinction Between Cases Where Defrauded Sharetaker Deals With Corporation Through Corporate Agent and Where He Deals With Agent Personally.* If the defrauded sharetaker, in purchasing the overissued or fraudulently issued shares, deals with the corporation innocently, through its agent guilty of the fraud, then the corporation will be liable to him to make good the damage which he has sustained.[59] But where the sharetaker, in purchasing the shares, deals with the agent of the corporation personally, and for his own account, as where the agent makes out an illegal and fraudulent certificate and pledges it for a loan of money for his own use, and the person advancing the money and receiving the certificate in pledge knows that he is loaning the money to the agent for his own use, then the sharetaker will not be entitled to indemnity from the corporation, but his only recourse will be against the agent.[60]

d. Corporation Liable For Fraudulent Issues Which Are Not Overissues — (I) *In General.* On the ordinary rule of *respondeat superior* a corporation is liable to one who has been defrauded by the act of its transfer clerk in issuing a certificate of its stock to a fictitious person, and so getting it in circulation.[61] If the certificate thus fraudulently issued by its agent does not exhaust its potential stock and create an overissue, it is bound specifically to perform the representation thus made by the certificate thus issued, and to admit an innocent purchaser to the rights of a shareholder.[62]

(II) *Corporation Has No Right to Have Such Certificates Canceled.* Nor can the corporation maintain a suit in equity to restrain the transfer of the certificate in such a case and compel its surrender, but it will be estopped from denying its validity.[63] Even suppose there may be in a given case a right of can-

58. Lincoln *v.* New Orleans Express Co., 45 La. Ann. 729, 12 So. 937.

59. New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30 [*overruling* it seems Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599]. See also Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Titus *v.* Great Western Turnpike Road Co., 61 N. Y. 237; Willis *v.* Fry, 13 Phila. (Pa.) 33, 36 Leg. Int. (Pa.) 47.

60. Knox *v.* Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 51 Am. St. Rep. 700, 31 L. R. A. 779; Manhattan L. Ins. Co. *v.* Forty-Second St., etc., Ferry R. Co., 19 N. Y. Suppl. 90, 46 N. Y. St. 130 [*affirmed* in 139 N. Y. 146, 31 N. E. 776, 54 N. Y. St. 474, forged certificate]; Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 4 S. Ct. 345, 28 L. ed. 385. For a somewhat similar case reaching the same result on the ground that the president of a corporation conspired with other officers of the company and procured a fraudulent overissue of its shares, some of which he transferred to a third person in lieu of good shares of the company which he had borrowed from her, and where the court proceeded upon the ground that he had acted as her agent and not as the agent of the company, see Wright's Appeal, 99 Pa. St. 425.

Circumstances under which the officers of a corporation are held not to have been negligent in failing to inquire whether an employee had canceled certificates of stock as they had directed him to do, where in point of fact he transferred them as collateral security for his own personal loan. Knox *v.* Eden Musee American Co., 17 N. Y. App. Div. 365, 45 N. Y. Suppl. 255.

61. Jarvis *v.* Manhattan Beach Co., 53 Hun (N. Y.) 362, 6 N. Y. Suppl. 703, 25 N. Y. St. 1.

62. Thus it has been held that where a corporation permits its agent to sell stock covered by certificates, when there is stock standing to its credit sufficient to cover such certificates, it is bound to make them good to the extent of any shares owned by the company within the limit of its capital stock, and such unsold shares should be applied to the satisfaction of the oldest outstanding certificate of that character. New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534.

63. Manhattan Beach Co. *v.* Harned, 27 Fed. 484, 23 Blatchf. 494.

Circumstances under which a corporation not estopped from recovering damages from its own treasurer for fraudulently issuing a certificate of its stock. Brooklyn Crosstown R. Co. *v.* Strong, 75 N. Y. 591.

Circumstances under which the defrauded

cellation, the failure by the corporation or its shareholders to take prompt action to procure the cancellation of stock claimed to be fraudulently issued will be deemed a ratification thereof by the corporation.[64]

(III) *Overissued Shares May Be Canceled and Dividends Thereon Enjoined.* But overissued shares being void, the holder of them cannot be admitted to the rights of a shareholder to the prejudice of the holders of genuine shares, and the latter may have an action in equity to cancel such spurious shares,[65] or to enjoin the corporation from paying dividends thereon or from making any future dividend until it is ascertained who are the genuine shareholders.[66] The corporation is an indispensable party to such an action for the cancellation of spurious shares,[67] and the same may be assumed as to such an action for an injunction. Equitable circumstances may of course intervene to prevent such a cancellation; and as a spurious issue does not invalidate the original stock the relief cannot extend so far as the cancellation of all the stock.[68] Holders of scrip issued by a corporation, for the purchase of which a certain per cent of the amount of the proceeds of sales is to be devoted, are entitled to have such of the scrip as is so purchased, canceled, and to have the amount of scrip improperly issued treated as cash paid to the corporation.[69] A corporation cannot maintain a proceeding for the cancellation of stock and bonds on the ground that they were illegally issued, without restoring or offering to restore to the holder of the same what it received from him or its value.[70] One who has purchased, as a single transaction, a block of shares cannot maintain an action to have a portion of them canceled because of fraud in their issue, while retaining the remainder.[71]

e. Doctrine That Fraudulent and Overissued Share Certificates Are Misrepresentations by Corporation to General Public Which It Is Bound to Make Good in Favor of Innocent Purchasers — (I) *Statement of Doctrine.* It is believed to be a sound doctrine in the law of fraud that a person who makes a false statement for the purpose of deceiving and entrapping any one of a particular class of persons whom it may catch is responsible for the consequences of such false statement to any one whom it does chance to catch.[72] Notwithstanding what was held in one of the earlier and elaborately considered but badly decided cases in the court of appeals of New York,[73] this rule governs the rights of subsequent purchasers in good faith of fraudulently issued shares, such share certificates constituting a continuing affirmation by the corporation to the general financial and commercial world that the person named therein is entitled to the number of shares of stock of the company named therein; so that if the certificate has been

sharetaker not estopped from maintaining a bill for a rescission. Snow *v.* Weber, 39 Mich. 143.

64. American Wire-Nail Co. *v.* Bayless, 91 Ky. 94, 15 S. W. 10, 12 Ky. L. Rep. 694.

65. Campbell *v.* Morgan, 4 Ill. App. 100.

66. Carpenter *v.* New York, etc., R. Co., 5 Abb. Pr. (N. Y.) 277; Underwood *v.* New York, etc., R. Co., 17 How. Pr. (N. Y.) 537.

67. Campbell *v.* Morgan, 4 Ill. App. 100.

68. Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894.

69. Rogers *v.* New York, etc., Land Co., 10 Misc. (N. Y.) 614, 32 N. Y. Suppl. 209, 65 N. Y. St. 332 [*affirmed* in 87 Hun (N. Y.) 107, 33 N. Y. Suppl. 840, 67 N. Y. St. 452].

70. Pocantico Waterworks Co. *v.* Low, 20 Misc. (N. Y.) 484, 46 N. Y. Suppl. 633.

71. Church *v.* Citizens' St. R. Co., 78 Fed. 526.

72. Morgan *v.* Skiddy, 62 N. Y. 319; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578; Cross *v.* Sackett, 2 Bosw. (N. Y.) 617; Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596; Ayre's Case, 25 Beav. 513, 4 Jur. N. S. 596, 27 L. J. Ch. 597; Wontner *v.* Shairp, 4 C. B. 404, 56 E. C. L. 404; Clarke *v.* Dickson, 6 C. B. N. S. 453, 5 Jur. N. S. 1027, 28 L. J. C. P. 225, 7 Wkly. Rep. 443, 95 E. C. L. 453; Bedford *v.* Bagshaw, 4 H. & N. 538, 29 L. J. Exch. 59; Davidson *v.* Tulloch, 6 Jur. N. S. 543, 1 Macq. H. L. Cas. 783, 2 L. T. Rep. N. S. 97, 8 Wkly. Rep. 309; Scott *v.* Dixon, 29 L. J. Exch. 62 note.

For applications of this doctrine to the misrepresentations of commercial agencies in their published books and circulars see Lindauer *v.* Hay, 61 Iowa 663, 17 N. W. 98; Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, 18 N. W. 206; Holmes *v.* Harrington, 20 Mo. App. 661; Eaton, etc., Co. *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389.

73. Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599 [*reversing* 4 Duer (N. Y.) 480].

issued in fraud of the rights of the corporation, by its agent authorized to issue its shares, the corporation must make it good, either by way of specific performance or damages, accordingly as it was issued within its powers or beyond its powers.[74]

(II) *Purchaser Not Innocent Where Circumstances Put Him Upon Inquiry.* Here as elsewhere a purchaser of illegal, fraudulent, or overissued shares will not be entitled to indemnity from the corporation as an innocent purchaser where he neglects the obvious means of knowledge and fails to follow up circumstances which are sufficient to put an ordinarily careful and prudent man upon inquiry.[75] But it has been held that a certificate of stock issued in favor of the secretary of the corporation is not sufficient to put a purchaser upon inquiry as to whether he is rightfully the owner, where no other mode of issuing stock than by the president or the secretary under the corporate seal is provided, and neither the secretary nor the president is prohibited from holding stock.[76]

(III) *Rights of Bona Fide Purchasers of Shares Fraudulently Issued.* *Bona fide* purchasers of corporate shares acquire no new rights or equities as shareholders which do not attach to the shares in the hands of the transferrer or assignor.[77]

(IV) *Estoppel Against Persons Concocting or Participating in Fraud.* Persons concocting frauds of the nature here under consideration cannot acquire any rights through their own unlawful and fraudulent conduct.[78]

f. Shares Surrendered and Afterward Reissued Do Not Constitute Overissue. The surrender of stock to the corporation, and the reissue by the corporation of such stock, do not constitute an overissue of the stock, although such reissue, together with the original issue, would have exceeded the limit but for the surrender.[79] Certificates of stock left by the holder with the manager of the corporation for sale, and not canceled in accordance with the rule of the company upon the issue of a new certificate to the purchaser, do not represent real stock in the hands of one to whom such manager fraudulently pledged them for a loan, but are mere vouchers.[80]

g. Defrauded Sharetaker May Have Action Against Officers or Agents Guilty of Fraud. If, after all the stock which the corporation is entitled to issue has been issued and taken by the public, the directors fraudulently issue further shares and put them upon the market as shares lawfully issued, and they are purchased by any one on the faith that they are lawfully issued, he may, in an action at law against the directors guilty of the fraud, recover the damages he has thus sustained.[81] If in such an action plaintiff shows that the certificates of stock which he purchased were issued after all the stock which the company had the

74. American Wire-Nail Co. *v.* Bayless, 91 Ky. 94, 15 S. W. 10, 12 Ky. L. Rep. 694; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30 (which case must be regarded as overruling in large part at least the case of Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599).

75. Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894; Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 4 S. Ct. 345, 28 L. ed. 385.

76. Cincinnati, etc., R. Co. *v.* Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777 [*affirming* 29 Ohio L. J. 15].

77. Church *v.* Citizens' St. R. Co., 78 Fed. 526.

78. For illustration see Hart *v.* Mt. Pleasant Park Stock Co., 97 Iowa 353, 66 N. W. 190; Baker *v.* Guarantee Trust, etc., Co., (N. J. 1895) 31 Atl. 174; Straman *v.* North Baltimore Water-Works Co., 8 Ohio Cir. Ct. 89 (holding that treasury stock issued to a corporation by a director upon a vote in which such director joined, for a nominal consideration, is void in his hands).

79. Wells *v.* Thompson Mfg. Co., 54 Mo. App. 41.

80. Knox *v.* Eden Musee American Co., 25 N. Y. Suppl. 164 [*affirmed* in 74 Hun (N. Y.) 483, 26 N. Y. Suppl. 482, 57 N. Y. St. 48 (*affirmed* in 148 N. Y. 441, 42 N. E. 988, 51 Am. St. Rep. 700, 31 L. R. A. 779)].

81. Bruff *v.* Mali, 36 N. Y. 200; Shotwell *v.* Mali, 38 Barb. (N. Y.) 445; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578. That directors of a corporation who put on the market false securities in the name of the corporation are individually liable, in an action of deceit, to purchasers of such securities who are thereby injured see Clark *v.* Edgar, 12 Mo. App. 345 [*affirmed* in 84 Mo. 106, 54 Am. Rep. 84]; Shotwell *v.* Mali, 38 Barb. (N. Y.) 445.

lawful right to issue had been taken, and there is no evidence that any stock had been surrendered, he has made out a *prima facie* case against the directors.[82] The burden is then cast upon defendants to show that plaintiff's certificates were issued upon the surrender or upon the transfer of genuine stock; and they do not do this by merely showing that prior to the time when plaintiff purchased his stock there were frequent surrenders or reissues of stock, because it might well be that all such surrenders and reissues were surrenders and reissues of the bogus stock.[83] Upon principles elsewhere discussed, it is not necessary, in order to sustain such an action, that the purchaser of such stock should have purchased it from the company or from defendants; he may maintain the action, although he purchased it in the market from other persons.[84] Even where the officers of the corporation selling the overissued shares have done so innocently, yet they are liable upon their implied representation that they had authority to issue valid shares; and they are constantly liable to the takers of the shares in damages, which damages will be the value of the shares which the purchaser would have received under the arrangement.[85]

h. Remedies of Corporation Against Its Officers and Agents For Damages Sustained Through Illegal or Overissue of Shares. The corporation has remedies, both at law and in equity, to recover from its agent by whom the fraud was committed, the damages which it thereby sustained. It has been held that a corporation whose treasurer fraudulently issues and circulates stock which becomes so intermingled with the genuine stock as to be indistinguishable therefrom and appropriates the proceeds to his own use may recover the moneys from the treasurer in an action of general assumpsit; and the treasurer cannot defend on the ground that the certificates which he thus fraudulently issued were illegal and void.[86] Where the fraudulent certificates which the authorized agent of the corporation has put forth are binding upon the corporation, it is entitled to maintain a suit in equity against the agent for a discovery and account of the moneys which he has received through the negotiation of such fraudulent certificates, and for a recovery of the same. Such an action, it has been held, proceeds upon the implied contract which binds every agent to keep his principal indemnified; upon the right which every party entitled to be indemnified has for relief against the anticipated consequences of the liability after it has occurred but before it has been consummated against him, by a recovery at law or in equity; and also in view of the extent and complexity of the claim where many such fraudulent certificates have been negotiated.[87] The jurisdiction of a court of equity in such a case is therefore supported on the ground of the want of an adequate remedy at law,[88]

82. Bruff *v.* Mali, 36 N. Y. 200.

83. Bruff *v.* Mali, 36 N. Y. 200.

84. Bruff *v.* Mali, 36 N. Y. 200. To the same effect is Shotwell *v.* Mali, 38 Barb. (N. Y.) 445 [*overruling* Seizer *v.* Mali, 32 Barb. (N. Y.) 76, but subsequently *reversed*, and the judgment of the special term affirmed in 41 N. Y. 619]; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578. But see Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29.

Evidence insufficient to sustain the charge of a fraudulent overissue. Smock *v.* Henderson, Wils. (Ind.) 241.

85. Firbank *v.* Humphreys, 18 Q. B. Div. 54, 56 L. J. Q. B. 57, 56 L. T. Rep. N. S. 36, 35 Wkly. Rep. 92. In an action on the case for a fraudulent sale of stock, brought against the self-styled president and the secretary of a fictitious joint-stock company, it is not necessary to show any privity of contract between plaintiff and the secretary. Bauman *v.* Bowles, 51 Ill. 380.

86. Rutland R. Co. *v.* Haven, 62 Vt. 39, 19 Atl. 769. See also East New York, etc., R. Co. *v.* Elmore, 5 Hun (N. Y.) 214.

87. Commonwealth Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. The court proceed upon the doctrine laid down in Renelaugh *v.* Hayes, 1 Vern. 189, to the effect that equity will give relief to a covenantee against his covenantor in the case of an express covenant of indemnity, even before the covenantee has been compelled to pay the money against which he is by the covenant indemnified, especially when the taking of long and intricate accounts is involved. See also Baker *v.* Shelbury, 1 Ch. Cas. 70; Flight *v.* Cook, 2 Ves. 619, 28 Eng. Reprint 394.

88. See, upon the general doctrine that equity relieves upon this ground, the following cases:

Connecticut.— New London Bank *v.* Lee, 1 Conn. 112, 27 Am. Dec. 713.

New York.— American Ins. Co. *v.* Fisk, 1 Paige 90.

of the right of a principal to an accounting by his agent,[89] upon the ground of trust,[90] and also on the ground of fraud.[91]

i. Other Decisions Relating to Shares Illegally Issued. One who receives shares in a corporation which have been illegally set apart in trust for the directors, as a gift made for the purpose of inducing his aid in "booming the concern," with full notice of a fraudulent scheme in pursuance of which such stock was issued, is liable to account therefor to the shareholders.[92] An agreement that a subscriber to the stock of a corporation shall be secured for a portion of his payments on account of his subscription, by a mortgage on the corporate property, is void as against the creditors of the corporation.[93]

L. Surrender or Cancellation of Shares and Release of Shareholder — 1. SUBSCRIBER TO SHARES CANNOT WITHDRAW AT PLEASURE. It is a mere application of the truism that one of the parties to a valid contract cannot rescind it without the consent of the other, to say that one who has entered into a valid contract of subscription to the shares of the capital stock of a corporation cannot withdraw therefrom at pleasure,[94] even where the rights of other subscribers and of creditors are not concerned.[95] Even where he has paid a portion of his subscription he cannot surrender his shares, since the right of forfeiture rests with the corporation and is a right which the corporation may waive.[96]

South Carolina.— Wamburzee *v.* Kennedy, 4 Desauss. 474.

United States.— Boyce *v.* Grundy, 3 Pet. 210, 7 L. ed. 655.

England.— Weymouth *v.* Boyer, 1 Ves. Jr. 416.

89. For this doctrine see Massey *v.* Banner, 4 Madd. 413, 20 Rev. Rep. 317; Mackenzie *v.* Johnson, 4 Madd. 373. *Compare* King *v.* Rossett, 2 Y. & J. 33.

90. Hovenden Frauds, § 162.

91. Green *v.* Barrett, 5 L. J. Ch. O. S. 6, 1 Sim. 45, 2 Eng. Ch. 45; Blain *v.* Agar, 5 L. J. Ch. O. S. 1, 8 Rev. Rep. 33, 856, 1 Sim. 37, 27 Rev. Rep. 150, 29 Rev. Rep. 110, 2 Eng. Ch. 37; Colt *v.* Woollaston, 2 P. Wms. 154, 24 Eng. Reprint 679; Burrowes *v.* Lock, 10 Ves. Jr. 470.

92. Paducah Land, etc., Co. *v.* Mulholland, 24 S. W. 624, 15 Ky. L. Rep. 624.

93. Boney *v.* Williams, 55 N. J. Eq. 691, 38 Atl. 189.

A corporation is liable on a certificate of its stock to one who has guaranteed the genuineness of a signature thereon, where the guarantor presents the certificate to the corporation itself to determine its validity before making the guaranty. Jarvis *v.* Manhattan Beach Co., 75 Hun (N. Y.) 100, 26 N. Y. Suppl. 1061, 58 N. Y. St. 167 [*affirmed* in 148 N. Y. 652, 43 N. E. 68, 51 Am. St. Rep. 727, 31 L. R. A. 776].

A transaction by which each individual shareholder of a corporation sells his stock to another corporation formed by the consolidation of three other corporations, receiving for each share sold five shares in the new corporation, does not create an increase of the capital stock of the first corporation, where it was not a party to the consolidation agreement upon which the new corporation was organized, and where directors have been elected for it and a separate corporate existence maintained, so that it has not become merged in the new corporation. Einstein *v.* Rochester Gas, etc., Co., 77 Hun (N. Y.) 149, 28 N. Y. Suppl. 434, 59 N. Y. St. 63 [*affirmed* in 146 N. Y. 46, 40 N. E. 631].

94. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Connecticut.— United Soc. *v.* Eagle Bank, 7 Conn. 456.

Illinois.— Ryder *v.* Alton, etc., R. Co., 13 Ill. 516.

Indiana.— Johnson *v.* Wabash, etc., Plank-Road Co., 16 Ind. 389.

Missouri.— Ollesheimer *v.* Thompson Mfg. Co., 44 Mo. App. 172.

New Jersey.— Bordentown, etc., Turnpike Co. *v.* Imlay, 4 N. J. L. 327.

Pennsylvania.— Modern L. Ins., etc., Co. *v.* Keller, 3 Pa. Co. Ct. 118.

South Carolina.— Cheraw, etc., R. Co. *v.* White, 10 S. C. 155.

See 12 Cent. Dig. tit. "Corporations," § 328.

95. Ryder *v.* Alton, etc., R. Co., 13 Ill. 516.

96. Klein *v.* Alton, etc., R. Co., 13 Ill. 514; Gaff *v.* Flesher, 33 Ohio St. 107; Kidwelly Canal Co. *v.* Raby, 2 Price 93. See also Whitestone First Religious Soc. *v.* Stone, 7 Johns. (N. Y.) 112; Martyn *v.* Hind, Cowp. 437, 1 Dougl. 137.

Instances under which a shareholder in a coöperative association organized for ideal purposes may not retire and receive pay for his shares, although the association has granted this right to other members, as a matter of arrangement in each individual case. Herring *v.* Ruskin Co-Operative Assoc., (Tenn. Ch. App. 1890) 52 S. W. 327.

Insufficient plea of release.— A plea by one subscriber to stock in a joint enterprise, where there were a number of subscriptions for a common object, that one of such subscribers had been released from liability on his subscription is bad, unless it avers that such release was made by the person lawfully holding the contract of subscription, in settlement for the work accomplished. Chicago

2. CORPORATION CANNOT RELEASE SUBSCRIBER — a. In General. Nor can the corporation, having regard to the rights of other subscribers or to the rights of creditors, release him, since to do so has the effect of giving away a portion of the assets of the corporation.[97] The general doctrine is that the corporation has no legal capacity to release an original subscriber to its capital stock from the obligation of paying for his shares, in whole or in part, and that any arrangement with him by which the company, its creditors, or shareholders shall lose any part of that subscription is *ultra vires* and a fraud upon the creditors and the co-subscribers.[98] Hence a by-law authorizing a shareholder to surrender his shares and withdraw, giving a prescribed notice, is invalid.[99] To this statement exceptions will be discovered in the statutory power to forfeit shares for the non-payment of subscriptions and in the power to make *bona fide* compromises with subscribers to shares.[1]

b. Cannot Cancel Share Certificates. Therefore the act of a corporation in canceling the share certificates of a member amounts to nothing, since the certificates are not shares, but merely documentary evidence of the rights of the shareholder.[2]

c. Directors Have No Such Power Unless Expressly Granted — (I) *In General.* The directors of a corporation have no such power unless it has been expressly granted by the charter or governing statute, for the simple reason that they have no power to give away the assets of the corporation and thereby destroy the corporation itself.[3] Moreover, if the directors of the company, not having express authority so to do, use funds of the company in buying in the shares of its members, they commit a breach of trust and will be compelled to make good to the company the funds so expended.[4] The principle that the directors cannot take such action in the absence of express power extends to the case of persons who have agreed to take shares, but who have not actually become shareholders; the directors have no implied power to release them from their agreement.[5]

(II) *Where Directors Possess Express Power They Cannot Delegate It.* Even where the directors have express power to accept a surrender from a shareholder of his shares they cannot delegate this power to a manager.[6]

Bldg., etc., Co. *v.* Summerour, 101 Ga. 820, 29 S. E. 291.

No release can be inferred from the delivery of a certificate for paid-up shares to the amount which has been paid up on a share subscription. Braddock Electric R. Co. *v.* Bily, 11 Pa. Super. Ct. 144.

97. Melvin *v.* Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; Chouteau *v.* Dean, 7 Mo. App. 210.

98. So stated in substance by Lamar, J., in Morgan *v.* Struthers, 131 U. S. 246, 9 S. Ct. 726, 33 L. ed. 132. See also Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Putnam *v.* New Albany, etc., R. Co., 16 Wall. (U. S.) 390, 21 L. ed. 361.

99. Vercoutere *v.* Golden State Land Co., 116 Cal. 410, 48 Pac. 375.

1. See *infra*, VI, O; VI, L, 20.

2. Chouteau *v.* Dean, 7 Mo. App. 210.

3. Trevor *v.* Whitworth, 12 App. Cas. 409, 57 L. T. Rep. N. S. 457, 36 Wkly. Rep. 145. *Compare In re* Dronfield Silkstone Coal Co., 17 Ch. D. 76, 50 L. J. Ch. 387, 44 L. T. Rep. N. S. 361, 29 Wkly. Rep. 768. See also *In re* United Service Co., L. R. 5 Ch. 707, 39 L. J. Ch. 730, 23 L. T. Rep. N. S. 331, 18 Wkly. Rep. 1058; Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43, 25 L. T. Rep. N. S. 636; Hodgkinson *v.* National Live Stock Ins. Co., 26 Beav. 473 [*affirmed* in 4 De G. & J. 422, 5 Jur. N. S. 969, 28 L. J. Ch. 676, 7 Wkly. Rep. 680, 61 Eng. Ch. 332]; Harris *v.* North Devon R. Co., 20 Beav. 384; *In re* London, etc., Consol. Coal Co., 5 Ch. D. 525, 46 L. J. Ch. 842, 36 L. T. Rep. N. S. 545; Burt *v.* British Nation L. Assur. Assoc., 4 De G. & J. 158, 61 Eng. Ch. 125; Matter of St. Marylebone Joint Stock Banking Co., 8 De G. M. & G. 607, 2 Jur. N. S. 1216, 26 L. J. Ch. 261, 5 Wkly. Rep. 26, 57 Eng. Ch. 470; *Re* Waterloo L., etc., Ins. Co., 10 Jur. N. S. 692; Playfair *v.* Birmingham, etc., Junction R. Co., 9 L. J. Ch. 253, 1 R. & Can. Cas. 640 [*distinguishing In re* Natal Invest. Co., L. R. 5 Ch. 22, 21 L. T. Rep. N. S. 445, 18 Wkly. Rep. 30]. See the strong language of Strong, J., in Putnam *v.* New Albany, etc., R. Co., 16 Wall. (U. S.) 390, 395, 21 L. ed. 361.

4. Evans *v.* Coventry, 8 De G. M. & G. 835, 26 L. J. Ch. 400, 5 Wkly. Rep. 436, 57 Eng. Ch. 645.

5. *In re* United Service Co., L. R. 5 Ch. 707, 39 L. J. Ch. 730, 23 L. T. Rep. N. S. 331, 18 Wkly. Rep. 1058; *In re* United Ports Co., L. R. 13 Eq. 474, 41 L. J. Ch. 270, 26 L. T. Rep. N. S. 124, 20 Wkly. Rep. 356.

6. *In re* County Palatine Loan, etc., Co., L. R. 9 Ch. 691, 43 L. J. Ch. 588, 31 L. T. Rep. N. S. 52, 22 Wkly. Rep. 697.

d. Corporation Cannot Achieve Result by Device of Reducing Capital Stock. Nor can the corporation achieve this result by reducing the capital stock except under the condition and in the manner authorized by the governing statute; but the corporation may deny the legality of such a reduction where it has not received the benefit of the transaction, and where to do so would not work a fraud on innocent parties.[7]

e. Corporation Cannot Relieve Particular Subscribers by Purchasing Their Shares. The true doctrine, although not universally adopted, is that a corporation cannot, either against its shareholders or against its creditors, relieve particular shareholders by purchasing their shares, unless empowered so to do by charter or statute, especially in view of the doctrine hereafter explained that it is *ultra vires* for a corporation to attempt to purchase and hold its own shares.[8] As the corporation cannot do this, it is a breach of trust for its directors to do it.[9]

3. No Right of Withdrawal as Against Existing Subscribers. No one of the subscribers to the shares of a corporation has the right to withdraw from his contract of subscription without the consent of all the others, so as thereby to diminish the company's funds, in which all have acquired an interest.[10] As already seen[11] some of the courts allow such a withdrawal before the corporation has been formed;[12] but clearly there is no such right after the corporation has been formed, although it has not yet entered upon the work for which it was created.[13] It has been held that a ratification of a fraudulent sale of stock to a corporation, by shareholders owning a minority of stock, made at a meeting of shareholders controlled by their votes, is not binding upon shareholders who did not consent to the purchase.[14]

4. No Right of Withdrawal as Against Creditors — a. In General. The assets of a corporation being a trust fund for its creditors, and the unpaid subscriptions being a part of this trust fund,[15] it is not competent for the directors, or even for the aggregate body of the shareholders,[16] to give away this trust fund by releasing the unperformed contracts of subscribers thereto.[17]

7. St. Louis Carriage Mfg. Co. *v.* Hilbert, 24 Mo. App. 338. See also Coppin *v.* Greenlees, etc., Co., 38 Ohio St. 275, 43 Am. Rep. 425. *Compare* Skinner *v.* Smith, 56 Hun (N. Y.) 437, 10 N. Y. Suppl. 81, 31 N. Y. St. 448. That a surrender of shares on which twenty per cent had been paid and an issue of share certificates for the amount paid up is valid was held in Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328, but the case is opposed to sound principle and to the weight of authority. See also Glenn *v.* Hatchett, 91 Ala. 316, 8 So. 656, holding a reduction of subscriptions valid as between the subscriber and the corporation, and consequently as against the assignee in insolvency of the corporation. See also Gaehle's Piano Mfg. Co. *v.* Berg, 45 Md. 113, which proceeds on the principle that such an agreement is good between the parties to it.

That a corporation cannot, under Cal. Civ. Code, § 309, prior to its dissolution, distribute its capital stock among its shareholders see Kohl *v.* Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520.

8. Currier *v.* Lebanon Slate Co., 56 N. H. 262.

9. Bedford R. Co. *v.* Bowser, 48 Pa. St. 29. See also Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

10. Melvin *v.* Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; Johnson *v.* Wabash, etc., Plank-Road Co., 16 Ind. 389; White Mountains R. Co. *v.* Eastman, 34 N. H. 124; Miller *v.* Hanover Junction, etc., R. Co., 87 Pa. St. 95, 30 Am. Rep. 349; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489. Conceded in Meyer *v.* Blair, 109 N. Y. 600, 17 N. E. 228, 16 N. Y. St. 380, 4 Am. St. Rep. 500; Morgan *v.* Struthers, 131 U. S. 246, 9 S. Ct. 726, 33 L. ed. 132; Lindley Comp. L. (5th ed.) 517 [*distinguishing* Plate Glass Universal Ins. Co. *v.* Sunley, 8 E. & B. 47, 4 Jur. N. S. 8, 26 L. J. Q. B. 316, 5 Wkly. Rep. 727, 92 E. C. L. 47].

11. See *supra*, VI, H, 6, a.

12. Muncy Traction Engine Co. *v.* De la Green, (Pa. 1888) 13 Atl. 747.

13. Twin Creek, etc., Turnpike Road Co. *v.* Lancaster, 79 Ky. 552.

14. Woodroof *v.* Howes, 88 Cal. 184, 26 Pac. 111.

15. Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274; Heggie *v.* People's Bldg., etc., Assoc., 107 N. C. 581, 12 S. E. 275.

16. Farnsworth *v.* Robbins, 36 Minn. 369, 31 N. W. 349.

17. *Connecticut.*— United Soc. *v.* Eagle Bank, 7 Conn. 456.

Mississippi.— Vick *v.* La Rochelle, 57 Miss. 602.

Missouri.— Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286; Gill *v.* Balis, 72 Mo. 424; Chouteau *v.* Dean, 7 Mo. App. 210.

b. Same Rule Where Subscription Is Payable in Property. Although the subscription by its terms is payable in property, and the subscriber has, by agreement with the corporation, surrendered all claim for his shares, and they have released all claim on the property, he is still liable to creditors.[18]

c. Subscriber Cannot Escape Liability by Substituting Another in His Place. Nor can a subscriber, except in the way of *bona fide* sale and transfer, effect a release from his obligation by substituting another in his place either without the sanction of the directors[19] or with their sanction.[20]

d. Distinction Between Cancellations of Share Subscriptions With Reference to Existing and to Future Creditors — (I) *In General.* With reference to the power of a corporation to cancel its share subscriptions and to release the subscribers, there are decisions which warrant the conclusion that while such cancellations are not good as to existing creditors,[21] or where the corporation is in debt,[22] yet they may be good as to future creditors.[23]

(II) *Cancellation Good Where There Are No Creditors, Provided All Shareholders Assent.* From this it necessarily follows that such cancellations are good when permitted by the governing statute, where there are no creditors and provided all the shareholders assent.[24]

e. Subscribers Cannot Be Released After Corporation Becomes Insolvent. The doctrine that such releases are invalid as to existing creditors carries with it the conclusion that subscribers cannot be released provided their subscriptions were valid, after the company has become insolvent so as to affect the rights of its creditors;[25] and such we have seen is the doctrine applied, even where the subscription was procured through fraud.[26]

f. English Doctrine on This Subject. The English courts hold that creditors

Pennsylvania.— Modern L. Ins., etc., Co. *v.* Keller, 3 Pa. Co. Ct. 118.

United States.— Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

Hence a release by an insolvent corporation of an unpaid portion of a subscription to its capital stock is fraudulent and void as to its creditors, although the debts were incurred before the subscription was made. Carter *v.* Union Printing Co., 54 Ark. 576, 16 S. W. 579; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466 (invalidity of resolution of directors that no further call shall be made); Upton *v.* Hanshrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417 (futility of stamping the word "unassessable" upon share certificates). See also Pickering *v.* Templeton, 2 Mo. App. 424 (delivering a certificate of paid-up stock when in fact only a part has been paid); Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

18. Singer *v.* Given, 61 Iowa 93, 15 N. W. 858; Ft. Madison Bank *v.* Alden, 129 U. S. 372, 9 S. Ct. 332, 32 L. ed. 725 (with the qualification that a creditor who was also a shareholder and who consented to the arrangement could not have equitable relief against the property as a trust fund). *Compare* Gelpcke *v.* Blake, 19 Iowa 263.

19. Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489.

20. Ollesheimer *v.* Thompson Mfg. Co., 44 Mo. App. 172.

21. Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74.

22. Zirkel *v.* Joliet Opera House Co., 79 Ill. 334.

23. Hill *v.* Silvey, 81 Ga. 500, 8 S. E. 808, 3 L. R. A. 150 (such an arrangement valid as to future creditors, except as to the difference between the amount of paid-up stock so issued and the minimum allowed by the charter for the transaction of business); Johnson *v.* Lullman, 15 Mo. App. 55 [*affirmed* in 88 Mo. 567]; Erskine *v.* Peck, 13 Mo. App. 280 [*affirmed* in 83 Mo. 465]; Steacy *v.* Little Rock, etc., R. Co., 22 Fed. Cas. No. 13,329, 5 Dill. 348.

24. Cooper *v.* Frederick, 9 Ala. 738 (resolution by the directors relinquishing one half of the stock subscription and permitting paid-up shares to be issued for the remainder not on its face illegal); Gelpcke *v.* Blake, 19 Iowa 263 (upholding a contract made by an agent of a railroad corporation releasing a subscriber without the consent of the shareholders, it not appearing that the company had any creditors); Zerkle *v.* Price, 7 Ohio S. & C. Pl. Dec. 465, 5 Ohio N. P. 480 (such an arrangement not absolutely void but voidable only, so that a guaranty of its performance may be enforced against the guarantor); Shoemaker *v.* Washburn Lumber Co., 97 Wis. 585, 73 N. W. 333. Much to the same effect see Cook *v.* Chittenden, 25 Fed. 544; Steacy *v.* Little Rock, etc., R. Co., 22 Fed. Cas. No. 13,329, 5 Dill. 348 (resolution releasing shareholders from unpaid balances of their subscriptions, made when there were no creditors, good as against creditors who put in their claims seven years later).

25. Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

26. See *supra*, VI, K, 4, c.

can only recover from shareholders of insolvent companies, in right of the company, that is, when the company, if a going concern, might have enforced the payment of the amount subscribed for.[27] Those courts generally treat the question from the standpoint of the social rights of the members of the company, rather than as a question of public policy or one which primarily concerns the rights of creditors.[28] Hence it is there held that if shares have been surrendered with the knowledge of the shareholders, under circumstances fully disclosed to them all, and such surrender has not been questioned for a considerable period, the company will be excluded from afterward disputing its validity;[29] that a resolution rescinding a contract of subscription after other subscribers have put their names on the books on the faith of it is void as to them; and that whatever may have been the reason which moved the subscriber to execute it he remains a contributory.[30] The question is said by Sir Nathaniel Lindley to depend largely upon the acts of parliament, the charter, and the regulations or the customs which govern the company in question;[31] and he adds (citing the cases in the margin) that where the power to surrender exists, all due formalities will be presumed in favor of the shareholder who has in fact *bona fide* retired from the company and whose shares have been canceled or otherwise disposed of by the company.[32]

5. Invalidity of Extrinsic and Collateral Agreements Releasing Subscribers. The courts have held with the greatest unanimity that where the contract of subscription is absolute on its face no extrinsic or collateral agreements between the subscriber and the promoters or agents of the corporation who procure him to

27. See for instance *Re* New Eberhart Co., 43 Ch. D. 118.

28. See a holding to the effect that a person who has acquired shares of a corporation out of the ordinary course has the burden of showing, on an application under the English Companies Act of 1898, for relief from liability on his stock, that he acted with due caution and conscientiousness, and that he has done nothing to disentitle himself to relief at the cost of innocent parties. *In re* Roxburghe Press, [1899] 1 Ch. 210, 68 L. J. Ch. 111, 80 L. T. Rep. N. S. 280, 6 Manson 57, 47 Wkly. Rep. 281.

29. *Re* Cameron Coalbrook Co., 32 Beav. 387; Matter of Agricultural Cattle Ins. Co., 31 Beav. 365 [*affirmed* in 4 De G. F. & J. 566, 8 Jur. N. S. 926, 31 L. J. Ch. 861, 7 L. T. Rep. N. S. 142, 10 Wkly. Rep. 852, 65 Eng. Ch. 442].

30. Holt's Case, 1 Sim. N. S. 389, 40 Eng. Ch. 389.

31. Lindley Comp. L. (5th ed.) 517.

32. Kipling *v.* Todd, 3 C. P. D. 350, 47 L. J. C. P. 617, 39 L. T. Rep. N. S. 181, 27 Wkly. Rep. 84. The retirement must be complete. See Barry *v.* Navan, etc., R. Co., L. R. 4 Ir. 68; Matter of Joint-Stock Co.'s Winding-up Acts, 1 De G. J. & S. 504, 10 Jur. N. S. 25, 33 L. J. Ch. 84, 12 Wkly. Rep. 60, 66 Eng. Ch. 391.

For other illustrations of the English doctrine see Matter of St. Marylebone Joint-stock Banking Co., 3 De G. & Sm. 198; Matter of Vale of Neath, etc., Brewery Co., 1 De G. & Sm. 750, 1 Macn. & G. 225, 47 Eng. Ch. 181. See too Daniell's Case, 22 Beav. 43 [*affirmed* in 1 De G. & J. 372, 3 Jur. N. S. 803, 26 L. J. Ch. 563, 5 Wkly. Rep. 677]; *In re* Esparto Trading Co., 12 Ch. D. 191, 48 L. J. Ch. 573, 28 Wkly. Rep. 146; Hole's Case, 3 De G. & Sm. 241; Matter of Vale of Neath, etc., Brewery Joint-stock Co., 3 De G. & Sm. 149; Holt's Case, 1 Sim. N. S. 389, 40 Eng. Ch. 389. *Compare* Matter of Royal Bank, 4 De G. & Sm. 177, 15 Jur. 28, 20 L. J. Ch. 137; Matter of St. Marylebone Joint-Stock Banking Co., 3 De G. & Sm. 267. Richmond's Case, 3 De G. & Sm. 96, 13 Jur. 727, and Matter of Vale of Neath, etc., Brewery Joint-Stock Co., 1 De G. M. & G. 421, 16 Jur. 343, 21 L. J. Ch. 688, 50 Eng. Ch. 322, were similar decisions with respect to other shareholders in the same company. *Compare* Munt's Case, 22 Beav. 55; Kent *v.* Jackson, 14 Beav. 367, 2 De G. M. & G. 49, 51 Eng. Ch. 36. See too *In re* Agriculturists' Cattle Ins. Co., L. R. 1 Ch. 511; *In re* Agricultural Cattle Ins. Co., L. R. 1 Ch. 161, 8 Jur. N. S. 926, 31 L. J. Ch. 861, 65 Eng. Ch. 442; Houldsworth *v.* Evans, L. R. 3 H. L. 263, 37 L. J. Ch. 800, 19 L. T. Rep. N. S. 211; Evans *v.* Smallcombe, L. R. 3 H. L. 249, 19 L. T. Rep. N. S. 207; Spackman *v.* Evans, L. R. 3 H. L. 171, 37 L. J. Ch. 752, 19 L. T. Rep. N. S. 151; Matter of Agricultural Cattle Ins. Co., 31 Beav. 365 [*affirmed* in 4 De G. F. & J. 566, 8 Jur. N. S. 926, 31 L. J. Ch. 861, 65 Eng. Ch. 442]; Matter of Cameron's Coalbrook Steam Coal, etc., Co., 18 Beav. 339, 5 De G. M. & G. 284, 24 L. J. Ch. 130, 54 Eng. Ch. 226; Richmond's Case, 4 Kay & J. 305, 6 Wkly. Rep. 779.

Valid release.—Release of a subscriber who gave his check for the deposit required by act of parliament, which check under the agreement was never presented to his banker, where the subscriber after the lapse of a year transferred his shares to a third party held to be valid. *In re* Towns' Drainage, etc.,

subscribe, not amounting to fraudulent representations on their part, can be shown in evidence for the purpose of discharging or reducing his liability as a shareholder whether to the corporation or to its creditors.[33]

6. Cancellation of Shares Unlawfully Issued — a. In General. This principle does not extend so far as to prevent the corporation from canceling stock that has been unlawfully issued, as where stock has been issued as a stock dividend, under pretense that the earnings of the corporation justify such a dividend, when such is not the fact.[34]

b. Release of Assumed Shareholder Who Cannot Be Held. On like grounds the obvious distinction must be kept in mind between the case where a shareholder is released who might have been held by the company, and where there is a retirement of supposed shares through the refusal of the supposed shareholder to receive them, when in fact he never agreed to receive them.[35]

c. No Cancellation Although Consideration Subsequently Failed. Although the consideration upon which shares were issued may have subsequently failed, the holder of such shares may not escape liability as a shareholder by returning them to the corporation and accounting for the proceeds.[36]

Utilization Co., L. R. 16 Eq. 104, 42 L. J. Ch. 786, 21 Wkly. Rep. 933.

33. *Alabama.*— Smith *v.* Tallassee Branch Cent. Plank-Road Co., 30 Ala. 650.

Arkansas.— Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443.

Illinois.— Jewell *v.* Rock River Paper Co., 101 Ill. 57; Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129.

Indiana.— Evansville, etc., R. Co. *v.* Posey, 12 Ind. 363.

Maine.— Kennebec, etc., R. Co. *v.* Waters, 34 Me. 369.

Maryland.— Baile *v.* Calvert College, etc., Educational Soc., 47 Md. 117.

Minnesota.— Minneapolis Threshing Mach. Co. *v.* Davis, 40 Minn. 110, 41 N. W. 1026, 12 Am. St. Rep. 701, 3 L. R. A. 796.

Mississippi.— Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

Missouri.— Ollesheimer *v.* Thompson Mfg. Co., 44 Mo. App. 172; Haskell *v.* Sells, 14 Mo. App. 91; Chouteau *v.* Dean, 7 Mo. App. 210; Pickering *v.* Templeton, 2 Mo. App. 424 (invalidity of option to withdraw although subscriber had not signed the articles of association).

Nevada.— Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 7 Pac. 83, 3 Am. St. Rep. 797.

New Hampshire.— White Mountains R. Co. *v.* Eastman, 34 N. H. 124.

North Carolina.— Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539; North Carolina R. Co. *v.* Leach, 49 N. C. 340.

Pennsylvania.— Robinson *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 334, 72 Am. Dec. 792.

South Carolina.— Cheraw, etc., R. Co. *v.* White, 10 S. C. 155 (subscriber signing his name and procuring others to sign also cannot release himself by erasing his name even before the subscription paper has been delivered to the corporation); Greenville, etc., R. Co. *v.* Coleman, 5 Rich. 118.

Tennessee.— Morrow *v.* Nashville Iron, etc., Co., 87 Tenn. 262, 10 S. W. 495, 10 Am. St. Rep. 658, 3 L. R. A. 37; Cunningham *v.* Edgefield, etc., R. Co., 2 Head 22.

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

United States.—Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968.

England.— Mangles *v.* Grand Collier Dock Co., 10 Sim. 519, 16 Eng. Ch. 519.

34. Hollingshead *v.* Woodward, 35 Hun (N. Y.) 410.

35. Lindley Comp. L. (5th ed.) 520, 521 [*citing* Matter of St. George's Steam Packet Co., 3 De G. & Sm. 191, 14 Jur. 826 (*reversed* in 2 Hall & T. 395, 19 L. J. Ch. 353, 2 Macn. & G. 201, 48 Eng. Ch. 156); Matter of St. George's Steam Packet Co., 3 De G. & Sm. 11, 13 Jur. 530, 18 L. J. Ch. 259]. See also *In re* Russian Iron Works Co., L. R. 1 Ch. 574, 12 Jur. N. S. 755, 35 L. J. Ch. 738, 14 L. T. Rep. N. S. 817, 659, 14 Wkly. Rep. 943; *In re* Russian Ironworks Co., L. R. 2 Eq. 741, 14 L. T. Rep. N. S. 728; Downes *v.* Ship, L. R. 3 H. L. 343, 37 L. J. Ch. 642, 19 L. T. Rep. N. S. 74, 17 Wkly. Rep. 34; *In re* Scottish Petroleum Co., 23 Ch. D. 413, 49 L. T. Rep. N. S. 348, 31 Wkly. Rep. 846; *In re* Scottish Petroleum Co., 17 Ch. D. 373, 50 L. J. Ch. 269, 43 L. T. Rep. N. S. 723, 29 Wkly. Rep. 372; Matter of Amazon L. Assur., etc., Co., 8 De G. M. & G. 177, 3 Drew. 409, 4 Wkly. Rep. 420, 57 Eng. Ch. 138; *In re* Joint-stock Co.'s Winding-up Acts, 3 Jur. N. S. 460. *Compare* Hallows *v.* Fernie, L. R. 3 Ch. 467, 18 L. T. Rep. N. S. 340, 16 Wkly. Rep. 873; Smith *v.* Chadwick, 20 Ch. D. 27, 51 L. J. Ch. 597, 46 L. T. Rep. N. S. 702, 30 Wkly. Rep. 661 [*affirmed* in 9 App. Cas. 187, 48 J. P. 644, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687].

36. Jenkins *v.* Bradley, 104 Wis. 540, 80 N. W. 1025. When a person makes a money subscription to a corporation to be expended in the development of its property in certain named ways, and by contract is to receive therefor "stock, bonds or other security,"

d. Cancellation and Right of Shareholder to Rescind Where Subscription Procured by Fraud.[37] It has been held that one who has been induced by the fraudulent representations of the officers and agents of an improvement company as to its financial standing and prospects to purchase shares of its capital stock is entitled to rescind the contract and recover from the company the amount paid thereon, although he paid third parties a premium and bonus to get the stock, when the certificates were issued directly to him by the company, which received the sum paid.[38]

7. Release of Subscription Resting on Conditions Disadvantageous to Corporation. If a subscription depends upon a condition onerous to the corporation, so that the corporation cannot enforce the subscription without putting itself at a disadvantage, it seems that it may release the subscriber, even without the consent of creditors, provided the other shareholders consent, acting in good faith.[39] And a resolution on the part of directors which merely has the effect of reducing or modifying the obligation of the subscriber according to the terms of the condition in his subscription, acquiesced in at the time by all parties, will not, after the lapse of a great length of time, be disturbed.[40]

8. Where Subscriber Has Acquired Legal Right to Release by Reason of Breach of Contract on Part of Corporation. Where the corporation makes a radical departure from the purpose which it was organized to promote, such as, on principles already stated,[41] confers upon dissenting shareholders the legal right to withdraw from the enterprise, it is of course competent for the directors to release them from their subscriptions.[42]

9. Releases Not Disturbed After Considerable Lapse of Time. A lapse of two years in one case, the company being also embarrassed,[43] of seven years in another,[44] of eight years in another,[45] of twelve years in another,[46] and of fifteen years in another[47] have suggested to the judges the inequity of disturbing settlements which, although wrong at the time, could not be righted so as to put the parties *in statu quo*.

10. Release Provable by Acquiescence and by Acts In Pais. The release by a corporation of a subscription for shares may be proved as well by the acquiescence of the shareholders, and by the fact that the corporation did not regard it as binding, as by the records.[48]

11. No Cancellation of Shares Efficacious Without Putting Sharetaker In Statu Quo. An issue of shares by a corporation for the purchase-price of property transferred to it cannot be set aside as fictitious, unless the entire transaction is set aside and canceled and the property returned to the seller.[49] The fact that

as may be determined by the board of directors, and the board subsequently declares that the subscriber, by virtue of scrip issued to him on the payment of such subscription, is entitled to the bonds of the company to the extent of the sum paid in, and that such development fund paid in "is hereby recognized as an indebtedness for which the holder is entitled at once to the principal and interest in money, except where he takes bonds in lieu of money," such subscriber, to the extent of the money paid in, is a creditor of the company, and the legal effect of the contract under this action of the board of directors is that the unpaid portion of the subscription so made is canceled, provided the subscriber does not elect to take therefor the bonds of the company. Barrow *v.* Smith, 109 Ga. 767, 35 S. W. 108.

37. See also *supra*, VI, K, where this subject is considered in detail.

38. McClanahan *v.* Ivanhoe Land, etc., Co., 96 Va. 124, 30 S. E. 450 [*distinguishing* Lewis *v.* Berryville Land, etc., Co., 90 Va. 693, 19 S. E. 781].

39. Nettles *v.* Marco, 33 S. C. 47, 11 S. E. 595.

40. Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

41. See *supra*, I, K, 2, b.

42. Meyer's Case, 16 Beav. 383.

43. Hoeft *v.* Kock, 123 Mich. 171, 81 N. W. 1070, 81 Am. St. Rep. 159.

44. Steacy *v.* Little Rock, etc., R. Co., 22 Fed. Cas. No. 13,329, 5 Dill. 348.

45. Hallett *v.* New England Roller-Grate Co., 105 Fed. 217.

46. Cook *v.* Chittenden, 25 Fed. 544.

47. Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

48. Tulare Sav. Bank *v.* Talbot, 131 Cal. 45, 63 Pac. 172.

49. Smith *v.* Ferries, etc., R. Co., (Cal. 1897) 51 Pac. 710.

the county bonds issued in exchange for corporate shares have been adjudged to be invalid does not authorize a judicial cancellation of the shares without an offer to return the bonds.[50]

12. Effect of Company Taking Shares Back and Reissuing Them. One who surrenders to the corporation shares of stock which have been issued to him as "full paid," but for which nothing in fact was paid, which stock the corporation afterward reissued, for value, to a solvent taker, is not liable to one who becomes a creditor subsequently to the surrender.[51] So obviously the stock of a corporation fully paid for may lawfully be returned to the company, or to a trustee for its benefit, to be sold or donated to subscribers to the corporate bonds, without creating any liability upon the stock on the part of the bondholders.[52]

13. Release by Act of Creditors — a. In General. If, after the retiring of a shareholder from the corporation by the sale of the stock, and due notice thereof as required by the charter, the creditor gives up old notes upon which the shareholder was liable and takes new ones, especially if done for the purpose of absolving him from liability, and imposing it upon his successor in the stock, this operates as a complete release to him both at law and in equity.[53]

b. Release of One Shareholder Does Not Release Others. This is for the reason already stated, that the contract of subscription is several in respect of each subscriber, and not joint.[54]

14. No Release by Reason of Default or Neglect of Commissioners. The subsequent default or neglect of the commissioners appointed to take subscriptions to the shares of a corporation in process of organization, to do some act imposed by the charter, such as to give notice to choose directors, does not operate as a revocation of a subscription.[55]

15. Release by Reason of Refusal of Corporation to Accept Subscription. If the rule already considered[56] is a sound one, that no contract is construed to be a subscription to shares until the other duly authorized body has accepted the subscription, then it must follow that where the corporation has rejected a subscription, not colorably and collusively but in good faith, its assignee in the event of insolvency will not be allowed to disaffirm its action and to compel payment from the subscriber; but his obligation will be deemed to have been extinguished.[57]

16. Release by Reason of Refusing to Sign Articles After Signing Preliminary Contract. One doctrine already considered[58] is that the subscription to a preliminary agreement to form a corporation is merely tentative and not binding, and that until the articles are signed or the corporation is formed there is a *locus pœnitentiæ*.[59] The other doctrine is that, after the subscriber signs the preliminary paper and others also sign, he is bound to them and they are bound to him, and he cannot escape the obligation of his contract by refusing to sign the final paper.[60]

50. Perry County *v.* Stebbins, 66 Ill. App. 427.

51. Johnson *v.* Lullman, 15 Mo. App. 55 [*affirmed* in 88 Mo. 567]; Erskine *v.* Peck, 13 Mo. App. 280 [*affirmed* in 83 Mo. 465].

52. Davis *v.* Montgomery Furnace, etc., Co., (Ala. 1890) 8 So. 496. The supreme court of Illinois has held that where corporate stock has been subscribed for but not taken up, is afterward transferred to the company, and is by the company sold to a third person at less than its face value as "treasury stock," the original subscribers are liable for the difference between what the corporation actually obtained for it and its face value. Alling *v.* Wenzel, 133 Ill. 264; s. c. *sub nom.* Alling *v.* Ward, 133 Ill. 264, 24 N. E. 551. *Compare* Cartwright *v.* Dickinson, 88 Tenn. 476, 12 S. W. 1030, 17 Am. St. Rep. 910, 7 L. R. A. 706.

53. New England Commercial Bank *v.* Newport, 6 R. I. 154, 75 Am. Dec. 688.

54. Poughkeepsie Bank *v.* Ibbotson, 5 Hill (N. Y.) 461. *Compare* Robinson *v.* Bealle, 20 Ga. 275.

55. Union Turnpike Road Co. *v.* Jenkins, 1 Cai. (N. Y.) 381.

56. See *supra*, VI, H, 5.

57. Potts *v.* Wallace, 32 Fed. 272.

58. See *supra*, VI, H, 6, a *et seq.*

59. Gleaves *v.* Brick Church Turnpike Co., 1 Sneed (Tenn.) 491.

60. *Illinois.*— Griswold *v.* Peoria University, 26 Ill. 41, 79 Am. Dec. 361.

Indiana.— Johnson *v.* Wabash, etc., Plank Road Co., 16 Ind. 389.

17. Release by Reason of Erasure of Subscriber's Name Before Subscription Delivered. If the agent has authority to receive the subscription, then the signing in a book or upon a paper in his possession is tantamount to a delivery; and hence a subsequent erasure does not prevent a suit to charge the party as a subscriber, but merely lets in parol evidence in explanation of the circumstances.[61] The authority of the agent to receive the subscription is exhausted when he receives it; and hence a subsequent notice to him by the subscriber is a mere nullity.[62] But if the agent has no authority to receive the subscription, a delivery of it to him is not a delivery of it to the company, but is a mere declaration by the subscriber of his purpose, made to a mere stranger, or perhaps a mere committal of his proposition to a stranger for delivery to the other contracting party; he may therefore revoke it and discharge himself of all obligation under it before it is handed to the company and accepted by it.[63]

18. Whether Release of One Subscriber Is Release of Others. There is some authority for the proposition that the release by the corporation of one subscriber is a release of all the others, since each is presumed to have subscribed on the faith of the others being bound;[64] but the proposition will not bear any examination, since it would result that a release of one subscriber would put an end to the corporation.[65] As each subscription is special and as the subscriptions are not joint, it seems a reasonable conclusion that the release of one subscriber, although on invalid grounds, does not at all operate to release any of the others.[66]

19. Release of Subscribers by Collusive Forfeiture of Shares. With respect to the release of subscribers by a collusive forfeiture of shares the general rule is,[67]

Massachusetts.— Bryant *v.* Goodnow, 5 Pick. 228; Farmington Academy *v.* Allen, 14 Mass. 172, 7 Am. Dec. 201.

Michigan.— Underwood *v.* Waldron, 12 Mich. 73.

Missouri.— Swain *v.* Hill, 30 Mo. App. 436; Haskell *v.* Sells, 14 Mo. App. 91; New Lindell Hotel Co. *v.* Smith, 13 Mo. App. 7.

New York.— Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. 157; Stanton *v.* Wilson, 2 Hill 153.

Pennsylvania.—Shober *v.* Lancaster County Park Assoc., 68 Pa. St. 429; Edinboro Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421.

England.— That the English doctrine is the same see *In re* Robinson, etc., Brewery Co., L. R. 13 Eq. 228; *Re* Imperial Land Co., 40 L. J. Ch. 180, 23 L. T. Rep. N. S. 838.

61. Johnson *v.* Wabash, etc., Plank-Road Co., 16 Ind. 389.

62. Lowe *v.* Edgefield, etc., R. Co., 1 Head (Tenn.) 659.

63. Lowe *v.* Edgefield, etc., R. Co., 1 Head (Tenn.) 659. *Compare* Lancaster *v.* Elliott, 28 Mo. App. 86. No defense to an action for a call that the name of one of the subscribers was erased where it was fairly inferable that it was done in good faith and with the consent of all the directors. Rensselaer, etc., Plank Road Co. *v.* Wetsel, 21 Barb. (N. Y.) 56.

A compromise decree making an offer or promise of settlement to all alike who are liable as holders of the stock of an insolvent corporation does not release those who do not accept it from their liability as shareholders. Hambleton *v.* Glenn, 72 Md. 331, 20 Atl. 115.

64. Rutz *v.* Esler, etc., Mfg. Co., 3 Ill. App. 83; Crawford County *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 141 (the managers released the other subscribers before they procured the subscription in controversy, which was a municipal subscription); McCully *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 25.

65. Macon, etc., R. Co. *v.* Vason, 57 Ga. 314.

66. Maine Mut. Mar. Ins. Co. *v.* Neal, 50 Me. 301, cancellation of premium notes in a mutual insurance company.

Release of a mere nominal subscription does not release other subscribers. Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240.

67. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

Connecticut.—Mann *v.* Cooke, 20 Conn. 178; Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Kentucky.— Gratz *v.* Redd, 4 B. Mon. 178; Instone *v.* Frankfort Bridge Co., 2 Bibb 576, 5 Am. Dec. 638.

Mississippi.— Freeman *v.* Winchester, 10 Sm. & M. 577.

New York.— Rensselaer, etc., Plank Road Co. *v.* Barton, 16 N. Y. 457 note; Troy, etc., R. Co. *v.* Kerr, 17 Barb. 581; Northern R. Co. *v.* Miller, 10 Barb. 260; Mann *v.* Currie, 2 Barb. 294; McDonough *v.* Phelps, 15 How. Pr. 372; Troy Turnpike, etc., Co. *v.* McChesney, 21 Wend. 296; Herkimer Mfg., etc., Co. *v.* Small, 21 Wend. 273; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459; Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Sagory *v.* Dubois, 3 Sandf. Ch. 466.

although there is some authority to the contrary,[68] that where a corporation possesses the power to forfeit the shares of its members for non-payment of assessments, this is merely a cumulative remedy against the shareholders, and that the existence of the right to forfeit their shares, without its exercise, does not deprive the company of the power to maintain actions against them to recover whatever is due from them on their contracts of subscription. In such cases the corporation has an election between two remedies: It may either declare a forfeiture, or it may bring an action for the amount due. If it declares a forfeiture, and the charter, governing statute, or constating instrument does not otherwise provide, the relation between the shareholder and the corporation is thereby terminated[69] and his contract of subscription is canceled; and neither the corporation[70] nor its creditors[71] can proceed against him for the remaining instalments, which would, but for the forfeiture, be due under his contract.[72] It is obvious that the courts will not permit a power so necessary to the successful existence of corporations to be turned into an instrument for their destruction in the event of their becoming embarrassed. Moreover, when we recur to the doctrine that the

North Carolina.— Tar River Nav. Co. *v.* Neal, 10 N. C. 520.

Tennessee.— Stokes *v.* Lebanon, etc., Turnpike Co., 6 Humphr. 241.

See also *infra*, VI, O, 2, a, (I) *et seq.*

68. *Maine.*— South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547.

Massachusetts.— Salem Mill Dam Corp. *v.* Ropes, 6 Pick. 23; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128; New Bedford, etc., Turnpike Corp. *v.* Adams, 8 Mass. 138, 5 Am. Dec. 81; Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39.

Mississippi.— Smith *v.* Natchez Steamboat Co., 1 How. 479.

New Hampshire.— New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300; Franklin Glass Co. *v.* Alexander, 2 N. H. 380, 9 Am. Dec. 92.

New York.—Townsend *v.* Goewey, 19 Wend. 424, 32 Am. Dec. 514; Dutchess Cotton Manufactory Co. *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459.

See also *infra*, VI, O, 2, b.

69. As under the railway acts of Massachusetts (Mass. Rev. Stat. (1836), c. 39, § 53; Mass Gen. Stat. (1860), c. 63, § 9). See Troy, etc., R. Co. *v.* Newton, 1 Gray (Mass.) 544; Lexington, etc., R. Co. *v.* Chandler, 13 Metc. (Mass.) 311.

70. Mechanics' Foundry, etc., Co. *v.* Hall, 121 Mass. 272; Cutler *v.* Middlesex Factory Co., 14 Pick. (Mass.) 483; Ripley *v.* Sampson, 10 Pick. (Mass.) 371; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128; Franklin Glass Co. *v.* White, 14 Mass. 286; Andover, etc., Turnpike Co. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Small *v.* Herkimer Mfg., etc., Co., 2 N. Y. 330 [*overruling* 2 Hill (N. Y.) 127, 21 Wend. (N. Y.) 273]; Ashton *v.* Burbank, 2 Fed. Cas. No. 582, 2 Dill. 435; *In re* Financial Corp., L. R. 2 Ch. 714, 719, 731; *In re* Hallenbeagle Min. Co., L. R. 2 Ch. 321, 36 L. J. Ch. 317, 15 L. T. Rep. N. S. 546, 15 Wkly. Rep. 294.

71. Allen *v.* Montgomery R. Co., 11 Ala. 437; Macauly *v.* Robinson, 18 La. Ann. 619; Mills *v.* Stewart, 41 N. Y. 384, Hunt, C. J., and Woodruff, J., dissenting [*affirming* 62 Barb. (N. Y.) 444].

72. The rule that a forfeiture of shares terminates a shareholder's liability to creditors has been carried so far, in New York, as to hold that after forfeiture a shareholder is not liable for debts contracted while he was a shareholder. Mills *v.* Stewart, 41 N. Y. 384.

That a similar rule obtains under the English Joint-Stock Companies Act and under the Companies Act of 1862 see *In re* Oriental Commercial Bank, L. R. 7 Ch. 200, 41 L. J. Ch. 11, 25 L. T. Rep. N. S. 443, 20 Wkly. Rep. 25; *In re* Blakely Ordnance Co., L. R. 6 Ch. 800, 40 L. J. Ch. 497, 25 L. T. Rep. N. S. 47, 19 Wkly. Rep. 687; *In re* Accidental, etc., Ins. Corp., L. R. 5 Ch. 428, 39 L. J. Ch. 585, 23 L. T. Rep. N. S. 223, 18 Wkly. Rep. 717; *In re* Blakely Ordnance Co., L. R. 5 Ch. 63, 39 L. J. Ch. 124, 21 L. T. Rep. N. S. 572, 18 Wkly. Rep. 103; *In re* Natal Invest. Co., L. R. 5 Ch. 22, 21 L. T. Rep. N. S. 445, 18 Wkly. Rep. 30; *In re* Accidental, etc., Ins. Corp., L. R. 4 Ch. 266, 38 L. J. Ch. 201, 19 L. T. Rep. N. S. 624, 17 Wkly. Rep. 216; *In re* Barned's Banking Co., L. R. 3 Ch. 161, 37 L. J. Ch. 87, 17 L. T. Rep. N. S. 305, 16 Wkly. Rep. 113 [*affirming* L. R. 4 Eq. 458]; *In re* Cobre Copper Mine Co., L. R. 9 Eq. 107, 39 L. J. Ch. 231, 18 Wkly. Rep. 371; *In re* China Steamship Co., L. R. 6 Eq. 232, 37 L. J. Ch. 901, 16 Wkly. Rep. 995; *In re* Contract Corp., L. R. 6 Eq. 17, 37 L. J. Ch. 617; *In re* Blakely Ordnance Co., L. R. 4 Eq. 135, 36 L. J. Ch. 665, 16 L. T. Rep. N. S. 472; Webb *v.* Whiffin, L. R. 5 H. L. 711, 42 L. J. Ch. 161; *In re* European Assur. Soc., 3 Ch. D. 388, 46 L. J. Ch. 411, 35 L. T. Rep. N. S. 654, 25 Wkly. Rep. 279; Matter of Joint-Stock Co.'s Winding-up Acts, 4 De G. & J. 437, 5 Jur. N. S. 853, 28 L. J. Ch. 721, 3 L. T. Rep. N. S. 294, 7 Wkly. Rep. 645, 61 Eng. Ch. 344; Matter of Kollman's R. Locomotive, etc., Imp. Co., 2 Hall & T. 388, 14 Jur. 655, 19 L. J. Ch. 332, 2 Macn. & G. 197, 48 Eng. Ch. 152; Thompson Stockh. § 97.

capital stock of a corporation is a trust fund for the payment of its creditors,[73] it becomes clear that these courts will not permit this fund to be frittered away by collusive forfeitures of shares made by the directors while the company is in failing circumstances, and with the view of enabling the favored shareholders to escape from liability to the company's creditors. The American books abound in the strongest expressions of opinion upon the principle which governs this subject,[74] and the English courts unite with ours in holding that a collusive forfeiture of shares made by a corporation when in a condition of insolvency or of impaired credit will not release the shareholders in the event of the company being wound up.[75] Such arrangements, in the view of the American courts, are void as to creditors,[76] unless the creditors assent to them.[77]

20. Bona Fide Compromises With Shareholders Are Valid. This doctrine does not extend so far as to annul a *bona fide* compromise of a question fairly in dispute, made between a corporation and one whom it claims to hold liable as a shareholder,[78] or a compromise which becomes necessary to save the company

73. See *infra*, VI, M, 1, b, (I).

74. Mann *v.* Cooke, 20 Conn. 178; Mills *v.* Stewart, 41 N. Y. 384; Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203; Putnam *v.* New Albany, etc., R. Co., 16 Wall. (U. S.) 290, 21 L. ed. 361.

75. *In re* Agricultural Cattle Ins. Co., L. R. 1 Ch. 161, 12 Jur. N. S. 79, 35 L. J. Ch. 296, 14 L. T. Rep. N. S. 468, 14 Wkly. Rep. 266 [*overruling* it seems Matter of Agricultural Cattle Ins. Co., 4 De G. F. & J. 566, 8 Jur. N. S. 926, 31 L. J. Ch. 861, 7 L. T. Rep. N. S. 142, 10 Wkly. Rep. 852, 65 Eng. Ch. 442]; Spackman *v.* Evans, L. R. 3 H. L. 171, 37 L. J. Ch. 752, 19 L. T. Rep. N. S. 151 [*affirming* 11 Jur. N. S. 207, 34 L. J. Ch. 321, 12 L. T. Rep. N. S. 130, 13 Wkly. Rep. 479]; Richmond's Case, 4 Kay & J. 305, 6 Wkly. Rep. 779. And see *In re* Agriculturists' Cattle Ins. Co., L. R. 1 Ch. 511; *In re* London, etc., Starch Co., L. R. 6 Eq. 77, 18 L. T. Rep. N. S. 283, 16 Wkly. Rep. 751; Matter of Vale of Neath, etc., Brewery Co., 3 De G. & Sm. 244.

As to what amounts to a valid forfeiture or release of a shareholder under the English Companies Act of 1862 see in addition to the foregoing *In re* United Service Co., L. R. 5 Ch. 707, 39 L. J. Ch. 730, 23 L. T. Rep. N. S. 331, 18 Wkly. Rep. 1058; *In re* Natal Invest. Co., L. R. 5 Ch. 22, 21 L. T. Rep. N. S. 445, 18 Wkly. Rep. 30. A clause in the deed of settlement of a joint-stock company to the effect that, in all cases not provided for by that or any supplemental deed of settlement, the directors may act in such a manner as to promote the interests and welfare of the retiring company has been held not to enable the directors to cancel the shares of a retiring director, so as to exempt him from future responsibility as a contributory. Matter of St. Marylebone Joint-Stock Banking Co., 3 De G. & Sm. 198, 14 Jur. 610, 19 L. J. Ch. 389.

76. Mann *v.* Cooke, 20 Conn. 178; Pickering *v.* Templeton, 2 Mo. App. 424; Mills *v.* Stewart, 41 N. Y. 384; Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203; Putnam *v.* New Albany, etc., R. Co., 16 Wall. (U. S.) 390, 21 L. ed. 361; Upton *v.* Hansbrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417.

77. Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

For a distinctive doctrine in the English courts on the subject of the release of shareholders by forfeiture of their shares see 2 Thompson Corp. § 1552; Thompson Stockh. § 196 *et seq.* The following cases were there examined: *In re* London, etc., Bank, L. R. 7 Ch. 55, 41 L. J. Ch. 1, 25 L. T. Rep. N. S. 471, 20 Wkly. Rep. 45; *In re* Agriculturist Cattle Ins. Co., L. R. 5 Ch. 79; *In re* Blakely Ordnance Co., L. R. 3 Ch. 412, 37 L. J. Ch. 230, 17 L. T. Rep. N. S. 554, 16 Wkly. Rep. 322; *In re* Agriculturist Cattle Ins. Co., L. R. 1 Ch. 161, 12 Jur. N. S. 79, 35 L. J. Ch. 296, 14 L. T. Rep. N. S. 468, 14 Wkly. Rep. 266; *In re* Cobre Copper Mine Co., L. R. 9 Eq. 107, 39 L. J. Ch. 231, 18 Wkly. Rep. 371; *In re* China Steamship Co., L. R. 6 Eq. 232, 37 L. J. Ch. 901, 16 Wkly. Rep. 995; *In re* East Konsberg Co., L. R. 1 Eq. 309; Evans *v.* Smallcombe, L. R. 3 H. L. 249, 19 L. T. Rep. N. S. 207; Spackman *v.* Evans, L. R. 3 H. L. 171, 37 L. J. Ch. 752, 19 L. T. Rep. N. S. 151; *Ex p.* Warkworth Dock Co., 18 Beav. 629; Moore *v.* Rawlins, 6 C. B. N. S. 289, 28 L. J. C. P. 247, 95 E. C. L. 289; Matter of Joint-Stock Co.'s Winding-up Acts, 4 De G. & J. 437, 5 Jur. N. S. 853, 28 L. J. Ch. 721, 3 L. T. Rep. N. S. 294, 7 Wkly. Rep. 645, 61 Eng. Ch. 344; Matter of Agriculturist Cattle Ins. Co., 3 De G. J. & S. 41, 11 Jur. N. S. 572, 34 L. J. Ch. 503, 12 L. T. Rep. N. S. 595, 13 Wkly. Rep. 849, 68 Eng. Ch. 32; Matter of St. Marylebone Joint-stock Banking Co., 3 De G. & Sm. 198, 14 Jur. 610, 19 L. J. Ch. 389; Matter of Kollman's R. Locomotive, etc., Imp. Co., Hall & T. 388, 14 Jur. 655, 19 L. J. Ch. 332, 2 Macn. & G. 197, 48 Eng. Ch. 152; Martin's Case, 2 Hem. & M. 669; Holt's Case, 1 Sim. N. S. 389, 40 Eng. Ch. 389.

That the liquidators cannot cancel valid forfeitures made by the directors see *In re* China Steamship Co., L. R. 6 Eq. 232, 37 L. J. Ch. 901, 16 Wkly. Rep. 995.

78. Whitaker *v.* Grummond, 68 Mich. 249, 36 N. W. 62; Dixon *v.* Evans, L. R. 5 H. L.

from hopeless embarrassment,[79] assuming of course that the directors are vested with this power. But it is necessary to the operation of this principle that there should be something to compromise — that there should be at least a *bona fide* dispute.[80] Accordingly it was deemed no argument to support the validity of a collusive forfeiture that the deed of settlement authorized the board of directors to compromise disputed claims; or that the other shareholders, having access to the books, might have known it, and must be deemed, after a lapse of considerable time, to have assented to it.[81]

21. Other Facts and Conditions Which Do Not Operate to Release. It has been held that a subscriber to the shares of a corporation will not be released from his contract by reason of the fact that other subscribers have not paid their subscriptions in full;[82] that the managing officers of the corporation have mismanaged its affairs, or committed breaches of their trust in a given particular;[83] that the subscriber was released from the obligation of his subscription, the rights of creditors not being involved;[84] that the promoters secured a subscription to the capital stock of the proposed company in excess of the prescribed amount, it not appearing that defendant's stock was a part of the alleged excess;[85] or that the directors passed a resolution to declare the shares of the subscriber forfeited for non-payment of his subscription at the end of thirty days, no further action to forfeit the shares having been taken.[86]

M. Payment For Shares — 1. In General — a. General Rule That Shares Can Be Issued Only at Full Value — (i) *Statement of Rule.* Unless the governing statute otherwise provides, the general rule is that a corporation or those acting in its behalf cannot issue its shares in the first instance at a discount, or except upon an agreement that they shall be paid for at their full value.[87] Under

606, 42 L. J. Ch. 139 [*reversing* L. R. 5 Ch. 79]; *In re* Norwich Provident Ins. Soc., 8 Ch. D. 334, 47 L. J. Ch. 601, 38 L. T. Rep. N. S. 267, 26 Wkly. Rep. 441; Matter of Agriculturist Cattle Ins. Co., 3 De G. J. & S. 41, 11 Jur. N. S. 572, 34 L. J. Ch. 503, 12 L. T. Rep. N. S. 595, 13 Wkly. Rep. 849, 68 Eng. Ch. 32. See also *In re* London, etc., Bank, L. R. 7 Ch. 55, 41 L. J. Ch. 1, 25 L. T. Rep. N. S. 471, 20 Wkly. Rep. 45 [*reversing* L. R. 12 Eq. 331]; *In re* Canadian Native Oil Co., L. R. 5 Eq. 118, 37 L. J. Ch. 257.

79. New Albany *v.* Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155.

80. *In re* Agriculturist Cattle Ins. Co., L. R. 5 Ch. 79 [*reversed* on other grounds in L. R. 5. H. L. 606, 42 L. J. Ch. 139]; Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43, 25 L. T. Rep. N. S. 636; *In re* United Ports Co., L. R. 13 Eq. 474, 41 L. J. Ch. 270, 26 L. T. Rep. N. S. 124, 20 Wkly. Rep. 356; Spackman *v.* Evans, L. R. 3 H. L. 171, 188, 231, 37 L. J. Ch. 752, 19 L. T. Rep. N. S. 151; Livingstone *v.* Temperance Colonization Soc., 17 Ont. App. 379. *Compare In re* London, etc., Bank, L. R. 7 Ch. 55, 41 L. J. Ch. 1, 25 L. T. Rep. N. S. 471, 20 Wkly. Rep. 45.

81. *In re* Agriculturist Cattle Ins. Co., L. R. 1 Ch. 161, 12 Jur. N. S. 79, 35 L. J. Ch. 296, 14 L. T. Rep. N. S. 468, 14 Wkly. Rep. 266.

Valid cancellation of shares upheld, although made on invalid grounds. *In re* London, etc., Bank, L. R. 7 Ch. 55, 41 L. J. Ch. 1, 25 L. T. Rep. N. S. 471, 20 Wkly. Rep. 45 [*distinguishing* Martin's Case, 2 Hem. & M. 669].

Municipal subscription to railway shares discharged in bonds, bonds afterward repurchased at a reduction, and transaction upheld. New Albany *v.* Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155.

Surrendering shares in land company in exchange for lands. Franco-Texan Land Co. *v.* Bousselet, 70 Tex. 422, 7 S. W. 761.

82. Cook *v.* Hopkinsville, etc., Turnpike Road Co., 32 S. W. 748, 17 Ky. L. Rep. 839.

83. Hards *v.* Platte Valley Imp. Co., 46 Nebr. 709, 65 N. W. 781.

84. Kesner *v.* World's Fair Hippodrome, etc., Co., 62 Ill. App. 89; Stone *v.* Vandalia Coal, etc., Co., 59 Ill. App. 536; United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Suppl. 906.

85. Shick *v.* Citizens' Enterprise Co., 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep. 230.

86. Hays *v.* Franklin County Lumber Co., 35 Nebr. 511, 53 N. W. 381. See also Cook *v.* Hopkinsville, etc., Turnpike Road Co., 32 S. W. 748, 17 Ky. L. Rep. 839 (subscription to shares of a turnpike road company); Philadelphia, etc., R. Co. *v.* Conway, 177 Pa. St. 364, 35 Atl. 716 (subscription to the shares of a railway company).

87. Williams *v.* Evans, 87 Ala. 725, 6 So. 702, 6 L. R. A. 218; Kehlor *v.* Lademann, 11 Mo. App. 550; Chouteau *v.* Dean, 7 Mo. App. 210; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203. *Compare* New Orleans, etc., R. Co. *v.* Frank, 39 La. Ann. 707, 2 So. 310; McDaniel *v.* Harvey, 51 Mo. App. 198 (directors of reorganized banking corporation cannot receive in payment of their share sub-

the operation of this rule any scheme by which shares are to be issued at a percentage of their par value is, in the absence of a statute sanctioning it, *ultra vires*, and not enforceable.[88]

(II) *Directors Have No Power to Fix Price of Shares at Less Than Face Value.* The foregoing proposition necessarily includes the further proposition that the directors of a corporation, unless thereto authorized by charter or statute, have no power to fix the price of shares at less than their face value, and to issue them at such reduced price.[89]

(III) *Such Contracts Not Aided in Equity.* Contracts to issue shares at less than their par value, being *ultra vires* the directors and fraudulent in law, will not, in the absence of facts creating an estoppel, be aided in equity by a decree for specific performance, while they remain executory,[90] especially where the consideration is positively illegal.[91]

(IV) *Shareholders Liable to Make Up Difference in Favor of Creditors of Corporation.* The effect of this rule is that shareholders who purchase their shares from the company at less than their par value will in the event of its insolvency be liable to make good to its creditors the difference between its par value and the price at which it was issued to them.[92] They must then pay, for the benefit of the creditors, any balances on account of shares subscribed for or purchased by them which have not been paid up in good faith, in money or in money's worth.[93]

b. Effect of American Doctrine That Assets of Corporation Are Trust Fund For Its Creditors — (I) *Statement of Doctrine.* A doctrine of the American courts, slowly becoming obsolete, invented by Mr. Justice Story,[94] is that the assets of a corporation are a trust fund for the payment of its creditors, who have an equitable lien or charge upon it, superior to that of the shareholders,[95] and

scriptions the certificates of old shares in the old insolvent corporation which have no money value); Welton *v.* Saffery, [1897] A. C. 299, 66 L. J. Ch. 362, 76 L. T. Rep. N. S. 505, 45 Wkly. Rep. 508.

In England it cannot do this even for the limited purpose of adjusting the rights of contributories among themselves, after the claims of creditors and the cost of winding-up have been satisfied. Welton *v.* Saffery, [1897] A. C. 299, 66 L. J. Ch. 362, 76 L. T. Rep. N. S. 505, 45 Wkly. Rep. 508.

The rule of the text applies to original corporators as well as to subsequent subscribers, and the stock which remains unsold is to be held as security for creditors. Cole *v.* Adams, 19 Tex. Civ. App. 507, 40 S. W. 1052.

88. Zelaya Min. Co. *v.* Meyer, 8 N. Y. Suppl. 487, 28 N. Y. St. 759; Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 1 Biss. 246.

Promoters, being trustees for the corporation which they are creating, cannot issue shares to themselves except upon an agreement for full payment. Dunn *v.* Howe, 96 Fed. 160.

89. Chouteau *v.* Dean, 7 Mo. App. 210; Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 513; Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 1 Biss. 246.

Power construed.— A power conferred by charter upon directors to sell "notes, bonds, scrip, and certificates for the payment of money or property," etc., confers no power upon them to issue shares of the corporation at less than par. Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 1 Biss. 246.

90. Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 1 Biss. 246.

91. Le Warne *v.* Meyer, 38 Fed. 191, shares issued in the purchase of lottery privileges.

92. Kehlor *v.* Lademann, 11 Mo. App. 550; Chouteau *v.* Dean, 7 Mo. App. 210.

93. *Illinois.*— Bates *v.* Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521 [*following* Great Western Tel. Co. *v.* Gray, 122 Ill. 630, 14 N. E. 214].

Iowa.— Osgood *v.* King, 42 Iowa 478.

Maine.—McAvity *v.* Lincoln Pulp, etc., Co., 82 Me. 504, 20 Atl. 82.

Montana.—Kelly *v.* Clark, 21 Mont. 291, 53 Pac. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621.

New York.— Boynton *v.* Hatch, 47 N. Y. 225; Thurston *v.* Duffy, 38 Hun 327.

Pennsylvania.— Bailey *v.* Pittsburgh, etc., Gas Coal, etc., Co., 69 Pa. St. 334.

Wisconsin.— Jenkins *v.* Bradley, 104 Wis. 540, 80 N. W. 1025; Gogebic Invest. Co. *v.* Iron Chief Min. Co., 78 Wis. 427, 47 N. W. 726, 23 Am. St. Rep. 417.

United States.—Hawley *v.* Upton, 102 U. S. 314, 26 L. ed. 179; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

94. Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308.

95. *Alabama.*— Curry *v.* Woodward, 53 Ala. 371; Smith *v.* Huckabee, 53 Ala. 191; St. Marys Bank *v.* St. John, 25 Ala. 566; Paschall *v.* Whitsett, 11 Ala. 472; Allen *v.* Montgomery R. Co., 11 Ala. 437.

Georgia.— Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Robison *v.* Carey,

that the directors of a corporation are consequently in a sense trustees for its creditors.[96]

(II) *Of What This Trust Fund Consists.* The capital stock of a corporation, which is subject to the operation of this principle, consists of all the stock which the members have subscribed.[97] This is deemed to consist of three funds: (1) Money which has been subscribed and paid in. (2) Money thus subscribed but not paid in.[98] (3) Money thus subscribed, but afterward improperly divided among the members, leaving the debts of the corporation unpaid.[99] Stated in another way the capital stock of a corporation in the eye of an American court of equity is the stake or pledge upon which the company obtains credit. If any member has not paid his share of it into the common treasury he is deemed to hold so much of a fund in his pocket, upon which the creditors of the concern have an equitable charge or lien, and a court of equity will lay hold of him and compel him to surrender up this fund for the benefit of such creditors.[100]

(III) *Doctrine Makes Shareholders Constructive Trustees For Creditors.* It is a necessary part of this doctrine that shareholders who have

8 Ga. 527; Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Illinois.— Tarbell *v.* Page, 24 Ill. 46.

Massachusetts.— Baker *v.* Atlas Bank, 9 Metc. 182; Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505.

Mississippi.— Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74.

New York.— Mann *v.* Pentz, 3 N. Y. 415; Hurd *v.* Tallman, 60 Barb. 272; Tinkham *v.* Borst, 31 Barb. 407; Briggs *v.* Penniman, 8 Cow. 387, 18 Am. Dec. 454; Slee *v.* Bloom, 19 Johns. 456, 10 Am. Dec. 273.

Ohio.— Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187; Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273, 13 Ohio 197.

Vermont.— Bassett *v.* St. Albans Hotel Co., 47 Vt. 313.

Wisconsin.— Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

United States.— Sawyer *v.* Hoag, 17 Wall. 610, 21 L. ed. 731; Putnam *v.* New Albany, etc., R. Co., 16 Wall. 390, 21 L. ed. 361; New Albany *v.* Burke, 11 Wall. 96, 20 L. ed. 155; Ogilvie *v.* Knox Ins. Co., 22 How. 380, 16 L. ed. 349; Curran *v.* Arkansas, 15 How. 304, 14 L. ed. 705; Mumma *v.* Potomac Co., 8 Pet. 286, 8 L. ed. 945; Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,122, 1 Woods 467; Payson *v.* Stoever, 19 Fed. Cas. No. 10,863, 2 Dill. 431; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308.

See also Story Eq. Jur. § 1252.

96. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121; Leffman *v.* Flanigan, 5 Phila. (Pa.) 155, 20 Leg. Int. (Pa.) 148; Maisch *v.* Saving Fund, 5 Phila. (Pa.) 30, 19 Leg. Int. (Pa.) 140. See also St. Marys Bank *v.* St. John, 25 Ala. 566; Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; Gratz *v.* Redd, 4 B. Mon. (Ky.) 178.

This doctrine is not found in the modern English books and was denied in one English case. *In re* Wincham Shipbuilding, etc., Co., 9 Ch. D. 322, 38 L. T. Rep. N. S. 659, 26 Wkly. Rep. 823.

The object of the English Winding-Up Act of 1848 was said to be to produce equality among shareholders. *Ex p.* Workworth Dock Co., 18 Beav. 629. And even under the Companies Act (1862), which was framed with the view of winding-up companies for the benefit of creditors as well as for that of shareholders the social rights of the shareholders seem to have been looked to by the judges quite as much as those of the creditors. Spackman *v.* Evans, L. R. 3 H. L. 171, 37 L. J. Ch. 752, 19 L. T. Rep. N. S. 151.

97. *Alabama.*— Allen *v.* Montgomery R. Co., 11 Ala. 437.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Mississippi.— Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74.

New York.— Mann *v.* Pentz, 3 N. Y. 415; Briggs *v.* Penniman, 8 Cow. 387, 18 Am. Dec. 454; Slee *v.* Bloom, 19 Johns. 456, 10 Am. Dec. 273.

Wisconsin.— Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

United States.— Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308.

98. *Alabama.*— Allen *v.* Montgomery R. Co., 11 Ala. 437.

Connecticut.— Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Massachusetts.—Spear *v.* Grant, 16 Mass. 9.

Mississippi.— Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74.

New York.— Mann *v.* Pentz, 3 N. Y. 415; Briggs *v.* Penniman, 8 Cow. 387, 18 Am. Dec. 454; Slee *v.* Bloom, 19 Johns. 456, 10 Am. Dec. 273.

Ohio.— Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187.

Vermont.— Bassett *v.* St. Albans Hotel Co., 47 Vt. 313.

United States.— Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220.

99. Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Lewis *v.* Robertson, 13 Sm. & M. (Miss.) 558; Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308.

100. Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

not paid in all that they have subscribed of the capital stock of the company are, as to so much as they still retain, constructive trustees for the creditors of the corporation. But some of the American courts have gone further and held that they are express trustees for such creditors, and that this trust is of that fiduciary character which prevents the running of the statute of limitations in favor of the shareholders and against the creditors, until the corporation itself dissolves or ceases business.[101]

(IV) *Corporation Cannot Transmute Trust Fund Into Ordinary Debt.* In so far as this trust fund consists of capital subscribed for but not paid in, the corporation cannot transmute it into an ordinary debt by a simulated payment, whereby the subscriber gives his check to the company for the full amount of his subscription, and receives back the check of the company for a portion of it as a pretended loan, thus creating a debt which, if the operation is effectual, ceases to be a trust fund to which creditors can look and becomes assets with which the directors may deal as they choose.[102]

(V) *Corporation Cannot Release Members From Paying For Shares* — (A) *In General.* In the view of most American courts whoever subscribes to an unconditional agreement to take shares becomes liable to pay for them, subject to the conditions named in the subscription paper, and to those imposed by the charter or by the general law.[103] As already seen[104] this obligation of payment cannot be released by the corporation without the sanction of express law so as to impair the security of creditors.

(B) *Cannot Agree That Unpaid Shares Shall Be Deemed Fully Paid Up.* Among the many devices which have been resorted to by the members of corporations to escape the liability assumed by their contracts of subscriptions, perhaps the most common and at the same time the most shallow and ineffective has been for the members to agree among themselves that their shares shall be deemed to be "fully paid up," when in fact they have not been so paid.[1] Even in England, where these questions are generally considered solely with reference to the rights

101. Curry *v.* Woodward, 53 Ala. 371, 376. The supreme court of Georgia declares it to be "a direct trust, purely technical, not cognizable at law, but falling within the proper, peculiar, and exclusive jurisdiction of a Court of Equity; and, consequently, one not subject to the presumption of satisfaction or payment or waiver." Hightower *v.* Thornton, 8 Ga. 486, 502, 52 Am. Dec. 412. In the high court of errors and appeals of Mississippi it was said to be "a continuing, subsisting trust and confidence to which the statute of limitations has no application." Payne *v.* Bullard, 23 Miss. 88, 90, 55 Am. Dec. 74. See also Allibone *v.* Hager, 46 Pa. St. 48, in which case the question arose under a statute.

102. Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731.

103. *Alabama.*— Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

Connecticut.—Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499.

Illinois.— Klein *v.* Alton, etc., R. Co., 13 Ill. 514; Banet *v.* Alton, etc., R. Co., 13 Ill. 504.

Kentucky.— Fry *v.* Lexington, etc., R. Co., 2 Metc. 314.

Maine.— Kennebec, etc., R. Co. *v.* Palmer, 34 Me. 366.

Massachusetts.— Brigham *v.* Mead, 10 Allen 245.

Missouri.— Pickering *v.* Templeton, 2 Mo. App. 424.

New York.—Dayton *v.* Borst, 31 N. Y. 435; Seymour *v.* Sturgess, 26 N. Y. 134; Burr *v.* Wilcox, 22 N. Y. 551; Rensselaer, etc., Plank Road Co. *v.* Barton, 16 N. Y. 457; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Strong *v.* Wheaton, 38 Barb. 616; Northern R. Co. *v.* Miller, 10 Barb. 260; Hartford, etc., R. Co. *v.* Croswell, 5 Hill 383, 40 Am. Dec. 354; Spear *v.* Crawford, 14 Wend. 20, 28 Am. Dec. 513; Dutchess Cotton Manufactory Co. *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459; Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Union Turnpike Road *v.* Jenkins, 1 Cai. 381; Sagory *v.* Dubois, 3 Sandf. Ch. 466.

Vermont.— Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

United States.— Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

104. See *supra*, VI, L, 2, a *et seq.*

1. Deadwood First Nat. Bank *v.* Gustin-Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676; A. Wight Co. *v.* Steinkemeyer, 6 Mo. App. 575; Pickering *v.* Templeton, 2 Mo. App. 424; Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 540, 35 L. ed. 227 (doctrine conceded, although not applied).

of the shareholders *inter sese*,[2] such agreements as between the original parties and their privies have been declared invalid by the courts.[3] It follows that any agreement, secret or otherwise, between the corporation and its shareholders that its shares shall not be paid in full, although possibly good as between the corporation and shareholders, is void as to creditors of the corporation in the event of its insolvency.[4]

(C) *Such Agreements Characterized as Frauds Upon Other Shareholders and Upon the Law.* Agreements releasing subscribers to the shares of corporations, upon their making sham payments of their subscriptions, have been justly held to be frauds upon the law.[5] All secret agreements releasing particular subscribers from the obligation of payment or otherwise attempting to reduce the obligation of their contract are then in the first instance void as frauds upon other subscribers.[6] This is especially so as to future subscribers who may be presumed to subscribe on the faith and under the persuasion so to speak of the subscription thus released.[7]

(D) *Corporation Cannot Issue New Shares to Old Shareholders Upon Agreement That They Shall Not Be Paid in Full.* A corporation cannot, upon increasing its capital stock, issue the new shares to its existing shareholders upon an agreement that the new shares shall not be paid in full, but shall be non-assessable (in the particular case) to the extent only of ten dollars per share of the par value of one hundred dollars, as against creditors who had received no notice of the arrangement prior to the contracting of their debt.[8] Equally futile as against creditors was the passage by the corporation of a resolution declaring that eighty per cent of all its new and increased stock should be non-assessable, and the issuing of share certificates to such of its shareholders as have paid the twenty per cent, which certificates bear the words "non-assessable."[9]

(E) *What Agreements Avoided Under This Rule.* All agreements between

2. See *supra*, VI, M, 1, b, (I), note 96; and *infra*, VI, M, 1, c, note 46.

3. *In re* Anglo-Moravian Hungarian Junction, L. R. 15 Eq. 407, 42 L. J. Ch. 474, 28 L. T. Rep. N. S. 264, 22 Wkly. Rep. 45; *Ex p.* Daniell, 1 De G. & J. 372, 3 Jur. N. S. 803, 26 L. J. Ch. 563, 5 Wkly. Rep. 677, 58 Eng. Ch. 289 [*affirming* 22 Beav. 43, 23 Beav. 568].

4. *Connecticut.*— Mann *v.* Cooke, 20 Conn. 178.

Illinois.— Jewell *v.* Rock River Paper Co., 101 Ill. 57; Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129; Melvin *v.* Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; Zirkel *v.* Joliet Opera House Co., 79 Ill. 334.

Iowa.— Jackson *v.* Traer, 64 Iowa 469, 20 N. W. 764, 52 Am. Rep. 449; Osgood *v.* King, 42 Iowa 478; Burnham *v.* Northwestern Ins. Co., 36 Iowa 632.

Maryland.— Crawford *v.* Rohrer, 59 Md. 599; Rider *v.* Morrison, 54 Md. 429.

Missouri.— Gill *v.* Balis, 72 Mo. 424; Skrainka *v.* Allen, 7 Mo. App. 434 [*affirmed* in 76 Mo. 384]; Chouteau *v.* Dean, 7 Mo. App. 210; Pickering *v.* Templeton, 2 Mo. App. 424.

New Hampshire.— White Mountains R. Co. *v.* Eastman, 34 N. H. 124.

New Jersey.— Wetherbee *v.* Baker, 35 N. J. Eq. 501.

New York.— Slee *v.* Bloom, 19 Johns. 456, 10 Am. Dec. 273; Sagory *v.* Dubois, 3 Sandf. Ch. 466.

Pennsylvania.— Robinson *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 334, 72 Am. Dec. 792; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489.

Vermont.— Blodgett *v.* Morrill, 20 Vt. 509.

United States.— Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968; Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203; Sawyer *v.* Hoag, 17 Wall. 610, 21 L. ed. 731; Upton *v.* Hansbrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417.

England.— *In re* Agriculturist Cattle Ins. Co., L. R. 1 Ch. 161, 12 Jur. N. S. 79, 35 L. J. Ch. 296, 14 L. T. Rep. N. S. 468, 14 Wkly. Rep. 266. See also Preston *v.* Guyon, 5 Jur. 146, 10 L. J. Ch. 73, 11 Sim. 327, 34 Eng. Ch. 327; Mangles *v.* Grand Collier Dock Co., 10 Sim. 519, 16 Eng. Ch. 519.

5. Or "in fraud of the statute." Port Whitby, etc., R. Co. *v.* Jones, 31 U. C. Q. B. 170.

6. White Mountains R. Co. *v.* Eastman, 34 N. H. 124.

7. Melvin *v.* Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199.

Not necessary that other shareholders should prove that they were actually misled, but this will be presumed. Melvin *v.* Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199.

8. Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129.

9. Upton *v.* Jackson, 28 Fed. Cas. No. 16,802, 1 Flipp. 413.

the subscriber and the corporation,[10] its officers,[11] agents,[12] promoters,[13] or members,[14] by which payment is dispensed with in whole or in part, or by which colorable or nominal payments are accepted,[15] are void, as where shares are voted to a director as a bonus, under a contract between him and the corporation that they shall not be assessable;[16] where a Louisiana corporation, organized for the nominal purpose of developing public improvements in Mexico, but really to carry on a lottery, issued its shares as paid up without any payments being made thereon;[17] or where corporate stock which has been subscribed for, but not paid up, is transferred to the company, and by it sold as "treasury stock" to third persons for less than its par value.[18]

(VI) *Corporation Cannot Effect Simulated Payment by Allowing Shares to Be Paid Up and Then Lending Money Back to Shareholder.* The capital stock of a corporation being a trust fund for the security of creditors,[19] this trust cannot be defeated by a simulated payment of the stock subscription, or by anything short of an actual payment in good faith.[20] The assets of a company cannot be applied to return to the shareholders what they have, or ought to have, paid upon their shares.[21] An arrangement by which the stock is nominally paid and the money immediately taken back as a loan to the shareholder is a device to change the debt from a debt impressed with the character of a trust to an ordinary loan, and is not a valid payment as against creditors of the corporation, although it may be good as between the company and the shareholder.[22] But a division among the shareholders of money which it has not engaged to apply in keeping up the nominal amount of their share capital has been held not a return and division of capital among the shareholders so as to render the dividend *ultra vires*.[23]

(VII) *Corporation Cannot Issue Its Shares as a Bonus*—(A) *Statement of Rule.* Even in England, where the American doctrine that the assets of a corporation are a trust fund for its creditors does not obtain in the sense in which it obtains in America, it is held that a corporation cannot give away its shares by issuing them to its existing shareholders as a bonus, although this is attempted in good faith and the transaction is publicly registered under the pro-

10. Great Western Tel. Co. *v.* Gray, 122 Ill. 630, 14 N. E. 214; Skrainka *v.* Allen, 7 Mo. App. 434 [*affirmed* in 76 Mo. 384]; Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797; Lee *v.* Imbrie, 13 Oreg. 510, 11 Pac. 270.

11. Osgood *v.* King, 42 Iowa 478.

12. Jewell *v.* Rock River Paper Co., 101 Ill. 57.

13. Joy *v.* Manion, 28 Mo. App. 55; Ollesheimer *v.* Thompson Mfg. Co., 44 Mo. App. 172.

14. A shareholder cannot defend against creditors, after the corporation has become insolvent, on the ground that there was a verbal understanding between himself and some members of the company that he should be relieved of his stock after certain difficulties were settled in the company. Topeka Mfg. Co. *v.* Hale, 39 Kan. 23, 17 Pac. 601.

15. Crawford *v.* Rohrer, 59 Md. 599.

16. Richardson *v.* Green, 133 U. S. 30, 10 S. Ct. 280, 33 L. ed. 516.

17. Le Warne *v.* Meyer, 38 Fed. 191.

18. Alling *v.* Wenzel, 133 Ill. 264, 24 N. E. 551. On the same principle it has been held that where the stock of a corporation is not subscribed for up to the minimum amount of capital fixed by the charter, and none of it is paid in, if the corporators organize, elect themselves as officers, proceed to business, and contract debts up to and beyond the nominal capital, having paid in nothing whatever, they commit a legal fraud by so doing, and are liable to creditors to make good the minimum capital, together with interest thereon, should this be necessary to discharge the corporate debts. Burns *v.* Beck, 83 Ga. 471, 10 S. E. 121. *Compare* Hill *v.* Silvey, 81 Ga. 500, 8 S. E. 808, 3 L. R. A. 150.

Substituting the paid-up shares of another member not allowed. Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539.

Payment by other members admissible. Vail *v.* Phillips, 14 N. J. L. J. 45.

19. See *supra*, VI, M, 1, b, (I),

20. Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

21. Lee *v.* Neuchatel Asphalte Co., 41 Ch. D. 1, 58 L. J. Ch. 408, 61 L. T. Rep. N. S. 11, 1 Meg. 140, 37 Wkly. Rep. 321.

22. Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731.

23. Lee *v.* Neuchatel Asphalte Co., 41 Ch. D. 1, 58 L. J. Ch. 408, 61 L. T. Rep. N. S. 11, 1 Meg. 140, 37 Wkly. Rep. 321. *Compare* Purton *v.* New Orleans, etc., R. Co., 3 La. Ann. 19.

visions of the statute.[24] In America the better doctrine is that this cannot be done as against creditors of the corporation; so that if a corporation issues to its bondholders its shares of stock with, say, forty per cent credited thereon as paid, the shareholders will be liable to the corporation or to its creditors in the event of its insolvency to the extent of the unpaid forty per cent.[25]

(B) *Contrary Doctrine.* The court of appeals of New York has, on the contrary, held — denying to this extent the doctrine that the assets of a corporation are a trust fund for its creditors — that a corporation can issue its unpaid shares as pretendedly paid up, as a bonus to its bondholders in order to market its bonds.[26] In like manner the supreme court of the United States has held that where a corporation cannot sell its bonds at par, without giving with them an equal amount of its increased stock, and the par value of the bonds is no more than equal to the actual value of the stock and bonds, the purchaser cannot be compelled by creditors of the corporation to pay the par value of the stock.[27]

(VIII) *Corporation Cannot Issue Its Bonds as a Bonus to Subscribers to Its Shares* — (A) *Statement of Rule.* Under a statute governing manufacturing corporations, by which they are prohibited from lending money to their shareholders, a scheme of organization by which each subscriber to the capital stock of the company is to receive interest-bearing bonds of the company, secured by a mortgage upon the company's assets, to an extent equal to the par value of his subscription, is void, even as between the company and its shareholders, while it remains solvent; since the effect of such an arrangement is to make the shareholders secured creditors, and to give them a better position than the general creditors of the corporation.[28] Accordingly where, by an arrangement between a corporation and persons who were invited to become its shareholders, the latter became such with the understanding that calls upon their stock were not to exceed forty per cent, but afterward the exigencies of the corporation were such that calls were made in excess of that amount, at which time, to compensate the shareholders for this excess in the calls, the corporation issued mortgage bonds to them, it was held that they were liable to creditors in respect of these bonds as they would have been if the calls had been made upon their shares and had not been paid.[29] But it seems that the conclusion will be different where the corporation issues its bonds as a gratuity to its shareholders, but becomes insolvent before paying anything upon the bonds, so that the loss incurred by the transaction falls upon misguided third persons who have become purchasers of the bonds.[30]

(B) *Such Arrangement May Be Valid as Between Company and Shareholders.* In such a case where the books of the company, and the directors as well as the shareholders, concur in saying that the stock is fully paid, it would, as between the shareholder and the company, all the other shareholders consenting, be regarded as fully paid, although not so as to creditors.[31] When therefore the president of a railroad company, who was authorized to collect subscriptions to the stock of the company, accepted the stock of another company in payment of a subscription, his company was bound by his act in such a sense as not to be able to maintain an action for payment against the subscriber.[32]

24. *In re* Eddystone Mar. Ins. Co., [1893] 3 Ch. 9, 62 L. J. Ch. 742, 69 L. T. Rep. N. S. 363, 2 Reports 516, 41 Wkly. Rep. 642.

25. Skrainka *v.* Allen, 7 Mo. App. 434 [*affirmed* in 76 Mo. 384].

26. Christensen *v.* Eno, 106 N. Y. 97, 12 N. E. 648, 8 N. Y. St. 682, 60 Am. Rep. 429. See also Christensen *v.* Quintard, 5 Silv. Supreme (N. Y.) 226, 8 N. Y. Suppl. 400, 29 N. Y. St. 61.

27. Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227 [*reversing* 41 Fed. 531].

28. Morrow *v.* Nashville Iron, etc., Co., 87 Tenn. 262, 10 S. W. 495, 10 Am. St. Rep. 658, 3 L. R. A. 37.

29. Skrainka *v.* Allen, 7 Mo. App. 434 [*affirmed* on this point in 76 Mo. 384]. See also *In re* Canadian Oil Works Corp., L. R. 10 Ch. 593, 44 L. J. Ch. 721, 33 L. T. Rep. N. S. 466, 24 Wkly. Rep. 191; *In re* Masons' Hall Tavern Co., L. R. 5 Eq. 286.

30. Christensen *v.* Eno, 106 N. Y. 97, 12 N. E. 648, 8 N. Y. St. 682, 60 Am. Rep. 429.

31. Skrainka *v.* Allen, 76 Mo. 384, 391, 392, per Hough, C. J.

32. East New York, etc., R. Co. *v.* Lighthall, 6 Rob. (N. Y.) 407. Much to the same

(c) *Such Arrangement May Be Valid as Among Members Personally.* An arrangement among the shareholders by which some of them obligate themselves to take the shares of another off his hands and to refund his money within a fixed time is valid, provided it is made in good faith, although other subscribers may not be informed of it; and therefore such an arrangement may be enforced as between the original parties to it,[33] although it may not be good as against the corporation or its creditors,[34] unless it should be shown to be a corrupt arrangement entered into for the purpose of holding out the subscriber having the agreement for indemnity as a "decoy" to influence the subscription of others.[35]

(d) *Whether Such Arrangement Valid as to Future Creditors* — (1) In General. According to one holding, where a corporation whose stock is not fully paid issues full-paid certificates to its shareholders, creditors who are such before the issue of such certificates may, if the company becomes insolvent, collect the portion of such stock which was unpaid and have it applied in payment of their debts; but creditors who become such after and with notice of the corporate proceedings by which the stock was made "full-paid" have no such right.[36] On the other hand the view has been taken that it is only future creditors who can set aside such an arrangement as to payment.[37]

(2) Future Creditors Who Give Credit With Full Knowledge Estopped to Complain. A broader statement of this doctrine is that, as between the company and its shareholders, whatever is agreed to be payment is payment, because both are estopped by their agreement;[38] and that one who becomes the creditor of a corporation knowing the manner in which its stock has been paid or payment therefor secured is deemed to waive his right to have strict payment made for his benefit.[39]

e. Rule as Between Corporation and Subscriber. As between the corporation and the subscriber the question is not generally treated as one of public policy; and hence, as between the sharetaker and the corporation, an agreement whereby shares are to be taken by him at less than their par value,[40] at a discount,[41] as unassessable,[42] or on payment in property or any other commodity at an overvaluation,[43] is valid, although not binding upon its creditors.[44] And this rule obtains, although persons subsequently, in good faith and for a full consideration, become

effect see Winston *v.* Dorsett Pipe, etc., Co., 129 Ill. 64, 21 N. E. 514, 4 L. R. A. 507. See also the reasoning of Miller, J., in Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731.

33. Morgan *v.* Struthers, 131 U. S. 246, 9 S. Ct. 726, 33 L. ed. 132.

34. Williams *v.* Benet, 34 S. C. 112, 13 S. E. 97.

35. Arrangement held valid.— An agreement among the shareholders of a corporation that the money and property received from them by the corporation shall discharge their liability on stock subscriptions is valid as among themselves. Esgen *v.* Smith, 113 Iowa 25, 84 N. W. 954.

Arrangement not enforced against corporation.— A personal agreement among several shareholders as to their respective interests in land subsequently conveyed absolutely by them to the corporation in payment for stock does not pass to the corporation, and cannot be enforced by it in an action against a portion of such shareholders, whose title to the land proved defective. Jenkins *v.* Bradley, 104 Wis. 540, 80 N. W. 1025.

36. Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737.

37. Flinn *v.* Bagley, 7 Fed. 785.

38. Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968.

39. Callanan *v.* Windsor, 78 Iowa 193, 42 N. W. 652; Deadwood First Nat. Bank *v.* Gustin Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676.

40. Roll *v.* St. Louis, etc., Smelting, etc., Co., 52 Mo. App. 60.

41. Hebberd *v.* Southwestern Land, etc., Co., 55 N. J. Eq. 18, 36 Atl. 122; Webb *v.* Shropshire R. Co., [1893] 3 Ch. 307, 63 L. J. Ch. 80, 69 L. T. Rep. N. S. 533, 7 Reports 231.

42. Dickerman *v.* Northern Trust Co., 176 U. S. 181, 20 S. Ct. 311, 44 L. ed. 423. See also Enterprise Ditch Co. *v.* Moffit, 58 Nebr. 642, 79 N. W. 560, 76 Am. St. Rep. 122, 45 L. R. A. 647.

43. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362; Wells *v.* Green Bay, etc., Canal Co., 90 Wis. 442, 64 N. W. 69; Krohn *v.* Williamson, 62 Fed. 869; Hadley *v.* Hadley, 77 L. T. Rep. N. S. 131.

44. Standard Matrix Mach. Co. *v.* Hills, 68 Mo. App. 249; Roll *v.* St. Louis, etc., Smelting, etc., Co., 52 Mo. App. 60; Hebberd *v.* Southwestern Land, etc., Co., 55 N. J. Eq. 18, 36 Atl. 122; Nenny *v.* Waddill, 6 Tex.

shareholders without any knowledge of, or acquiescence in, the illegal act.[45] As such a transaction estops the corporation, it also estops other shareholders, at least where the nature of the transaction is known to them and they do not dissent at the time.[46]

d. Issuing Shares at Less Than Par to Pay Past Indebtedness. There is judicial authority for the view that if a corporation, being indebted, arranges to pay its debt in stock certificates at less than their par value, the persons receiving such certificates will be assessable for any unpaid balances at the suit of creditors after the insolvency of the corporation.[47] But it seems that this principle has no application to issuing shares at a reduced valuation in payment of an existing debt of the corporation, where the corporation is already insolvent and the shares are consequently depreciated or valueless.[48]

e. Making Payment For Subscribed Shares by Means of Device of Reducing Capital Stock. As against prior creditors it is equally futile for a corporation to attempt to enable its shareholders to pay for their shares by the device of reducing the capital stock, to the extent of the reduction discharging them from the liability incurred by their subscription; but in such a case they remain liable to make good the full amount, according to their undertaking.[49] But it has been held that this may be done before the corporation has incurred any debts, and before the subscriptions to its capital stock have ever been made public.[50]

Civ. App. 244 25 S. W. 308. That a subscription to stock payable in property at a fictitious valuation, although void as to the company because in violation of Ala. Const. art. 14, § 6, and Ala. Code, § 1662, is enforceable in favor of the company's creditors see Joseph *v.* Davis, (Ala. 1892) 10 So. 830.

45. Miller *v.* University Magazine Co., 10 Misc. (N. Y.) 311, 30 N. Y. Suppl. 969, 63 N. Y. St. 128.

46. Northern Trust Co. *v.* Columbia Straw Paper Co., 75 Fed. 936.

Laches, acquiescence, and acts of ratification covering a period of twenty years will cut off any right of action for a rescission which the corporation might otherwise have. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

This seems to be the English doctrine, where the governing principle is that the rights of creditors are worked out after insolvency, in the right of the company, so that if the company has made a contract with its subscriber that his shares shall not be paid for, the court will not make another contract between the parties. Waterhouse *v.* Jamieson, L. R. 2 H. L. Sc. 29; Burkinshaw *v.* Nicolls, 3 App. Cas. 1004, 48 L. J. Ch. 179, 39 L. T. Rep. N. S. 308, 26 Wkly. Rep. 821; *In re* Western of Canada Oil, etc., Co., 1 Ch. D. 115, 45 L. J. Ch. 5, 33 L. T. Rep. N. S. 645, 24 Wkly. Rep. 165; Matter of Great Northern, etc., Coal Co., 3 De G. J. & S. 367, 32 L. J. Ch. 421, 7 L. T. Rep. N. S. 486, 8 L. T. Rep. N. S. 472, 68 Eng. Ch. 278. Leaving the sharetaker liable, not *ex contractu* for the par value of the shares, but *ex delicto* for their real value, see *In re* Western of Canada Oil, etc., Co., 1 Ch. D. 115, 45 L. J. Ch. 5, 33 L. T. Rep. N. S. 645, 24 Wkly. Rep. 165. *Compare In re* Anglo-Moravian Hungarian Junction R. Co., L. R. 15 Eq. 407, 42 L. J. Ch. 474, 28 L. T. Rep. N. S. 264, 22 Wkly. Rep. 45.

A shareholder who participated in the issue of shares as fully paid cannot subsequently claim, in a controversy with the corporation, that such action was fraudulent as to him. Ten Eyck *v.* Pontiac, etc., R. Co., 114 Mich. 494, 72 N. W. 362 [*citing* Arkansas River Land, etc., Co. *v.* Farmers' L. & T. Co., 13 Colo. 587, 22 Pac. 954].

47. Jackson *v.* Traer, 64 Iowa 469, 20 N. W. 764, 52 Am. Rep. 449. But see Kehlor *v.* Lademann, 11 Mo. App. 550 (manufacturing partnership reorganized as a corporation, and issued the shares of the corporation to the creditors of the partnership in satisfaction of their demands, at less than par — creditors assessable as shareholders for the difference); Van Cott *v.* Van Brunt, 82 N. Y. 535; Fogg *v.* Blair, 139 U. S. 118, 11 S. Ct. 476, 35 L. ed. 104; Clark *v.* Bever, 139 U. S. 96, 11 S. Ct. 468, 35 L. ed. 88 [*affirming* 31 Fed. 670].

48. Clark *v.* Bever, 31 Fed. 670 [*affirmed* in 139 U. S. 96, 11 S. Ct. 468, 35 L. ed. 88]. That such an arrangement is good as between the corporation and one to whom the creditor, who has taken the corporation's shares in payment of his debt, has subsequently transferred such shares for value see Crossley *v.* Louisiana Sav. Bank, etc., Co., 38 La. Ann. 74.

Extinguishing indebtedness of shareholders to corporation, upon reorganization, by issuing new shares.— That a corporation, on reorganization, may lawfully provide that debts of shareholders which remain unpaid for a certain time shall be extinguished by application of a sufficient portion of the new stock see Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282, 21 Atl. 169, 170, 27 Wkly. Notes Cas. 91, 95.

49. *In re* State Ins. Co., 14 Fed. 28, 11 Biss. 301.

50. Hill *v.* Silvey, 81 Ga. 500, 8 S. E. 808, 3 L. R. A. 150.

f. Obligation of Full Payment Same Where Capital Stock Is Increased. The obligation to pay for shares which are issued in pursuance of a resolution to increase the capital stock of the company is the same, and for the same reasons, as the obligation to pay in full for original shares; and to the extent to which full payment is not made the subscribers to the increased stock remain liable to the creditors of the company.[51]

g. Statutes Construed to Allow Corporations to Issue Shares at Discount. Statutes, like the English Companies Clauses Consolidation Act of 1845, and the acts amending the same, exist which are judicially construed to allow companies to issue their shares at a discount.[52] Statutes of Minnesota relating to manufacturing and other corporations are construed as conferring no authority upon such corporations to issue shares as fully paid contrary to the fact.[53]

h. Effect of Issuing Shares of New Corporation in Exchange For Shares of Old. Shares of a new company issued in exchange, share for share, for that of a company existing under the laws of another state, without any payment therefor except the transfer of the old company's stock and assets, when this is done to evade the liability of shareholders under the laws governing the original company, will be deemed paid, as against the creditors of the old company, only to the extent that the actual value of the property, actually received from the old company, exceeded the sum of its indebtedness.[54]

i. New American Doctrine That Corporation Can Give Away, or For Less Than Par Value Dispose of, Unissued Shares. The supreme court of the United States have held that an active corporation may, even as against its creditors, for the purpose of paying its debts and obtaining money for the successful prosecution of its business, issue new shares and sell them for the best price that can be obtained;[55] that a corporation may give away its unissued shares at twenty cents on the dollar in the payment of a debt, reasoning that its creditors are not prejudiced by the fact of its giving away its unissued shares, provided they are worthless at the time;[56] that a railroad company can issue its shares to a contractor as a bonus, and that, if the company subsequently becomes insolvent, its creditors cannot charge the contractor as a holder of the unpaid shares, but can at most charge him to the extent of their market value at the time when he received them from the corporation, which market value he must aver and prove.[57]

j. Effect of Payment or Settlement of Share Subscriptions by Giving Promissory Notes — (i) *In General.* Although prohibited from receiving anything

51. Veeder *v.* Mudgett, 95 N. Y. 295; *In re* Weymouth, etc., Steam Packet Co., [1891] 1 Ch. 66, 60 L. J. Ch. 93, 63 L. T. Rep. N. S. 686, 2 Meg. 366, 39 Wkly. Rep. 49.

52. Ross *v.* Kelly, 36 Minn. 38, 29 N. W. 591, 31 N. W. 219 (construing Minn. Gen. Stat. (1874), c. 34); *In re* South Mountain Consol. Min. Co., 5 Fed. 403, 7 Sawy. 30 (construing a similar statute in California); Webb *v.* Shropshire R. Co., [1893] 3 Ch. 307, 63 L. J. Ch. 80, 69 L. T. Rep. N. S. 533, 7 Reports 237; Statham *v.* Brighton Mar. Palace, etc., Co., [1899] 1 Ch. 199, 67 L. J. Ch. 172, 80 L. T. Rep. N. S. 73, 6 Manson 308, 47 Wkly. Rep. 183; Walsh *v.* North West Electric Co., 11 Manitoba 629 [*distinguishing* Daniell's Case, 22 Beav. 43, construing a Manitoba statute, and not considering the question with reference to the rights of creditors].

53. Wallace *v.* Carpenter Electric Heating Mfg. Co., 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530.

54. Sprague *v.* National Bank of America, 172 Ill. 149, 50 N. E. 19, 64 Am. St. Rep. 17, 42 L. R. A. 606 [*affirming* 66 Ill. App. 320].

55. Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227.

56. Clark *v.* Bever, 139 U. S. 96, 112, 11 S. Ct. 468, 35 L. ed. 88, a "Credit Mobilier" case, in which the president of the railroad company was also president of the construction company.

57. Fogg *v.* Blair, 139 U. S. 118, 11 S. Ct. 476, 35 L. ed. 104, the court saying. "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors." In so holding the supreme court of the United States refused to follow the decisions of the highest courts in the states, construing their own statutes, as shown by Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274; Kehlor *v.* Lademann, 11 Mo. App. 550; Chouteau *v.* Dean, 7 Mo. App. 210, and as shown by the decision of the supreme court of Iowa in Jackson *v.* Traer, 64 Iowa 469, 20 N. W. 764, 52 Am. Rep. 449. See also Tama Water-Power Co. *v.* Hopkins, 79 Iowa 653, 44 N. W. 797; Boulton Carbon Co. *v.* Mills, 78 Iowa 460, 43 N. W. 290, 5 L. R. A. 649.

but cash in payment for their shares,[58] if corporations receive promissory notes in settlement of their subscriptions, the notes will not be invalidated, but will be good as against the makers, on the theory of being supported by a good consideration.[59] Such a note becomes a part of the assets of the corporation, which are a trust fund for the payment of its creditors, and the surrender of them to their makers is a fraud upon such creditors.[60]

(II) *Remedy of Company Where It Has Received Settlement in Promissory Note.* The company cannot, it would seem, retain the note and sue the shareholder for original assessments, but its remedy is upon the note; and it has been held that a subscriber who has given his note in settlement of his subscription is not liable for assessments on the stock, where the certificates have been placed is escrow in the hands of a third person to be delivered to the subscriber when the note is paid, where the note has not been paid or the stock transferred.[61] After the company has exercised its right to forfeit the stock — a subject hereafter considered[62] — by reason of the note not being paid at maturity, it cannot maintain an action upon the note, since it cannot have both the shares themselves and what the subscriber has agreed to pay for them;[63] nor can it, after such a forfeiture, and especially after a material change has been made in its charter without the consent of the subscriber, by transferring the note to a third person, confer upon him a right of action against the subscriber.[64] But where the note has been assigned in good faith before maturity, and the subscriber pays it in good faith to the holder, the company can have no further claim against him, either upon the note or on the original contract of subscription.[65]

(III) *Whether Giving of Note Secured by Mortgage Is Payment and Reinvestment, or Merely Collateral Security.* It has been held that the effect of executing a note secured by a mortgage in settlement of a stock subscription is a payment for the shares and a reinvestment of the money by the corporation, so that the liability of the shareholder on the note and mortgage was no less than that of any other borrower; nor did his rights as a shareholder stand on any better footing than the rights of those who paid for their stock, but borrowed nothing from the company.[66]

k. Construction of English Statute Requiring Registry of Contract Where Shares Not to Be Paid For in Full. This is likely to have counterparts in America. The principle of it has been adopted in the article on corporations in the recent constitution of Virginia. It may be of interest to American lawyers and judges, and is as follows: "Every share in any company shall be deemed and taken to

58. Pacific Trust Co. *v.* Dorsey, 72 Cal. 55, 12 Pac. 49 [*affirmed* in 13 Pac. 148].

59. *Illinois.*— Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

Mississippi.— Hayne *v.* Beauchamp, 5 Sm. & M. 515.

New York.— Magee *v.* Badger, 30 Barb. 246.

Pennsylvania.— Leighty *v.* Susquehanna, etc., Turnpike Co., 14 Serg. & R. 434.

United States.— Alexander *v.* Horner, 1 Fed. Cas. No. 169, 1 McCrary 634.

60. Jenkins *v.* Armour, 13 Fed. Cas. No. 7,260, 6 Biss. 312.

61. Cormac *v.* Western White Bronze Co., 77 Iowa 32, 41 N. W. 480.

62. See *infra*, VI, O, 2, g, (I) *et seq.*

63. Ashton *v.* Burbank, 2 Fed. Cas. No. 582, 2 Dill. 435.

64. Ashton *v.* Burbank, 2 Fed. Cas. No. 582, 2 Dill. 435. Of course the rule would be otherwise in case the note is transferred before maturity, for value and without notice to the transferee of the circumstances which create a failure of consideration. 2 Thompson Corp. § 1658.

65. Alexander *v.* Horner, 1 Fed. Cas. No. 169, 1 McCrary 634.

Such notes when deemed negotiable, with an example of one of them. Stillwell *v.* Craig, 58 Mo. 24. See also Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Washington County Mut. Ins. Co. *v.* Miller, 26 Vt. 77.

Validity of such notes in the hands of indorsees. Magee *v.* Badger, 30 Barb. (N. Y.) 246; Willmarth *v.* Crawford, 10 Wend. (N. Y.) 341 (indorsee without notice); Alexander *v.* Horner, 1 Fed. Cas. No. 169, 1 McCrary 634 (indorsee without notice).

When indorsee entitled to subrogation to the lien of the corporation on the shares for the unpaid balance. Petersburg Sav., etc., Co. *v.* Lumsden, 75 Va. 327.

66. Union Cent. L. Ins. Co. *v.* Curtis, 35 Ohio St. 343. Much to the same effect see

have been issued and to be subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint-stock companies at or before the issue of such shares."[67] The document filed must show the consideration for the shares to be issued, although it is not necessary that the consideration be stated with full particularity.[68] It is insufficient where it only identifies the consideration for the shares to be issued by reference to another contract not filed.[69] So the filing of a contract which merely refers to an unregistered contract showing such consideration is not a sufficient compliance with the statutory mandate.[70] The allottee of shares will not be relieved from his obligation to pay their par value by a compliance with this statute, where the consideration rendered by him for them was elusory, or where a discount was allowed him; but the court may inquire in each case whether the price paid was reasonable, or whether what was given for the shares had a cash value in the market equal to their nominal value.[71]

2. Payment For Shares in Property — a. When Such Payment Allowed — (i) *Where Statute Does Not Require Payment in Cash* **— (a)** *In General.* Where the charter or governing statute does not require payment in cash, then the shares may be paid for in such property as the corporation would have occasion to buy, at a fair valuation, provided the transaction is in good faith.[72]

Hazelett *v.* Butler University, 84 Ind. 230. But *compare* Russell *v.* Bristol, 50 Conn. 221, construction of a subscription to a guarantee fund.

67. Companies Act (1876), § 25.

68. *In re* Kharaskhoma Exploring, etc., Syndicate, [1897] 2 Ch. 451, 66 L. J. Ch. 675, 77 L. T. Rep. N. S. 82, 4 Manson 249, 46 Wkly. Rep. 37.

69. *In re* Kharaskhoma Exploring, etc., Syndicate, [1897] 2 Ch. 451, 66 L. J. Ch. 675, 77 L. T. Rep. N. S. 82, 4 Manson 249, 46 Wkly. Rep. 37.

70. *In re* Kharaskhoma Exploring, etc., Syndicate, [1897] 2 Ch. 451, 66 L. J. Ch. 675, 77 L. T. Rep. N. S. 82, 4 Manson 249, 46 Wkly. Rep. 37.

71. *In re* Theatrical Trust, [1895] 1 Ch. 771, 64 L. J. Ch. 419, 76 L. T. Rep. N. S. 397, 4 Manson 179, 45 Wkly. Rep. 557. For the construction of a similar statute of New South Wales see Smith *v.* Brown, [1896] A. C. 614, 65 L. J. P. C. 89, 75 L. T. Rep. N. S. 213, 45 Wkly. Rep. 132. *Compare In re* Poole Firebrick, etc., Co., L. R. 10 Ch. 157, 44 L. J. Ch. 240.

To satisfy the English statute above quoted the contract which is so filed need not be made directly between the allottee of the shares and the company, or show on its face which particular shares are to be allotted; but an agreement by which the company, in consideration of the transfer to it of the rights or property of another company, is to allot to the shareholders of the latter company paid-up shares of its own is sufficient. *In re* Common Petroleum Engine Co., [1895] 2 Ch. 759, 65 L. J. Ch. 76, 73 L. T. Rep. N. S. 338, 2 Manson 598, 13 Reports 840.

Later decisions construing this statute are: *In re* Frost, [1899] 2 Ch. 207, 68 L. J. Ch. 544, 80 L. T. Rep. N. S. 849, 48 Wkly. Rep. 39 [*affirming* [1898] 2 Ch. 556, 67 L. J. Ch. 691, 79 L. T. Rep. N. S. 269, 47 Wkly. Rep. 27, contract not insufficient because it describes the property turned in for the shares in a general way, etc.]; *In re* African Gold Concessions, etc., Co., [1899] 1 Ch. 414, 68 L. J. Ch. 215, 80 L. T. Rep. N. S. 282, 6 Manson, 84, 47 Wkly. Rep. 509 (sufficient if it states plainly the nature of the consideration and supplies the means of identification, etc.); *In re* Jackson, [1899] 1 Ch. 348, 68 L. Ch. 190, 79 L. T. Rep. N. S. 662, 6 Manson 125 (circumstances under which the court will require the filing of a supplemental contract showing the determination of the directors with reference to the amount of the consideration to be paid in shares and construction of later statute permitting court to relieve one from failure through inadvertence to file the contract or a sufficient contract).

72. *Indiana.*— Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20.

Missouri.— Kraft-Holmes Grocery Co. *v.* Crow, 36 Mo. App. 288.

New York.— Skinner *v.* Smith, 56 Hun 437, 10 N. Y. Suppl. 81, 31 N. Y. St. 448.

United States.— Foreman *v.* Bigelow, 9 Fed. Cas. No. 4,934, 4 Cliff. 508; Phelan *v.* Hazard, 19 Fed. Cas. No. 11,068, 5 Dill. 45; Steacy *v.* Little Rock, etc., R. Co., 22 Fed. Cas. No. 13,329, 5 Dill. 348.

England.— *In re* Paraguassu Steam Tramroad Co., L. R. 9 Ch. 355, 43 L. J. Ch. 482, 30 L. T. Rep. N. S. 211, 22 Wkly. Rep. 386; *In re* Matlock Old Bath Hydropathic Co., L. R. 9 Ch. 60; *In re* Harmony, etc., Tin, etc., Min. Co., L. R. 8 Ch. 407, 42 L. J. Ch. 488, 28 L. T. Rep. N. S. 153, 21 Wkly. Rep. 306; *In re* Steamship, etc., Coal Co., L. R. 4 Ch. 772, 21 L. T. Rep. N. S. 317, 18 Wkly. Rep. 2; *In re* Steam Tramway Co., L. R. 18 Eq. 670, 44 L. J. Ch. 125, 22 Wkly. Rep. 820; *In re* British Farmers' Pure Linseed

(B) *Contrary Doctrine.* On the contrary it has been held that a provision of a corporate charter that no stock shall be issued or certificate be given therefor until the amount subscribed for shall have been paid requires payment in cash.[73]

(II) *Where Governing Statute Requires Payment in Cash.* Even where the charter, statute, or other governing instrument, by its terms, requires payment in money, yet unless the language is such as to import a prohibition of anything but money, the courts are generally agreed that payment may be made in any kind of property or services which the corporation may lawfully purchase in the prosecution of its business, provided it be done in good faith, and provided such property or services be conveyed or rendered at a fair valuation.[74] The reason is that the law does not require the parties to go through the vain transaction which would be exhibited if the subscriber should pay for his shares in cash and if the corporation should hand back the cash in purchasing from the subscriber such property as the corporation might wish to buy from him; or, what would be the equivalent of such a transaction, that there should be a mere exchange of checks between the parties.[75]

b. Payment Must Be "in Money or in Money's Worth." The officers of a corporation being trustees for its shareholders, and in a sense for its creditors, their trust cannot be defeated by anything short of actual payment for shares in good faith.[76] This payment need not always be in money; but the rule is that "if a man contracts to take shares he must pay for them, to use a homely phrase, 'in meal or in malt'; he must either pay in money or in money's worth. If he pays in one or the other, that will be a satisfaction."[77]

Cake Co., 7 Ch. D. 533 [*affirmed* in 3 App. Cas. 1004, 48 L. J. Ch. 179, 39 L. T. Rep. N. S. 308, 26 Wkly. Rep. 819].

See 12 Cent. Dig. tit. "Corporations," § 338.

73. State *v.* New Orleans Debenture Redemption Co., 51 La. Ann. 1827, 26 So. 586.

74. *Colorado.*— Arapahoe Cattle, etc., Co. *v.* Stevens, 13 Colo. 534, 22 Pac. 823, services.

Maine.— Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904.

Maryland.— Brant *v.* Ehlen, 59 Md. 1.

Missouri.— Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212; State *v.* Wood, 13 Mo. App. 139.

New York.— Lohman *v.* New York, etc., R. Co., 2 Sandf. 39.

Tennessee.— Searight *v.* Payne, 6 Lea 283.

United States.— Phelan *v.* Hazard, 19 Fed. Cas. No. 11,068, 5 Dill. 45.

England.— *In re* Harmony, etc., Tin, etc., Min. Co., L. R. 8 Ch. 407, 42 L. J. Ch. 488, 28 L. T. Rep. N. S. 153, 21 Wkly. Rep. 306; *In re* Pen Allt Silver Lead Min. Co., L. R. 8 Ch. 270, 42 L. J. Ch. 481, 27 L. T. Rep. N. S. 124, 21 Wkly. Rep. 301; *In re* Baglan Hall Colliery Co., L. R. 5 Ch. 346, 39 L. J. Ch. 591, 23 L. T. Rep. N. S. 60, 18 Wkly. Rep. 499; *In re* Heyford Ironworks Co., L. R. 5 Ch. 11, 39 L. J. Ch. 120, 21 L. T. Rep. N. S. 412, 18 Wkly. Rep. 31; *In re* China Steamship, etc., Coal Co., L. R. 4 Ch. 772, 21 L. T. Rep. N. S. 317, 18 Wkly. Rep. 2; *In re* Limehouse Works Co., L. R. 17 Eq. 169, 43 L. J. Ch. 538, 29 L. T. Rep. N. S. 636, 22 Wkly. Rep. 228; *In re* Mercantile Trading Co., L. R. 11 Eq. 131, 40 L. J. Ch. 130, 23 L. T. Rep. N. S. 456, 19 Wkly. Rep. 93; Woodfall's Case, 3 De G. & Sm. 63, 14 Jur. 29.

See 12 Cent. Dig. tit. "Corporations," § 338.

75. See the preceding cases and Shannon *v.* Stevenson, 173 Pa. St. 419, 34 Atl. 218, 37 Wkly. Notes Cas. (Pa.) 537.

76. Wetherbee *v.* Baker, 35 N. J. Eq. 501.

Payment in specie.— In some cases it has been held that payment can only be made in specie, as in case of a banking corporation. King *v.* Elliott, 5 Sm. & M. (Miss.) 428.

77. Lord Justice Gifford, in *In re* China Steamship, etc., Coal Co., L. R. 4 Ch. 772, 779, 21 L. T. Rep. N. S. 317, 18 Wkly. Rep. 2 [*quoted* by Sherwood, J., in Liebke *v.* Knapp, 79 Mo. 22, 27, 49 Am. Rep. 212].

For a fair explanation of the "money or money's worth" doctrine see the language of Davis, J., in Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539.

Other English expressions of the same rule, involving the conclusion that a man who subscribes for shares must fairly and honestly fulfil the obligation which he has assumed, may be collected from the following cases: *In re* Harmony, etc., Tin, etc., Min. Co., L. R. 8 Ch. 407, 42 L. J. Ch. 488, 28 L. T. Rep. N. S. 153, 21 Wkly. Rep. 306; *In re* Pen Allt Silver Lead Min. Co., L. R. 8 Ch. 270, 42 L. J. Ch. 481, 27 L. T. Rep. N. S. 124, 21 Wkly. Rep. 301; *In re* Heyford Ironworks Co., L. R. 5 Ch. 270, 39 L. J. Ch. 422, 22 L. T. Rep. N. S. 187, 18 Wkly. Rep. 302; *In re* Limehouse Works Co., L. R. 17 Eq. 169, 43 L. J. Ch. 538, 29 L. T. Rep. N. S. 636, 22 Wkly. Rep. 228; *In re* South of France Co., L. R. 7 Eq. 11; Burkinshaw *v.* Nicolls, 3 App. Cas. 1004, 48 L. J. Ch. 179, 39 L. T. Rep. N. S. 308, 26 Wkly. Rep. 821. Other English cases illustrating the rule are:

c. Rule Where Statute Permits Payment in Property. Statutes have been enacted permitting corporations to receive payment in property, provided they report the case according to the fact.[78] Such a statute has been held applicable to an original subscription as well as to an increase of capital. The effect of it is that when payment has been fairly made in property the subscriber is discharged from his obligation in the absence of fraud.[79]

d. Invalidity of Secret Collateral Agreements to Pay in Property. If the shares are to be paid for in property it ought to be so stated in the contract of subscription. Where the contract is expressed to be payable in money, secret collateral agreements to discharge it, let us say in land[80] or in goods,[81] will be invalid as against creditors in the event of its insolvency.[82]

e. Distinction Between "True Value Rule" and "Good Faith Rule." Stating the proposition in outline so as to give a collected view of these opposing doctrines, and making fuller definitions in subsequent paragraphs, it may be said that the "true value rule" is the rule stated and illustrated by the preceding cases, founded on the maxim that "shares must be paid for in money or in money's worth." On the other hand the "good faith rule" is the rule that whatever the parties call payment is payment as among themselves, that is as between the corporation and its shareholders, without regard to the value of the property turned in; that this is equally the rule where the rights of creditors are involved, provided the coadventurers in turning in the property acted "in good faith"; but that a decisive overvaluation of the property turned in, or, what is the same thing, a decisive undervaluation of the shares, is evidence of bad faith. Under either rule, where shareholders turn in property of a fictitious or imaginary value in payment for their shares, this is no payment as against the creditors of the corporation.[83]

f. "True Value Rule" — (i) *Statement of Rule.* The "true value rule" is that payment of corporate shares in anything except money will not be regarded as payment, except to the extent of the true or actual value of the property turned in and received in lieu of money, and regardless of the question of fraud.[84]

In re Paraguassu Steam Tramroad Co., L. R. 9 Ch. 355, 43 L. J. Ch. 482, 30 L. T. Rep. N. S. 211, 22 Wkly. Rep. 386; *In re* Richmond Hill Hotel Co., L. R. 2 Ch. 527, 36 L. J. Ch. 613, 16 L. T. Rep. N. S. 442; *In re* Richmond Hill Hotel Co., L. R. 2 Ch. 511, 36 L. J. Ch. 593, 16 L. T. Rep. N. S. 301, 15 Wkly. Rep. 665. After twenty-five years' experience with the rule in *In re* Harmony, etc., Tin, etc., Min. Co., L. R. 8 Ch. 407, 42 L. J. Ch. 488, 28 L. T. Rep. N. S. 153, 21 Wkly. Rep. 306, where, although the statute recited that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash," and under which payment in property instead of cash was sanctioned on the ground that the legislature could not have required the parties to have gone through the useless formality of merely exchanging checks, Lord Halsbury, L. C., sitting in the court of appeal, expressed his strong disapprobation of it, but felt bound to follow it until it should be overruled in the house of lords. *In re* Johannesburg Hotel Co., [1891] 1 Ch. 119, 129, 60 L. J. Ch. 391, 64 L. T. Rep. N. S. 61, 2 Meg. 409, 39 Wkly. Rep. 260. Referring to Spargo's case, the lord chancellor said: "I venture to doubt whether what is described by those eminent judges as the absurdity of handing money backwards and forwards when two people have cross demands, is so great as the absurdity of construing the words 'payment in cash' as payment without cash."

78. Edmonds Stat. at L. (2d ed.) p. 741, c. 333, § 2.

79. Boynton *v.* Hatch, 47 N. Y. 225. See also Tallmadge *v.* Fishkill Iron Co., 4 Barb. (N. Y.) 382.

What if a statute allowing payment in property is repealed after subscription and before incorporation. Knox *v.* Childersburg Land Co., 86 Ala. 180, 5 So. 578.

80. Noble *v.* Callender, 20 Ohio St. 199.

81. Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187.

82. Coit *v.* North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 S. Ct. 231, 30 L. ed. 420. See also Haviland *v.* Chace, 39 Barb. (N. Y.) 283; Nickoll's Case, 24 Beav. 639.

83. Alling *v.* Wenzell, 27 Ill. App. 511.

84. Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904; Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274; Farmers' Bank *v.* Gallaher, 43 Mo. App. 482.

In New York this doctrine, that as against creditors of the corporation, transfers of property in payment of shares will be regarded as payment only to the extent of the

Stated differently the "true value rule" is that where payment is made in property, labor, services, or in anything other than money, the commodity must be turned in at its true value at the time, and that an overvalution of it, or an undervaluation of the shares, leaves the shares unpaid to that extent, and the shareholders liable to make up the deficiency in favor of creditors of the corporation, without regard to the question whether the discrepancy was the result of fraud, mistake, bad judgment, or a cheerful optimism.[85] Under this rule, in an action to charge a shareholder with the corporate debts up to the amount of his stock, because the stock has been issued for property not worth its par value, it is not necessary to prove that the trustees were guilty of fraudulent intent;[86] but the true inquiry will be, What was the reasonable value, or the reasonable market value of the property conveyed or the services rendered?[87]

(II) *Standards by Which to Determine True Value.* It has been ruled that the true inquiry, in determining whether or not the price paid by a majority of the shareholders of a corporation for property is so excessive as to be a fraud on the minority, is, What under all the circumstances is a fair value of the property to the company, considering its proposed use and the general purposes for which the company is organized?[88]

(III) *Effect of Constitutional Provisions and Statutes Prohibiting Issue of Shares Except For Money Paid, Property Delivered, Etc.* Constitutional and statutory prohibitions exist in many of the states, prohibiting corporations from issuing their stock or bonds except for money paid or property or labor received, and some of them have applied it to the purpose for which the corporation was organized. It is a just conclusion where statutes or constitutional ordinances exist prohibiting the issue of stock except for money or property actually received, and requiring payments in property to be at its money value, that where payment of a stock subscription is made to a corporation at less than its actual value, the subscribers will be liable to creditors of the corporation in the event of its insolvency, for the difference between the actual value of the property conveyed and the amount of their subscriptions.[89]

actual value of the property, was laid down in an early case in the supreme court. Tallmadge *v.* Fishkill Iron Co., 4 Barb. (N. Y.) 382. Later decisions seem to have modified the rule. Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. (N. Y.) 410, 9 L. R. A. 527 [*reversing* 52 Hun (N. Y.) 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]; Van Cott *v.* Van Brunt, 82 N. Y. 535.

85. *Alabama.*— Roman *v.* Dimmick, 115 Ala. 233, 22 So. 109.

Illinois.— National Bank of America *v.* Pacific R. Co., 66 Ill. App. 320; Thayer *v.* El Plomo Min. Co., 40 Ill. App. 344.

Missouri.— Shepard *v.* Drake, 61 Mo. App. 134. In Woodfolk *v.* January, 131 Mo. 620, 33 S. W. 432, the supreme court of Missouri, departing from its former doctrine, adopted the "good faith rule." Subsequently, in Van Cleve *v.* Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593, in an able and convincing opinion by Brace, J., it reinstated the "true value rule."

Ohio.— Gates *v.* Tippecanoe Stone Co., 9 Ohio Cir. Ct. 99, 6 Ohio Cir. Dec. 23 [*affirmed* in 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705].

Utah.— Salt Lake Hardware Co. *v.* Tintic Milling Co., 13 Utah 432, 45 Pac. 200.

See also Altenberg *v.* Grant, 85 Fed. 345, 29 C. C. A. 185 [*reversing* 83 Fed. 980, 28 C. C. A. 244].

86. National Tube Works Co. *v.* Gilfillan, 124 N. Y. 302, 35 N. Y. St. 357, 26 N. E. 538 [*affirming* 46 Hun (N. Y.) 248, 11 N. Y. St. 533].

87. Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274.

88. Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. (N. Y.) 410, 9 L. R. A. 527 [*reversing* 52 Hun (N. Y.) 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]. That a payment by the transfer to the corporation of the assets of an insolvent partnership, whose business the corporation was organized for the purpose of continuing, and whose debts it assumed, is not a good payment as against creditors see Ford *v.* Lamson, 17 Ohio Cir. Ct. 539, 9 Ohio Cir. Dec. 374.

89. Elyton Land Co. *v.* Birmingham Warehouse, etc., Co., 92 Ala. 407, 9 So. 129, 25 Am. Rep. 65, 12 L. R. A. 307.

Notwithstanding such a constitutional provision it has been held that stock and bonds in a railroad company issued in pursuance of a reorganization scheme, in exchange for stock and bonds of another corporation, the property of which the issuing corporation was organized to acquire, which latter bonds were not shown to be invalid, would not be

(iv) *Whether Knowledge of Creditors as to Manner in Which Shares Have Been Paid For Affects Their Rights.* On the theory that the "true value rule" is a rule of public policy, the right of a creditor of the corporation to enforce the liability of its shareholders who have not paid their subscriptions in full is not dependent in any degree upon the fact of his knowledge, at the time of extending the credit, that such subscriptions were or were not paid in full,[90] although this is not the doctrine of all the courts.[91]

g. **"Good Faith Rule"**—(i) *Statement of Rule.* The so-called "good faith rule" proceeds upon the proposition that where the governing statute of a corporation authorizes its shares to be paid for in property instead of cash,[92] or where the law of the forum otherwise concedes this power to it,[93] the fact that they are so paid for, and at an overvaluation of the property, affords no ground of complaint to the creditors, provided such payment is made and accepted in good faith.[94] According to several decisions the fraud here meant is actual fraud, in the sense of a dishonest purpose, and not constructive or theoretical fraud;[95] but as we shall presently see[96] a gross overvaluation is evidence of actual fraud, although it is often called constructive fraud. Stated in another way, and supported by decisions variously expressed, this rule is that unless the overvaluation of the property, labor, etc., turned in in payment for the shares is intentional, that is, overvalued to the knowledge of the parties to the transaction, or is actually fraudulent, or so gross as to be constructively fraudulent, the value at which it was turned in in payment is to be deemed payment, and the shares are to be deemed to have been paid up to that extent, and the shareholders are protected from further assessment in respect of such payment, even in favor of creditors.[97] The doctrine has been carried so far as to result in the proposition that "while the contract stands unimpeached, the courts, even when the rights of creditors

held to be invalid because at the time of the exchange the cash value of the physical property and privileges acquired by the reorganized corporation was not fully equal to the par value of the securities issued in exchange for them. Sioux City, etc., R. Co. *v.* Manhattan Trust Co., 92 Fed. 428, 34 C. C. A. 431.

Statutes construed.— A statute allowing shares to be issued for property to "the amount of the value thereof," means the actual value, or the fairly estimated value of the property exchanged for the shares. Kelly *v.* Clark, 21 Mont. 291, 53 Pac. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621. A statute prohibiting corporations from issuing either stock or bonds, except for money, labor done, or property actually received, for the use and "lawful purposes" of such corporation, allows the corporation to issue its stock to obtain control of a rival corporation, since the prevention of ruinous competition is a "lawful purpose." Rafferty *v.* Buffalo City Gas Co., 37 N. Y. App. Div. 618, 56 N. Y. Suppl. 288.

90. Sprague *v.* National Bank of America, 172 Ill. 149, 50 N. E. 19, 64 Am. St. Rep. 17, 42 L. R. A. 606 [*affirming* 66 Ill. App. 320].

91. Adamant Mfg. Co. *v.* Wallace, 16 Wash. 614, 48 Pac. 415.

92. Coit *v.* North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 S. Ct. 231, 30 L. R. A. 420.

93. Liehke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212.

94. *Indiana.*— Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20..

Michigan.— Young *v.* Erie Iron Co., 65 Mich. 111, 31 N. W. 814.

New Jersey.— Bickley *v.* Schlag, 46 N. J. Eq. 533, 20 Atl. 250.

New York.— Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. 410, 9 L. R. A. 527 [*reversing* 52 Hun 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]; Dodge *v.* Havemeyer, 4 N. Y. St. 561.

Wisconsin.— Whitehill *v.* Jacobs, 75 Wis. 474, 44 N. W. 630.

United States.— Ft. Madison Bank *v.* Alden, 129 U. S. 372, 9 S. Ct. 332, 32 L. ed. 725; Phelan *v.* Hazard, 19 Fed. Cas. No. 11,068, 5 Dill. 45.

95. Young *v.* Erie Iron Co., 65 Mich. 111, 31 N. W. 814; Whitehill *v.* Jacobs, 75 Wis. 474, 44 N. W. 630; Ft. Madison Bank *v.* Alden, 129 U. S. 372, 9 S. Ct. 332, 32 L. ed. 725.

96. See *infra*, VI, M, 2, g, (iii).

97. *Illinois.*— Streater Reclining Car Seat Co. *v.* Rankin, 45 Ill. App. 226.

Indiana.— Bruner *v.* Brown, 139 Ind. 600, 38 N. E. 318; Clow *v.* Brown, (Sup. 1892) 31 N. E. 361.

Nebraska.— Gilkie, etc., Co. *v.* Dawson Town, etc., Co., 46 Nebr. 333, 64 N. W. 978, 1097. *Compare* Troup *v.* Horbach, 53 Nebr. 795, 74 N. W. 326.

New York.— Powers *v.* Knapp, 85 Hun 38, 32 N. Y. Suppl. 622, 66 N. Y. St. 133.

Pennsylvania.— American Tube, etc., Co. *v.* Hays, 165 Pa. St. 489, 30 Atl. 936, 35 Wkly. Notes Cas. 530.

are involved, will treat that as a payment which the parties have agreed should be payment." [98]

(II) *Overvaluation Not of Itself Evidence of Fraud.* As value is largely a matter of opinion, anticipation, or belief,[99] and in the case under consideration the question being how much can probably be got out of the property by the corporation, it follows as a reasonable conclusion that the mere fact that the promoters or the contracting officers of the corporation put too high an estimate on the property is not evidence of fraud,[1] although a gross and obvious overvaluation would be.[2] To justify the finding of fraud in such a case there must be either an actual fraudulent intent or such reckless conduct as would indicate without explanation an intent to defraud.[3]

(III) *Gross Overvaluation With Knowledge Is Evidence of Actual Fraud, Although Sometimes Called "Constructive Fraud."* "If there is a material overvaluation of the property, to the knowledge of the contracting parties, the transaction is a fraud as to subsequent creditors of the corporation without notice; and if it becomes insolvent the shareholders so paying for their stock will be charged, in equity, to the extent necessary to pay such creditors, with the difference between the real value of the property and the par value of their stock." [4]

Tennessee.— Jones *v.* Whitworth, 94 Tenn. 602, 30 S. W. 736; Kelley *v.* Fletcher, 94 Tenn. 1, 28 S. W. 1099.

Washington.— Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 16 Wash. 499, 48 Pac. 333 [*rehearing denied* in 48 Pac. 737]; Turner *v.* Bailey, 12 Wash. 634, 42 Pac. 115. *Compare* Kroenert *v.* Johnston, 19 Wash. 96, 52 Pac. 605.

United States.— Rickerson Roller-Mill Co. *v.* Farrell Foundry, etc., Co., 75 Fed. 55; Northwestern Mut. L. Ins. Co. *v.* Cotton Exch. Real-Estate Co., 70 Fed. 155.

Canada.— Matter of Hess Mfg. Co., 23 Can. Supreme Ct. 644.

Compare Larocque *v.* Beauchemin, [1897] A. C. 358, 66 L. J. P. C. 59, 76 L. T. Rep. N. S. 473, 4 Manson 263, 45 Wkly. Rep. 639.

The English doctrine seems to be that if the company could not impeach the transaction, the creditors, who can claim only in the right of the company, cannot. *In re* Baglan Hall Colliery Co., L. R. 5 Ch. 346, 39 L. J. Ch. 591, 23 L. T. Rep. N. S. 60, 18 Wkly. Rep. 499. To the same general effect see *In re* Tavarone Min. Co., L. R. 8 Ch. 956, 42 L. J. Ch. 768, 29 L. T. Rep. N. S. 363, 21 Wkly. Rep. 829; *In re* Harmony, etc., Min. Co., L. R. 8 Ch. 407, 42 L. J. Ch. 488, 28 L. T. Rep. N. S. 153, 21 Wkly. Rep. 306; *In re* Heyford Ironworks Co., L. R. 5 Ch. 270, 39 L. J. Ch. 422, 22 L. T. Rep. N. S. 187, 18 Wkly. Rep. 302; *In re* Heyford Co., L. R. 5 Ch. 11, 39 L. J. Ch. 130, 21 L. T. Rep. N. S. 412, 18 Wkly. Rep. 31; *In re* Limehouse Works Co., L. R. 17 Eq. 169, 43 L. J. Ch. 538, 29 L. T. Rep. N. S. 636, 22 Wkly. Rep. 228; *Re* Mercantile Trading Co., L. R. 11 Exch. 131, 40 L. J. Ch. 130, 23 L. T. Rep. N. S. 456, 19 Wkly. Rep. 93; *In re* Pen Alit Silver Lead Min. Co., 8 Ch. 270, 42 L. J. Ch. 481, 27 L. T. Rep. N. S. 124, 21 Wkly. Rep. 301.

98. Phelan *v.* Hazard, 19 Fed. Cas. No. 11,068, 5 Dill. 45.

99. That value is ordinarily proved by the opinions of witnesses, which opinions are not conclusive on the triers of the fact, see Winkler *v.* St. Louis, etc., R. Co., 21 Mo. App. 99.

1. Peck *v.* Coalfield Co., 11 Ill. App. 88, 3 Ill. App. 619 [*affirmed* in 98 Ill. 139]; Carr *v.* Le Fevre, 27 Pa. St. 413.

2. Carr *v.* Le Fevre, 27 Pa. St. 413; Merrill Nat. Bank *v.* Illinois, etc., Lumber Co., 101 Wis. 247, 77 N. W. 185 ("valuation substantially in excess of its real value"); Coit *v.* North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 S. Ct. 231, 30 L. ed. 421.

3. Young *v.* Erie Iron Co., 65 Mich. 111, 31 N. W. 814. See also Graves *v.* Brooks, 117 Mich. 424, 75 N. W. 932; Van Cott *v.* Van Brunt, 82 N. Y. 535; Boynton *v.* Hatch, 47 N. Y. 225.

4. Hastings Malting Co. *v.* Iron Range Brewing Co., 65 Minn. 28, 33, 67 N. W. 652.

The above doctrine is supported by many cases, among them the following:

Iowa.— Boulton Carbon Co. *v.* Mills, 78 Iowa 460, 43 N. W. 290, 5 L. R. A. 649; Osgood *v.* King, 42 Iowa 478.

Montana.— Kelly *v.* Clark, 21 Mont. 291, 53 Pac. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621.

New York.— Douglass *v.* Ireland, 73 N. Y. 100 (overvaluation held to amount to fraud); National Tube Works Co. *v.* Gilfillan, 46 Hun 248, 11 N. Y. St. 533 [*affirmed* in 124 N. Y. 302, 26 N. E. 538, 35 N. Y. St. 357]. *Compare* Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. 410, 9 L. R. A. 527 [*reversing* 52 Hun 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409].

Tennessee.— Bristol Bank, etc., Co. *v.* Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228.

United States.—Preston *v.* Cincinnati, etc., R. Co., 36 Fed. 54, 1 L. R. A. 140, a scheme of vulgar fraud — shareholders held liable.

(iv) *What Overvaluations Have Been Held Fraudulent.* Within the meaning of the foregoing rule, the following overvaluations have been held to be fraudulent: Where there is a gross overvaluation to the knowledge of the sharetaker;[5] where the overvaluation is so gross as, in the absence of an explanation, creates on the face of the transaction an inference of fraudulent intent,[6] especially where viewed in connection with the other facts of the case;[7] as where a corporation, for the purpose of enabling a subscriber to get his shares at less than par, buys from him a worthless patent right and afterward resells it to him for a nominal sum, the transaction being a mere evasion of the statutory requirement that the shares are to be sold at par;[8] or where "paid-up shares" to the amount of three hundred thousand dollars were issued in exchange for property of the well-understood value of no more than seventy-five thousand dollars;[9] or where land is conveyed to a corporation in full payment of shares of the par value of one million two hundred and fifty thousand dollars, which land was purchased for ninety thousand dollars.[10]

(v) *What Overvaluations Have Been Held Not Fraudulent.* On the other hand overvaluations were held not fraudulent where shares to the extent of one million dollars were issued for property worth two hundred and twenty thousand dollars;[11] where shares in a corporation which were practically worthless because the corporation owned no property or franchises of any kind were issued in consideration of the transfer to the corporation of property worth one million two hundred thousand dollars, against which there was an indebtedness of one million and fifty thousand dollars, which indebtedness the corporation assumed, the conclusion being that the issue of shares was not fictitious and void;[12] where shares were issued to pay for an interest in land which both the corporation and the grantee believed to be worth fifty-five thousand dollars, but which was actually worth only fifteen thousand six hundred dollars.[13]

(vi) *What Is "Good Faith" Within Meaning of Rule.* It has been held that the belief that a prudent and sensible business man would hold in the ordinary conduct of his own business affairs is what constitutes good faith in the valuation of property for which stock of a corporation is issued.[14]

(vii) *Questions of Procedure Connected With "Good Faith Rule"*— (a) *View That Contract Must Be Impeached For Fraud in Direct Proceeding.* There is a view, seemingly confined to two or three decisions, that the creditors of the corporation cannot charge the shareholder with the difference between the agreed and the actual value of the property delivered in payment of his shares until the transaction has been impeached for fraud in a direct proceeding.[15] But it does not appear from these decisions what proceeding the creditor of the corporation is expected to take in order to impeach the transaction, whether a bill

5. Wishard *v.* Hansen, 99 Iowa 307, 68 N. W. 691, 61 Am. St. Rep. 238; Hastings Malting Co. *v.* Iron Range Brewing Co., 65 Minn. 28, 33, 67 N. W. 652.

6. Coleman *v.* Howe, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133 [*affirming* 53 Ill. App. 82].

7. Lloyd *v.* Preston, 146 U. S. 630, 13 S. Ct. 131, 36 L. ed. 1111.

8. Peck *v.* Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616.

9. Coleman *v.* Howe, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133 [*affirming* 53 Ill. App. 82].

10. Lea *v.* Iron Belt Mercantile Co., 119 Ala. 271, 24 So. 28.

11. Rood *v.* Whorton, 74 Fed. 118, 20 C. C. A. 332. *Compare* the equally unsatisfactory case of Giddings *v.* Holter, 19 Mont. 263, 48 Pac. 8, where the question was whether directors who had reported, in the report required by statute, that the shares of the corporation were paid in full, when they had been paid in town lots carved out of a recent government land entry which was annulled by the government land-office, made a false report.

12. Smith *v.* Ferrier, etc., R. Co., (Cal. 1897) 51 Pac. 710.

13. Jenkins *v.* Bradley, 104 Wis. 540, 80 N. W. 1025.

14. Kelly *v.* Clark, 21 Mont. 291, 53 Pac. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621.

15. Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20; Brant *v.* Ehlen, 59 Md. 1; Phelan *v.* Hazard, 19 Fed. Cas. No. 11,068, 5 Dill. 45. *Compare* Coit *v.* North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 S. Ct. 231, 30 L. ed. 420.

in equity in which the corporation, the directors, and the shareholders are made parties, or what.

(B) *Whether Fraudulent Overvaluation Should Be Pleaded.* Under the "good faith rule" there can be no doubt that a fraudulent overvaluation should be pleaded by a creditor proceeding to charge a shareholder with the difference between real value and pretended value; but under the "true value rule" a charge of fraud is not necessary.[16]

(C) *Manner of Pleading Fraud.* In pleading fraud under the "good faith rule," it has been held to be necessary to charge that the corporation was misled or overreached by defendant, as to the situation or value of the property, that the transaction was merely colorable, or that it was a device to absorb the capital stock of the corporation without paying what was regarded and agreed upon as an equivalent for it.[17]

(D) *Consideration May Be Shown by Parol.* The consideration for the shares and the real nature of the transaction may be shown by parol, notwithstanding the recitals in the corporate record.[18]

(E) *Trial by Jury of Question of Fraud.* The fraud here under consideration, being fraud in fact, it follows that in actions at law the issue of fraud or good faith is contestable and before a jury,[19] although where the issue has been submitted to a judge without a jury, the unsuccessful party cannot object for the first time in an appellate court that this was done.[20]

(F) *Whether Creditors Have Right of Action Against Directors For Fraudulent Overvaluation.* As a general rule creditors of the corporation have no right of action against the directors for a fraudulent overvaluation, since in theory of law the wrong is a wrong to the corporation and not a direct wrong to the creditors.[21] This does not exclude the conclusion that where the formation of a corporate organization has been resorted to in order to cloak a fraud upon the public, and where shares pretendedly paid up in property of great value have been foisted by fraudulent representations made by the directors, they may not have a direct action against the directors to recover damages for the fraud.[22] In every such case it is necessary in order to a recovery that plaintiff should show that he relied upon the fraudulent representations.[23]

(VIII) *Subsequent Creditors With Full Knowledge Have No Redress.* On whatever theory the conclusion is placed, the rule seems to be that those who extend credit to the corporation with full knowledge as to the manner in which its shares have been paid for, if at all, cannot charge its shareholders with any supposed difference between real value and fictitious value, in case of payment in property.[24] And this is especially true where one shareholder, being a creditor, seeks to charge other shareholders.[25]

h. Rescission of Contracts Whereby Shares Are Paid For in Property — (I) *In General.* This subject rests upon principles already considered.[26] It seems that a promise between a corporation and one to whom its shares have been

16. Boynton *v.* Hatch, 47 N. Y. 225.

17. Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20.

18. Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212. To this point see Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371; Hollocher *v.* Hollocher, 62 Mo. 267; Fontaine *v.* Boatmen's Sav. Inst., 57 Mo. 552.

19. Frankenthal *v.* Goldstein, 44 Mo. App. 189 (cases reviewed); Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87.

20. Dodge *v.* Havemeyer, 4 N. Y. St. 561.

21. Priest *v.* White, 89 Mo. 609, 1 S. W. 361.

22. Such were the cases of Baker *v.* Crandall, 78 Mo. 584, 47 Am. Rep. 126 [*affirming* 7 Mo. App. 564]; Watson *v.* Crandall, 78 Mo. 583 [*affirming* 7 Mo. App. 233]; Hornblower *v.* Crandall, 78 Mo. 581 [*affirming* 7 Mo. App. 220 and *followed* in Whiting *v.* Crandall, 78 Mo. App. 593].

23. This was one of the grounds of the decision in Priest *v.* White, 89 Mo. 609, 1 S. W. 361.

24. Deadwood First Nat. Bank *v.* Gustin Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676.

25. Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657; Whitehill *v.* Jacobs, 75 Wis. 474, 44 N. W. 630.

26. See *supra*, VI, L.

issued as fully paid up, when nothing has been paid, in order to settle a controversy between the sharetaker and other coadventurers, followed by a redelivery of the share certificates to the corporation, and a subsequent reissue of them to *bona fide* takers, will not afford ground for charging the first subscriber as a shareholder, since the trust fund available for creditors has not been diminished by the transaction.[27] It has been held that a shareholder who surrenders unpaid shares to the corporation is not liable to creditors of the corporation, whose demands subsequently accrue;[28] but this can scarcely be affirmed with confidence.[29]

(II) *Corporation or Its Representative Cannot Disaffirm Without Restoring Property Received.* On familiar grounds neither the corporation nor its legal representative can disaffirm a contract whereby property has been delivered to the corporation in payment for its shares, on the ground of inadequacy in the value of the property, or of a fraudulent overvaluation, without restoring the property to the shareholder sought to be charged,[30] nor can this be done in any event against a *bona fide* purchaser of shares in open market.[31]

(III) *No Disaffirmance Where Contract Fully Executed on One Side.* The foregoing proposition is tantamount to another, which is that there can be no disaffirmance of such a contract, or any aid extended by a court of equity to either party, for the purpose of rescinding it, where it has been fully executed on one side, so that the parties cannot be put *in statu quo*, as where bonds had been given in payment of shares of the stock of an insurance company, on which the company had embarked in business, and this, although the capital stock may not have been paid in good faith, and although the company may have embarked in business in violation of the provisions of its charter.[32]

(IV) *Where Shares Turn Out Void Because Issued For Less Than Full Value in Violation of Law, Subscriber May Recover Back Consideration Paid by Him.* Where shares in a corporation are sold in good faith for less than their full value, and a certificate is issued therefor, which is in fact void, because issued for shares as fully paid, whereby they are worthless in the hands of the sharetaker, he may maintain an action against the corporation to recover back the money which is thus paid, as upon a consideration which has failed.[33]

i. Payment For Shares in What Kind of Property — (I) *What Kind of Property Is Deemed to Be "Money's Worth" to Corporation.* Within the rule already stated a payment of shares may be made in any kind of property which the corporation, under its charter or governing statute, may take and hold; in any services such as it might lawfully contract for; or in any solvent credits which it might lawfully acquire. It may be made in land, labor, materials useful for its business, or in satisfaction of damages or other liabilities.[34] In the absence of a statutory prohibition, the shares of a corporation may be paid for in any kind

27. Accordingly, in an action by the creditors of a corporation engaged in the manufacture of iron, to charge defendant with a statutory liability as a shareholder, it was held that he might show in exoneration that he became a shareholder by transferring to the corporation a furnace owned by him, in exchange for the stock; and that, some of the shareholders being dissatisfied, he took back the furnace and transferred the stock, taking a deed for the furnace. Morgan *v.* Lewis, 46 Ohio St. 1, 17 N. E. 558.

28. Erskine *v.* Peck, 13 Mo. App. 280 [*affirmed* in 83 Mo. 465].

29. Johnson *v.* Lullman, 15 Mo. App. 55 [*affirmed* in 88 Mo. 567].

30. Gillin *v.* Sawyer, 93 Me. 151, 44 Atl. 677; Foreman *v.* Bigelow, 9 Fed. Cas. No. 4,934, 4 Cliff. 508.

31. Foreman *v.* Bigelow, 9 Fed. Cas. No. 4,934, 4 Cliff. 508.

32. Yard *v.* Pacific Mut. Ins. Co., 10 N. J. Eq. 480, 64 Am. Dec. 467. *Compare* Thorp *v.* Woodhull, 1 Sandf. Ch. (N. Y.) 411.

33. Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88 [*rehearing denied* in 81 N. W. 118].

34. Arapahoe Cattle, etc., Land Co. *v.* Stevens, 13 Colo. 534, 22 Pac. 823; Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318; Carr *v.* Le Fevre, 27 Pa. St. 413 (land); Searight *v.* Payne, 6 Lea (Tenn.) 283.

of property, labor, services, or other commodity such as the corporation might lawfully receive and pay for in money.[35]

(II) *Particulars as to What Kind of Property.* Payment for example may be made in solvent securities;[36] in the stock and bonds of a former corporation, in which case the franchise of the former corporation is to be construed in determining whether there has been a fair valuation;[37] in benefits represented by expenditures in developing the property before the corporation was organized;[38] in a debt due by the corporation to the subscriber, which may be set off *pro tanto* against his subscription;[39] in a credit on the purchase-price of land covered by a bond, which bond was given by the subscriber to the corporation to convey certain lands to it for a certain sum;[40] in case of a mining company, in mining lands;[41] in book-accounts which are incidents of the business which the sharetaker has transferred to the corporation;[42] in the notes of a prior copartnership, where the corporation has been organized to take over and continue its business;[43] in the property of the prior copartnership in such a case — nor is a conveyance of the partnership assets to the corporation the case of persons contracting with themselves, since the corporation is in law a distinct person from the members of the copartnership;[44] in services or labor valuable and useful to the corporation;[45] in newspaper puffing and advertising in order to further a great scheme such as requires the support of the public;[46] in the case of insurance companies paying commissions on business done for the company by local agents, where the agreement with the local agent is collateral to the share subscription;[47] in services as a director of the corporation, and upon consideration of the person so serving transferring to the corporation, it being a bank, the custom of a mercantile house, of

35. Hastings Malting Co. *v.* Iron Range Brewing Co., 65 Minn. 28, 33, 67 N. W. 652. In such a case where the property is turned in at a fair valuation (Mercer *v.* Park City Mineral Water Co., 38 S. W. 841, 18 Ky. L. Rep. 985) or where no issue is made as to its value (Elderkin *v.* Peterson, 8 Wash. 674, 36 Pac. 1089) the shares are deemed paid for to the extent to which it was agreed between the parties that the commodity should be deemed payment.

36. McRae *v.* Russell, 34 N. C. 224; Vermont Cent. R. Co. *v.* Clayes, 21 Vt. 30; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709. That some of the subscriptions to the capital stock of a trust company appointed as assignee for creditors had not been paid in cash, but in securities, cannot be raised by collateral attack in garnishment proceedings against such company on the ground that the assignment is void see Roane Iron Co. *v.* Wisconsin Trust Co., 99 Wis. 273, 74 N. W. 818, 67 Am. St. Rep. 856.

37. Rafferty *v.* Buffalo City Gas Co., 37 N. Y. App. Div. 618, 56 N. Y. Suppl. 288.

38. Geneva Mineral Spring Co. *v.* Coursey, 45 N. Y. App. Div. 268, 61 N. Y. Suppl. 98 [*rehearing denied* in 62 N. Y. Suppl. 1137].

39. Richardson *v.* Graham, 45 W. Va. 134, 30 S. E. 92 [*citing* Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20].

40. Libby *v.* Mt. Monadnock Mineral Spring, etc., Co., 68 N. H. 444, 44 Atl. 602.

41. Foreman *v.* Bigelow, 9 Fed. Cas. No. 4,934, 4 Cliff. 508; Phelan *v.* Hazard, 19 Fed. Cas. No. 11,068, 5 Dill. 45. *Compare In re* South Mountain Consol. Min. Co., 5 Fed. 403, 7 Sawy. 30.

42. Gurney *v.* Union Transfer, etc., Co., 51 N. Y. Super. Ct. 444, 8 N. Y. Suppl. 549, 29 N. Y. St. 274.

43. Stoddard *v.* Shetucket Foundry, etc., Co., 34 Conn. 542.

44. St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544.

45. McComb *v.* Cordova Apartment Assoc., 10 N. Y. Suppl. 552, 31 N. Y. St. 334; McComb *v.* Barcelona Apartment Assoc., 10 N. Y. Suppl. 546, 31 N. Y. St. 325.

That the value of services must bear some reasonable proportion to the nominal value of the shares issued for them see Chouteau *v.* Dean, 7 Mo. App. 210, 215, opinion by Lewis, P. J.

Construction of a peculiar contract whereby persons were to subscribe for the shares of a corporation, they to be employed by the corporation, and to pay for the shares a certain per cent of their wages until their subscription should be paid for, with the conclusion that the subscribers could not, on the corporation becoming insolvent, recover from it the amount of wages retained on account of their subscription. Lincott *v.* Northwood Union Shoe Co., 68 N. H. 260, 44 Atl. 992.

46. Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212, no objection that the editorials were published gratuitously. To the contrary, where full-paid shares were to be issued to a person in exchange for his influence in promoting the sale of the goods which the corporation is organized to manufacture see Peninsular Sav. Bank *v.* Black Flag Stove Polish Co., 105 Mich. 535, 63 N. W. 514.

47. *In re* General Provident Assur. Co., L. R. 9 Eq. 74; Matter of Companies Act,

which he was a member;[48] in services rendered by officers of the corporation in cases where the directors have the right to pay compensation to such officers;[49] in a note, bond, or other contract, secured by a mortgage;[50] in a certified check on a solvent bank, wherein the drawer has funds sufficient to meet it;[51] in the promissory note of the subscriber, although this is not payment until the note is paid,[52] and this in the face of a constitutional provision which forbids the issue of stock by corporations except for money paid, labor done, or property actually received;[53] in the case of a water-supply company, in the construction of its plant and the acquisition of the property and rights necessary to its operation;[54] in the good-will of a business, which the corporation lawfully takes over and continues;[55] in services agreed to be performed in the future, as well as in services already performed;[56] in anything which the company honestly and not colorably buys, and at any price which it sees fit to pay, provided the transaction is made public by a registration under a statute permitting such transactions to take place;[57] in an incorporeal hereditament, such as the right to take minerals from land;[58] in work done and materials furnished by contractors, in which case, in the absence of fraud, the shares cannot be made assessable as between the original parties, on the ground that the work was defectively done;[59] in a steam-boiler necessary to the operation of the business of the company, and put in in running order by the shareholder;[60] and in a case where shares have been subscribed for by one in a credit company, at the request of another, in a judgment recovered by such other against the company.[61]

(III) *Whether Payment Can Be Made by Transferring Worthless Patented or Unpatented Invention.* Certainly, where the "true value rule" obtains, a payment for shares cannot be made by transferring to the corporation an invention patented or unpatented, which turns out to be worthless, since such an invention is not property, but is a mere possibility.[62] But an agreement

4 De G. J. & S. 749, 11 Jur. N. S. 574, 34 L. J. Ch. 525, 12 L. T. Rep. N. S. 717, 13 Wkly. Rep. 958, 69 Eng. Ch. 574.

48. Rich *v.* Lincoln State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382.

49. Morton *v.* Timken, 48 N. J. L. 87, 2 Atl. 783, mandamus granted to compel the issuing of the shares.

50. Governor *v.* Baker, 14 Ala. 652; Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179; Western Bank *v.* Tallman, 17 Wis. 530; Andrews *v.* Hart, 17 Wis. 297; Lyon *v.* Ewings, 17 Wis. 61; Clark *v.* Farrington, 11 Wis. 306. Certificates issued not invalidated by the fact that the security taken by the corporation turns out to be worthless. Protection L. Ins. Co. *v.* Osgood, 93 Ill. 69.

51. *In re* Staten Island Rapid Transit R. Co., 37 Hun (N. Y.) 422.

52. Leighty *v.* Susquehanna, etc., Turnpike Co., 14 Serg. & R. (Pa.) 434.

53. Pacific Trust Co. *v.* Dorsey, 72 Cal. 55, 12 Pac. 49 [*affirmed* in 13 Pac. 148]. For a case presenting the fanciful theory that although the contract of subscription was void, because the commissioners had power to receive subscriptions only in cash, yet the note was good as having been given for the purchase of so much stock, see Hayne *v.* Beauchamp, 5 Sm. & M. (Miss.) 515. The better view is that in case of a corporation having the inherent or implied power to take and negotiate promissory notes in the course of its business, it may receive such a note in settlement of a subscription to its capital stock. Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Magee *v.* Badger, 30 Barb. (N. Y.) 246.

54. Drake *v.* New York Suburban Water Co., 26 N. Y. App. Div. 499, 50 N. Y. Suppl. 826, where the contract was executed on both sides.

55. Washburn *v.* National Wall-Paper Co., 81 Fed. 17, 26 C. C. A. 312.

56. Shannon *v.* Stevenson, 173 Pa. St. 419, 34 Atl. 218, 37 Wkly. Notes Cas. (Pa.) 537.

57. *In re* Wragg, [1897] 1 Ch. 796, 66 L. J. Ch. 419, 76 L. T. Rep. N. S. 397, 45 Wkly. Rep. 557, under English Companies Act (1867).

58. Shepard *v.* Drake, 61 Mo. App. 134.

59. Riverton Water Co. *v.* Hummel, 175 Pa. St. 575, 34 Atl. 851. Circumstances under which the shares issued under statutory authority by the purchasers of the property and franchises of the corporation at a foreclosure sale, upon a reincorporation, are to be deemed full-paid see Wells *v.* Green Bay, etc., Canal Co., 90 Wis. 442, 64 N. W. 69.

60. Samuel *v.* Swanger, 7 Del. Co. (Pa.) 446.

61. *In re* Paraguassu Steam Tramroad Co., L. R. 9 Ch. 355, 43 L. J. Ch. 482, 30 L. T. Rep. N. S. 211, 22 Wkly. Rep. 386.

62. Chisholm *v.* Forny, 65 Iowa 333, 21 N. W. 664 (transfer of a worthless patent right does not satisfy the Iowa statute); Van Cleve *v.* Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; National Tube-Works Co. *v.* Gilfillan, 124 N. Y. 302, 26 N. E. 538,

between the owner of a patent right and a third party that the latter should form a corporation to work the patent and should issue to the former a certain number of full-paid shares of the capital stock of the corporation for the transfer of the patent right is, in the absence of fraud or of a purpose to impose on the public, a valid agreement.[63]

j. Various Other Holdings Relating to Payment of Shares in Property — (I) *When Subscription Payable in Property Is Demandable in Money.* If the subscription is in terms payable in materials, and is not paid in materials according to the contract, it is demandable in money, and an action of debt will lie thereon.[64]

(II) *Corporation May Purchase Property Payable Partly in Stock or Bonds.* In the absence of a statutory prohibition, a corporation which purchases property, intending to issue stock in payment therefor, need not make the whole payment in stock; it may issue stock for a portion and pay in cash or issue bonds for the balance.[65]

(III) *Other Subscribers Not Discharged Because Corporation Accepts Payment of Some Subscribers in Advance of Regular Calls in Depreciated Money.* In one case it was held that the act of the directors of a corporation during the late Civil war in allowing subscribers to discharge their entire subscriptions in advance of the regular calls in depreciated Confederate money, being *ultra vires* and void, did not have the effect of discharging other subscribers who had not enjoyed this privilege. The court proceeded on the ground that what had been done did not stand in the way of the company collecting from the favored subscribers the amounts really due from them.[66]

(IV) *Corporation Receiving Land in Payment For Its Shares Is Purchaser For Value.* Where the subscriber has paid for his shares in land at a given valuation, the corporation is a purchaser for value, within the recording acts, and is not affected with knowledge of a defect in the title, which may be possessed by the conveying shareholder, although the latter is president of the corporation.[67]

(V) *Payment in Lands Title to Which Fails.* Under the "true value rule" quitclaim deeds to a corporation, by subscribers to its shares, of lands in which they erroneously supposed they had an interest, cannot constitute a valid payment for their stock as against creditors of the corporation.[68]

(VI) *Rights of Shareholder Who Has Paid More Than Par For Shares.* A shareholder who has voluntarily paid more than par for his stock

35 N. Y. St. 357 [*affirming* 46 Hun (N. Y.) 248, transfer of an unpatented invention found by the jury to be worth but a small proportion of the shares issued, and a verdict directed for plaintiff, a creditor of the corporation]; Tasker *v.* Wallace, 6 Daly (N. Y.) 364 (transfer of patent rights of an unascertained value not a payment for shares under the statutes of New York).

63. Beyrich *v.* Liebler, 3 N. Y. Suppl. 293, 20 N. Y. St. 769. *Compare* Edwards *v.* Bringier Sugar Extracting Co., 27 La. Ann. 118; *In re* Postage Stamp Automatic Delivery Co., [1892] 3 Ch. 566, 61 L. J. Ch. 597, 67 L. T. Rep. N. S. 88, 41 Wkly. Rep. 29.

The following two cases were decided upon the construction of two statutes, one of them prohibiting corporations from disposing of their shares at less than par, except in sales of shares at auction for the non-payment of assessments, and the other declaring that certificates of stock issued by a corporation at its organization to pay promoters for certain patents, and by them transferred to one of their number to hold as treasury stock, are without consideration and void. Kimball *v.* New England Roller-Grate Co., 69 N. H. 485, 45 Atl. 253; State *v.* Williams, 69 N. H. 485, 45 Atl. 253.

64. Haywood, etc., Plank Road Co. *v.* Bryan, 51 N. C. 82.

65. Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. (N. Y.) 410, 9 L. R. A. 527 [*reversing* 52 Hun (N. Y.) 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409].

66. Macon, etc., R. Co. *v.* Vason, 57 Ga. 314.

67. Frenkel *v.* Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736.

68. Henderson *v.* Turngren, 9 Utah 432, 35 Pac. 495. But *compare* Giddings *v.* Holter, 19 Mont. 263, 48 Pac. 268. That the title to shares issued in payment for property is not affected by the fact that the share-taker obtained the property on credit and had not paid for it, with a good many other complications in a squabble among shareholders see West *v.* Huiskamp, 63 Fed. 749, 11 C. C. A. 401.

in discharge of his obligation on his share subscription cannot compel the corporation to refund the sum he has paid in excess of the par value.[69]

(VII) *OTHER HOLDINGS.* The fact that shares are issued to innocent parties upon property fraudulently acquired by a corporation does not deprive the defrauded grantor of relief, as the managers of the corporation are the agents of the shareholders in issuing stock upon property which the corporation had no right to, and the shareholders must bear the consequences of their wrong and look to them for redress.[70] The fact that a subscription contract, binding each party to pay one hundred and fifty dollars for one lot and three shares of stock in a corporation, of the par value of twenty-five dollars each, has become unenforceable so far as concerns the lot, as against a subscriber, because of a resort to chance in the distribution of the lots in which he did not participate, does not render it unenforceable so far as concerns his liability for the stock.[71]

3. RIGHTS OF BONA FIDE PURCHASERS OF UNPAID SHARES — a. Bona Fide Purchasers Protected Where Certificates Recite That Shares Are Paid Up. *Bona fide* purchasers of shares, the certificates of which recite that the shares have been paid for in full, are protected from future assessments, whether by the company or on behalf of its creditors, very much on the principle that protects the innocent purchasers of commercial paper, although it is admitted that share certificates are not negotiable instruments.[72]

b. Bona Fide Purchasers Protected, Although Certificates Do Not Recite That Shares Are Paid Up. Some of the courts have carried the principle so far as to hold that where shares of corporate stock are issued as paid-up shares, an innocent purchaser of the same, who takes them in good faith as paid up, in the absence of any circumstance to put him upon inquiry, and when the books of the corporation would give no notice that the stock was not paid up, is not liable to creditors of the corporation for the amount unpaid; nor is it necessary in such a case, the certificates being in the usual form, that in order that they should be regarded as paid up in the hands of an innocent purchaser they should state on their face that they were fully paid up.[73]

c. Subsequent Purchaser With Notice of Fraudulent Overvaluation Not Protected. But where property has been conveyed to the company in payment of shares of its stock, at a gross or fraudulent overvaluation, a subsequent purchaser

69. Esgen *v.* Smith, 113 Iowa 25, 84 N. W. 954.

70. Texas Consol. Compress, etc., Assoc. *v.* Dublin, etc., Co., (Tex. Civ. App. 1896) 38 S. W. 404.

71. Emshwiler *v.* Tyner, 21 Ind. App. 347, 52 N. E. 459, 69 Am. St. Rep. 360.

Shares not assessable.— Circumstances under which shares issued to incorporators of a land company as fully paid, in exchange for land conveyed by them to the corporation, are not assessable for the payment of an encumbrance on the land. John R. Proctor Land Co. *v.* Cooke, 103 Ky. 96, 44 S. W. 391, 19 Ky. L. Rep. 1734.

The mere intention of one who conveys all his property to a corporation and takes stock therefor that his debts shall be paid out of the proceeds of the corporation will not bind the corporation, where there is no agreement to that effect between him and the corporation. Durlacher *v.* Frazer, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. Rep. 918.

Construction of the provision of the charter of a water company that only a stated per cent of the capital shall be paid up, except as otherwise provided, etc., with the conclusion that the payment of a greater per cent is authorized when necessary to put the works in condition, etc. Burlington *v.* Burlington Water Co., 86 Iowa 266, 53 N. W. 246.

72. Brant *v.* Ehler, 59 Md. 1; Du Pont *v.* Tilden, 42 Fed. 87; Foreman *v.* Bigelow, 9 Fed. Cas. No. 4,934, 4 Cliff. 508; Phelan *v.* Hazard, 19 Fed. Cas. No. 11,068, 5 Dill. 45; Waterhouse *v.* Jamieson, L. R. 2 H. L. Sc. 29; Burkinshaw *v.* Nicolls, 3 App. Cas. 1004, 48 L. J. Ch. 179, 39 L. T. Rep. N. S. 308, 26 Wkly. Rep. 819; *In re* British Farmers Pure Linseed Cake Co., 7 Ch. D. 533; McCracken *v.* McIntyre, 1 Can. Supreme Ct. 479.

73. Keystone Bridge Co. *v.* McCluney, 8 Mo. App. 496 [*cited* and referred to by the supreme court of Missouri in Skrainka *v.* Allen, 76 Mo. 384, 392]. See also Erskine *v.* Lowenstein, 11 Mo. App. 595; West Nashville Planing-Mill Co. *v.* Nashville Sav. Bank, 86 Tenn. 252, 6 S. W. 340, 6 Am. St. Rep. 835. *Compare* Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 1 Biss. 246.

That there is a distinction between the case where share certificates issue purporting to be fully paid and where they do not purport to be fully paid see the observations of Dillon, J., in Steacy *v.* Little Rock, etc., R. Co., 22 Fed. Cas. No. 13,329, 5 Dill. 348, 373.

of the shares, with notice of the fact, is liable to creditors of the corporation to the same extent as the original subscriber.[74]

d. When Record of Conveyance of Land to Corporation Not Notice That Shares Issued Therefor Have Been Paid Up. The record of a deed of conveyance of real estate to a corporation, reciting that the consideration is a certain number of paid-up shares of the stock, does not constitute constructive notice to creditors that the subscriptions to such shares have been paid in.[75]

e. Effect of Surrender of Unpaid Shares and Reissue of Them to Bona Fide Purchaser. Where such a transaction has taken place, one who subsequently becomes a creditor cannot, in the event of the subsequent insolvency of the corporation, hold the original shareholder to the liability assumed by his contract or to that imposed upon him by statute. The reason is that by such a surrender and reissue of the shares the assets of the corporation have been in nowise diminished or impaired, and no element of estoppel enters into such a case.[76]

N. Assessments and Calls — 1. In General — a. What Are Assessments and What Not. An assessment is said to be a rating of the shareholders by the board of directors, or by the shareholders in aggregate meeting, by instalments, of which notice is given to them, which notice usually passes under the name of a "call."[77] It is a levy on the shares of the corporation requiring each shareholder to pay it in proportion to the number of shares owned by him.[78] These two words, "assessments" and "calls," although really meaning different things, are constantly confused in legal treatises and in judicial opinions.[79]

b. When Assessment Is Necessary to Right of Action. Statutes, charters, by-laws, and contracts of subscription usually provide that the amount subscribed for shall be paid when called for by the directors or by the shareholders. Where such a provision enters into the contract, no action can be maintained against the subscriber on his contract of subscription until a valid assessment has been made,[80] except for the purpose of paying the debts of the corporation after insolvency.[81] The general rule may therefore be said to be that a call or assessment, or something standing in the place of and equivalent to it, either made by the company or by a court having jurisdiction, is necessary to right of action against the shareholder.[82] Generally speaking the call must be clearly proved and the recovery is limited to the amount which has been called.[83] It has been so held where the terms of the contract of subscription were that the subscriber would pay "all charges and assessments regularly levied or assessed," and the fact that notwithstanding the terms of the subscription the subscriber paid the full price for his

74. Boulton Carbon Co. *v.* Mills, 78 Iowa 430, 43 N. W. 290, 5 L. R. A. 649.

75. Osgood *v.* King, 42 Iowa 478.

76. Erskine *v.* Peck, 13 Mo. App. 280 [*affirmed* in 83 Mo. 465].

77. Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276. See also CALL, 6 Cyc. 265.

78. Omaha Law Library Assoc. *v.* Connell, 55 Nebr. 536, 75 N. W. 837.

79. See Gary *v.* York Min. Co., 9 Utah 464, 35 Pac. 494.

Effect of an oral agreement by a shareholder to accept such drafts as the corporation may draw upon him for calls. Bank of Commerce *v.* Bogy, 9 Mo. App. 335. See also Bank of Commerce *v.* Bogy, 44 Mo. 13, 100 Am. Dec. 247.

80. *Illinois.*— Great Western Tel. Co. *v.* Barker, 56 Ill. App. 402.

Louisiana.— Purton *v.* New Orleans, etc., R. Co., 3 La. Ann. 19.

Michigan.— Halsey Fire Engine Co. *v.* Donovan, 57 Mich. 318, 23 N. W. 828.

New Jersey.— Grosse Isle Hotel Co. *v.* I'Anson, 43 N. J. L. 442.

New York.— Williams *v.* Taylor, 120 N. Y. 244, 24 N. E. 288, 30 N. Y. St. 646; Bouton *v.* Dry Dock, etc., Stage Co., 4 E. D. Smith 420 (under section 7 of the New York act relating to stage companies).

United States.— Chandler *v.* Siddle, 5 Fed. Cas. No. 2,594, 3 Dill. 477.

See also *In re* Cawley, 42 Ch. Div. 209; Halifax Carette Co. *v.* Moir, 28 Nova Scotia 45.

See 12 Cent. Dig. tit. "Corporations," § 371.

81. West End Real-Estate Co. *v.* Claiborne, 97 Va. 734, 34 S. E. 900; Alexander *v.* Automatic Telephone Co., [1899] 2 Ch. 302, 68 L. J. Ch. 514, 80 L. T. Rep. N. S. 753. See also *infra*, VI, N, 1, c, (I).

82. Chandler *v.* Siddle, 5 Fed. Cas. No. 2,594, 3 Dill. 477.

83. South Georgia, etc., R. Co. *v.* Ayres, 56 Ga. 230.

shares ought not to establish his liability to pay in like manner for the rest; nor was it evidence of an agreement on his part to pay without a call.[84]

c. When Assessment Is Not Necessary — (I) *In General.* No assessment is necessary as a condition precedent to a right of action against the shareholder, where by the terms of his subscription he has agreed to pay the amount subscribed by him at certain specified dates, in which case an action for the agreed instalments may be maintained, although proceedings have not been taken to forfeit and sell the shares for the delinquency.[85] Nor as a general rule are an assessment and call necessary to a right of action where the corporation has ceased to be a going concern and has gone into liquidation in any form, and where the whole amount due by the shareholders is necessary to satisfy the valid demands of the creditors.[86] It is equally obvious that the governing statute or contract of subscription may be such that the whole amount subscribed for will be presently due and payable, without the necessity of any formal call, or even of any demand for the whole or any part of it by the directors; but that they may sue for it at once without any previous demand, the bringing of the action being in theory of law a sufficient demand.[87] It has been held that in the absence of anything in the governing statute, by-law, or in the contract of subscription, making the unpaid balance payable on assessments and calls, the full amount of the subscription is payable on demand.[88]

(II) *No Call Necessary to Bring in Statutory Deposit.* With respect to the statutory deposit which, under many schemes of incorporation, the subscriber is required to pay at the time of making his subscription, if the theory of the jurisdiction is that the failure to make it does not render the subscription void, then it follows that it is a debt payable on demand, that no formal call for it is necessary, but that the bringing of an action to recover it is a demand.[89]

(III) *No Assessment Necessary in Case of Preliminary Agreement to Subscribe.* The rule which requires an assessment obviously has no application to the case of an executory contract to subscribe for shares in the company. Such a contract is broken when the promisor refuses to make the subscription according to his agreement, and the measure of damages is the difference between the market value of the stock at the time of trial and the amount agreed to be paid for it.[90]

(IV) *Right of Shareholder to Pay at Once Without Waiting For Call.* It has been reasoned that a subscription to the stock of a corporation creates something more than a mere power on the part of the corporation to create an indebtedness by making a call on the subscriber, but that it gives a right to the shareholder to pay it at once; and he need not wait for a call.[91]

d. Assessments by Judicial Courts Administering Assets in Insolvency. Sometimes the court which administers, through its receiver or otherwise, the assets of an insolvent corporation, will ascertain the necessity of a call and will make it by an order of court.[92]

e. Doctrine That Corporations Have No Power to Assess Shares Unless Power Expressly Granted. Cases are found which put forward the doctrine that a cor-

84. Grosse Isle Hotel Co. *v.* I'Anson, 43 N. J. L. 442 [*affirming* 42 N. J. L. 10].

85. West *v.* Crawford, 80 Cal. 19, 21 Pac. 1123; Shattuck *v.* Robbins, 68 N. H. 565, 44 Atl. 694.

86. Washington Sav. Bank *v.* Butchers', etc., Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; Citizens, etc., Sav. Bank, etc. *v.* Gillespie, 115 Pa. St. 564, 9 Atl. 73. Circumstances under which an action by the assignee of an insolvent corporation may maintain an action against a shareholder upon his unpaid subscription, although no call has been made upon him by the court. Johnson *v.* Allis, 71 Conn. 207, 41 Atl. 816.

87. See *infra*, VI, N, 2, e, (III).

88. Champion Fire Kindler Co. *v.* Rischert, 74 Mo. App. 537.

89. Eastern Plank Road Co. *v.* Vaughan, 20 Barb. (N. Y.) 155.

90. Rhey *v.* Ebensburg, etc., Plank-Road Co., 27 Pa. St. 261.

91. Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,112, 1 Woods 463.

92. Glenn *v.* Howard, 81 Ga. 383, 8 S. E. 636, 12 Am. St. Rep. 318; Sanger *v.* Upton,

poration has no incidental power to assess for its own use a sum of money on the corporators and compel them by an action at law to pay the same; but such power must be derived from statute or from some express promise to pay.[93] But as a grant of the power to raise a joint stock necessarily implies a power to raise it in the usual way the force of these decisions is not perceived.

f. Power of Directors to Make Assessments — (I) *In General.* Under the best modern conceptions, the directors of a corporation have the power, in virtue of their general office as business managers, to make assessments upon the capital stock for the purposes of the corporation.[94]

(II) *Shareholders May Delegate Power to Directors.* Where the charter authorized the shareholders to make calls for payment of subscriptions for stock, and to appoint a board of directors consisting of shareholders to "manage the business of the corporation," it was held that the shareholders might by resolution after the organization of the company delegate to the board of directors the power to call in the stock.[95]

(III) *Shareholders May Fix Times of Payment in Their Contracts of Subscription.* The shareholders may, in their contracts of subscription, fix the times of payment; and as the shareholders are above the directors, unless a mandatory statute fixes the duties of the directors in this respect, the fact that power is conferred upon them to make calls for instalments of stock subscribed does not prevent shareholders in their articles of association or in any written contract to pay for stock from fixing the time of payment; and if such time is fixed by the terms of the subscription the party subscribing is bound thereby.[96]

(IV) *Directors Cannot Delegate Power to Ministerial Officers.* This power being discretionary in its nature, directors cannot delegate it to ministerial officers.[97] Cases are found where this principle has been departed from, as

91 U. S. 56, 23 L. ed. 220; Chandler *v.* Siddle, 5 Fed. Cas. No. 2,594, 3 Dill. 477 (United States district court sitting in bankruptcy).

93. Duluth Club *v.* MacDonald, 74 Minn. 254, 76 N. W. 1128, 73 Am. St. Rep. 344; Enterprise Ditch Co. *v.* Moffit, 58 Nebr. 642, 79 N. W. 560, 76 Am. St. Rep. 122, 45 L. R. A. 647; Williams *v.* Lowe, 4 Nebr. 382.

94. Budd *v.* Multonoma St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169, holding that a general statute (Hill Code Oreg. § 3225) clothing the directors with the exercise of the power vested in the corporation confers upon them this power. A decision of Story, J., at circuit that directors do not possess this power by implication and do not acquire it by a by-law authorizing them to "take care of the interests, and manage the concerns of the corporation" seems to be opposed to modern conceptions and to be untenable in its strictness. *Ex p.* Winsor, 30 Fed. Cas. No. 17,884, 3 Story 411.

Necessity of authority from shareholders or corporation.— That a requisition for the payment of stock made by the directors of a corporation, under the authority of the by-laws, is binding upon each individual shareholder without his assent see Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 479. But where the power was given to a corporation, by the legislature, to raise a fund in addition to the capital stock, by assessments on the shareholders, it was held that the directors had no power to lay assessments for this purpose, without authority from the corporation. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579. And a statute providing that an assessment upon capital stock must be made by the corporation has been construed to mean that it must be authorized by the shareholders. Lykens Valley Creamery Co. *v.* Bonawitz, 1 Dauph. Co. Rep. (Pa.) 249.

95. Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92.

96. Estell *v.* Knightstown, etc., Turnpike Co., 41 Ind. 174.

Contract construed.— Circumstances under which a written instrument signed by certain shareholders was construed as intending that the calls for instalments should be made as the business of the corporation required, and that the trustees had no right to call for all of it at once, unless the business required it. Williams *v.* Taylor, 120 N. Y. 244, 24 N. E. 288, 30 N. Y. St. 646 [*reversing* 41 Hun (N. Y.) 545, and *distinguishing* Tuckerman *v.* Brown, 33 N. Y. 297, 88 Am. Dec. 386; Howlands *v.* Edmunds, 24 N. Y. 307; Lake Ontario R. Co. *v.* Mason, 16 N. Y. 451].

97. *In re* County Palatine Loan, etc., Co., L. R. 9 Ch. 691, 43 L. J. Ch. 588, 31 L. T. Rep. N. S. 52, 22 Wkly. Rep. 697; *In re* London, etc., Bank, L. R. 3 Ch. 651, 37 L. J. Ch. 905, 19 L. T. Rep. N. S. 193, 16 Wkly. Rep. 1003; *In re* Leeds Banking Co., L. R. 1 Ch. 561, 36 L. J. Ch. 42, 14 L. T. Rep. N. S. 747, 14 Wkly. Rep. 883, 942; Cook *v.* Ward, 2 C. P. D. 255, 36 L. T. Rep. N. S. 893, 25 Wkly. Rep. 593.

Statutes exist conferring this power upon directors such as, in England, the Companies

where the treasurer was authorized to levy and call assessments as might be needed.[98]

(v) *Limitations of Power Must Be Sought For in Charter, Statute, By-Laws, Etc.* Necessarily the limitations of the power by directors with respect to the levying of assessments must be sought for in the charter, the governing statute, the by-laws, or the resolutions adopted by the shareholders in general meeting. Thus if the charter confers the power to raise a definite sum, when this sum is raised the power of assessment is exhausted.[99] So stock which has been fully paid up cannot be further assessed without special authority conferred by charter or by statute;[1] and moreover this authority, in order to be valid, must obviously have been conferred prior to the subscription, or it would impair the obligation of the contract and be void.[2] Moreover, where the directors possess this power, they must exercise it in accordance with the charter; all the prerequisites of that instrument must be complied with before an action will lie to recover instalments.[3]

(vi) *If Directors Possess Power Shareholders Cannot Question Necessity For Its Exercise.* Assuming that the directors are vested with the discretionary power of making assessments, and that the exercise of the power by them is not specially restrained, the wisdom or necessity of making them is exclusively for their determination, and is not open to question by the shareholders in the judicial courts, in the absence of fraud.[4]

(vii) *Directors Cannot Assess Paid-Up Stock Unless Specially Empowered by Statute or Where Shareholders so Contract.* In the absence of special authority conferred upon them by law, or of the assent of the shareholders evidenced in some form, the directors of a corporation have no power to assess shares which have been fully paid up.[5] But they may assess full-

Act of 1862 (*In re* Taurine Co., 25 Ch. D. 118, 53 L. J. Ch. 271, 49 L. T. Rep. N. S. 514, 32 Wkly. Rep. 129), and the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16 (see Totterdell *v.* Fareham Blue Brick Co., L. R. 1 C. P. 674, 12 Jur. N. S. 901, 35 L. J. C. P. 278, 14 Wkly. Rep. 919; D'Arcy *v.* Tamar, etc., R. Co., L. R. 2 Exch. 158, 4 H. & C. 463, 21 Jur. N. S. 543, 36 L. J. Exch. 543, 13 L. T. Rep. N. S. 626, 14 Wkly. Rep. 968); and where the power of delegation exists, its exercise will under particular circumstances be presumed (*In re* Barned's Banking Co., L. R. 3 Ch. 105, 37 L. J. Ch. 81, 17 L. T. Rep. N. S. 269, 16 Wkly. Rep. 193; Totterdell *v.* Fareham Blue Brick, etc., Co., L. R. 1 C. P. 674, 12 Jur. N. S. 901, 35 L. J. C. P. 278, 14 Wkly. Rep. 919; *In re* Tavistock Ironworks Co., L. R. 4 Eq. 233, 36 L. J. Ch. 616, 16 L. T. Rep. N. S. 824, 15 Wkly. Rep. 1007; Lindley Comp. L. (5th ed.) 156, 329, 338).

98. Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81. See also Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536, where a very irregular and it seems illegal assessment was worked out and made valid on the theory that the directors might ratify the acts of a committee of their members. *Compare* Pike *v.* Bangor, etc., R. Co., 68 Me. 445, where an assessment made by a committee of one, and not ratified by the board, was held void. See also Silver Hook Road *v.* Green, 12 R. I. 164, where it was held that a delegation of this discretionary power to the treasurer was unauthorized and that calls made by him were hence invalid.

99. State *v.* Morristown F. Assoc., 23 N. J. L. 195. See also *infra*, VI, N, 1, f, (VIII).

1. Great Falls, etc., R. Co. *v.* Copp, 38 N. H. 124; Atlantic De Laine Co. *v.* Mason, 5 R. I. 463.

2. See *infra*, VIII, F, 2.

3. Banet *v.* Alton, etc., R. Co., 13 Ill. 504. Where the charter of a company authorizes an assessment and call on unpaid shares of stock only in case of "losses exceeding the means of the corporation," this clause does not limit the right of the company so created to make an assessment for payment of losses only. When the funds are exhausted by losses and an assessment becomes necessary, it may be made for all purposes, either to pay debts already contracted or to create a new fund for the purpose of a business basis. *In re* Republic Ins. Co., 20 Fed. Cas. No. 11,704, 3 Biss. 452. See also Louisiana Paper Co. *v.* Waples, 15 Fed. Cas. No. 8,540, 3 Woods 34, where, pursuing a statute, it was held that after the payment of forty per cent of the subscription, no shareholder was liable for the balance unless it had been called for by a vote of three fourths of the shareholders.

4. Judah *v.* American Live Stock Ins. Assoc., 4 Ind. 333; Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286; Budd *v.* Multonoma St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169; Oglesby *v.* Attrill, 105 U. S. 605, 26 L. ed. 1186. See also Bailey *v.* Birkenhead, etc., R. Co., 12 Beav. 433, 14 Jur. 119, 19 L. J. Ch. 377, 6 R. & Can. Cas. 256.

5. Wells *v.* Green Bay, etc., Canal Co., 90 Wis. 442, 64 N. W. 69; *In re* Sovereign L.

paid shares where the governing statute, existing at the time of the formation of the corporation, gives them authority so to do.[6] And within the limits where public policy is not concerned, and subject to the rights of innocent persons dealing with the corporation, shareholders may vary by contract the liability which the governing statute imposes upon them, at least to the extent of increasing such liability,[7] as by agreeing that their shares shall be assessable where they would not be assessable under the governing statute.[8]

g. Power of Corporation to Make Assessments After Adoption of Resolution to Discontinue Business. The adoption by a corporation of a resolution to discontinue business does not operate as a dissolution, in such a sense as to deprive the corporation of the power to enforce assessments upon stock by actions against its shareholders.[9]

h. Illegality of One Assessment Will Not Vitiate Subsequent Legal Assessment. It has been laid down in an action for calls that the illegality of one assessment, in the particular case, the first assessment, will not vitiate subsequent assessments or proceedings for the forfeiture and sale of the shares thereunder, or afford a good defense to an action for the recovery of such subsequent assessments.[10]

i. Periodicity of Calls — Intervals Between Them. The intervals which may or must elapse between the different calls depend of course upon the governing instrument, whatever it may be, charter, statute, by-laws, or resolution of the shareholders in general meeting.[11]

j. Several Instalments May Be Included in Single Call. Where the terms of a subscription required that "assessments should not exceed five dollars on each share at one time," it was held that if no greater sum is payable at one time, the fact that several assessments were voted at one time is immaterial.[12] On a similar

Assur. Co., [1892] 3 Ch. 279, 62 L. J. Ch. 36, 67 L. T. Rep. N. S. 336, 41 Wkly. Rep. 1.

6. As under Utah Comp. Laws (1888), §§ 2374, 2375, 2393. Gary *v.* York Min. Co., 9 Utah 464, 35 Pac. 494.

Construction of California statute (Cal. Civ. Code, § 322) limiting amount of assessment to ten per cent with stated exceptions. Pacific Fruit Co. *v.* Coon, 107 Cal. 447, 40 Pac. 542. See also Price's Appeal, 106 Pa. St. 421; Santa Cruz R. Co. *v.* Spreckles, 65 Cal. 193, 3 Pac. 661, 802.

Other examples of assessments authorized by particular statutes. Younglove *v.* Steinman, 80 Cal. 375, 22 Pac. 189; Taylor *v.* North Star Gold Min. Co., 79 Cal. 285, 21 Pac. 753.

Stock issued to an attorney as collateral security for a claim for legal services not assessable as between the parties to the transaction. Biggio *v.* Sandheger, 10 Ohio S. & C. Pl. Dec. 316, 8 Ohio N. P. 13.

That a corporation formed from a partnership may assess its capital stock to pay debts incurred by the firm in procuring property which has been transferred to the corporation, so long as the assessment is less upon each person than he was originally required to furnish as a partner, the firm capital not having been actually paid in, see Hennessy *v.* Griggs, 1 N. D. 52, 44 N. W. 1010.

7. Ventura, etc., R. Co. *v.* Hartman, 116 Cal. 260, 48 Pac. 65; Marysville Electric Light, etc., Co. *v.* Johnson, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215; West *v.* Crawford, 80 Cal. 19, 21 Pac. 1123.

8. Marysville Electric Light, etc., Co. *v.* Johnson, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215.

What does not amount to such agreement. — It has been held that a recital on certificates of the stock of a business corporation organized under N. Y. Laws (1890), c. 567, that they are fully paid and non-assessable beyond ten dollars per annum does not amount to an agreement on the part of the holder that the shares may be assessed to that amount or authorize the corporation to do so. Sullivan County Club *v.* Butler, 26 Misc. (N. Y.) 306, 56 N. Y. Suppl. 1.

9. Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286.

10. European, etc., R. Co. *v.* McLeod, 16 N. Brunsw. 3.

11. Subscribers to stock in a railroad company must pay their subscriptions as the work progresses, such being the intent of the parties, as gathered from the nature of the work to be accomplished. McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

Statutes have been enacted conferring upon the directors full discretionary power as to the time and manner of payment, under which they might require the whole subscription to be paid either at one time or in instalments. Haun *v.* Mulberry, etc., Gravel Road Co., 33 Ind. 103.

How period calculated. — It has been held that when not more than two calls are to be made in any successive twelve months, the period is to be calculated from the date of the first call, so that three calls may be made in thirteen successive months, provided but four be made in two years. Dinkgrave *v.* Vicksburg, etc., R. Co., 10 La. Ann. 514.

12. Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Rutland, etc., R. Co.

view a resolution of the board of directors of a railroad company requiring the payment of ten per cent every thirty days on all cash subscriptions until the whole subscriptions are paid has been held evidence of a call for a payment of instalments on stock subscribed for in thirty days from its date and every thirty days thereafter.[13]

k. Regularity and Manner of Convening Meetings to Make Assessments. If the meeting is a special one, then it can be convened only upon notice duly given to the shareholders, stating the object of the meeting. Neither a clause in the charter declaring that "all or any business of the corporation may be transacted, or acted on" at such a meeting, nor a by-law passed in pursuance of the charter prescribing how notice of special meeting shall be served upon the shareholders, can dispense with the necessity of specifying in such a case the purpose in the notice of the meeting.[14]

l. Interest Upon Assessments. Judicial authority does not seem to be unanimous upon the question upon what date interest accrues upon an assessment upon shares. According to an English decision interest begins to run from the time when the call ought to be paid and not from its date.[15] According to an American view it accrues from the making of the call.[16] While it is not as a general rule competent for the directors to pay interest on shares,[17] yet if a member pays in his subscription before it becomes due according to the terms of the contract — that is to say, before it is called — and the directors have agreed to pay interest on it as so much money advanced to the company, they must pay this interest, although there may be no profits out of which to pay it.[18]

m. Actions to Recover Back Money Paid on Assessments. If the shareholders in a corporation, desiring to raise capital to prosecute the venture, assess themselves and pay into the treasury sums beyond what is required by the mere obligation of their subscriptions, one of them who subsequently becomes dissatisfied with what he has done cannot maintain an action against the corporation to recover back what he has thus voluntarily paid in on the theory that it is a loan.[19]

n. Injunction Against Enforcement of Assessments. It seems that a shareholder may have an injunction to prevent a forfeiture of his shares for non-payment of a call, where the shares are fully paid up, although relief will be confined to restraining proceedings against his shares,[20] or under particular circumstances where he has been inveigled into subscribing through fraud.[21]

v. Thrall, 35 Vt. 536. *Compare* Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276.

13. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430.

14. Mason *v.* Atlantic De Laine Co., 5 R. I. 463. That a finding that a meeting of directors of a corporation was "duly and regularly convened," and that an assessment made thereat was "lawfully and rightfully levied," includes a finding that the necessary notice was given see Younglove *v.* Steinman, 80 Cal. 375, 22 Pac. 189.

Statutes are found which contain minute regulations as to the manner in which meetings shall be held to vote assessments upon shares, such for example as Colo. Gen. Stat. (1883), c. 19, § 86.

15. Johnson *v.* Lyttle's Iron Agency, 5 Ch. D. 687, 46 L. J. Ch. 786, 36 L. T. Rep. N. S. 528, 25 Wkly. Rep. 548.

16. McCoy *v.* World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288 [*affirming* 87 Ill. App. 605].

Under a Virginia statute (Va. Code (1873), c. 57, § 23) a shareholder in a corporation is liable for interest from the date of the call on him for an assessment to meet corporate liabilities. Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184.

Effect of forfeiture.— Interest not recoverable upon calls for the non-payment of which the shares have been forfeited. *In re* Blakely Ordnance Co., L. R. 3 Ch. 412, L. R. 5 Eq. 6, 37 L. J. Ch. 230, 17 L. T. Rep. N. S. 554, 16 Wkly. Rep. 322.

Provision of act treated as penalty.— An act of incorporation authorizing the company to charge five per cent interest per month on all stock subscribed and not paid within thirty days was treated as a penalty, and not merely interest. Custar *v.* Titusville Gas, etc., Co., 63 Pa. St. 381.

17. See *infra*, VII, C, 1, a.

18. Dale *v.* Martin, L. R. 11 Ir. 371 [*affirming* L. R. 9 Ir. 498].

19. Ridwell *v.* Pittsburgh, etc., R. Co., 114 Pa. St. 535, 6 Atl. 729.

20. Moore *v.* New Jersey Lighterage Co., 57 N. Y. Super. Ct. 1, 5 N. Y. Suppl. 192, 23 N. Y. St. 213.

21. See *supra*, VI, K, 3, a.

Injunction refused.—State of case in which

o. Assessments Must Be Equal. A demurrer will be sustained to a complaint in an action against a shareholder to recover an assessment upon the shares of the corporation, which alleges that some of the shareholders have paid forty per cent of their subscriptions, and others but two per cent, and that a horizontal assessment of thirty-five per cent has been made on all shareholders alike, on the ground that such assessment is unequal and unjust and should not be enforced, even though it was made by the court of another state having jurisdiction.[22] If the shares are divided into different classes, then the assessments must be equal with respect to the shareholders of each class.[23]

p. No Right to Assess Shareholders in Respect of Shares Lawfully Bought in by Corporation. Shares purchased by a company, under statutory authority to purchase its own stock, are extinguished, and are not kept alive in the company as trustee for the shareholders so as to render the shareholders liable, upon the winding-up of the company, to reimburse the company for a call upon the amount unpaid thereon, in addition to the amount unpaid on their own shares;[24] nor can a member defend against his liability as a shareholder on the ground that shares thus bought in are not also assessed, since the non-assessment of them accrues to the benefit of all the shareholders.[25]

q. Assessments Must Be Made by Formal Action of Directors Sitting as Board — Not Separately on Street. Calls must be made by appropriate and formal action by the directors and evidenced by the minutes of their proceedings, and cannot be made by mere street conversations between the president and the directors.[26]

r. Whether Resolution of Assessment Must Fix Date and Place of Payment. When the obligation of the shareholders is to pay their subscriptions when and

an injunction was refused. Gorman *v.* Guardian Sav. Bank, 4 Mo. App. 180.

Mere insolvency no ground for such an injunction, but may be a good ground for enforcing payment. Dill *v.* Wabash Valley R. Co., 21 Ill. 91.

No injunction on the ground of mistake of law as to the obligation incurred by the subscriber. Chesapeake, etc., Canal Co. *v.* Dulany, 5 Fed. Cas. No. 2,647, 4 Cranch C. C. 85.

Not a ground of equitable relief that the directors are not themselves paying assessments. Grant *v.* Attrill, 11 Fed. 469.

Temporary injunction does not affect validity of assessment.— That a temporary injunction has been issued against an assessment with an order to show cause, etc., does not affect the validity of the assessment, but merely suspends the power to collect it until the hearing of the order to show cause, so that if there is no appearance on the day fixed for the hearing the injunction is at an end, see Miles *v.* Sheep Rock Min., etc., Co., 15 Utah 436, 49 Pac. 536.

22. Bowen *v.* Kuehn, 79 Wis. 53, 47 N. W. 374; Great Western Tel. Co. *v.* Burnham, 79 Wis. 47, 47 N. W. 373, 24 Am. St. Rep. 698. Persons named in the charter as shareholders liable for calls in respect of the shares there stated to be held by them, without further action by directors in allotting the shares or giving them notice of allotment. *In re* Haggert Bros. Mfg. Co., 19 Ont. App. 582 [*following* Matter of London Speaker Printing Co., 16 Ont. App. 508].

23. Brockway *v.* Gadsden Mineral Land Co., 102 Ala. 620, 15 So. 431.

No assessment leviable against an original subscriber after a sale of his shares (nonpaid up) and a repurchase of them — seemingly unsound decision. Franklin Glass Co. *v.* Alexander, 2 N. H. 380, 9 Am. Dec. 92.

Provision for additional payment on default.— Statute under which it is competent for the directors to require that if default be made in any payment the person in default shall pay in an additional amount, with the conclusion that where no call has been made the penalty cannot be collected. Bair *v.* Wilson, 15 Pa. Super. Ct. 131.

Who liable to an assessment where a transfer of shares is *in fieri*. San Gabriel Valley Land, etc., Co. *v.* Dennis, (Cal. 1893) 34 Pac. 441.

Directors no power to rescind a former assessment in order to make room for a new assessment, but such action is a breach of trust. Miles *v.* Sheep Rock Min., etc., Co., 15 Utah 436, 49 Pac. 536.

24. *In re* Sovereign L. Assur. Co., [1892] 3 Ch. 279, 62 L. J. Ch. 36, 67 L. T. Rep. N. S. 336, 41 Wkly. Rep. 1.

25. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa 455, 72 N. W. 657.

Stock deposited by the owners with the treasurer of the corporation to be sold and part of the proceeds to be returned to them and the remainder loaned to the company and repaid by it is not "treasury stock," but the depositors are liable in respect of it as shareholders. Lexow *v.* Pennsylvania Diamond Drill Co., 5 Pa. Dist. 491.

26. Branch *v.* Augusta Glass Works, 95 Ga. 573, 23 S. E. 128.

as the directors shall call for them, it is clear that a call in order to be valid should fix the date at which the sum called for is to be paid. If the governing instrument requires that the call should fix both the date and place of payment that must be done.[27] But in the absence of a governing instrument requiring the call to fix the place of payment as well as the date there would seem to be no propriety in holding a call invalid for failing to name a place of payment; since the proper place, in the absence of a different direction, would manifestly be the treasury of the company.[28]

2. Conditions Precedent to Valid Assessments — a. Subscription of Entire Capital or Sum Proposed to be Raised — (i) *Statement of Rule* — (a) *Generally.* The general rule, supported by the concurrence of most of the courts, is that where the charter or governing statute fixes the amount of capital which the corporation shall have, and does not authorize it to commence business with a less amount, no assessment can be made upon subscribers until the capital so fixed has been all filled up by *bona fide* subscriptions, unless the subscriber has by conduct or otherwise waived his privilege.[29]

(b) *Statutes Varying Rule.* Statutes exist in many of the states varying this rule and permitting particular corporations to commence business when a stated

27. *In re* Cawley, 42 Ch. D. 209; Halifax Carette Co. *v.* Moir, 28 Nova Scotia 45.

28. Accordingly it has been held that a call is not invalid because it does not name the time, place, or person to whom the payment is to be made, where the corporation has a place of business and an officer authorized to receive money due it; since the time under such circumstances is on demand, and the place is the place of business of the corporation, and the person to whom payment is to be made, the treasurer. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa 455, 72 N. W. 657 [*distinguishing* North, etc., R. Co. *v.* Spullock, 88 Ga. 283, 14 S. E. 478; *In re* Cawley, 42 Ch. D. 209]. To the same effect see American Pastoral Co. *v.* Gurney, 61 Fed. 41.

29. *Illinois.*—Temple *v.* Lemon, 112 Ill. 51.

Iowa.— Peoria, etc., R. Co. *v.* Preston, 35 Iowa 115, where many cases are examined.

Louisiana.— Exposition R., etc., Co. *v.* Canal St. Exposition R. Co., 42 La. Ann. 370, 7 So. 627.

Maine.— Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.

Massachusetts.— Penobscot, etc., R. Co. *v.* Whittier, 12 Gray 244; Stoneham Branch R. Co. *v.* Gould, 2 Gray 277; Worcester, etc., R. Co. *v.* Hinds, 8 Cush. 110; Cabot, etc., Bridge *v.* Chapin, 6 Cush. 50; Central Turnpike Corp. *v.* Valentine, 10 Pick. 142; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. 23, 9 Pick. 187, 19 Am. Dec. 363.

Michigan.— Shurtz *v.* Schoolcraft, etc., R. Co., 9 Mich. 269, previous to the Michigan act of 1857.

Missouri.— Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481.

New Hampshire.— Contoocook Valley R. Co. *v.* Barker, 32 N. H. 363; New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300; Littleton Mfg. Co. *v.* Parker, 14 N. H. 543.

New York.— Bray *v.* Farwell, 81 N. Y. 600; Sullivan County Club *v.* Butler, 26 Misc. 306, 56 N. Y. Suppl. 1.

Tennessee.— Read *v.* Memphis Gayoso Gas Co., 9 Heisk. 545.

Texas.— Orynski *v.* Loustaunan, (Sup. 1890) 15 S. W. 674.

Wisconsin.— Anvil Min. Co. *v.* Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232.

See also *supra*, VI, H, 14, a; 19 Am. & Eng. Corp. Cas. 285 note; 21 Am. & Eng. Corp. Cas. 305 note. In Wadsworth Joint Stock Comp. 318, it is said: "The amounts of capital mentioned in the statute must have been subscribed before calls upon the shareholders can be made or enforced. In such cases there is a condition precedent to be satisfied before a share subscription can be subjected to an action for a call."

It is believed that the rule of the text is applicable to subscriptions of every kind, whether the scheme is to be incorporated or to be left unincorporated. It is applicable to unincorporated joint-stock companies in New York. Bray *v.* Farwell, 81 N. Y. 600. See also Curry Hotel Co. *v.* Mullins, 93 Mich. 318, 53 N. W. 360; Duluth Invest Co. *v.* Witt, 63 Minn. 538, 65 N. W. 956; Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716; Hards *v.* Platte Valley Imp. Co., 35 Nebr. 263, 53 N. W. 73; Birge *v.* Browning, 11 Wash. 249, 39 Pac. 643; Elderkin *v.* Peterson, 8 Wash. 674, 36 Pac. 1089; Denny Hotel Co. *v.* Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130. There is a case in California to the effect that where a prospectus stated that the opera-house which was the object of the subscription was "to be built by a corporation with a capital stock of twenty thousand dollars, consisting of ons thousand shares at twenty dollars per share," it was not a condition precedent to the liability of a subscriber that the whole amount of the capital stock so stated should be subscribed. Auburn Opera-House, etc., Assoc. *v.* Hill, (Cal. 1893) 32 Pac. 587.

percentage of their capital intended to be raised has been subscribed;[30] but under such a statute until the stated percentage has been subscribed the subscribers are not liable.[31] So it has been held that a corporation, whose articles of association provide that the holders of shares for the time being, whatever the number issued or subscribed for, shall form the company, may make calls upon its stock, although the entire amount of stock has not been subscribed for or the shares allotted.[32]

(II) *Rule Requires Bona Fide Subscriptions by Responsible Persons* — (A) *In General.* The meaning of this rule is that the fund intended to be raised shall be subscribed in good faith, and not colorably under some secret arrangement for a rescission, by persons able to pay and to bear equally with the other subscribers the burdens assumed.[33]

(B) *What Are Good Subscriptions.* A joint subscription to stock by the trustees of the corporation for the purpose of completing the subscription for the full capital stock is a binding contract and effectual for the purpose of perfecting the liability of former subscribers on their subscriptions.[34] A subscription by a married woman, made at the request of her husband, the assessment of which was paid by him, has been held to render him personally liable as a subscriber, and for that reason to be counted as a good subscription in making up the requisite amount under this rule.[35]

(III) *Condition May Be Waived by Subscriber* — (A) *In General.* But it has been conceded that such a charter or statutory provision is capable of being waived by the subscriber, either by signing an agreement to that effect or by conduct in subsequently participating in the organization and business of the corporation;[36] and a course of conduct showing his acquiescence in the act of the directors in commencing business before the stated amount of stock had been subscribed will be evidence of such waiver.[37]

(B) *What Deemed Waiver.* This condition is so waived where the shareholder pays the required admission fee and instalment due on each share, receives his share certificate, and is credited with dividends in respect of his shares;[38] where a majority of the subscribers to the shares of a railway company enter into an agreement supplementary to their share subscriptions, to pay their subscriptions as fast as the work of construction progresses, on the faith of which agreement the directors enter into and carry out contracts for such construction, the waiver and estoppel operating only as against the parties to the agreement.[39] Such a condition is waived by the subscriber signing and acknowledging the articles of

For the present doctrine in England see Lindley Comp. L. (5th ed.) 410, citing and commenting upon numerous cases.

30. Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Nebr. 279, 62 N. W. 480; Astoria, etc., R. Co. *v.* Hill, 20 Oreg. 177, 25 Pac. 379.

31. Fairview R. Co. *v.* Spillman, 23 Oreg. 587, 32 Pac. 688; Anvil Min. Co. *v.* Sherman, 74 Wis. 226, 42 N. W. 226, 4. L. R. A. 232.

Under Cal. Civ. Code, § 331, an assessment is permitted when one fourth of the shares has been subscribed for. Ventura, etc., R. Co. *v.* Hartman, 116 Cal. 260, 48 Pac. 65. See also San Bernardino Invest. Co. *v.* Merrill, 108 Cal. 490, 41 Pac. 487.

32. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313.

33. Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236; Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Cabot, etc., Bridge *v.* Chapin, 6 Cush. (Mass.) 50; New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300.

34. Hardin *v.* Mullin, 16 Wash. 647, 48 Pac. 349.

35. Kampmann *v.* Tarver, (Tex. Civ. App. 1895) 29 S. W. 1144.

36. Cabot, etc., Bridge *v.* Chapin, 6 Cush. (Mass.) 50; New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300; Bray *v.* Farwell, 81 N. Y. 600 (recognized); Pitchford *v.* Davis, 8 L. J. Exch. 157, 5 M. & W. 2.

37. Bray *v.* Farwell, 81 N. Y. 600; Pitchford *v.* Davis, 8 L. J. Exch. 157, 5 M. & W. 2.

Circumstances not amounting to waiver. — Circumstances under which it was held that a subscriber had not, by dealing with his shares as property, precluded himself from contesting an assessment on this ground. Bray *v.* Farwell, 81 N. Y. 600.

38. Duluth Invest. Co. *v.* Witt, 63 Minn. 538, 65 N. W. 956.

39. Anderson *v.* Middle, etc., Tennessee Cent. R. Co., 91 Tenn. 44, 17 S. W. 803.

incorporation, acting as one of the trustees, voting for calls upon the shares, and performing other acts which necessarily recognize the rightful existence of the corporation.[40] But it is not waived by the payment by a subscriber of part of his subscription without knowledge of the failure to procure the required amount;[41] by consenting to and waiving notice of a shareholders' meeting on three occasions, and voting by proxy at a special meeting, where he does not then know that the required amount of stock has not been subscribed.[42]

(IV) *Rule Where Capital and Number of Shares Are Fixed by Members*—(A) *Statement of Rule.* There is judicial authority in favor of the proposition that the rule is the same where the governing statute allows the members to fix the amount of the capital and the number and denomination of the shares,[43] the rule being that already adverted to,[44] that the person who agrees to take shares in a company with a given capital is *prima facie* not bound to take shares in a company with a different capital.[45]

(B) *No Valid Assessment Until Capital and Number of Shares Are Fixed*—(1) In General. Under this theory no valid assessment can be laid upon the shares of subscribers to the stock of a corporation, unless the number of the shares of capital stock is definitely fixed, either by the charter, the directors, or the shareholders.[46] The theory is that if the charter does not fix the number of shares it is to be presumed that the legislature intended that the shareholders or the directors should fix the number; and it is indispensable that the number be so determined before any assessment can be made thereon.[47] And if in such a case the number of shares, so fixed, exceeds the number actually subscribed for and taken, the shareholders or directors may change the number; but the assessment must be upon the whole number. If the shares are not all taken, an assessment upon the number that have been taken is void. A subscriber who has paid the first assessment is not thereby estopped from setting up this defense to a suit for the second.[48]

(2) Opposing Rule Where Subscription Embodies Express Promise to Pay. There is an opposing view that where the number of shares is not fixed by the charter or by the agreement of subscription, and the subscriber promises to pay for the shares which he takes, his subscription is not deemed to be made upon condition that the whole number of shares constituting the capital stock according to the by-laws shall be subscribed.[49] Where the charter merely fixes the maximum amount of the capital to be raised, and the subscription embodies a definite promise to take and pay for the shares set opposite the respective names of the subscribers at a stated sum per share, the same conclusion follows. Such a case

40. Auburn Opera-House, etc., Assoc. *v.* Hill, (Cal. 1893) 32 Pac. 587.

41. Johnson *v.* Schar, 9 S. D. 536, 70 N. W. 838.

42. Fairview R. Co. *v.* Spillman, 23 Oreg. 587, 32 Pac. 688.

43. Contoocook Valley R. Co. *v.* Barker, 32 N. H. 363; Littleton Mfg. Co. *v.* Parker, 14 N. H. 543.

44. See *supra*, VI, H, 14, a; VI, J, 1, e.

45. Lindley Comp. L. (5th ed.) 393 [*citing* Bourne *v.* Freeth, 9 B. & C. 632, 7 L. J. K. B. O. S. 292, 4 M. & R. 512, 17 E. C. L. 285; Fox *v.* Clifton, 6 Bing. 776, 8 L. J. C. P. O. S. 257, 4 M. & P. 676, 31 Rev. Rep. 536, 19 E. C. L. 347; Pitchford *v.* Davis, 8 L. J. Exch. 157, 5 M. & W. 2].

46. Pike *v.* Bangor, etc., R. Co., 68 Me. 445; Somerset R. Co. *v.* Clarke, 61 Me. 379.

47. Somerset, etc., R. Co. *v.* Cushing, 45 Me. 524. Accordingly, where the charter of a railroad corporation provided that the capital stock should consist of not more than a stated number of shares, "the number of which shall be determined from time to time by the directors thereof," it was held that the directors had no power to levy assessments before determining the number of shares. Troy, etc., R. Co. *v.* Newton, 8 Gray (Mass.) 596; Stoneham Branch R. Co. *v.* Gould, 2 Gray (Mass.) 277; Worcester, etc., R. Co. *v.* Hinds, 8 Cush. (Mass.) 110.

48. Somerset, etc., R. Co. *v.* Cushing, 45 Me. 524. But *compare* York, etc., R. Co. *v.* Pratt, 40 Me. 447; White Mountains R. Co. *v.* Eastman, 34 N. H. 124 (not necessary for the corporation to determine the ultimate amount of the capital, within the limit of ten thousand shares, before proceeding to make assessments upon the first five hundred subscribed for). And see *infra*, VI, N, 2, a, (IV), (B), (2).

49. Kennebec, etc., R. Co. *v.* Jarvis, 34 Me. 360.

is distinguished from those cases in which a definite capital is fixed, or a definite proportion or sum is required as a condition precedent to organization, or in which conditional subscriptions are made.[50]

(v) *Whether Rule Applies to Issues of New Shares Increasing Capital of Company.* This principle does not apply to the case where a corporation issues new shares to increase its capital, unless it is so expressed in the governing statute, or in some other scheme or instrument under which the increase is made.[51]

(vi) *Whether Subscription to All Shares Is Condition Precedent Which Corporation Must Show.* The theory of some of the courts is that a subscription of all the shares intended to be raised, or required by the charter to be raised, is a condition precedent which, in an action to recover an assessment, the corporation must allege and prove;[52] but other courts take the contrary view.[53]

b. Doctrine That Shares May Be Assessed Before Whole Amount Subscribed — (i) *In General.* The doctrine already announced,[54] that a subscription of the entire sum intended to be raised is a condition precedent to a liability on the part of the subscriber, has not met with universal acceptance. The view has been taken that calls may be made before all capital stock is subscribed, if so agreed between the corporation and the shareholders, unless the charter otherwise provides.[55] The doctrine of these cases is that whenever the corporation is so organized as to be able to prosecute its business, it has through its board of directors the power to levy assessments.[56]

50. Warwick R. Co. *v.* Cady, 11 R. I. 131.

51. Clarke *v.* Thomas, 34 Ohio St. 46; Aspinwall *v.* Butler, 133 U. S. 595, 10 S. Ct. 417, 33 L. ed. 779. See also Avegno *v.* Citizens' Bank, 40 La. Ann. 799, 5 So. 537; Nutter *v.* Lexington, etc., R. Co., 6 Gray (Mass.) 85; Thayer *v.* Butler, 141 U. S. 234, 11 S. Ct. 987, 35 L. ed. 711; Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 11 S. Ct. 984, 35 L. ed. 702; Aspinwall *v.* Butler, 133 U. S. 595, 10 S. Ct. 417, 33 L. ed. 779; Delano *v.* Butler, 118 U. S. 634, 7 S. Ct. 39, 30 L. ed. 260; Minor *v.* Alexandria Mechanics Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47. *Contra*, to the foregoing see Read *v.* Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545.

52. Central Turnpike Corp. *v.* Valentine, 10 Pick. (Mass.) 142; Salemn Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23.

53. Lail *v.* Mt. Sterling Coal Road Co., 13 Bush (Ky.) 32; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328.

54. See *supra*, VI, N, 2, a, (I).

55. Cheraw, etc., R. Co. *v.* Garland, 14 S. C. 63.

That it is not necessary to fix the capital stock to enable a corporation to maintain an action on the subscription agreement see Bucksport, etc., R. Co. *v.* Buck, 65 Me. 536.

56. This is the doctrine which obtains under the general incorporation laws of Oregon. Willamette Freighting Co. *v.* Stannus, 4 Oreg. 261. That a corporation may receive subscriptions to stock and may sue thereon before being fully organized see Oregon Cent. R. Co. *v.* Scoggin, 3 Oreg. 161. So under an Indiana statute for the incorporation of railroad companies, after the subscription of fifty thousand dollars to its stock, the company may call in the subscriptions, without waiting for the subscription of the whole capital stock, as a condition precedent to their right to collect. Hoagland *v.* Cincinnati, etc., R. Co., 18 Ind. 452. So the supreme court of the United States has held that the subscription of the whole capital stock of five hundred thousand dollars was not a condition precedent to the putting of the Mechanics' Bank of Alexandria in operation as a corporation. Minor *v.* Alexandria Mechanics Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47. The supreme court of Oregon reason that when a sufficient amount of the capital stock of a private corporation has been subscribed to authorize the shareholders to proceed to the election of directors, after such election assessments may be legally made upon the unpaid stock so subscribed, and this although the corporation has increased its capital stock, and the entire amount of the shares of the original stock and of the increased stock has not been subscribed. But they concede that it is otherwise where a subscription of the entire number of shares, of the original as well as any contemplated increase of stock, has been made a condition precedent to the exercise of the power of levying assessments. Willamette Freighting Co. *v.* Stannus, 4 Oreg. 261. Another court has held that an unconditional promise in a stock subscription to pay for a certain number of shares at par is binding, although the amount of capital stock was not fixed, and the minimum number of shares named in the charter was not subscribed for. Skowhegan, etc., R. Co. *v.* Kinsman, 77 Me. 370. The same conclusion has been reached where the corporation was organized under a general law, and the subscription agreement did not contain an express provision that all the stock should be subscribed. West *v.* Crawford, 80 Cal. 19, 21 Pac. 1123. In New York a plank-road company might go

(II) *Shareholder Liable to Creditors Where Corporation Has Commenced Business Without Full Amount Being Subscribed.* For the fact that the shareholders suffered the corporation to embark upon its business, holding itself out to possess a stated capital without the amount of that capital being subscribed, works a fraud upon the general public and upon subsequent creditors. The general rule therefore is that a shareholder is liable to creditors upon his contract of subscription where the corporation has entered upon business and incurred debts, although the whole amount of the capital stock has not been taken up.[57]

(III) *Shares Assessable, Although Sufficient Amount Has Not Been Paid in to Authorize Company to Commence Business.* It is then no defense to a proceeding against a shareholder, whether by the company or by one of its creditors, to recover in respect of a balance due upon his stock subscription, that by the terms of its charter the company was prohibited from commencing business until a prescribed amount of capital stock should be paid in. Such a provision, it has been well held, was intended for the benefit of those who might deal with the company, not for the benefit of its shareholders as a condition precedent to the right to enforce the collection of calls duly made upon stock subscribed.[58]

c. Shares Not Assessable Until Organization of Corporation — (I) *Rule Stated.* The general rule is that shares of stock in a corporation are not assessable until the corporation has been organized, for the reason that until then there is no board of directors capable of making the assessment;[59] although of course it is competent for the subscribers to agree to the payment of a stated amount to cover the expenses of promotion and organization, and this is generally required by statute as already seen.[60]

(II) *De Jure Organization Necessary.* In the absence of circumstances creating an estoppel a mere *de facto* organization is not a sufficient basis for compelling the shareholder to pay assessments upon his subscription.[61]

d. Form, Substance, and Language of Resolution of Assessment. In respect of the form in which the board of directors choose to couch the assessment or call, it is not necessary that the resolution adopted by them should show that the call is made for any corporate purpose, or that the demands of the business of the corporation require that the subscriptions to the capital stock should be paid. All that is necessary is that there should be some act or resolution which evinces a clear official intent to render due and payable a part of the unpaid subscription.[62] If a call leaves the date at which it is to be paid in blank, it will be invalid until another resolution is passed fixing the date, and the curative resolution will not relate back to the former one.[63] An omission to make a record of a call for a par-

into operation before the whole nominal amount of its stock was subscribed. Rensselaer, etc., Plank Road Co. *v.* Barton, 16 N. Y. 457; Schenectady, etc., Plank Road Co. *v.* Thacher, 11 N. Y. 102; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157.

57. Farnsworth *v.* Robbins, 36 Minn. 369, 31 N. W. 349; Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797. See also *infra*, VI, N, 2, b, (III). To the contrary see an early case in New York holding that in such a case shareholders are not individually liable to creditors of the corporation, on the ground that it is discretionary with the company to raise the whole amount of capital mentioned in the certificate or not — an untenable decision. Brinckerhoff *v.* Brown, 7 Johns. Ch. (N. Y.) 217 [*affirming* 4 Johns. Ch. (N. Y.) 671].

58. Naugatuck Water Co. *v.* Nichols, 58 Conn. 403, 20 Atl. 315, 8 L. R. A. 637; McDermott *v.* Donegan, 44 Mo. 85. See also Sims *v.* Brooklyn St. R. Co., 37 Ohio St. 556.

Rule varied under particular statutes allowing shares to be assessed when a stated percentage has been subscribed and when the corporation has organized. Hunt *v.* Kansas, etc., Bridge Co., 11 Kan. 412; Boston, etc., R. Co. *v.* Wellington, 113 Mass. 79; Jewett *v.* Valley R. Co., 34 Ohio St. 601.

59. Carlisle *v.* Cahawba, etc., R. Co., 4 Ala. 70; Anvil Min. Co. *v.* Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232; Halifax Carette Co. *v.* Moir, 28 Nova Scotia 45.

60. See *supra*, VI, H, 13, a *et seq.*

61. Williams *v.* Citizens' Enterprise Co., 153 Ind. 496, 55 N. E. 425.

62. Budd *v.* Multonoma St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169 [*citing* Cook Stockh. § 115].

63. *In re* Cawley, 42 Ch. D. 209.

ticular instalment is supplied by the record of a call for all other unpaid instalments.[64] Where a corporation was limited to calls of fifteen per cent per annum, and ten per cent had already been called, it was held immaterial that the last call (meaning the assessment) did not specify the amount, time, or place of payment, the accompanying notice pointing out the time and place.[65]

e. Notice of "Call" or Notice of "Assessment" — (I) *What Is a "Call."* In strictness an assessment is not a call. An assessment is a resolution, usually by the board of directors, that the shareholders shall, within a date named, and at a place named, pay a certain percentage of their share subscriptions; and the notice of this resolution communicated to them is a call.[66] But in practice the words "assessment" and "call" are used interchangeably, and it has been held in England that it is the assessment which makes the call.[67]

(II) *Doctrine That Demand or Notice Is Necessary Before Action.* Where the terms of the contract are that the subscriber will pay assessments when made by the directors, then, on principle and on some authority, he is not required to pay until he has received notice of an assessment, since it would be unjust to treat him as being in default for not paying a call of which he had no knowledge.[68] So if the law of the corporation, whatever it be, requires a notice as a condition precedent to such an action, and there is no waiver of the condition, of course the notice must be given.[69] Thus if the charter expressly requires notice to be given in certain newspapers and for a certain number of days before the call for instalments shall be valid, then the company must show a compliance with such condition precedent before a recovery can be had on such calls.[70] So if by the terms of the contract of subscription the subscription is payable upon twenty days' notice, plaintiffs, in order to recover, must prove in the first instance not only that they gave notice but that they gave it twenty days before bringing suit.[71]

(III) *When Notice of Assessment Not Deemed Necessary* — (A) *In General.* On the other hand if there is no such provision, and if the subscription has been accepted by the corporation, so that the contract has become complete and the subscriber has become a shareholder, a notice is not indispensably necessary to the right of the corporation to maintain the action; but the general rule of law applies that the bringing of the action is itself a demand.[72] It has been

64. Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81.

65. Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169.

66. Shaw *v.* Rowley, 11 Jur. 911, 16 L. J. Exch. 180, 6 M. & W. 810, 5 R. & Can. Cas. 47.

67. Stratford, etc., R. Co. *v.* Stratton, 2 B. & Ad. 518, 9 L. J. K. B. O. S. 268, 22 E. C. L. 219.

68. Miles *v.* Bough, 3 Q. B. 845, 3 G. & D. 119, 12 L. J. Q. B. 74, 3 R. & Can. Cas. 668, 43 E. C. L. 1001; Lindley Comp. L. (5th ed.) 417. See too Scarlett *v.* Baltimore City Academy of Music, 43 Md. 203; Painter *v.* Liverpool Oil Gas Light Co., 3 A. & E. 433, 2 Hurl. & N. 233, 5 L. J. M. C. 108, 6 N. & M. 736, 30 E. C. L. 209; Edinburgh, etc., R. Co. *v.* Hebblewhite, 6 M. & W. 707.

69. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430. See Alabama, etc., R. Co. *v.* Rawley, 9 Fla. 508.

70. Macon, etc., R. Co. *v.* Vason, 57 Ga. 314.

71. Cole *v.* Joliet Opera House Co., 79 Ill. 96. A statute (N. J. Rev. p. 926, § 7), providing that the directors may require subscriptions to be paid "in such installments as they may deem proper" imports that a subscription does not fall due until notice of a call therefor made by the directors. Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. L. 363.

72. Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33; Wilson *v.* Wills Valley R. Co., 33 Ga. 466; Beckner *v.* Riverside, etc., Turnpike Co., 65 Ind. 468; Van Riper *v.* American Cent. Ins. Co., 60 Ind. 123; Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51; Estell *v.* Knightstown, etc., Turnpike Co., 41 Ind. 174; Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Eakright *v.* Logansport, etc., R. Co., 13 Ind. 408; Smith *v.* Indiana, etc., R. Co., 12 Ind. 61; Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337; Ross *v.* Lafayette, etc., Co., 6 Ind. 297; United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Suppl. 906. The Indian cases hold that the shareholder is neither entitled to a notice of the assessment, nor of the time and place of payment.

broadly reasoned that a contract to pay for stock in instalments as assessed is a contract to pay them on demand, and the bringing of a suit is a sufficient demand;[73] from which it of course follows that no notice of the call, by publication or otherwise, is necessary.[74] So where, by the terms of the contract of subscription, the times of payment of the instalments are fixed, of course there is no necessity for a demand before bringing suit.[75] And where the subscription was to the stock of a railroad company, and the subscribers by the terms of the contract stipulated to pay the first instalment after the work should be commenced, "as shall hereafter be directed by the directors of said company," and there was no stipulation for notice to the subscribers of the calling in of the instalment, it was held that no proof of notice or demand, other than an order passed as above by the directors and entered on the record book, was necessary, in a suit against a subscriber to recover said instalment.[76] Nor is the corporation compelled, if it have two remedies, one by forfeiture and the other by suit, to give notice to defendant before suit brought against him of which one it intends to avail itself.[77] It has been well held that a shareholder will be presumed to have had knowledge of such stock assessments as were called while he was a director, and that he cannot defend an action to recover assessments on the ground that he did not have such knowledge.[78]

(B) *Theory That No Notice Is Necessary Except to Forfeit Shares.* In Pennsylvania and in Indiana the doctrine is found that while no notice is necessary, unless the charter or statute requires it, preliminary to bringing an action to recover the assessment, since the action is itself a notice, yet a notice is necessary in order to forfeit the shares as a penalty for the non-payment of the assessment.[79]

(IV) *Form of Notice and Manner of Giving It*—(A) *In General.* The notice must be given according to the governing statute, by-law, or regulation of the particular company.[80] If the governing instrument, of whatever nature, require the notice to be signed by the directors, it will not be sufficient if their signatures are affixed by a clerk.[81]

73. Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404; Breedlove *v.* Martinsville, etc., R. Co., 12 Ind. 114; Smith *v.* Indiana, etc., R. Co., 12 Ind. 61.

74. Beckner *v.* Riverside, etc., Turnpike Co., 65 Ind. 468.

75. New Albany, etc., R. Co. *v.* Pickens, 5 Ind. 247.

76. Ross *v.* Lafayette, etc., R. Co., 6 Ind. 297.

77. New Albany, etc., R. Co. *v.* Pickens, 5 Ind. 247. A statute of this state (1 Gav. & H. 507, § 8), authorizing notice to be given of calls for payment by instalments of stock subscriptions, has been held to apply only to subscriptions in money. Ohio, etc., R. Co. *v.* Cramer, 23 Ind. 490.

78. Spellier Electric Time Co. *v.* Geiger, 147 Pa. St. 399, 23 Atl. 547.

79. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500 [*cited* with approval in Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302]. See also Hill *v.* Nisbet, 100 Ind. 541; Smith *v.* Indiana, etc., R. Co., 12 Ind. 61; Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280.

80. Watson *v.* Eales, 23 Beav. 294.

That the governing statute must be complied with in respect to the contents of the order levying the assessment see Raht *v.* Sevier Min. Co., 18 Utah 290, 54 Pac. 889.

81. Miles *v.* Bough, 3 Q. B. 845, 3 G. & D. 119, 12 L. J. Q. B. 74, 3 R. & Can. Cas. 668, 43 E. C. L. 1001.

Notice construed.—A notice requiring payment to be made to the account of a person at a particular bank is equivalent to a notice to pay to that person. Miles *v.* Bough, 3 Q. B. 845, 3 G. & D. 119, 12 L. J. Q. B. 74, 3 R. & Can. Cas. 668, 43 E. C. L. 1001. But see *In re* Leeds Banking Co., L. R. 1 Ch. 150.

Necessity of pleading compliance with statute.— Where the governing statute authorized the directors to call in the capital stock "by giving such notice as the by-laws shall prescribe," this was held to supersede the common-law method of making calls; so that an action to recover a call could not be sustained where the complaint did not state that the call was made by giving such notice thereof as the by-laws of the corporation prescribed. A petition omitting this allegation did not state a cause of action. Germania Iron Min. Co. *v.* King, 94 Wis. 439, 69 N. W. 181, 36 L. R. A. 51.

Sufficiency of notice.— Notice describing the assessment as having been "levied upon the capital stock of the corporation" is sufficient under the California statute, without using the expression "upon the subscribed stock." San Joaquin Land, etc., Co. *v.* Beecher, 101 Cal. 70, 35 Pac. 349. A call on the shareholders of a land improvement com-

(B) *Notice Ordinarily Given by Secretary.* The secretary is ordinarily the proper officer of the corporation to give notice of the assessment to the shareholders.[82]

(C) *When Verbal Notice Sufficient.* Where the charter of the corporation does not require a written notice of calls for stock, a verbal notice by the secretary, by order of the president, in pursuance of a resolution of the board of directors, is sufficient.[83]

(D) *Notice After Change of Corporate Name.* A notice given after a change of the corporate name, in the former name, is immaterial, since it could not lead to a mistake.[84]

(V) *SERVICE OF NOTICE* — (A) *In General.* Although the fact of the notice may be a condition precedent to the right of action by the corporation for the assessment, yet, in respect of the manner of giving it, the statute may be regarded as directory, so that personal notice is in fact brought home to the subscriber for the period required by the charter or statute.[85] Thus, where the charter required publication of the notice in certain newspapers, a personal service was held good.[86] So where a by-law required that the notice should be served by letter through the mail, a written notice of the time and place of sale, signed by the treasurer, and delivered to the owner of the shares or left at his dwelling-house and received by him as soon as he was entitled to receive it by mail, was held sufficient.[87]

(B) *Notice by Publication.* Where this mode of giving notice is prescribed by the governing statute, by-law, or regulation, it is indispensable that it should be followed,[88] unless the sensible view is taken that personal notice will dispense with a notice by publication. This mode of giving notice has been held reasonable.[89]

(C) *Publication For What Length of Time.* Where the governing statute required the notice to be published "at least sixty days," it was held a sufficient compliance with it that the notice was published once for a period of sixty full days before the day of payment.[90]

(D) *Evidence of Notice Having Been Served.* A list of persons prepared by a deceased clerk, whose business it was to send out the notices of assessment,

pany, stating that they may pay cash or "by a promise to pay in the form of a land contract or contracts," without showing who may exercise the option, or prescribing any condition to govern in settlement of the balance due the corporation, is void for indefiniteness. North Milwaukee Town Site Co. No. 2 *v.* Bishop, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174. Where the subscription is by its terms payable in materials at a given place, but not at a fixed time, a resolution of the directors requiring payment of stock subscriptions in instalments is manifestly not a sufficient demand of this sort of a subscription. Ohio, etc., R. Co. *v.* Cramer, 23 Ind. 490.

Where the by-laws prescribe the manner in which notice of the call shall be given, the giving of such notice is a sufficient demand to authorize the bringing of the action. Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654.

82. American Pastoral Co. *v.* Gurney, 61 Fed. 41.

83. Smith *v.* Tallassee Branch Cent. Plank-Road Co., 30 Ala. 650. See also Crozer *v.* Leland, 4 Whart. (Pa.) 12.

84. Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500. See also *supra*, I, C, 6, a.

85. Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455.

86. Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455.

87. Lexington, etc., R. Co. *v.* Chandler, 13 Metc. (Mass.) 311.

Circumstances under which personal notice must be given, or may be dispensed with. Grubbs *v.* Vicksburg, etc., R. Co., 50 Ala. 398. See also Fisher *v.* Evansville, etc., R. Co., 7 Ind. 407.

88. Macon, etc., R. Co. *v.* Vason, 57 Ga. 314; Louisville, etc., Turnpike Road Co. *v.* Meriwether, 5 B. Mon. (Ky.) 13.

89. Louisville, etc., Turnpike Road Co. *v.* Meriwether, 5 B. Mon. (Ky.) 13. Further as to notice by publication in a newspaper held sufficient see Dinkgrave *v.* Vicksburg, etc., R. Co., 10 La. Ann. 514. And as to such notice held insufficient see Alabama, etc., R. Co. *v.* Rawley, 9 Fla. 508.

That the affidavit of the publisher's clerk is sufficient evidence of the publication of the notice see Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169.

90. Muskingum Valley Turnpike Co. *v.* Ward, 13 Ohio 120, 42 Am. Dec. 191. State of pleading under which the court would look to the time of filing the declaration or petition to ascertain whether the sixty days had

which list was ticked or marked by him so as to show what notices were sent to the persons on the list, has been held admissible to prove that a notice was sent to such persons.[91] Proof that such notice was duly mailed to the subscriber makes out a *prima facie* case of notification, under a statute which implies that he shall have notice of the call.[92]

O. Forfeiture of Shares For Non-Payment of Assessments — 1. Power to Forfeit and How Exercised — a. Requisites of Valid Forfeiture — (I) *In General.* Four things are necessary to a valid forfeiture of shares: (1) An authority to forfeit derived from statute or charter;[93] (2) an express intention to forfeit;[94] (3) this intention carried into effect with due formality;[95] and (4) for the benefit of the corporation, and not merely to release the shareholder from his obligation of subscription.[96]

(II) *Power to Forfeit Must Be Conferred by Statute or Charter.* A corporation has no inherent power to forfeit or sell the shares of stock owned by delinquent shareholders. It is not a common-law remedy, and can be exercised only when it is expressly conferred by some statute, or by the articles of incorporation.[97] As stated by Sir Nathaniel Lindley, citing the marginal cases, "Even a majority of shareholders cannot confer it unless empowered so to do by the company's act, charter, deed of settlement, or regulations.[98] But if there is power to forfeit for non-payment of calls, that power may be extended to non-payment of additional capital which may be authorized to be raised."[99]

(III) *There Must Be Expressed and Bona Fide Intention to Forfeit.* Moreover, it is necessary to a valid forfeiture that there should have been an expressed and *bona fide* intention to forfeit the shares. As has been pointed out by Sir Nathaniel Lindley: "The power to forfeit is a trust, the execution of which will be narrowly scanned by the court.[1] It cannot, for example, be exercised surreptitiously, for the purpose of expelling a shareholder;[2] nor by connivance, for the purpose of assisting him in getting rid of shares and retiring from the company, in fraud of the other shareholders. A court will not sanction or recognize as valid a forfeiture made *mala fide* for any such purpose."[3]

(IV) *Power Can Be Exercised Only For Benefit of Corporation, Not For Benefit of Shareholder.* The power conferred by statute upon the directors of a corporation to forfeit its shares for the non-payment of assess-

expired. Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455.

91. Eastern Union R. Co. *v.* Symonds, 5 Exch. 237, 19 L. J. Exch. 287.

92. Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. L. 363.

93. See *infra*, VI, O, 1, a, (II).

94. See *infra*, VI, O, 1, a, (III).

95. See *infra*, VI, O, 1, a, (V).

96. See *infra*, VI, O, 1, a, (IV).

97. Hill *v.* Nisbet, 100 Ind. 341; Westcott *v.* Minnesota Min. Co., 23 Mich. 145; Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169; Hart *v.* Clarke, 6 De G. M. & G. 232, 3 Eq. Rep. 264, 24 L. J. Ch. 137, 3 Wkly. Rep. 147, 55 Eng. Ch. 183 [*affirmed* in 6 H. L. Cas. 633]; Norman *v.* Mitchell, 5 De G. M. & G. 648, 54 Eng. Ch. 511; *In re* National Patent Steam Fuel Co., 4 Drew. 535 [*affirmed* in 4 De G. & J. 46, 5 Jur. N. S. 420, 28 L. J. Ch. 637, 61 Eng. Ch. 37].

As to companies partly English and partly foreign see Sudlow *v.* Dutch Rhenish R. Co., 21 Beav. 43.

The right to forfeit the shares of members is analogous to the right to expel members from non-stockholding corporations, as to which see Associations; Clubs.

Power to sell stock after failure to collect by suit.— That a corporation, although having no statutory power to declare shares forfeited for non-payment of calls, may, after failing to collect the full amount by suit, collect the rest by a sale of the stock, was held in Chase *v.* East Tennessee, etc., R. Co., 5 Lea (Tenn.) 415.

98. *In re* National Patent Steam Fuel Co., 4 Drew. 535 [*affirmed* in 4 De G. & J. 46, 5 Jur. N. S. 420, 28 L. J. Ch. 637, 61 Eng. Ch. 37].

99. *In re* Cobre Copper Mine Co., L. R. 9 Eq. 107, 39 L. J. Ch. 231, 18 Wkly. Rep. 371.

1. Harris *v.* North Devon R. Co., 20 Beav. 384; Blisset *v.* Daniel, 1 Eq. Rep. 484, 10 Hare 493, 18 Jur. 122, 1 Wkly. Rep. 529, 44 Eng. Ch. 478; Stubbs *v.* Lister, 1 Y. & Coll. Ch. 81, 20 Eng. Ch. 81. See also *In re* Agriculturists' Cattle Ins. Co., L. R. 1 Ch. 511, 12 Jur. N. S. 611, 35 L. J. Ch. 750, 14 L. T. Rep. N. S. 841, 14 Wkly. Rep. 954; Sweny *v.* Smith, L. R. 7 Eq. 324, 38 L. J. Ch. 446.

2. See cases in the preceding note.

3. Lindley Comp. L. (5th ed.) 532.

ments is intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company, and cannot be employed for the benefit of the shareholders.[4] Accordingly, where the intention was not to forfeit the shares, but merely to cancel them, the shareholder remained a contributory.[5] It is upon this ground that the invalidity of collusive forfeitures rests, a subject already considered.[6]

(v) *Power Must Be Carried Into Effect in Formal Compliance With Law*—(a) *In General.* Moreover, in order to a valid forfeiture of shares, the power to forfeit them must be carried into effect in substantial compliance with the governing statute;[7] and if the charter or by-laws of the particular company make no provision, then the provisions of the general law apply.[8] It can be exercised only by directors who have been properly elected or appointed;[9] and the proper number must concur in the resolution to forfeit.[10]

(b) *If Governing Statute Requires Power to Be Carried Out Through By-Law, By-Law Must Be First Enacted.* If the statute which confers the power prescribes that it shall be exercised by a by-law, the company cannot exercise it until it has made a by-law such as the statute authorizes, and then its compliance with the by-law must affirmatively appear in order to show a valid exercise of the power.[11]

(c) *Validity of By-Laws Forfeiting Shares.* A corporation cannot enforce a by-law which provides for a forfeiture of the shares of the shareholder for non-payment of assessments, unless power to do so is conferred by the charter or governing statute.[12] Accordingly it has been held that a right of recovery by a foreign corporation, of calls made upon stock which has been forfeited for non-payment of such calls, being in conflict with the current of legislation in this country, cannot depend on a by-law merely, but must exist in the act under which the company is incorporated.[13]

(vi) *Assessment Must Be Legal.* It is scarcely necessary to say that in order to support a forfeiture of shares the assessment for the non-payment of

4. Common *v.* McArthur, 29 Can. Supreme Ct. 239.

5. *In re* Esparto Trading Co., 12 Ch. D. 191, 48 L. J. Ch. 573, 28 Wkly. Rep. 146.

6. See *supra*, VI, L. 19.

7. Portland, etc., R. Co. *v.* Graham, 11 Metc. (Mass.) 1; Morris *v.* Metalline Land Co., 164 Pa. St. 326, 30 Atl. 240, 27 L. R. A. 305; Germantown Pass. R. Co. *v.* Fitler, 60 Pa. St. 124, 100 Am. Dec. 546; Schwab *v.* Frisco Min., etc., Co., 21 Utah 258, 60 Pac. 940; Raht *v.* Sevier Min., etc., Co., 18 Utah 290, 54 Pac. 889; *In re* East Kongsberg Co., L. R. 1 Eq. 309; Garden Gully United Quartz Min. Co. *v.* McLister, 1 App. Cas. 39, 33 L. T. Rep. N. S. 408, 24 Wkly. Rep. 744. See also Birmingham, etc., R. Co. *v.* Locke, 1 Q. B. 256, 2 R. & Can. Cas. 867, 41 E. C. L. 527; London, etc., R. Co. *v.* Fairclough, 10 L. J. C. P. 133, 2 M. & G. 674, 2 R. & Can. Cas. 544, 3 Scott N. R. 68, 40 E. C. L. 800; Edinburgh, etc., R. Co. *v.* Hebblewhite, 6 M. & W. 707. *Compare In re* Australian Direct Steam Nav. Co., 3 Ch. D. 661 [*affirmed* in 5 Ch. D. 70].

A positive statutory provision on this subject will of course control any principle adopted, as a more equitable rule. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313.

8. Spurgeon *v.* Santa Ana Valley Irrigation Co., 120 Cal. 71, 52 Pac. 140, 39 L. R. A. 701.

9. Garden Gully United Quartz Min. Co. *v.* McLister, 1 App. Cas. 39, 33 L. T. Rep. N. S. 408, 24 Wkly. Rep. 744.

10. *In re* Alma Spinning Co., 16 Ch. D. 681, 50 L. J. Ch. 167, 43 L. T. Rep. N. S. 620, 29 Wkly. Rep. 133. But it seems that such an informal forfeiture may be validated by being treated as a good forfeiture, both by the company and the shareholder. *In re* Tavistock Ironworks Co., L. R. 4 Eq. 233, 36 L. J. Ch. 616, 16 L. T. Rep. N. S. 824, 15 Wkly. Rep. 1007, where the resolution was passed by two directors out of six.

11. Mitchell *v.* Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406; Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169; Dearborn *v.* Washington Sav. Bank, 18 Wash. 8, 50 Pac. 575 [*distinguishing* Mt. Holly Paper Co.'s Appeal, 99 Pa. St. 513; Bohmer *v.* Richmond City Bank, 77 Va. 445; Petersburg Sav., etc., Co. *v.* Lumsden, 75 Va. 327].

A mere resolution of the board to forfeit the shares of the particular member will not be sufficient. The principle under consideration requires a by-law operating generally upon all the members and reasonable in its character. Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

12. See *supra*, VI, O, 1, a, (II).

13. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313.

which the forfeiture is attempted must be legal.[14] If not made by the proper officers it will not support a forfeiture, as if the power to make it is lodged in the directors by the charter, and they undertake to delegate it to a committee consisting of the president and treasurer.[15] Nor will a forfeiture of shares be valid which is based upon an assessment made upon subscriptions given upon a condition precedent with which the corporation has failed to comply,[16] or upon an illegal consideration;[17] but otherwise, in the absence of fraud, where it is given on the promise of the performance of something in the nature of a condition subsequent, such as the carrying out of a particular enterprise and the enterprise is afterward abandoned.[18] In such a case it has been held that the dissenting shareholder may recover back his instalments, the theory being that the *delictum* is not complete and that the law ought not to encourage men to persevere in their efforts to violate it.[19] If the assessment is otherwise valid, it is not rendered invalid from the fact that the directors may have previously misappropriated the corporate funds.[20]

(VII) *When Corporation Waives Right of Forfeiture or Becomes Estopped From Insisting Upon It.* One court has held that, where a corporation has power to sell the stock of a corporator for the payment of each call as it is made, and to hold the shareholder responsible for the deficiency, if the corporation fails to sell the stock as each successive defalcation occurs, and waits until all the calls are made, it thereby loses its remedy by sale.[21] But another court has with better sense held the contrary.[22] The corporation may be estopped by its conduct from forfeiting the shares of a member.[23]

(VIII) *Notice of Intention to Forfeit*—(A) *In General.* The principle that the right of forfeiture must be pursued with great strictness includes the proposition that the shareholder must have the prescribed notice of the intention to forfeit his shares, in default of which the forfeiture will be void. It has even been held in England that a shareholder whose shares have been regularly for-

Reasonableness of by-law.— A by-law empowering the board of directors to declare any stock forfeited for failure of any shareholder to pay an assessment within two months after it is called for by the board, and to sell such stock for account of the delinquent after thirty days' notice, and first to apply the proceeds to the payment of any balance due on the stock, without releasing the delinquent from his original subscription, is authorized by a statute empowering corporations to provide by their by-laws the "mode of selling shares for non-payment of assessments," and is reasonable. Elizabeth City Cotton Mills *v.* Dunstan, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654.

Insufficient grounds for relief from forfeiture.— That a shareholder will not be relieved against a forfeiture of his shares for failing to pay dues thereon as required by the by-laws, merely because a demand by him for an examination of the books, accounts, and securities of the corporation, made long after his failure to pay dues, was denied see Buker *v.* Leighton Lea Assoc., 18 N. Y. App. Div. 548, 46 N. Y. Suppl. 35, two of the five judges (Follett and Green, JJ.) dissenting.

14. Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236.

15. York, etc., R. Co. *v.* Ritchie, 40 Me. 425. It has been held that a general resolution of a railroad company forfeiting stock for non-payment of instalments must declare to the shareholder that they claim to forfeit his specific stock, otherwise it will not be valid. Johnson *v.* Albany, etc., R. Co., 40 How. Pr. (N. Y.) 193.

16. Frankfort, etc., Turnpike Co. *v.* Churchill, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159.

17. Knowlton *v.* Congress, etc., Spring Co., 14 Fed. Cas. No. 7,903, 14 Blatchf. 364.

18. Knowlton *v.* Congress, etc., Spring Co., 14 Fed. Cas. No. 7,903, 14 Blatchf. 364.

19. Knowlton *v.* Congress, etc., Spring Co., 14 Fed. Cas. No. 7,903, 14 Blatchf. 364 [*denying* on this point Knowlton *v.* Congress, etc., Spring Co., 57 N. Y. 518].

20. Marshall *v.* Golden Fleece Gold, etc., Min. Co., 10 Nev. 156.

21. Stokes *v.* Lebanon, etc., Turnpike Co., 6 Humphr. (Tenn.) 241.

22. Brockenbrough *v.* James River, etc., Canal Co., 1 Patt. & H. (Va.) 94.

23. This will appear by a case where the officer in charge of a bank — his grade does not appear — informed a party applying to the bank for information that he might safely lend money to one of its shareholders, and that the stock was free from encumbrance. Acting upon the faith of this information, the applicant advanced money, taking a pledge of the shares for his security. It was held that the bank was thereby estopped from forfeiting the stocks for assessments due thereon by the pledger. Moore *v.* Bank of Commerce, 52 Mo. 377.

feited, but without notice to him, is entitled to prove damages therefor, in competition with other creditors of the company, where the company is wound up.[24]

(B) *How Served in Case of Deceased Member.* A company having notice of the death of a member cannot bind his estate by mailing to him at his registered address a notice preliminary to forfeiting his shares for non-payment of calls due at his death, or a notice of an extraordinary general meeting to be held for the purpose of altering the articles in such a manner as to impose a fresh liability on his shares.[25]

b. Sale of Shares to Enforce Assessments — (I) *What Notice of Sale Must Be Given.* The manner of giving notice of the sale of shares for delinquent assessments is generally prescribed by statute or by-law,[26] and this must be followed;[27] and where the statute or by-law is silent, the notice must obviously be reasonable according to the circumstances of each particular case. Where the charter or governing statute prescribes the time or duration of the notice and the manner of giving it, these requirements must be strictly followed or the sale will be void.[28] Where the length of time of the notice is not prescribed by the governing statute or by an authoritative by-law, a notice must be given for a reasonable time; and it has been held that three days' notice is unreasonably short, and therefore insufficient, if the proprietor resides at a distance.[29] Moreover the notice must be certain as to the place of sale; and therefore a notice which merely stated that a sale would be made by an auctioneer named, who was and had long been an auctioneer at the place where the notice bore date, was insufficient, because it did not express the place of sale.[30] Reasonable certainty is also required in describing the shares which are to be sold, but this rule is complied with by a description which clearly identifies them.[31]

(II) *Place and Mode of Sale.* In respect of the mode of sale the governing statute must be strictly pursued. When therefore the charter of a railroad company authorized such a sale to take place at the post-office in a particular town, and at public auction, it was held that it could take place in no other place or manner.[32] In like manner, where no such sale is allowed by the governing

24. *In re* New Chile Gold Min. Co., 45 Ch. D. 598, 60 L. J. Ch. 90, 63 L. T. Rep. N. S. 344, 2 Meg. 355, 39 Wkly. Rep. 59.

For cases illustrating the insufficiency of notices in such cases see Watson *v.* Eales, 23 Beav. 294; Van Dieman's Land Co. *v.* Cockerell, 1 C. B. N. S. 732, 87 E. C. L. 732, 3 Jur. N. S. 241, 26 L. J. C. P. 203, 5 Wkly. Rep. 312 [*affirming* 18 C. B. 454, 86 E. C. L. 454]; Johnson *v.* Lyttle's Iron Agency, 5 Ch. D. 687, 46 L. J. Ch. 786, 36 L. T. Rep. N. S. 528, 25 Wkly. Rep. 548; London, etc., R. Co. *v.* Fairclough, 10 L. J. C. P. 133, 2 M. & G. 674, 2 R. & Can. Cas. 544, 3 Scott N. R. 68, 40 E. C. L. 800; Edinburgh, etc., R. Co. *v.* Hebblewhite, 6 M. & W. 707. *Compare* Graham *v.* Van Dieman's Land Co., 1 H. & N. 541, 2 Jur. N. S. 1191, 26 L. J. Excb. 73, 5 Wkly. Rep. 149.

25. Allen *v.* West Africa Gold Reefs, [1899] 2 Ch. 40, 68 L. J. Ch. 540, 80 L. T. Rep. N. S. 750, 47 Wkly. Rep. 568.

26. That the advertisement need not be published in the same newspaper as the notice of the assessment under Cal. Civ. Code, § 337, see Stockton Combined Harvester, etc., Works *v.* Houser, 109 Cal. 1, 41 Pac. 809.

27. San Bernardino Invest. Co. *v.* Merrill, 108 Cal. 490, 41 Pac. 487.

28. Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236.

29. Lexington, etc., R. Co. *v.* Staples, 5 Gray (Mass.) 520.

30. Lexington, etc., R. Co. *v.* Staples, 5 Gray (Mass.) 520.

31. York, etc., R. Co. *v.* Pratt, 40 Me. 447.

For an instance of a defective compliance with the statute as to notice of sale see Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236. On the last point the court cite Bearce *v.* Fossett, 34 Me. 575, where it was held that an officer's return that he posted certain notices in a public place, without saying in a public and conspicuous place as required by the statute, was insufficient. That statutes requiring notice to be given, and the service of it to be proved in a particular mode, are to be strictly pursued is held in Newby *v.* Perkins, 1 Dana (Ky.) 440, 25 Am. Dec. 160.

Notice how served in case of deceased shareholder where governing statute or instrument does not provide for the mode of notice. — In such a case the conclusion was that a notice sent by mail to him at his registered address would bind his executors. New Zealand Gold Extraction Co. *v.* Peacock, [1894] 1 Q. B. 622, 63 L. J. Q. B. 227, 70 L. T. Rep. N. S. 110, 9 Reports 669.

32. Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236.

statute except under regulations established in the form of by-laws, and no such regulations have been made, there can be no valid sale.[33]

c. Whether Forfeiture Carried Out Bars Further Right of Action on Part of Corporation. One doctrine under this head is that the corporation may exercise its option to forfeit the shares of the delinquent member, or to sue for the assessment; but it cannot do both; if it forfeits the shares, it cannot maintain an action for any balance remaining uncollected.[34] The other doctrine is applicable in a case where the governing statute or by-law does not provide for an *ipso facto* forfeiture by a mere declaration on the part of the directors, but provides for a sale of the shares at public auction, after advertisement. Then, as in the case of a sale of property under a mortgage, the shareholder remains liable for the unliquidated balance.[35]

2. Effect of Such Forfeitures — a. View That Remedy by Forfeiture Is Cumulative Merely and Does Not Negative Right of Action For Assessments — (i) *In General.* The courts which hold to the prevailing doctrine that a subscription to the stock of a corporation implies an undertaking to pay for the shares, although such an undertaking may not be expressed in the contract of subscription,[36] take the correlative view that the remedy given to the corporation by the charter,[37] the governing statute,[38] or authorized and valid by-laws[39] to enforce compliance with the contract of subscription, by forfeiting the shares of the delinquent, is cumulative merely, and does not negative the right of the corporation to sue for the assessments.

(ii) *Company May Either Declare Shares Forfeited or Bring Action to Collect Assessment.* The company may, in the case of the non-payment

33. Mitchell *v.* Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406. See also *supra*, VI, O, 1, a, (v), (b).

The provisions of Mass. Rev. Stat. c. 30, § 53, as to the mode in which shares of a shareholder in a corporation may be sold for the non-payment of assessments, do not apply to the case of new shares offered to existing shareholders and sold because not taken by such shareholders. Sewall *v.* Eastern R. Co., 9 Cush. (Mass.) 5.

34. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313 [*reversing* 51 Ill. App. 204].

35. Thomson's Succession, 46 La. Ann. 1074, 15 So. 379. *Compare* Minnehaha Driving Park Assoc. *v.* Legg, 50 Minn. 333, 52 N. W. 898.

Interest and expenses.— it has been held that a statute authorizing a recovery after forfeiture of corporate stock, of all calls owing upon it at the time of the forfeiture, does not authorize a recovery of interest and expenses thereafter accruing. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 313, 27 L. R. A. 313.

36. See *supra*, VI, H, 3, a.

37. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

Florida.—Barbee *v.* Jacksonville, etc., Plank Road Co., 6 Fla. 262.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Illinois.— Raymond *v.* Caton, 24 Ill. 123.

Kentucky.— Instone *v.* Frankfort Bridge Co., 2 Bibb 576, 5 Am. Dec. 638.

Maine.— Kennebec, etc., R. Co. *v.* Jarvis, 34 Me. 360; South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547.

Massachusetts.— Boston, etc., R. Co. *v.* Wellington, 113 Mass. 79; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39.

Mississippi.— Freeman *v.* Winchester, 10 Sm. & M. 577; Commercial Bank *v.* State, 6 Sm. & M. 599.

New York.— Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. 541; Troy, etc., R. Co. *v.* Tibbits, 18 Barb. 297; Mann *v.* Currie, 2 Barb. 294; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. 217, 6 Am. Dec. 273.

South Carolina.— Greenville, etc., R. Co. *v.* Cathcart, 4 Rich. 89.

Tennessee.— Stokes *v.* Lebanon, etc., Turnpike Co., 6 Humphr. 241.

England.— Great Northern R. Co. *v.* Kennedy, 7 D. & L. 197, 4 Exch. 417, 13 Jur. 1008, 19 L. J. Exch. 11, 6 R. & Can. Cas. 5; Inglis *v.* Great Northern R. Co., 16 Jur. 895, 1 Macq. 112. In Giles *v.* Hutt, 3 Exch. 18, 18 L. J. Exch. 53, 5 R. & Can. Cas. 505; London, etc., R. Co. *v.* Fairclough, 10 L. J. C. P. 133, 2 M. & G. 674, 2 R. & Can. Cas. 544, 3 Scott N. R. 68, 40 E. C. L. 800; Edinburgh, etc., R. Co. *v.* Hebblewhite, 6 M. & W. 707, there was only an option to sue or forfeit.

Compare Mann *v.* Cooke, 20 Conn. 178.

38. San Bernardino Invest. Co. *v.* Merrill, 108 Cal. 490, 41 Pac. 487.

39. San Joaquin Land, etc., Co. *v.* Beecher, 101 Cal. 70, 35 Pac. 349; San Gabriel Valley Land, etc., Co. *v.* Dennis, (Cal. 1893) 34 Pac. 441; Denver Chamber of Commerce, etc. *v.* Green, 8 Colo. App. 420, 47 Pac. 140; At-

of the assessments, either bring an action against the shareholder to recover them or declare the shares forfeited;[40] and where the charter provides that the shares shall be liable to forfeiture, and that the company may declare the same forfeited and vested in the company, the option to forfeit is with the company and not with the shareholder.[41] From the same principle another conclusion follows, namely, that an unsuccessful attempt on the part of the corporation to sell the shares does not deprive it of its remedy against the delinquent shareholder by action;[42] and of course a mere unexecuted threat so to do will not have such an effect.[43] Moreover, as the corporation has its election whether or not it will resort to the remedy by forfeiture, its failure to do so will be no ground of forfeiting its charter.[44] The general rule therefore is that the corporation may waive the remedy by forfeiture and sale of the shares and proceed against the shareholder by action;[45] and a resolution of the directors instructing the president and secretary to commence such an action is sufficient evidence of such a waiver.[46]

(III) *Rule Applicable Where There Is Express Promise to Pay For Shares.* And where there is in the contract of subscription an express promise to pay for the shares, all the courts, including those which hold that such an express promise is necessary to give a right of action for assessments,[47] agree that the corporation may maintain thereon an action for assessments, notwithstanding the charter or governing statute gives it a remedy by forfeiture.[48] It has even been held that such an express promise to pay may be enforced by an action, although the charter provides no other remedy than a sale of the shares.[49]

b. Statutes Under Which Remedy by Forfeiture Is Exclusive. Statutes and schemes of incorporation exist under which the remedy by forfeiture is held to be exclusive.[50] This as already seen is the New England doctrine where the contract of subscription does not embody an express promise to pay for the shares.[51]

c. Effect of Forfeiture Upon Action For Prior Assessment. It has been held that where an action has been commenced to recover certain instalments of a sub-

lantic Dynamite Co. *v.* Andrews, 97 Mich. 466, 56 N. W. 858; Puget Sound, etc., R. Co. *v.* Ouellette, 7 Wash. 265, 34 Pac. 929.

40. Troy Turnpike, etc., Co. *v.* McChesney, 21 Wend. (N. Y.) 296; Herkimer Mfg., etc., Co. *v.* Small, 21 Wend. (N. Y.) 273.

41. North Eastern R. Co. *v.* Rodrigues, 10 Rich. (S. C.) 278.

42. Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

43. Macon, etc., R. Co. *v.* Vason, 57 Ga. 314.

44. Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599.

45. San Joaquin Land, etc., Co. *v.* Beecher, 101 Cal. 70, 35 Pac. 349.

46. San Gabriel Valley Land, etc., Co. *v.* Dennis, (Cal. 1893) 34 Pac. 441.

47. See *supra*, VI, H, 4, b, (I).

48. Taunton, etc., Turnpike Corp. *v.* Whiting, 10 Mass. 327, 6 Am. Dec. 124; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39; White Mountains R. Co. *v.* Eastman, 34 N. H. 124; New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300; Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; Dutchess Cotton Manufactory Co. *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273.

49. Connecticut, etc., Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 581.

50. As in the case of a mining company in California. *In re* South Mountain Consol. Min. Co., 5 Fed. 403, 7 Sawy. 30. That an action of assumpsit cannot be maintained to collect assessments upon full-paid stock where another mode of collection is prescribed by the by-laws see Belmont Park Assoc. *v.* Toller, 6 Pa. Co. Ct. 266.

51. *California.*— West *v.* Belding, (1889) 21 Pac. 1136; West *v.* Crawford, 80 Cal. 19, 21 Pac. 1123.

Colorado.— Arkansas River Land, etc., Co. *v.* Farmers' L. & T. Co., 13 Colo. 587, 22 Pac. 954.

Delaware.— Odd Fellows Hall Co. *v.* Glazier, 5 Harr. 172.

Maine.— Belfast, etc., R. Co. *v.* Moore, 60 Me. 561; Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470.

Massachusetts.— Katama Land Co. *v.* Jernegan, 126 Mass. 155; Mechanics' Foundry, etc., Co. *v.* Hall, 121 Mass. 272; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128; Franklin Glass Co. *v.* White, 14 Mass. 286; New Bedford, etc., Turnpike Co. *v.* Adams, 8 Mass. 138, 5 Am. Dec. 81; Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39.

New Hampshire.— New Hampshire Cent., etc., R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300; Franklin Glass Co. *v.* Alexander, 2 N. H. 380, 9 Am. Dec. 92 (per Woodbury, J.).

scription which have been duly called for, and then a further call is made, and the shares are forfeited for non-payment thereof, the subscriber may plead such forfeiture in bar of the further maintenance of the suit.[52]

d. Corporation May Recover Any Balance Due After Forfeiture and Sale — (I) *In General.* By analogy to the law applicable in the case of mortgages, it is frequently held that the shareholder is liable to the corporation for any balance due after selling his shares to enforce his liability for assessments thereon and applying the proceeds in satisfaction of the indebtedness and costs.[53] But those courts which take the view that an express promise in the subscription paper to pay for the shares is necessary to support an action for assessments, and that the only remedy, in the absence of such a promise, is to forfeit the shares, are driven by the mere logic of their position to hold that after forfeiting and reselling the shares there can be no action for any unsatisfied balance; since the subscriber has made no promise which in the view of those courts will support an action.[54]

(II) *Statutory Right of Action For Such Residue.* Under the view that an express promise to pay is necessary to support a right of action for assessments, where the legislature interposes and gives a right of action for any unpaid residue, then the courts hold that the statute must be strictly complied with.[55] When therefore the governing statute prescribes the terms on which shares in the stock of a railroad company may be sold for the payment of assessments, and the shareholder be held to pay the balance if the shares are not sold for a sum sufficient to pay the assessment, those terms are in this view conditions precedent, and unless they are strictly complied with the sale is illegal and the shareholder is not chargeable.[56] Moreover, in order to support such an action, it must affirmatively appear that the sale was made for a legal assessment and did not include any illegal one.[57]

e. Where Sale Brings More Than Due, Shareholder Entitled to Residue. If the sale of the shares brings more than the amount due the corporation it must turn over the excess to the shareholder.[58]

f. Status of Shares After Forfeiture — (I) *In General.* Shares which have been bought in by the corporation because there is no outside bidder rest, accord-

Vermont.— Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181; Essex Bridge Co. *v.* Tuttle, 2 Vt. 393.

52. Small *v.* Herkimer Mfg., etc., Co., 2 N. Y. 330 [*overruling* Troy Turnpike, etc., Co. *v.* McChesney, 21 Wend. (N. Y.) 296; Herkimer Mfg., etc., Co. *v.* Small, 21 Wend. (N. Y.) 273].

53. Merrimac Min. Co. *v.* Bagley, 14 Mich. 501; Herkimer Mfg., etc., Co. *v.* Small, 21 Wend. (N. Y.) 273; Brockenbrough *v.* James River, etc., Canal Co., 1 Patt. & H. (Va.) 94. *Compare* New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300, holding that resort must first be had to a sale of the shares before an action at law can be maintained. See also Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491, holding that where the contract of subscription embodies an express promise to pay for the shares the subscriber will be liable in assumpsit for assessments under a by-law before resort is had to a sale of his shares.

54. Mechanics' Foundry, etc., Co. *v.* Hall, 121 Mass. 272; Andover, etc., Turnpike Co. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80.

55. Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236; Lexington, etc., R. Co. *v.* Staples, 5 Gray (Mass.) 520; Portland, etc., R. Co. *v.* Graham, 11 Metc. (Mass.) 1.

56. Portland, etc., R. Co. *v.* Graham, 11 Metc. (Mass.) 1.

57. Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236; Stoneham Branch R. Co. *v.* Gould, 2 Gray (Mass.) 277.

For an illustration in case of a double assessment see Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236.

For a statute providing for a sale of shares by auction in case of a non-payment of assessments and that the shareholder shall be personally liable for the deficiency see Mass. Rev. Stat. (1836), c. 39, § 53; Mass. Gen. Stat. 1860, c. 63, § 9. See Troy, etc., R. Co. *v.* Newton, 1 Gray (Mass.) 544; Lexington, etc., R. Co. *v.* Chandler, 13 Metc. (Mass.) 311.

58. Mitchell *v.* Vermont Copper Min. Co., 47 How. Pr. (N. Y.) 218; Herkimer Mfg., etc., Co. *v.* Small, 21 Wend. (N. Y.) 273. *Compare* State University *v.* Winston, 5 Stew. & P. (Ala.) 17. That this view has been overruled in New York see Small *v.* Herkimer Mfg., etc., Co., 2 N. Y. 330 [*reversing* 21 Wend. (N. Y.) 273].

ing to one decision, in such a nondescript state that they cannot be sold on an execution issued against the corporation in satisfaction of its debts.[59]

(II) *Reissuing Such Shares.* In England, where a limited company has power to forfeit shares for non-payment of calls, and sell, reallot, and dispose of them in such a manner as the directors think fit, it can, in reallotting forfeited shares partly paid up, give credit for the money already received in respect of the shares. Such a transaction is not an issue of shares, and is not contrary to the principles that the company under the Companies Acts cannot issue shares at a discount.[60]

g. What Forfeiture Releases Shareholder's Liability — (I) *In General.* Where there is a strict forfeiture, by a resolution of the directors, as explained in a preceding section, by which the corporation seizes the shares to its own use, this severs the connection of the shareholder with the corporation, and he thereupon ceases to be a shareholder, or to be further liable for his unpaid subscriptions.[61] And where the forfeiture has taken the form of a sale of the shares by the corporation upon notice, it may be safely assumed that the purchaser takes them subject to future assessments; and the connection of the original shareholder with the corporation ceases, except that as already stated he may remain liable for any unsatisfied balance due in respect of the assessment already made for which the shares were forfeited and sold. Assuming the forfeiture to be valid in the sense of not being collusive or *ultra vires* he thereby ceases to be a shareholder for all future purposes.[62] But if the forfeiture is invalid in respect of something which the parties cannot waive and which cannot be cured by their acquiescence, he remains liable to the company's creditors in the event of its insolvency.[63] On the other hand, where there has been a mere irregularity in making a *bona fide* forfeiture within the company's powers, as by failing to give him the prescribed notice, or to pass a formal resolution of forfeiture, but only an entry to that effect on the corporate books has been made by the secretary, yet if both the company and the shareholder treat the forfeiture as valid, it will be held such as against the company's creditors.[64]

(II) *Valid Forfeiture Releases Liability of Shareholder to Creditors.* A valid forfeiture releases his liability to creditors of the corporation, unless as to so much of the calls already made as was not satisfied by the sale of the shares, where the forfeiture takes that form. A creditor of the corporation cannot thereafter charge him with the amount which remains unpaid, under his

59. Robinson *v.* Spaulding Gold, etc., Min. Co., 72 Cal. 32, 13 Pac. 65.

60. Morrison *v.* Trustees, etc., Ins. Corp., 68 L. J. Ch. 11, 79 L. T. Rep. N. S. 605, 5 Manson 356.

61. Macaulay *v.* Robinson, 18 La. Ann. 619; Mills *v.* Stewart, 41 N. Y. 384.

62. *In re* Asiatic Banking Corp., L. R. 9 Eq. 236, 39 L. J. Ch. 59, 21 L. T. Rep. N. S. 350, 18 Wkly. Rep. 245; *In re* Cobre Copper Min. Co., L. R. 9 Eq. 107, 39 L. J. Ch. 231, 18 Wkly. Rep. 371; *In re* China Steamship Co., L. R. 6 Eq. 232, 37 L. J. Ch. 901, 16 Wkly. Rep. 995; Strick *v.* Swansea Tinplate Co., 36 Ch. D. 558; *In re* Kollmann's R. Locomotive, etc., Co., 2 Hall & T. 388, 14 Jur. 655, 19 L. J. Ch. 332, 2 Macn. & G. 197, 48 Eng. Ch. 152 [*affirming* 3 De G. & Sm. 175]; *Ex p.* Baily, 15 Jur. 29.

63. Garden Gully United Quartz Min. Co. *v.* McLister, 1 App. Cas. 39, 33 L. T. Rep. N. S. 408, 24 Wkly. Rep. 744; *In re* Alma Spinning Co., 16 Ch. D. 681, 50 L. J. Ch. 167, 43 L. T. Rep. N. S. 620, 29 Wkly. Rep. 133; *In re* Esparto Trading Co., 12 Ch. D. 191, 48 L. J. Ch. 573, 28 Wkly. Rep. 146. See also *infra*, VI, O, 2, g, (III), (A).

64. *In re* North Hollenbeagle Min. Co., L. R. 2 Ch. 321, 36 L. J. Ch. 317, 15 L. T. Rep. N. S. 546, 15 Wkly. Rep. 294.

For further illustrations of this principle see *In re* Financial Corp., L. R. 2 Ch. 714 (shares forfeited illegally subdivided); *In re* Tavistock Ironworks Co., L. R. 4 Eq. 233, 36 L. J. Ch. 616, 16 L. T. Rep. N. S. 824, 15 Wkly. Rep. 1007 (forfeiture by a minority of the directors); Matter of Joint-Stock Co.'s Winding-up Acts, 4 De G. & J. 437, 5 Jur. N. S. 853, 28 L. J. Ch. 721, 3 L. T. Rep. N. S. 294, 7 Wkly. Rep. 645, 61 Eng. Ch. 344 [*reversing* on this point 5 Jur. N. S. 617]; Matter of Joint-Stock Co.'s Winding-up Acts, 1 De G. J. & S. 495, 66 Eng. Ch. 384; Matter of Joint-Stock Co.'s Winding-up Acts, 1 De G. J. & S. 488, 32 L. J. Ch. 326, 8 L. T. Rep. N. S. 98, 1 New Rep. 407, 66 Eng. Ch. 379 (when forfeiture presumed); *Re* State F. Ins. Co., 32 L. J. Ch. 135, 7 L. T. Rep. N. S. 618, 11 Wkly. Rep. 226. *Compare In re* Australian Direct Steam Nav., 3 Ch. D. 661

general engagement as a subscriber.[65] This doctrine, a little more amplified, is that the individual liability of a shareholder for a corporate debt is subordinate to the power of the directors to compromise the debt or to forfeit the shares of the shareholder for non-payment of his dues to the corporation; and that if the directors have in good faith, and within such power as the law regulating the corporation gives them, declared all the stock of a member forfeited for non-payment of dues, he cannot be held liable as a shareholder for corporate debts.[66] The mere existence in the corporation of a right to forfeit the shares of a member for his non-payment of assessments lawfully laid against them is not a valid defense on the part of the shareholder against creditors of the corporation,[67] the power thus given to forfeit shares being merely a cumulative remedy.[68] Moreover we shall see that in such cases the corporation has an election between two remedies: It may either declare a forfeiture, or it may bring an action at law for the amount due. If it declares a forfeiture under conditions which render the forfeiture valid, the relation between the shareholder and the corporation is thereby terminated and his contract of subscription canceled; and neither the corporation[69] nor its creditors[70] can proceed against him for the remaining instalments due under such contract.

(III) *Ultra Vires Forfeitures Do Not Release Shareholder's Liability to Creditors*—(A) *In General.* If the charter or governing statute of

[*affirmed* in 5 Ch. D. 70]. See *infra*, VI, O, 2, g, (III), (B).

65. Allen *v.* Montgomery R. Co., 11 Ala. 437; Macauly *v.* Robinson, 18 La. Ann. 619.

66. Mills *v.* Stewart, 62 Barb. (N. Y.) 444.

67. Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412; Mann *v.* Currie, 2 Barb. (N. Y.) 294; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466.

68. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

Connecticut.— Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Kentucky.— Gratz *v.* Redd, 4 B. Mon. 178; Instone *v.* Frankfort Bridge Co., 2 Bibb 576, 5 Am. Dec. 638.

New York.— Troy, etc., R. Co. *v.* Kerr, 17 Barb. 581; Mann *v.* Currie, 2 Barb. 294; McDonough *v.* Phelps, 15 How. Pr. 372; Troy Turnpike, etc., Co. *v.* McChesney, 21 Wend. 296; Herkimer Mfg., etc., Co. *v.* Small, 21 Wend. 273; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459; Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. 217, 6 Am. Dec. 273.

North Carolina.— Tar River Nav. Co. *v.* Neal, 10 N. C. 520.

See also *supra*, VI, O, 2, a, (I).

69. Mechanics' Foundry, etc., Co. *v.* Hall, 121 Mass. 272; Cutler *v.* Middlesex Factory Co., 14 Pick. (Mass.) 483; Ripley *v.* Sampson, 10 Pick. (Mass.) 371; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128; Franklin Glass Co. *v.* White, 14 Mass. 286; Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Small *v.* Herkimer Mfg., etc., Co., 2 N. Y. 330 [*overruling* 2 Hill (N. Y.) 127, 21 Wend. (N. Y.) 273]; Ashton *v.* Burbank, 2 Fed. Cas. No. 582, 2 Dill. 435; *In re* Financial Corp., L. R. 2 Ch. 714; *In re* North Hallenbeagle Min. Co., L. R. 2 Ch. 321, 36 L. J. Ch. 317, 15 L. T. Rep. N. S. 546, 15 Wkly. Rep. 294.

70. Allen *v.* Montgomery R. Co., 11 Ala. 437; Macauly *v.* Robinson, 18 La. Ann. 619; Mills *v.* Stewart, 41 N. Y. 384, Hunt, C. J., and Woodruff, J., dissenting [*affirming* 62 Barb. (N. Y.) 444].

Further explanations of the principle.— The rule that a forfeiture of shares terminates a shareholder's liability to creditors has been carried so far in New York as to hold that after forfeiture a shareholder is not liable for debts contracted while he was a shareholder. Mills *v.* Stewart, 41 N. Y. 384. Under the English Joint-Stock Companies Act a similar rule obtains. After the shares of a member have been forfeited by the directors, in pursuance of the terms of the deed of settlement, he cannot, in the event of the insolvency of the company, be put upon the list of contributories (*In re* Natal Invest. Co., L. R. 5 Ch. 22, 21 L. T. Rep. N. S. 445, 18 Wkly. Rep. 30; *In re* Cobre Copper Mine Co., L. R. 9 Eq. 107, 39 L. J. Ch. 231, 18 Wkly. Rep. 371; *In re* China Steamship Co., L. R. 6 Eq. 232, 37 L. J. Ch. 901, 16 Wkly. Rep. 995; Matter of Joint-Stock Co.'s Winding-up Acts, 4 De G. & J. 437, 5 Jur. N. S. 853, 28 L. J. Ch. 721, 3 L. T. Rep. N. S. 645, 7 Wkly. Rep. 344, 61 Eng. Ch. 344; *In re* Kollmann's R. Locomotive, etc., Co., 2 Hall & T. 388, 14 Jur. 655, 19 L. J. Ch. 332, 2 Macn. & G. 197, 48 Eng. Ch. 152), unless insolvency supervenes within one year after forfeiture, in which case, by the terms of the Companies Act of 1862 (25 & 26 Vict. c. 89, § 38), he will be liable to contribute as a past member (*In re* Blakely Ordnance Co., L. R. 5 Ch. 63, 39 L. J. Ch. 124, 21 L. T. Rep. N. S. 572, 18 Wkly. Rep. 103; *In re* Accidental, etc., Ins. Corp., L. R. 4 Ch. 266, 38 L. J. Ch. 201, 19 L. T. Rep. N. S. 624, 17 Wkly. Rep. 216).

a corporation, or, in England, the deed of settlement of a joint-stock company, does not authorize the board of directors to forfeit the shares of a member for a given cause or in a given manner, then a forfeiture for such cause or in such manner will be set aside as *ultra vires*, and the shareholder will be put upon the list of contributories.[71] On this subject the established doctrine in England is said to be that where a joint-stock company is trading under a deed shares can be forfeited or transferred only in the mode pointed out in the deed.[72] The English courts place this rule on the ground that such a forfeiture is a fraud upon the other members;[73] the American courts place it upon the higher ground that it is a fraud upon creditors.[74] It is to be noted, however, that the essential difference between an English trading company, except where the liability is limited by statute, and an American corporation, is that the English company is merely a numerous partnership, the members being liable without limit for the debts of the concern; whereas in an American corporation the members are liable only to the extent of the amount of their subscriptions, unless made further liable by statute.

(B) *Effect of Acquiescence and Laches.* Where as in England the shareholders are liable without limit for the debts of the company, and where consequently a forfeiture of the shares of a member which if illegal releases him from his liability and imposes an additional liability upon the others, it follows that if with a knowledge that such a forfeiture has been allowed they stand by for a considerable lapse of time and take no steps to undo it, they will be excluded from relief in equity on the ground of laches.[75] The principle of course operates against the shareholder whose shares have been illegally forfeited, so as to bar him from relief against the forfeiture.[76] So the forfeiture of shares of stock for non-payment of assessments thereon, although irregular or defective in form, is not void but voidable only; and the shareholder and the company, by subsequent knowledge and acquiescence therein, are estopped to deny its validity, as against a purchaser at the forfeiture sale.[77]

h. Collusive Forfeitures. Restating a doctrine already considered,[78] it is to be kept in mind that the power to forfeit can only be exercised for the benefit of the company, and never for the benefit of the shareholder. If therefore a shareholder procures his shares to be forfeited by the directors for the purpose of unloading the burden and escaping the liability which attends them, this will not discharge his liability to creditors in respect of them in case the company becomes insolvent, but under English law he remains a contributory.[79] On the other hand,

71. *In re* Agriculturist Cattle Ins. Co., L. R. 5 Ch. 79; Spackman *v.* Evans, L. R. 3 H. L. 171, 37 L. J. Ch. 752, 19 L. T. Rep. N. S. 151; Matter of St. Marylebone Joint-Stock Banking Co., 3 De G. & Sm. 198, 14 Jur. 610, 19 L. J. Ch. 389.

72. *In re* Kollmann's R. Locomotive, etc., Co., 2 Hall & T. 388, 14 Jur. 655, 19 L. J. Ch. 332, 2 Macn. & G. 197, 48 Eng. Ch. 152 [*affirming* 3 De G. & Sm. 175], per Mr. Baron Rolfe, Lord Commissioner. But this doctrine does not apply to a case where a party holding what are inaccurately called shares has never executed the deed so as to be strictly a shareholder. Beresford's Case, 3 De G. & Sm. 175.

73. For the English doctrine as to ultra vires forfeitures restated see 2 Thompson Corp. § 1799 and notes.

74. Distinction between the American and English cases on the subject of *ultra vires* forfeitures see 2 Thompson Corp. § 1800 and notes.

75. Houldsworth *v.* Evans, L. R. 3 H. L. 263, 37 L. J. Ch. 800, 19 L. T. Rep. N. S. 211; Spackman *v.* Evans, L. R. 3 H. L. 171, 37 L. J. Ch. 752, 19 L. T. Rep. N. S. 151; Evans *v.* Smallcombe, L. R. 3 H. L. 249, 19 L. T. Rep. N. S. 207.

76. Rule *v.* Jewell, 18 Ch. D. 660, 29 Wkly. Rep. 755; Clegg *v.* Edmondson, 8 De G. M. & G. 787, 3 Jur. N. S. 299, 26 L. J. Ch. 673, 57 Eng. Ch. 608. In Hart *v.* Clarke, 6 De G. M. & G. 232 [*affirmed* in 6 H. L. Cas. 633], and Clements *v.* Hall, 2 De G. & J. 173, 4 Jur. N. S. 494, 27 L. J. Ch. 349, 6 Wkly. Rep. 358, 59 Eng. Ch. 138, laches were held no bar.

77. Raht *v.* Sevier Min., etc., Co., 18 Utah 290, 54 Pac. 889.

78. See *supra*, VI, O, 1, a, (IV).

79. *In re* Agriculturists' Cattle Ins. Co., L. R. 1 Ch. 511, 12 Jur. N. S. 611, 35 L. J. Ch. 750, 14 L. T. Rep. N. S. 841, 14 Wkly. Rep. 954; *Re* Agriculturists' Cattle Ins. Co., L. R. 1 Ch. 161, 12 Jur. N. S. 79, 35 L. J.

as Sir Nathaniel Lindley points out,[80] an *ultra vires* surrender of shares cannot be made valid by referring it to the power of forfeiture.[81] But this principle does not of course extend to the release of one who never was bound as a shareholder.[82]

i. Presumption That Shares Were Regularly Forfeited. Of course as under many charters and by-laws the shares of corporations may be forfeited for the non-payment of dues to the corporation, if it appear that the stock of a particular shareholder was forfeited, the presumption is that it is regularly and lawfully forfeited; and no decree can be rendered against him, the effect of which is to charge him with liability as holder of such shares, unless it is first ascertained by a judicial investigation whether the shares were properly forfeited or not.[83]

3. When Equity Will Relieve Against Such Forfeitures. The forfeiture of the shares of a member for non-payment of assessments lawfully made thereon, where the right of forfeiture exists, either under the charter or governing statute, or under a valid contract between the corporation and the shareholder, does not fall within the category of forfeitures against which equity will relieve, in the absence of fraud, accident, or mistake.[84] But where the articles of association provided no mode in which a forfeiture of the shares of a member should be established, and where the mode pursued was a mere declaration by the trustees that the stock stood forfeited, and where there were other equitable circumstances in favor of the shareholder and he came in and tendered the whole amount due, principal and interest, it was held that he should be allowed to redeem.[85] And in general it may be said that while equity will not relieve a holder whose shares have been duly forfeited,[86] yet it will not interfere to prevent a forfeiture pending the settlement of a dispute between the company and the shareholder as to what is really due by the latter in respect of his shares;[87] and it will also restore to his rights as a shareholder one whose shares have been illegally forfeited.[88]

Ch. 296, 14 L. T. Rep. N. S. 468, 14 Wkly. Rep. 266; *In re* London, etc., Starch Co., L. R. 6 Eq. 77, 18 L. T. Rep. N. S. 283, 16 Wkly. Rep. 751; Matter of Joint-Stock Co.'s Winding-up Acts, 4 Kay & J. 305, 6 Wkly. Rep. 779.

80. Lindley Comp. L. (5th ed.) 845.

81. *In re* United Service Co., L. R. 5 Ch. 707, 39 L. J. Ch. 730, 23 L. T. Rep. N. S. 331, 18 Wkly. Rep. 1058; *In re* Esparto Trading Co., 12 Ch. Div. 191, 48 L. J. Ch. 573, 28 Wkly. Rep. 146.

82. Lindley Comp. L. (5th ed.) 845 [*citing* Goldsmid's Case, 16 Beav. 262; Matter of Joint-Stock Co.'s Winding-up Acts, 1 De G. J. & S. 495, 66 Eng. Ch. 384; Matter of Agriculturist Cattle Ins. Co., 3 De G. J. & S. 41, 11 Jur. N. S. 572, 34 L. J. Ch. 503, 12 L. T. Rep. N. S. 595, 13 Wkly. Rep. 849, 68 Eng. Ch. 32]. See also Dixon *v.* Evans, L. R. 5 H. L. 606, 42 L. J. Ch. 139 [*reversing* L. R. 5 Ch. 79].

83. Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528. As to this presumption see Matter of Joint-Stock Co.'s Winding-up Acts, 1 De G. J. & S. 495, 66 Eng. Ch. 384; Matter of Joint-Stock Co.'s Winding-up Acts, 1 De G. J. & S. 488, 32 L. J. Ch. 326, 8 L. T. Rep. N. S. 98, 1 New Rep. 407, 66 Eng. Ch. 379; *Re* State F. Ins. Co., 32 L. J. Ch. 135, 7 L. T. Rep. N. S. 618, 11 Wkly. Rep. 226.

84. Weeks *v.* Silver Islet Consol. Min. Co., 55 N. Y. Super. Ct. 1, 8 N. Y. St. 110.

85. Walker *v.* Ogden, 29 Fed. Cas. No. 17,081, 1 Biss. 287.

86. Sparks *v.* Liverpool Water-Works Co., 13 Ves. Jr. 428.

87. Naylor *v.* South Devon R. Co., 1 De G. & S. 32. So it will see that he gets credit for what the shares would have brought if properly sold. Stubbs *v.* Lister, 1 Y. & Coll. Ch. 81, 20 Eng. Ch. 81.

88. Hart *v.* Clarke, 6 De G. M. & G. 232, 3 Eq. Rep. 264, 24 L. J. Ch. 137, 3 Wkly. Rep. 147, 55 Eng. Ch. 183 [*affirmed* in 6 H. L. Cas. 633]; Stubbs *v.* Lister, 1 Y. & Coll. Ch. 81, 20 Eng. Ch. 81. See also Small *v.* Herkimer Mfg., etc., Co., 2 N. Y. 330; Germantown Pass. R. Co. *v.* Fitler, 60 Pa. St. 124, 100 Am. Dec. 546; Sweny *v.* Smith, L. R. 7 Eq. 324, 38 L. J. Ch. 446; Wood *v.* Woad, L. R. 9 Exch. 190; Garden Gully United Quartz Min. Co. *v.* McLister, 1 App. Cas. 39, 33 L. T. Rep. N. S. 408, 24 Wkly. Rep. 744; Sudlow *v.* Dutch, etc., R. Co., 21 Beav. 43; Naylor *v.* South Devon R. Co., 1 De G. & Sm. 32; Sparks *v.* Liverpool Water Works, 13 Ves. Jr. 428; Prendergast *v.* Turton, 1 Y. & Coll. Ch. 98, 20 Eng. Ch. 98.

As to the effect of delay in seeking such relief see *supra*, VI, O, 2, g, (I); VI, O, 2, g, (III), (B).

No relief where shareholder has acquiesced until a fortunate change of circumstances (Sayre *v.* Citizens' Gas Light, etc., Co., 69 Cal. 207, 7 Pac. 437, 10 Pac. 408) or unless shareholder offers to pay what is due (Walker *v.* Ogden, 28 Fed. Cas. No. 17,081, 1 Biss. 287). Injunction to restrain sale of shares merely because notice of sale has not been published for a sufficient length of time not

P. Actions to Enforce Subscriptions — 1. Parties — a. Such Actions Brought in Corporate Name. Actions to collect assessments against shareholders are regularly brought in the corporate name,[89] although the contract may have been made with public commissioners acting for the benefit of the intended corporation.[90] But, where the trustees are an incorporated body,[91] they may bring the action in their own name, alleging their corporate character.[92] In some statutory agreements of organization, especially in England, the action is brought by an officer of the corporation named as "its public officer." [93] If the corporation has changed its name, it is immaterial that the action is brought in the old name if the misnomer is not pleaded in abatement.[94] If the corporation has assigned its share subscriptions under a power to dispose of share subscriptions as well as to collect them, the title of the assignee will be protected against subsequent proceedings by garnishment against the company, even if no formal assignment in writing has been executed;[95] and if the share subscription has been made on a pledge, and the assignee has performed the condition, he may maintain an action against the subscriber to enforce the contract, as in case of a subscription to a railroad on condition of its being built on a certain route.[96]

b. Non-Joinder of Other Shareholders. As the obligation of each shareholder is several and not joint, so each must severally respond on his contract of subscription to the calls which have been made upon him, without reference to the others; and hence where an action is brought upon such a call the non-joinder of the other shareholders is no defense or ground of exception,[97] or where the status of the subscriber is merely that of a partner in a joint-stock company.[98]

2. Pleadings — a. Form of Action. The action is of course an action at law,[99]

granted unless shareholder undertakes to pay the amount of the assessment. Burham *v.* San Francisco Fuse Mfg. Co., 76 Cal. 26, 17 Pac. 939.

Relief against a forfeiture order by the manager after the making of an assignment for the benefit of creditors. Germantown Pass., etc., R. Co. *v.* Fitler, 60 Pa. St. 124, 100 Am. Dec. 546. Injunction granted against a forfeiture where the shares had been paid in full. Moore *v.* New Jersey Lighterage Co., 57 N. Y. Super. Ct. 1, 5 N. Y. Suppl. 192, 23 N. Y. St. 213.

89. Edinboro' Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421.

90. Delaware, etc., R. Co. *v.* Irick, 23 N. J. L. 321.

91. See *supra*, I, A, 6.

92. Comfort *v.* Leland, 3 Whart. (Pa.) 81.

93. Lindley Comp. L. (5th ed.) 427; Smith *v.* Goldsworthy, 4 Q. B. 430, 3 G. & D. 448, 7 Jur. 389, 12 L. J. Q. B. 192, 45 E. C. L. 430 (where the action was brought in the name of the company); Wills *v.* Sutherland, 7 D. & L. 89, 4 Exch. 211, 18 L. J. Exch. 450 [*affirmed* in 5 Exch. 715]; Skinner *v.* Lambert, 2 Dowl. N. S. 132, 4 M. & Gr. 477, 11 L. J. C. P. 237, 5 Scott N. R. 197, 43 E. C. L. 249; Chapman *v.* Milvain, 5 Exch. 61, 14 Jur. 251, 19 L. J. Exch. 228, 1 L. M. & P. 209; Lawrence *v.* Wynn, 8 L. J. Exch. 237, 5 M. & W. 355. See also Welland R. Co. *v.* Blake, 6 H. & N. 410, 7 Jur. N. S. 373, 30 L. J. Exch. 161, 3 L. T. Rep. N. S. 678, 9 Wkly. Rep. 386.

In English "cost-book" companies the purser can sue. 32 & 33 Vict. c. 19, § 13.

Under a banking law of the state of New York, such an action was properly brought in the name of the president of the corporation. Stanton *v.* Wilson, 2 Hill (N. Y.) 153.

In South Carolina where, by the terms of the subscription paper, the instalments were to be paid "to the treasurer of the company," an action was maintainable by one who might be treasurer at the time the action was to be commenced. Ramey *v.* Anderson, 1 McMull. (S. C.) 300.

Objection that defendant is member of plaintiff corporation. — In whatever way the action is brought, provided it be the authorized and proper way, the objection which is good where one partner sues another at law is of course not available; it is no objection that defendant is a member of plaintiff corporation or joint-stock company. Willoughby *v.* Comstock, 3 Hill (N. Y.) 389.

94. Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500.

What is sufficient authority in an agent to institute such an action in the corporate name and behalf. Athol Music Hall Co. *v.* Carey, 116 Mass. 471. *Compare* Davis *v.* Smith American Organ Co., 117 Mass. 456.

95. Morris *v.* Cheney, 51 Ill. 451.

96. Smith *v.* Hollett, 34 Ind. 519.

Action by the state treasurer proper in case of a subscription to raise a fund for the building of a state house. State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626.

97. Baker *v.* Atkins, 62 Me. 205.

98. Haynes *v.* Kent, 8 La. Ann. 132.

99. Stokes *v.* Lebanon, etc., Turnpike Co., 6 Humphr. (Tenn.) 241.

This action is distinguishable from an action to charge shareholders for the benefit of creditors, where the remedy as hereafter seen is in equity. See *infra*, VIII, A, 1 *et seq.*

as distinguished from a suit in equity, although in one state, possibly in others, the remedy is in equity.[1] Regularly the form of the action at common law is *indebitatus assumpsit*.[2] If the subscription has been made before the coming into existence of the corporation, and if the corporation, relying upon the subscription, has expended money, it may maintain an action against the subscriber as for money laid out and expended.[3]

b. Averments of Declaration, Complaint, or Petition — (I) *In General.* These questions refer themselves rather to the general rules of pleading than to anything special to the subject of corporations. The usual averments of a declaration, petition, or complaint, in such an action, by whatever name called, are, first, a recitation of the terms of the contract of subscription, showing that the subscription was payable when called for by the directors, or otherwise as the case may be; followed by an averment that the call has been made accordingly and notice thereof given, and that defendant has failed and refused to comply with the same.[4] A declaration that made no reference to a written contract of subscription, and failed to aver any assessment or call by the directors, but averred that the subscription was payable in such manner and proportion and at such times as the directors should appoint, was of course bad on demurrer.[5] Where the directors were authorized to receive subscriptions for the construction of the road as a whole, or for the construction of particular sections of it, a count on the general subscription, which averred a call made on the subscribers of the stock of a particular division, was of course bad.[6] An averment that the president and directors made the assessment is tantamount to an averment that the corporation or company made it, and it is hence not a good ground of demurrer that the declaration fails to aver an assessment or call by the company.[7]

(II) *Particular Averments* — (A) *Of Corporate Existence* — (1) In General. The plaintiff must of course allege its own corporate existence, although this may be done in general terms.[8]

(2) Performance of Conditions Precedent to Existence of Corporation. There is judicial authority to the effect that it is necessary, in such an action, to aver the performance of the conditions precedent which are necessary to the coming into existence of the corporation, such as the filing of the articles of association within the county where the corporation is organized, and the filing of a duplicate of the articles in the office of the secretary of state.[9]

1. Baker *v.* Atkins, 62 Me. 205.

2. Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Beene *v.* Cahaba, etc., Co., 3 Ala. 660; Peake *v.* Wabash R. Co., 18 Ill. 88; Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638; Taunton, etc., Turnpike Corp. *v.* Whiting, 10 Mass. 327, 6 Am. Dec. 124; Essex Turnpike Corp. *v.* Collins, 8 Mass. 292.

3. Griswold *v.* Peoria University, 26 Ill. 41, 79 Am. Dec. 361.

4. Beckner *v.* Riverside, etc., Turnpike Co., 65 Ind. 468.

5. McClasky *v.* Grand Rapids, etc., R. Co., 16 Ind. 96.

6. Tomlin *v.* Tonica, etc., R. Co., 23 Ill. 429.

7. Union Turnpike Road Co. *v.* Jenkins, 1 Cai. (N. Y.) 381.

As to the effect of the Alabama statute of Feb. 5, 1883, on the question of the averments of such a declaration see Bolling *v.* Le Grand, 87 Ala. 482, 6 So. 332.

8. It has been held in New Jersey that the act of incorporation should be set out in the declaration. Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367. This is quite beyond what is generally required.

Right to capital stock.— In the view of one court the complaint must show that the company is authorized to have a capital stock and to receive such subscriptions. Minneapolis Harvester Works *v.* Libby, 24 Minn. 327.

Manner of organization.— Another court has held that it is not necessary to set out the manner of the organization of plaintiff corporation, or its specific objects. Williams *v.* Franklin Tp. Academical Assoc., 26 Ind. 310.

Filing articles.— The same court has held that the certificate or articles of association should be filed with the complaint, and proper averments made, of the liability of each person whose signature appears thereto. Herron *v.* Vance, 17 Ind. 595.

9. Nelson *v.* Blakey, 47 Ind. 38. See also New Albany, etc., R. Co. *v.* Pickens, 5 Ind. 247.

Instance of a good complaint where the subscription is made prior to organization. Minneapolis Threshing-Mach. Co. *v.* Crevier, 39 Minn. 417, 40 N. W. 507.

(B) *Of Existence of Board of Directors.* Where by the terms of the subscription an assessment can be made only by the board of directors, the existence of the board of directors need not it seems be strictly alleged; but it will be sufficient to aver "that the corporation was organized" and that the board of directors of said corporation made assessments, etc.[10]

(C) *Of Performance by Corporation of Conditions Precedent Named in Contract of Subscription.* If the subscription is made to depend upon the performance by the corporation of a valid condition precedent, then, until the condition is performed the corporation will have no right of action to enforce the subscription;[11] it must accordingly aver the performance of the condition on its part.[12]

(D) *Of Consideration.* Even where the suit is upon a promissory note given to pay a certain sum per share for the number of shares subscribed for by the maker, in such manner and proportion and at such time and place as should be determined by the president and directors, it was necessary to set out the consideration by a sufficient averment.[13]

(E) *Of Notice of Call.* In those jurisdictions which adhere to the correct rule that notice of the call is necessary before the subscriber can be regarded as in default,[14] it is necessary for the corporation to aver such notice in its declaration or complaint in some sufficient form.[15] An averment of notice was held good, although it did not in terms aver that due notice had been given.[16]

(F) *Other Averments.* If the action is brought in a circuit court of the United States, it is necessary to aver in the declaration, in order to show jurisdiction in the court, that plaintiff is a corporation created by the laws of a particular state therein named, other than the state in which the action is brought.[17]

c. What Instrument Foundation of Action. In an action for calls against shareholders who have subscribed preliminary articles of subscription, prior to or separate from the articles of association by which the corporation is formed, the instrument which constitutes the foundation of the action is not the articles of association, but the contract of subscription.[18] This constitutes the contract

10. Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455.

11. McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. (Ky.) 218, 235, 61 Am. Dec. 181. See also *supra*, VI, J.

12. That it is necessary to aver that the corporation has issued or offered to issue the stock to defendant see St. Paul, etc., R. Co. *v.* Robbins, 23 Minn. 439.

Necessity of alleging performance of statutory condition that the corporation shall not transact business except with its members until at least one half of its capital stock has been duly subscribed for and twenty per cent thereof paid in. Anvil Min. Co. *v.* Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232.

That the performance of conditions precedent, named in the contract of subscription, need not be averred where the action is upon the statute and not upon the contract see Amherst, etc., R. Co. *v.* Watson, 4 Gray (Mass.) 61. And this although the contract has inadvertently been made a part of the record. Troy, etc., R. Co. *v.* Newton, 1 Gray (Mass.) 544.

13. Union Turnpike Road *v.* Jenkins, 1 Cai. (N. Y.) 381.

14. See *supra*, VI, N, 2, e, (II).

15. Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455, 22 Ark. 361. Such was the early rule in Indiana, afterward departed from in the era of railroad building. Corydon Steam Mill *v.* Pell, 4 Blackf. (Ind.) 472.

16. Mississippi, etc., R. Co. *v.* Turrentine, 21 Ark. 445 [*following* Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455].

17. Pennsylvania *v.* Quicksilver Min. Co., 10 Wall. (U. S.) 553, 19 L. ed. 998; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953. *Compare* National Steamship Co. *v.* Tugman, 106 U. S. 118, 1 S. Ct. 58, 27 L. ed. 87; Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207; Germania F. Ins. Co. *v.* Francis, 11 Wall. (U. S.) 210, 20 L. ed. 77; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353.

For a precedent of a good complaint where the corporation assigned the stock subscription and gave the assignee a written order on the subscriber for the same, which the subscriber accepted, see Stockton *v.* Creager, 51 Ind. 262.

As to what averments of the payment of the required deposit (see *supra*, VI, H, 13) will be accepted as sufficient see Highland Turnpike Co. *v.* McKean, 11 Johns. (N. Y.) 98. See also Grayble *v.* York, etc., Turnpike Road Co., 10 Serg. & R. (Pa.) 269.

18. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430.

between the subscriber and the corporation; since as elsewhere seen[19] such subscriptions inure to its benefit when its organization is complete.[20]

d. Defensive Pleadings. Unless the governing statute makes the subscription payable absolutely, and without a call, an answer which denies that the call has been made is good on demurrer.[21]

3. Suing For Too Much and Recovering What Is Due. Where the corporation sues for several instalments, it may recover those which are due, although it fails to make out its case as to others.[22] So where several assessments have been made the directors may waive or abandon one that is void and maintain the action for those that are valid.[23]

4. Effect of Changes in Corporation Pending Such Action. Such an action is not defeated by the fact that pending it plaintiff has consolidated with another company and thereby ceased to exist. The cause of action has not died, but has passed to a new company. If this is a valid objection in any form, it must be considered matter in abatement merely and be pleaded *puis darrein continuance*.[24]

5. Evidence — a. Evidence of Existence of Corporation — (I) *Charter or Certificate of Incorporation and User Thereunder.* In these as in other cases the usual proof of the existence of the corporation is made by proving a charter or certificate of incorporation granted by the secretary of state or other proper officer, and user thereunder.[25]

(II) *Recognition by State.* Where the legislature of a state has full power to create a corporation, whether private or municipal, its corporate existence may be proved by legislative recognition, making a *de jure* corporation out of what was before a *de facto* corporation only.[26]

(III) *Recitals in Subscription Paper Estopping Subscriber.* Again the existence of the corporation may be proved by recitals in the subscription paper which have the effect of estopping the subscriber to deny such existence, as where

19. See *supra*, VI, H, 6, d, (VII).

20. Tonica, etc., R. Co. *v.* McNeely, 21 Ill. 71; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654.

Filing paper which is foundation of action. — That plaintiff must affix a copy of the subscription paper to his petition see Hudson *v.* Plank Road Co., 4 Greene (Iowa) 152. That it is not necessary for plaintiff to make profert of the subscription paper because it is not the foundation of the action see Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455. That it is not proper to file the subscription paper, in an action against one of the subscribers, since it embraces several distinct contracts, see Workman *v.* Campbell, 46 Mo. 305; Hannibal, etc., Plank Road Co. *v.* Robinson, 27 Mo. 396 (proceeding before a justice of the peace). That the resolution of the directors making an assessment is not the written instrument required to be filed under the statute see Van Riper *v.* American Cent. Ins. Co., 60 Ind. 123.

21. Mansfield, etc., R. Co. *v.* Hall, 26 Ohio St. 310.

Matter of defense must be raised in court below. — Defensive matter available by plea or answer cannot of course be taken advantage of for the first time in an appellate court, as that, by the terms of the contract, the directors could assess the defendant only twenty-five dollars a share at a time, and the assessment sued for was forty-two dollars. Eastern Plank Road Co. *v.* Vaughan, 20 Barb. (N. Y.) 155.

22. St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279.

23. Read *v.* Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545.

24. Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389. See also *supra*, III, D, 2, a *et seq.*

That a suit curing a failure to pay deposit required by a previous statute will not help out an action upon a subscription see Ogle *v.* Somerset, etc., Turnpike Road Co., 13 Serg. & R. (Pa.) 256.

Instructions to juries in such actions under Maryland theory upholding independence of the jury. Maltby *v.* Northwestern Virginia R. Co., 16 Md. 422.

25. *Maine.*—Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78.

New York.— Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Eaton *v.* Aspinwall, 19 N. Y. 119 (per Gray, J.); U. S. Bank *v.* Stearns, 15 Wend. 314; Utica Ins. Co. *v.* Tilman, 1 Wend. 555; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459.

North Carolina.— Wilmington, etc., R. Co. *v.* Thompson, 52 N. C. 387.

Vermont.— Searsburg Turnpike Co. *v.* Cutler, 6 Vt. 315.

England.— Snow *v.* Peacock, 3 Bing. 406, 11 E. C. L. 201, 2 C. & P. 215, 12 E. C. L. 535, 11 Moore C. P. 286.

26. Comanche County *v.* Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. ed. 604.

the paper recites that a company has been formed under a general law, and that the articles of association, with the necessary affidavits, have been duly filed, this being deemed conclusive evidence of a corporation as against the subscriber.[27]

(iv) *Letters Patent From Governor.* Letters patent from the governor of the state, issued in pursuance of an act of incorporation, have been held sufficient evidence of the existence of the corporation to enable it to maintain such an action.[28]

(v) *Burden of Proof With Respect to Corporate Existence.* Where the governing statute makes certain formalities *prima facie* evidence of a due organization, and those formalities appear, the burden of showing defects rests upon those who challenge the corporate existence.[29]

(vi) *Corporate Existence Admitted by Pleading General Issue or General Denial.* Here, as in other actions, if defendant pleads the general issue at common law or the general denial under the codes, he thereby admits the legal capacity of plaintiff to sue, and this rule has been held to obtain in an action by a corporation upon a subscription to its stock.[30]

b. Books and Records of Corporation as Evidence — (i) *Are Always Evidence Against Corporation Itself.* The entries in the books and other records kept by the corporation are always evidence against the corporation itself, on the ground of being solemn, self-disserving admissions against its own existence. For example they are constantly referred to for the purpose proving the fact of the existence of the corporation.[31] While according to one holding a corporate record recorded in a public office, as required by law, is conclusive evidence to show that a particular person is a shareholder, raising an estoppel against the corporation from proving the contrary,[32] yet the only sound opinion is that such records are *prima facie* evidence against the corporation, but subject to explanation, and to such proof under particular conditions as may destroy their effect.[33]

(ii) *Not Admissible to Connect Stranger With Corporation.* While as between members of the corporation its books and records are *prima facie* evidence of all corporate acts therein recorded, yet there is no principle on which they can be used as against a stranger to connect him with the corporation,[34] unless, as sometimes in England, they are made evidence of this fact by an act of the legislature.[35]

27. Black River, etc., R. Co. *v.* Clarke, 25 N. Y. 208.

28. Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302. So held in regard to letters-patent of the governor of Pennsylvania, in respect of a corporation created by an act of the legislature of that state in Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476.

Articles of association duly certified by the secretary of state are *prima facie* evidence as to the amount of capital stock that has been subscribed. Jewell *v.* Rock River Paper Co., 101 Ill. 57.

29. Thus under a statute of Connecticut making a certified copy of the original certificate of organization of any joint-stock corporation *prima facie* evidence of the due formation, existence, and capacity of such corporation (Conn. Gen. Stat. p. 439, § 23), where the shareholders, after the filing of the certificate of organization, seek to take advantage of any defect in the organization, in a suit against the corporation upon its contracts, the burden of showing any defect rests upon them. Wood *v.* Wiley Constr. Co., 56 Conn. 87, 13 Atl. 137.

30. Rockland, etc., Steamboat Co. *v.* Sewall, 78 Me. 167, 3 Atl. 181; Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737. A plea of the general issue admits the competency of plaintiff to sue as a corporation. Society for Propagation of Gospel *v.* Pawlet, 4 Pet. (U. S.) 480, 7 L. ed. 927. But it admits that fact only; it does not admit that it was organized under a certain law, but plaintiff, a creditor suing a shareholder, must prove such fact. Gay *v.* Keys, 30 Ill. 413. In a suit against a shareholder by an assignee in bankruptcy of the corporation, a plea of the general issue admits the existence of the corporation. Pullman *v.* Upton, 96 U. S. 328, 24 L. ed. 818.

31. Hudson *v.* Carman, 41 Me. 84.

32. Stratton *v.* Lyons, 53 Vt. 130.

33. Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654.

34. Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87; Mudgett *v.* Horrell, 33 Cal. 25; Chase *v.* Sycamore, etc., R. Co., 38 Ill. 215; Matter of Joint-Stock Co.'s Acts, 3 De G. J. & S. 465, 68 Eng. Ch. 351; Angell & A. Corp. 679; Greenleaf Ev. § 493.

35. Bristol, etc., Canal Nav. Co. *v.* Amos, 1 M. & S. 569. See the opinion of Sawyer, J.,

(III) *Are Evidence of Acceptance of Subscription.* It has been held in such an action that the minutes of a meeting of the directors of the corporation, while not binding on the alleged subscriber, are nevertheless admissible in evidence to show an acceptance by the corporation of his proposal to take stock.[36]

(IV) *Admissible Against One Who Has Exercised Privileges of Shareholder.* The test being that the person against whom such records are admitted must have stood in such a relation to the corporation as to be chargeable with knowledge of such records, it follows that the records kept by the clerk of a railroad corporation of the proceedings of the directors, in ordering assessments upon the shares of the capital stock, may be used as evidence by the corporation, in a suit brought by them to recover an assessment upon the shares subscribed for by defendant, he being one of the original grantees in the charter, and a director at the time the assessment was ordered, and having exercised the privileges of a shareholder in virtue of the shares upon which the assessment was made.[37]

(V) *View That Such Records Are Presumptive Evidence of Membership*—(A) *In General.* Some of the courts have fallen down upon the absurd and unjust rule that where the name of an individual appears upon the books of the corporation as a shareholder this fact is *prima facie* evidence of his being the owner of the shares, casting the burden on him to show that such is not the fact,[38] a rule which rests upon no higher principle than this: If one person marks another down in his private books as his debtor, this puts the latter, or his estate after his death, to the burden and expense of proving that such is not the fact; a rule which has the further effect of raising the records of private corporations to a level not accorded to solemn judicial records; for a judgment is not admissible in evidence against a person who was not a party to the proceeding, for the purpose of disposing of his substantial rights.[39] Nor in general can one of the parties to a private contract prove the existence of the contract by his own private memorandum or records.[40]

(B) *But Subject to Contradiction and Explanation by Parol*—(1) In General. But even if the books of a corporation can be received as presumptive evidence to prove that a particular person was a shareholder, such presumption may be overcome by parol testimony showing that he never accepted, but refused to accept, stock in the company.[41] But parol evidence will not be heard to show that a person had at a certain time by transferring his shares ceased to be a shareholder; the books of the corporation only will be looked to.[42] An alleged subscriber, sued upon his alleged contract of subscription, may introduce extracts from the minutes of the proceedings of the company, in connection with oral

in White Mountains R. Co. *v.* Eastman, 34 N. H. 124, where he undertook to state the tests by which to determine the admissibility of such records.

36. Colfax Hotel Co. *v.* Lyon, 69 Iowa 683, 29 N. W. 780.

37. White Mountains R. Co. *v.* Eastman, 34 N. H. 124.

38. *Alabama.*— Lehman *v.* Glenn, 87 Ala. 618, 6 So. 44.

California.— Mudgett *v.* Horrell, 33 Cal. 25.

Indiana.— Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430.

Maine.— Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Merrill *v.* Walker, 24 Me. 237; Coffin *v.* Collins, 17 Me. 440.

New York.— Hoagland *v.* Bell, 36 Barb. 57; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. 157.

United States.— Turnbull *v.* Payson, 95 U. S. 418, 24 L. ed. 437; Rockville, etc., Turnpike Road *v.* Van Ness, 20 Fed. Cas. No. 11,986, 2 Cranch C. C. 449.

39. Strauss *v.* Ayres, 87 Mo. 348; McKinney *v.* Guhman, 38 Mo. App. 344; Griffith *v.* Gillum, 31 Mo. App. 33; Holladay *v.* Menifee, 30 Mo. App. 207.

40. See Anchor Milling Co. *v.* Walsh, 37 Mo. App. 567; Hensgen *v.* Donnelly, 24 Mo. App. 398, on the question when books of account should be admitted in evidence.

The ordinary mode of making proof in actions for assessments under the rule that the corporate records are *prima facie* evidence for defendant is explained in Turnbull *v.* Payson, 95 U. S. 418, 24 L. ed. 437, opinion by Clifford, J.

41. Mudgett *v.* Horrell, 33 Cal. 25; Matter of Joint-Stock Co.'s Acts, 3 De G. J. & S. 465, 68 Eng. Ch. 351.

42. Stanley *v.* Stanley, 26 Me. 191. See also *infra*, VII, D, 5, a, (I) *et seq.*; VIII, N, 9, a, (I) *et seq.*

evidence, in which appeared two statements of lists of subscribers without defendant's name.[43]

(2) Exception Not Applicable in Case of Records to Which Defendant Is Privy. The view expressed in the preceding section would not of course be the correct view where the book which is offered in evidence is one to which defendant is privy. Thus if it is the original subscription book, and what purports to be his name appears as a subscriber therein, and such book is the foundation of the action, and he does not deny his signature on oath, as required by the statute, the book is competent evidence against him, provided it is sufficiently identified;[44] and it has been held that it is sufficiently identified where the clerk of the corporation swears that it came to him together with the other books of the corporation.[45] So where evidence has been given fixing the character of defendant as a subscriber or shareholder, the books and records of the corporation are admissible for the purpose of proving that an assessment by the directors has been made, and the amount of the same; and indeed they are the best evidence of such facts.[46] Accordingly, where defendant was shown to have been one of the original grantees named in the charter, and a director of the corporation at the time when the assessment was ordered, and that he had exercised the privileges of a shareholder in virtue of the shares of which the assessment was made, there was of course no difficulty in holding that the records kept by the clerk of the corporation of the proceedings of the directors in ordering assessments were admissible in evidence against him.[47] Moreover, in such action the records of the corporation are competent evidence, generally the best evidence, to show that the corporation has done certain acts, proof of which may be material under the issues.[48] They may also be admissible to show that the number of shares has been subscribed to warrant the subscribers in proceeding with the organization of the corporation under the governing statute.[49]

(vi) *Such Records Evidence in Case of Successive Transfers.* But where the shares have been transferred from one shareholder to another, and the question is, as between the successive shareholders, who shall be answerable to the creditors of the corporation, then as hereafter seen[50] the rule is that he whose name stands as shareholder on the corporate records must answer, although in fact another was the equitable owner, who has transferred it as pledge to the person sought to be charged.[51]

(vii) *Admissibility of Corporate Books Transcribed From Original Subscription Papers.* Where subscriptions to corporate shares are taken upon separate pieces of paper and are afterward transcribed in a book of the corporation,

43. Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146.

44. Breedlove *v.* Martinsville, etc., R. Co., 12 Ind. 114.

45. Breedlove *v.* Martinsville, etc., R. Co., 12 Ind. 114.

46. The books of the corporation are admissible to prove the amount of the assessment against one who claims under an original corporator. Comfort *v.* Leland, 3 Whart. (Pa.) 81. Under Tex. Rev. Stat. art. 586, requiring corporations to keep a record of all business transactions, and article 601, making such records or copies thereof competent evidence, the best evidence of an assessment made by the directors is the record of the order or resolution of the board of directors. Guadalupe, etc., Stock Assoc. *v.* West, 76 Tex. 461, 13 S. W. 307.

47. White Mountains R. Co. *v.* Eastman, 34 N. H. 124.

48. See 6 Thompson Corp. § 7734.

49. Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587.

50. See *infra*, VIII, M, 1, a.

51. Holyoke Bank *v.* Burnham, 11 Cush. (Mass.) 183; Empire City Bank's Case, 8 Abb. Pr. (N. Y.) 192. See Grew *v.* Breed, 10 Metc. (Mass.) 569; Crease *v.* Babcock, 10 Metc. (Mass.) 525. The statutes of Maine are to be construed as making the transfer-books of a corporation conclusive so far as creditors are concerned, as to who are to be considered shareholders. Stanley *v.* Stanley, 26 Me. 191. But where the controversy is as to the right to vote at a corporate election under a statute of New York, the court may go behind the entries in the transfer-book of the corporation, and determine whether a transfer was a sale or only a pledge, and whether the pledger or the pledgee was entitled to vote thereon. Strong *v.* Smith, 15 Hun (N. Y.) 222. But see *supra*, IV, F, 3, b.

the book will be evidence, in an action to charge an alleged subscriber, of the fact of his being such.[52]

(VIII) *Effect of Failure to Deny Under Oath.* In some remedial systems the entries on the records of the corporation showing that he is a shareholder are evidence against him, unless his answer contains a plea in the nature of *non est factum*, denying under oath the fact of his subscription, a plea denying it, but not under oath, not being good.[53]

(IX) *Corporate Records Not Evidence Against Shareholder in Respect of Private Dealings.* The books of a corporation are not admissible against a member, as evidence of his private contracts and dealings with the company, even in a suit against him by a creditor,[54] as a "stock-book" introduced to show entries of assessments.[55] Unless the shareholder is connected with such records by other evidence than by merely showing that he is a shareholder, they are not in general competent evidence in themselves to establish an action or claim against him; and this has been held even in a case where defendant was a trustee as well as a shareholder.[56]

c. Other Evidence of Membership — (I) *Effect of Charter as Evidence.* The charter of a corporation, issued by an officer of the state under a general law, is *prima facie* evidence that the persons named therein were members of the corporation at the commencement of its existence.[57] If the charter authorizes the corporation to take subscriptions for stock, without specifying in what manner, it is sufficient evidence, in a suit on such subscription, no proof being offered to the contrary, that the corporation was authorized to enter into the contract with defendant.[58] From the principle already discussed,[59] that the governing statute enters into and forms a part of the contract of subscription, it must follow that where this statute is in the form of a special act of the legislature, chartering the company, or in the form of articles of incorporation under a general law, in every

52. Hayden *v.* Atlanta Cotton Factory, 61 Ga. 233; Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281; Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146.

Plaintiff corporation may, it has been held, produce in evidence a subscription paper by which the signers bind themselves to pay for the shares opposite their names, plaintiff having stated its intention to show that the amount so subscribed was entered on its stock-list and ledger. It may then introduce such stock ledger and shareholders' list, compiled from subscription lists like the above, and from a memorandum, made by an agent appointed to collect quotas; and this, although defendant offers to prove that he had withdrawn his proposal to subscribe before the books were in existence. Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146. So where, in a suit by a corporation on a stock subscription, the defense was that the agreed number of shares had not been *bona fide* subscribed so as to make the subscription binding, it was held that the original subscription book, made up by copying from lists which were carried around to solicit subscriptions and accepted by the directors, was admissible. Hayden *v.* Atlanta Cotton Factory, 61 Ga. 233. The theory of these holdings is that the person so taking the subscriptions is impliedly constituted the agent of the subscribers for the purpose of entering their names in the formal books adopted for the purpose. Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281.

53. Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

54. Hager *v.* Cleveland, 36 Md. 476.

55. Haynes *v.* Brown, 36 N. H. 545.

56. Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046, 36 N. Y. St. 500, 22 Am. St. Rep. 816, 12 L. R. A. 473.

Records of public commissioners appointed to organize corporations.— This mode of organizing private corporations has substantially gone out of existence, and consequently the question of the admissibility of the records of such commissioners has become unimportant. Allusion may, however, be made to the rule that the subscription books kept by such commissioners are presumptive evidence that the subscriptions therein contained are genuine, that is to say made by the persons named therein or by persons duly authorized by them.

Connecticut.— Lane *v.* Brainerd, 30 Conn. 565.

Georgia.—Wood *v.* Coosa, etc., R. Co., 32 Ga. 273.

Illinois.— Peake *v.* Wabash R. Co., 18 Ill. 88.

Massachusetts.— Marlborough Branch R. Co. *v.* Arnold, 9 Gray 159, 69 Am. Dec. 279.

Mississippi.— Smith *v.* Natchez Steamboat Co., 1 How. 479.

57. McHose *v.* Wheeler, 45 Pa. St. 32.

58. Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476.

59. See *supra*, VI, H, 2; VI, H, 20, b.

case where the relation of shareholder is established the charter is evidence against him, provided it is relevant to the issues.[60]

(II) *Evidence of Assent to, or Acceptance of, Charter.* A special statute incorporating certain persons for purposes of private advantage or emolument does not bind any person named therein unless he consents thereto.[61] Accordingly it has been held that where a partnership becomes incorporated there must be some act or expression to signify their acceptance of the charter, in order to charge the several members as corporators.[62] So where it did not appear that defendants had in any manner signified their refusal to accept a charter incorporating a voluntary association, they were held not to be incorporators; but it must be noted that they were not named in the charter.[63] So an act of the legislature by which "the members of" several mutual fire-insurance companies are made a new corporation, and which "shall not affect the legal rights of any person" and is to take effect "when accepted by the members of said corporation," does not constitute a member of one of the old companies, who does not expressly assent to it, a member of the new corporation, although the act be duly accepted by a majority of the members of each of the old companies.[64]

(III) *The Usual Evidence.* The usual evidence is that defendant signed the subscription paper, attended corporate meetings, and voted for directors.[65]

(IV) *Declarations and Admissions of Party and Others.* If a party admits himself to be a subscriber, and on the faith of such admission others have acted for his benefit, he will be estopped from subsequently denying that he did in fact subscribe.[66]

(V) *What Is Sufficient Evidence of Acceptance of Proposal by Corporation.* Where, in an action on a stock subscription, it appeared that defendant subscribed to the capital of the corporation, which had been created for building a seminary, but after the seminary was built refused to pay his subscription, it was held that the delivery of the subscription, the demand of payment, and the subsequent suit to recover the same, were sufficient evidence of acceptance of the subscription by the corporation.[67]

(VI) *When Certified Copy of Subscription Is Not Evidence.* Where there is no law authorizing a paper containing the subscription to the capital

60. Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968.

61. Ellis *v.* Marshall, 2 Mass. 269, 3 Am. Dec. 49.

62. Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209.

63. Southern Steam Packet Co. *v.* Magrath, McMull. Eq. (S. C.) 93.

64. Hamilton Mut. Ins. Co. *v.* Hobart, 2 Gray (Mass.) 543.

But where a corporation organized under a general law was subsequently reincorporated under a special charter, it was held that, although the original subscription may have been made to the stock of the corporation formed under the general law, yet, if the subsequent act of incorporation was accepted, and, by consent and general understanding, the stock subscribed for in the first corporation was allowed to stand and be treated as stock in the second corporation, its holders would be as effectually shareholders in this corporation as if they had become such by a new subscription, and their receipt of dividends on their stock would be evidence of an unequivocal character. Hammond *v.* Straus, 53 Md. 1.

65. Lexington, etc., R. Co. *v.* Chandler, 13 Mete. (Mass.) 311.

Evidence sufficient to show that the person sought to be charged as a shareholder was such is disclosed by the facts of the following cases: Ross *v.* Gold Hill Bank, 20 Nev. 191, 19 Pac. 243; New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300; Vanderwerken *v.* Glenn, 85 Va. 9, 6 S. E. 806; Thayer *v.* Butler, 141 U. S. 234, 11 S. Ct. 987, 35 L. ed. 711; Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 11 S. Ct. 984, 35 L. ed. 702; Aspinwall *v.* Butler, 133 U. S. 595, 10 S. Ct. 417, 33 L. ed. 779.

66. Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489. But not so as to the declaration of another subscriber that he did not intend to pay for his shares, for the purpose of showing fraud on the part of the corporation (Hayden *v.* Atlanta Cotton Factory, 61 Ga. 233); or as to the declaration of a commissioner authorized by an act of the legislature to receive subscriptions, that a particular individual subscribed for a stated number of shares and paid the first instalment, for the purpose of proving the fact of the subscription, after the death of the commissioner (Western Maryland R. Co. *v.* Manro, 32 Md. 280).

67. Richmondville Union Seminary *v.* McDonald, 34 N. Y. 379.

stock of a corporation to be filed in the office of the secretary of state, a copy thereof, certified under the seal of the secretary of state, is not admissible as *prima facie* evidence, in a suit by the corporation to charge defendant as a shareholder.[68]

(VII) *Certificate of Secretary of Corporation.* Charters have been granted which contain the provision that the certificate of the secretary of the company shall be evidence of any act or order of the directors. This, it has been held, requires a certificate *in totidem verbis*, and that the secretary cannot certify that a "sufficient" call was made; and his certificate that he "published notice" of the calls is not admissible in evidence.[69]

d. Other Points of Evidence[70] — (I) *Genuineness of Other Signatures to Subscription Papers.* It is not essential to the company's right of action against a subscriber to show that the other signatures to the contract are genuine. The reason is that his promise is several and is not conditioned, by the terms of the contract, upon the fact of their subscribing.[71] But of course if fictitious names have been put down for the fraudulent purpose of inducing him to subscribe, that is matter of defense which he may plead and prove.[72]

(II) *Subscription by Agent or Attorney.* A party may of course become bound as a shareholder where another person subscribes his name for shares at his request; and a statute making it unlawful for any person to subscribe for shares in the name of other persons does not exclude a *bona fide* subscription by an attorney in the name of his principal.[73] Whether a person who without authority assumes to subscribe for shares in a corporation in the name of another thereby renders himself liable as a shareholder has been affirmed[74] and denied.[75]

(III) *Burden of Proof.* If the subscription is made upon a valid condition precedent[76] the burden is upon the corporation to show compliance with the condition on its part, or a waiver of compliance by defendant.[77] But if the defense of the subscriber is payment, or something done which is the equivalent of payment or satisfaction, then, upon a well-understood rule,[78] the burden is on defendant.[79]

6. Defenses — a. Defense of Want of Corporate Existence — (I) *Defense That Corporation Was Not Properly Organized* — (A) *In General.* The general rule is that the subscriber cannot, when sued by the corporation to enforce his contract of subscription, set up as a defense an irregularity in the organization of the corporation;[80] and the same rule obtains where the action is

68. Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581. *Compare* Bouchaud *v.* Dias, 3 Den. (N. Y.) 238; Jackson *v.* Leggett, 7 Wend. (N. Y.) 377; Dick *v.* Balch, 8 Pet. (U. S.) 30, 8 L. ed. 856.

69. Tomlin *v.* Tonica, etc., R. Co., 23 Ill. 429.

Certificate to exempt member from jury duty.— Certificate of such secretary under a statute, of the fact of being an active member, to entitle him to exemption from jury duty. State *v.* Primm, 50 Mo. 87.

70. Evidence of the value of the stock irrelevant. South Georgia, etc., R. Co. *v.* Ayres, 56 Ga. 230.

Not necessary to prove that directors were duly elected — sufficient that they were such *de facto*. Rockville, etc., Turnpike Road *v.* Van Ness, 20 Fed. Cas. No. 11,986, 2 Cranch C. C. 449.

71. Richmondville Union Seminary *v.* McDonald, 34 N. Y. 379.

72. See *supra*, VI, K, 3, c.

73. State *v.* Lehre, 7 Rich. (S. C.) 234.

74. Burr *v.* Wilcox, 22 N. Y. 551 [*affirming* 6 Bosw. (N. Y.) 198]; State *v.* Smith, 48 Vt. 266. *Compare* Molson's Bank *v.* Boardman, 47 Hun (N. Y.) 135.

75. Salem Mill Dam Corp. *v.* Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363, where it is said that while the corporation cannot maintain an action against him for an assessment it can maintain a special action on the case against him for the wrong done.

76. See *supra*, VI, J, 2, a *et seq.*

77. Central Turnpike Corp. *v.* Valentine, 10 Pick. (Mass.) 142. *Compare* Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23.

78. Greenleaf Ev. § 74.

79. Denny *v.* Northwestern Christian University, 16 Ind. 220.

80. *Alabama.*— Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120.

Illinois.— Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

Kentucky.— Wight *v.* Shelby R. Co., 16 B. Mon. 4, 63 Am. Dec. 522; Hughes *v.* Somerset Bank, 5 Litt. 45.

Louisiana.— East Pascagoula Hotel Co. *v.* West, 13 La. Ann. 545.

Michigan.— Monroe *v.* Ft. Wayne, etc., R.

brought by or on behalf of creditors of the corporation.[81] So, in an action by an insolvent corporation to collect an assessment for the purpose of paying their debts, the interests of the creditors will be so far regarded that no defense grounded on defects in the organization of the corporation can be maintained, unless it could have been successfully set up in answer to a creditor's bill against the shareholders to enforce their personal liability.[82]

(B) *Provided There Was a Corporation De Facto.* Many of the cases qualify this rule with the proviso that there is a corporation *de facto*, although informally [83] or even illegally [84] organized. The doctrine is universally settled that a corporation may exist *de facto*, although not *de jure*. It may have an existence which will be perfectly valid in so far as the rights of third persons are concerned, but which nevertheless cannot be maintained against the state. That is, it may exist so long as the state acquiesces and does not institute proceedings to oust it.[85] But as there can be no *de facto* office to fill,[86] so there can be no *de facto* corporation where the pretended corporation is one which the law does not authorize to exist at all, but one the existence of which it prohibits. Accordingly the reasoning is that when it is shown that a charter has been granted, then those in possession and actually exercising the corporate rights will be considered as rightfully there, against wrong-doers, and against all those who have treated or acted with them in their corporate character; that the sovereign alone has a right to complain, since if it is a usurpation, it is upon his rights and his acquiescence is evidence that all things have been rightfully performed.[87] And the same reasoning would apply where there is a general law authorizing the organization of such a corporation as the one which brings the action. In short this principle may be invoked against one who has subscribed for stock in a body which has attempted irregularly to create itself a corporation.[88]

(C) *Validity of Corporate Organization Questionable Only by State.* With this qualification, either expressed or tacitly implied, the courts reason that the

Co., 28 Mich. 272; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

Missouri.— Home Stock Ins. Co. *v.* Sherwood, 72 Mo. 461; Central Plankroad Co. *v.* Clemens, 16 Mo. 359.

New York.— Cayuga Lake R. Co. *v.* Kyle, 64 N. Y. 185; Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Eaton *v.* Aspinwall, 19 N. Y. 119 [*affirming* 6 Duer 176, 3 Abb. Pr. 417, 13 How. Pr. 184]; Schenectady, etc., Plank Road R. Co. *v.* Thatcher, 11 N. Y. 102.

Pennsylvania.— Patterson *v.* Wyomissing Mfg. Co., 40 Pa. St. 117; Edinboro' Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421.

United States.— Rockville, etc., Turnpike Road Co. *v.* Van Ness, 20 Fed. Cas. No. 11,986, 2 Cranch C. C. 449.

81. *Alabama.*— McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

Georgia.— But see Heard *v.* Sibley, 52 Ga. 310.

Illinois.— Baker *v.* Backus, 32 Ill. 79.

Maryland.—Booth *v.* Campbell, 37 Md. 522.

New York.— Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482.

Rhode Island.— Slocum *v.* Providence Steam, etc., Co., 10 R. I. 112.

United States.— Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Upton *v.* Hansbrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417.

82. Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295.

83. Monroe *v.* Ft. Wayne, etc., R. Co., 28 Mich. 272; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Montpelier, etc., R. Co. *v.* Langdon, 46 Vt. 284.

84. Eaton *v.* Aspinwall, 19 N. Y. 119.

85. Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120; Lehmau *v.* Warner, 61 Ala. 455. See also Baker *v.* Backus, 32 Ill. 79.

86. Jester *v.* Spurgeon, 27 Mo. App. 477.

87. Elizabeth City Academy *v.* Lindsey, 28 N. C. 476, 45 Am. Dec. 500; Tar River Nav. Co. *v.* Neal, 10 N. C. 520. To the same effect see Atlantic, etc., R. Co. *v.* Johnston, 70 N. C. 348; Wilmington, etc., R. Co. *v.* Saunders, 48 N. C. 126.

88. Chubb *v.* Upton, 95 U. S. 665, 667, 24 L. ed. 523, per Hunt, J.

Illustrative cases, among others, may be found in South Georgia, etc., R. Co. *v.* Ayres, 56 Ga. 230; Appleton Mut. F. Ins. Co. *v.* Jesser, 5 Allen (Mass.) 446; Monroe *v.* Ft. Wayne, etc., R. Co., 28 Mich. 272; Cayuga Lake R. Co. *v.* Kyle, 64 N. Y. 185.

Theories as to what is necessary to constitute a corporation de facto have been already considered. See *supra*, I, O. See especially Gantt, J., in Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416, 420; Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75 [*quoted* with approval in Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416].

validity of the organization of the corporation can be questioned only in a direct proceeding against the corporation by the state.[89]

(D) *Shareholders Estopped to Deny Corporate Organization* — (1) IN GENERAL. Many of the cases rest the same conclusion on the ground that the shareholder is estopped by his conduct from denying the fact of the regularity or legality of the organization of the corporation.[90]

(2) IN WHAT MANNER ESTOPPEL ARISES. Where the corporation was in pretended existence at the time when the subscription was made, and the subscriber contracted with it in its corporate name, and thereby recognized its corporate existence, within the meaning of a rule elsewhere discussed,[91] as for instance where the subscriber executed his note to the corporation for his subscription, using its corporate name as payee,[92] especially if the note has been assigned by the corporation to a third person.[93] The rule under this head is not confined to actions by the corporation against its own shareholders to enforce their contracts of subscription; but it extends to any case of an action by a corporation against any one who has contracted with the corporation in its corporate name, and it may be stated thus: (1) A person who has contracted with a body in writing, by a corporate name, when sued upon the instrument in the same name, is estopped to deny that the payee or obligee is such a corporation.[94] (2) Where the subscriber has participated in the organization of the corporation, in its meetings, in its business, or has otherwise acted in reference to it in virtue of being a shareholder,[95]

89. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Illinois.— Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93.

Kentucky.— Hughes *v.* Somerset Bank, 5 Litt. 45.

Massachusetts.— Appleton Mut. F. Ins. Co. *v.* Jesser, 5 Allen 446; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Michigan.— Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

New York.— Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Eaton *v.* Aspinwall, 19 N. Y. 119.

90. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Connecticut.— Lane *v.* Brainerd, 30 Conn. 565.

Illinois.— Tarbell *v.* Page, 24 Ill. 46; Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93.

Kansas.— McCune Min. Co. *v.* Adams, 35 Kan. 193, 10 Pac. 468.

Kentucky.— Ferguson *v.* Landram, 5 Bush 230, 96 Am. Dec. 350.

Massachusetts.— Holyoke Bank *v.* Goodman Paper Mfg. Co., 9 Cush. 576; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Michigan.—Parker *v.* Northern Cent. Michigan R. Co., 33 Mich. 23.

New York.— Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Eaton *v.* Aspinwall, 19 N. Y. 119; Abbott *v.* Aspinwall, 26 Barb. 202; Mead *v.* Keeler, 24 Barb. 20, 25.

Pennsylvania.— McHose *v.* Wheeler, 45 Pa. St. 32.

United States.— Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, 307.

See also Slocum *v.* Warren, 10 R. I. 116, where there is a long and valuable discussion of this principle of estoppel in the opinion of the court, by Durfee, J., in which numerous authorities are examined, resulting in the conclusion that a shareholder proceeded against by a creditor of the corporation could not set up, in order to escape liability, the defense that the corporation had not come into existence by reason of its failing to pay into the treasury of the state the statutory tax or fee consisting of one hundred dollars.

91. Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459. See also *supra*, I, N, 1, b.

92. Lucas Market Sav. Bank *v.* Goldsoll, 8 Mo. App. 595.

93. Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

94. *Illinois.*— Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93.

Indiana.— Brookville, etc., Turnpike Co. *v.* McCarty, 8 Ind. 392, 65 Am. Dec. 768.

Kentucky.— Hughes *v.* Somerset Bank, 5 Litt. 45.

Massachusetts.— Worcester Medical Inst. *v.* Harding, 11 Cush. 285.

Missouri.— Hamtramck *v.* Edwardsville Bank, 2 Mo. 169.

New York.— Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459.

On the question of estoppel see the following analogous decisions: Burlington *v.* Gilbert, 31 Iowa 366, 7 Am. Rep. 143; *In re* Sharp, 56 N. Y. 257, 15 Am. Rep. 415; Bidwell *v.* Pittsburgh, 85 Pa. St. 412, 27 Am. Rep. 662, and cases cited.

95. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Kansas.— Hunt *v.* Kansas, etc., Bridge Co., 11 Kan. 412.

Massachusetts.— Cabot, etc., Bridge *v.* Chapin, 6 Cush. 50.

Missouri.— Central Plankroad Co. *v.* Clemens, 16 Mo. 359.

in which case as already seen [96] the estoppel extends so far as to prevent him from denying that the assessment was duly made. (3) Where the rights of creditors of the corporation have supervened,[97] a subject reserved for future treatment, for instance, where the subscriber gives his promissory note in settlement of his subscription and it passes into the hands of an innocent holder for value before maturity,[98] although this rather concerns an immunity which attaches to negotiable paper. Where the proceeding is by a creditor to enforce the individual liability of the shareholder, this principle of estoppel extends so far as to prevent him from setting up the unconstitutionality of the charter as his defense.[99]

(E) *Principle Limited to Corporations Which May Lawfully Exist.* As already seen,[1] the limitation of the rule which upholds the acts of *de facto* corporations is that it applies only to corporations which might lawfully exist; otherwise the courts would be called upon to sanction usurpations of corporate privileges and violations of positive law, which courts will not in general do, even where both parties to a controversy request it.[2]

(F) *Constitutionality of Charter or Governing Statute.* Notwithstanding the foregoing, on grounds of public convenience and necessity, it has been held that the rule which prohibits the trial of the question of corporate existence in a collateral proceeding extends so far as to prevent the constitutionality of the act of incorporation from being drawn into question even where the attempt is made by the corporation.[3] So it has been held that a shareholder in a corporation who has participated in its organization and acted as a director cannot set up the unconstitutionality of the statute under which the organization was had, as a defense to the payment of his stock subscription.[4] For stronger reasons the principle of estoppel will prevent the shareholder of a corporation, whose charter is repugnant to the constitution of the state, and hence void, from urging that fact when sued in respect of his individual liability to creditors under the charter.[5]

(G) *Defense That Charter Was Obtained by Fraud.* It cannot be shown as a defense to such an action that the charter of the company was obtained by fraud, and it is proper to exclude evidence tendered for this purpose, provided it appear that the shareholder participated in the business of the company, voted to accept an amendment of its charter, acted as a director, etc.[6] But it has been held that "where a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a *bona fide* subscriber, by which he has either sustained or might sustain injury, no action can be maintained against him by the corporation for the amount of his subscription, unless such subscriber has accepted the charter, and by his own acts has assisted in putting it in operation."[7] In the same case the doctrine on which we are commenting was said not to apply in cases where the corporation never had any legal existence, but was a sham, and where a large portion of the stock was fraudulently and fictitiously created, for the mere purpose of being used as a decoy to induce other people to subscribe. Accordingly where the affidavits required by the law as a condition precedent to the issuing of the license by the secretary of state were shown never to have been filed, and where the five thousand dollars in

New York.— Dutchess Cotton Manufactory Co. *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459.

Pennsylvania.—Clark *v.* Monongahela Nav. Co., 10 Watts 364; Centre, etc., Turnpike Co. *v.* McConaby, 16 Serg. & R. 140.

England.— Cheltenham, etc., R. Co. *v.* Daniel, 2 Q. B. 281, 2 R. & Can. Cas. 728, 42 E. C. L. 675; Sheffield, etc., R. Co. *v.* Woodcock, 11 L. J. Exch. 26, 7 M. & W. 578.

96. See *supra*, I, K, 6, a; VI, H, 13, d; VI, J, 1, e, (II); VI, J, 2, d, (II); VI, k, 1, g, (II).

97. See *infra*, VI, P, 6, a, (I), (H).

98. Camp *v.* Byrne, 41 Mo. 525.

99. McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83.

1. See *supra*, I, O, 2, d.

2. St. Louis Colonization Assoc. *v.* Hennessy, 11 Mo. App. 555.

3. St. Louis *v.* Shields, 62 Mo. 247.

4. Weinman *v.* Wilkinsburg, etc., R. Co., 118 Pa. St. 192, 12 Atl. 288.

5. McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83.

6. Smith *v.* Heidecker, 39 Mo. 157.

7. Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205, 208.

cash of the capital stock, as required by the statute, had not been paid in by the subscribers at the time the license was issued, it was held that the corporation could not maintain an action against a subscriber to enforce his stock subscription.[8]

(H) *Shareholders Estopped as Against Creditors From Setting Up Their Own Incorporation.* When the shareholders in a body which has acted and held itself out as a corporation are proceeded against by creditors, they are equally estopped by their own conduct from denying that they are a corporation;[9] for it would be palpably wrong to permit a defendant, who is one of the owners of the capital stock of a *de facto* corporation, which operates and sues for his benefit, to set up a failure of its organizers to perform a duty initiatory to its legal existence, when plaintiff, if sued by the corporation for defendant's benefit, could not set up the same fact as a defense to the suit.[10] "Their own acts," says Brickell, C. J., "vitalized the corporation, gave it credit, invited and induced dealings with it; and it is true conservatism, and sound policy, promotive of right and equity, to seal their lips against contradiction and denial of that which they must be taken to have affirmed, to the injury of strangers who have trusted the affirmation."[11]

(I) *Estoppel to Set Up Non-Existence of Corporation at Time of Subscription.* In their struggles with this question[12] the courts have sometimes rested their conclusions on the ground that in such a case as in others, the shareholder, when sued by the corporation, is estopped from denying its lawful existence;[13] and this principle of estoppel comes into play with stronger force where the action against a shareholder is by or on behalf of the creditors of the corporation.[14]

(J) *Estoppel to Set Up Dissolution of Corporation Where Proceeding Is on Behalf of Creditors.* Where the proceeding is by or on behalf of creditors, it is totally immaterial that as soon as the indebtedness was created the corporation

8. Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205. See also Wells *v.* Jones, 41 Mo. App. 1.

9. *Illinois.*— McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Wheelock *v.* Kost, 77 Ill. 296; Tarbell *v.* Page, 24 Ill. 46; Rice *v.* Rock Island, etc., R. Co., 21 Ill. 93.

New York.— Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Eaton *v.* Aspinwall, 19 N. Y. 119; Abbott *v.* Aspinwall, 26 Barb. 202; Mead *v.* Keeler, 24 Barb. 20.

Pennsylvania.— McHose *v.* Wheeler, 45 Pa. St. 32.

Rhode Island.—Slocum *v.* Providence Steam, etc., Co., 10 R. I. 112.

United States.— Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Upton *v.* Hansbrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417.

See 12 Cent. Dig. tit. "Corporations," § 92.

10. Eaton *v.* Aspinwall, 19 N. Y. 119.

11. Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120, 133. And see McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83.

Instances where defense of no incorporation has been held unavailable.— Without entering into impracticable details, the following cases may be referred to as presenting instances where the defense of no incorporation has been held unavailable, either on grounds of estoppel or on other grounds, to the shareholder in an action to recover assessments or otherwise to enforce his contract of subscription, either in favor of the corporation or its creditors.

Illinois.— Tarbell *v.* Page, 24 Ill. 46.

Massachusetts.— Merrick *v.* Reynolds Engine, etc., Co., 101 Mass. 381; Newcomb *v.* Reed, 12 Allen 362; Dooley *v.* Cheshire Glass Co., 15 Gray 494; Boston Acid Mfg. Co. *v.* Moring, 15 Gray 211; Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. 282.

New York.— Eaton *v.* Aspinwall, 19 N. Y. 119; Abbott *v.* Aspinwall, 26 Barb. 202; Mead *v.* Keeler, 24 Barb. 20.

Pennsylvania.— McHose *v.* Wheeler, 45 Pa. St. 32; Patterson *v.* Wyomissing Co., 40 Pa. St. 117.

Rhode Island.—Slocum *v.* Providence Steam, etc., Co., 10 R. I. 112.

United States.— Union Horseshoe Works *v.* Lewis, 24 Fed. Cas. No. 14,365, 1 Abb. 518; Upton *v.* Hansbrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417.

Instances where this defense was successful.— In the following cases against shareholders this defense of no incorporation was successfully set up. Katama Land Co. *v.* Holley, 129 Mass. 540; Dorris *v.* Sweeney, 60 N. Y. 463 (contract made before the formation of the corporation and conditioned upon its formation).

12. See *supra*, VI, H, 6, d, (VII).

13. Dorris *v.* French, 4 Hun (N. Y.) 292, 6 Thomps. & C. (N. Y.) 581.

14. Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

had been dissolved by the state on the ground that it never legally existed.[15] For, although by a rule of the common law, a forfeiture of a corporate charter may extinguish all debts due by the corporation, yet the collateral undertaking of the shareholders, under a section of its charter which makes them individually liable for its debts, will remain unimpaired.[16]

(K) *Rule Operates to Protect Shareholders of De Facto Corporations From Personal Liability.* In the absence of a statutory provision making shareholders liable in case of failure to comply with the requirements of a charter, persons who have contracted with a *de facto* corporation as a corporation cannot deny its existence in order to charge its shareholders individually as partners.[17]

(L) *Whether Shareholder Estopped to Deny Corporate Existence by Reason of Paying One or More Instalments.* One court has held that the payment of an instalment on a subscription to its stock is a sufficient recognition of the legal existence and organization of the corporation by the subscriber so paying to enable it to recover the remaining instalments from him.[18] But another has held that in an action to enforce a subscription to corporate stock a declaration that defendant paid all of his subscription except that sued on, which is alleged to have been duly and regularly called in and demand therefor made, payment of which was refused by defendant, does not allege sufficient facts to create an estoppel to dispute the corporate existence.[19]

(M) *Shareholder Estopped to Deny Corporate Existence by Attending Meetings, Serving as Director, Etc.* Speaking generally it may be said that in an action for an assessment the shareholder will be estopped from denying the existence of the corporation by the fact that he has participated in its organization, attended its meetings, served as a director, or otherwise has knowingly derived benefits which he could not have derived except on the assumption of its valid existence as a corporation,[20] a subject reserved for future consideration. This principle applies with even greater force where the rights of creditors are involved,[21] and especially where there has been a great lapse of time;[22] and so where a consolidation has taken place years before, estopping the shareholder from setting up technical objections to the proceedings taken by the other corporation to effect the consolidation.[23]

(N) *Opposing Doctrine That Existence of Corporation Must Be Affirmatively Proved.* Some authority is found in the decisions of highly respectable courts to the effect that in actions of this nature, whether by the corporation to recover assessments from its shareholders or on behalf of its creditors, the shareholder will not be estopped to deny the existence of the corporation, but that its existence must be affirmatively proved by plaintiff.[24]

(O) *View That Question of No Incorporation Cannot Be Tried Where Proceeding to Collect Subscription Is Brought in Equity.* In a case in a court

15. Rowland *v.* Meader Furniture Co., 38 Ohio St. 269; Gaff *v.* Flesher, 33 Ohio St. 453.

16. Robinson *v.* Lane, 19 Ga. 337. See also *infra*, VIII, P, 1, c, (II), (C).

17. Stout *v.* Zulick, 48 N. J. L. 599, 7 Atl. 362. Another court has stated the rule which protects them even more broadly, by holding that persons dealing with a corporation which is not legally organized cannot, for this reason, proceed against shareholders who for several years acted as a corporation in good faith, supposing themselves to be incorporated, the state not having moved in the matter. Gartside Coal Co. *v.* Maxwell, 22 Fed. 197.

18. Maltby *v.* Northwestern Virginia R. Co., 16 Md. 422.

19. Schloss *v.* Montgomery Trade Co., 87 Ala. 411, 6 So. 360, 13 Am. St. Rep. 51.

20. Cahot, etc., Bridge *v.* Chapin, 6 Cush. (Mass.) 50; Schenectady, etc., Plank Road Co. *v.* Thatcher, 11 N. Y. 102; Rockville, etc., Turnpike Road *v.* Van Ness, 20 Fed. Cas. No. 11,986, 2 Cranch C. C. 449.

21. Smith *v.* Heidecker, 39 Mo. 157; Eaton *v.* Aspinwall, 6 Duer (N. Y.) 176 [*affirmed* in 19 N. Y. 119].

22. Mead *v.* Keeler, 24 Barb. (N. Y.) 20.

23. Wells *v.* Rodgers, 60 Mich. 525, 27 N. W. 671.

24. Indianapolis Furnace, etc., Co. *v.* Herkimer, 46 Ind. 142; Hudson *v.* Carman, 41 Me. 84; Utley *v.* Union Tool Co., 11 Gray (Mass.) 139; Unity Ins. Co. *v.* Cram, 43 N. H. 636.

of equity the view has been taken that an allegation that a corporation was not properly organized, and therefore had no authority to collect a subscription made to its capital stock, is a question that can be tried only in a court of law.[25] But while a proceeding to forfeit the charter is necessarily a proceeding at law, yet if such a question can under any circumstances at all be tried in a collateral proceeding against a shareholder, the trial can only be a trial for the purposes of that proceeding, and it is not perceived why such a trial cannot be as well had in a court of equity as in a court at law, if the court otherwise has jurisdiction.[26]

b. Matters Affecting Contract of Subscription — (I) *That Subscription Was Feigned and Fraudulent.* It will be no defense to an action against a shareholder for an assessment that the subscription was feigned and fraudulent, and that the company was a party to the fraud;[27] or that the shareholders agreed among themselves to issue their stock certificates as "paid up,"[28] since a party will not thus be allowed to set up his own turpitude. But this principle can have no application where the subscriber was innocent and was induced to take the shares by fraud.[29]

(II) *That Subscription Paper Was Abandoned.* It will be competent to set up as a defense to such an action, and to establish the defense by parol evidence, that the subscription paper which is the subject of the action was abandoned and that a new one was substituted in its place and made the basis of the organization of the company.[30]

(III) *Various Irregularities, Illegalities, Etc., in Subscription or Allotment of Shares.* The following defenses, which fall under this head, have been held unavailing: The failure of the commissioners to give notice of the time and place of receiving the subscriptions, since the object of the statutory provision for such notice is merely designed to prevent a monopoly of the stock, and the want of notice is therefore no defense to one who does subscribe;[31] that the subscription books were opened upon a notice signed not by all but by a majority only of the original corporators;[32] that some of the subscriptions necessary to make up the requisite amount were improperly made, provided they were accepted *bona fide* and acted upon by the corporation;[33] that the sum subscribed exceeded the amount intended to be raised, but in such a case the subscriptions of all the subscribers should be paid *pro rata*;[34] the failure of the agent who received the subscription to return the subscription paper to the home office of the corporation, since this was not necessary to complete the contract of subscription;[35] that the subscription was made before the organization of the company took place;[36] that the stock had never been received by the commissioners, having been delivered to them in escrow merely, inasmuch as that allegation was contradicted and disproved by the record, that is, it was recognized by plaintiff

25. Thompson *v.* Guion, 58 N. C. 113.

26. 2 Thompson Corp. § 1873.

27. Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489.

28. Wurtzburger *v.* Anniston Rolling Mills, 94 Ala. 640, 10 So. 129; Goff *v.* Hawkeye Pump, etc., Co., 62 Iowa 691, 18 N. W. 307. See also Clayton *v.* Ore Knob Co., 109 N. C. 385, 14 S. E. 36.

29. See *supra*, VI, K, 1, a (I).

30. Southern Hotel Co. *v.* Newman, 30 Mo. 118.

31. Hagers-Town Turnpike Road Co. *v.* Creeger, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495. See also Union Turnpike Road Co. *v.* Jenkins, 1 Cai. (N. Y.) 381, 389. In such a case it was held an error to instruct the jury that they might presume that the notice above described was given according to the directions of the law, the court saying: "Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of the legality of its existence." Hagers-Town Turnpike Road Co. *v.* Creeger, 5 Harr. & J. (Md.) 122, 125, 9 Am. Dec. 495.

32. Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257.

33. Baile *v.* Calvert College Education Soc., 47 Md. 117. See also *supra*, VI, N, 2, a, (I), (A) *et seq.*

34. State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626. See also *supra*, VI, N, 1, o. It is quite the reverse where the requisite capital is not subscribed for. See *supra*, VI, N, 2, a, (I), (A) *et seq.*

35. Pickering *v.* Templeton, 2 Mo. App. 424.

36. Stanton *v.* Wilson, 2 Hill (N. Y.) 153. See *supra*, VI, H, 6, a *et seq.*

corporation as valid stock;[37] that the formula at the head of the contract of subscription was not precisely the same as that recited in the act of incorporation in respect of the name or designation of the corporation itself, the variance not being material, and such as to amount to a failure of identity.[38]

(IV) *That Shares Were Not Allotted by Numbers.* Where a person has subscribed to the capital stock of a corporation, and an action is brought against him for an assessment, it will be no defense on his part that the shares were not allotted to him by numbers; but that notwithstanding this the company proceeded to forfeit his shares, to sell them, and to bring the present action against him for the residue. The reason is that the shares being equal in amount no confusion could arise from the failure to allot the shares to the subscriber by particular numbers.[39] Of course the rule is different where the governing statute prescribes that the names of the shareholders shall be entered upon the register of the company, "together with the number of shares to which such stockholders shall be respectively entitled, distinguishing each share by its number," and on this ground certain English cases are to be distinguished.[40]

(V) *That Notes Were Received From Subscriber Instead of Money.* Nor is it a good defense to an action by the corporation on a promissory note given by a subscriber in settlement of his subscription, that the corporation improperly received the note in payment of the stock, instead of requiring defendant to pay the money.[41]

(VI) *That Directors Released Other Shareholders.* Nor is it any defense to such an action that the directors, without the consent of the other shareholders, released certain of the subscribers to the company's stock from liability therefor; for such a release if made is void, and the shareholder whom the directors have attempted to release remains bound to make good his subscription.[42]

(VII) *That No Share Certificate Was Delivered to Defendant.* It will be no defense that the corporation failed to deliver to defendant a certificate of his shares, since the certificate does not constitute the shares, but is merely an evidence or muniment of his title,[43] especially where the subscriber has not demanded the certificates and the corporation has not refused to deliver them.[44] Therefore a paragraph of an answer in such an action setting up that the corporation has made to defendant no tender of a certificate of his shares is bad.[45]

37. Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

38. Hagers-Town Turnpike Road Co. *v.* Creeger, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495. So of a subscription book. Oler *v.* Baltimore, etc., R. Co., 41 Md. 583.

39. European, etc., R. Co. *v.* McLeod, 16 N. Brunsw. 3.

40. Wolverhampton New Waterworks Co. *v.* Hawksford, 7 C. B. N. S. 795, 812, 97 E. C. L. 795 (where it was said by Erle, C. J., that "no shares had been numbered, and no specific shares had been appropriated;" but the real ground of the decision seems to have been that defendant's name was not on any register of shareholders such as the company was required by the act to keep. At least this was the understanding of the case by a majority of the supreme court of New Brunswick. European, etc., R. Co. *v.* McLeod, 16 N. Brunsw. 3); Newry, etc., R. Co. *v.* Edmunds, 2 Exch. 118, 123, 17 L. J. Exch. 102, 5 R. & Can. Cas. 275.

41. Finnell *v.* Sanford, 17 B. Mon. (Ky.) 748; Home Stock Ins. Co. *v.* Sherwood, 72 Mo. 461. It is not a good defense, within section 9 of the Illinois act of 1845, to an action by a corporation on notes given for a subscription to the stock that the notes were stock notes. Ryan *v.* Vanlandingham, 25 Ill. 128.

42. Dorman *v.* Jacksonville, etc., Plank Road Co., 7 Fla. 265; Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286. *Compare* Gill *v.* Balis, 72 Mo. 424; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203. See also Faulkner *v.* Hebard, 26 Vt. 452.

43. South Georgia, etc., R. Co. *v.* Ayres, 56 Ga. 230; Smith *v.* Gower, 2 Duv. (Ky.) 17; Dallas Cotton, etc., Mills *v.* Clancey, (Tex. App. 1891) 15 S. W. 194; Hawley *v.* Upton, 102 U. S. 314, 26 L. ed. 179; Farrar *v.* Walker, 8 Fed. Cas. No. 4,679, 3 Dill. 506 note. Hence it is not necessary for plaintiff to allege that a certificate was tendered to defendant before the action was brought. Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51.

44. Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

45. Slipher *v.* Earhart, 83 Ind. 173; Drover *v.* Evans, 59 Ind. 454; Hartsville University *v.* Hamilton, 34 Ind. 506; Beaver *v.* Hartsville University, 34 Ind. 245; Heaston *v.* Cin-

(VIII) *That Company Guaranteed That It Would Pay Interest on Shares.* A guaranty in the contract of subscription that the corporation will pay interest on the stock "as soon as paid" constitutes no defense to an action against a shareholder for an assessment, although the company has broken the agreement and suspended operations.[46]

c. **Matters Affecting Legality of Assessment** — (I) *In General.* Defendant may of course challenge the legality of the assessment.[47] He may show that the order for it was made by less than a majority of the directors, and is therefore void; and subsequent action by the whole board under this order will not amount to a ratification.[48] Where the governing statute requires that the shareholders shall be assessed equally in respect of their subscriptions, if an equal assessment has not been made, this fact is a good defense on the part of any shareholder when sued by the company to recover an assessment.[49]

(II) *That There Has Been Prior Forfeiture of Shares.* Defendant cannot plead that by reason of his default respecting another instalment he had forfeited to the corporation all the shares subscribed by him, and that the amount thus forfeited was equal to the amount claimed in the suit.[50] But as already seen[51] a valid forfeiture of shares, and hence one not fraudulent or collusive, dissolves the connection between the shareholder and the company, and therefore creditors of the company cannot, in the event of its becoming insolvent, charge him as a shareholder with the amount remaining unpaid on his shares.[52]

(III) *That There Has Been Transfer of Shares to Escape Liability as Shareholder.* Within the limits hereafter discussed,[53] if a subscriber to stock of a corporation transfer it without the assent of the corporation, the transfer will be no defense to him in an action for the amount due on his subscription.[54] But the corporation — the rights of the creditors not being involved — may affirm such a transfer and proceed against the transferee to show that the transfer was made without any consideration.[55]

(IV) *Waiver by Conduct of Irregularity of Assessment.* A shareholder may by his conduct validate an irregular assessment; as by participating in a meeting called for the purpose of organization, submitting to be elected director and acting as such;[56] or by assisting in framing the by-law under which the assessments are levied, and voting for its adoption.[57] But an illegal assessment upon corporate stock cannot be made good, upon the footing of contract, from an assent, to be presumed from an assent to former illegal assessments of lesser amount; nor can such assent be given with effect by an assignor of stock, after an assignment of the stock and notice of the assignment given to the corporation.[58]

(V) *Waiver by Conduct of Right to Object That Statutory Deposit Has Not Been Paid.* The same rule applies to the matter of the non-payment

cinnati, etc., R. Co., 16 Ind. 175, 79 Am. Dec. 430; Vawter *v.* Ohio, etc., R. Co., 14 Ind. 174. That the company is at most bound to make a conditional tender see Hardy *v.* Merriweather, 14 Ind. 203.

46. Miller *v.* Pittsburgh, etc., R. Co., 40 Pa. St. 237, 80 Am. Dec. 570. In this case and in the subsequent case of Pittsburgh, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126, the practice of paying interest on stock is denounced, and in the latter case it is held that the corporation cannot without statutory authority bind itself for such interest.

47. Lancaster Starch Co. *v.* Moore, 62 N. H. 671. See also *supra*, VI, N, 1, b.

48. Hamilton *v.* Grand Rapids, etc., R. Co., 13 Ind. 347; Cowley *v.* Grand Rapids, etc., R. Co., 13 Ind. 61; Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58.

49. European, etc., R. Co. *v.* McLeod, 16 N. Brunsw. 3.

50. Herkimer Mfg. Co. *v.* Small, 2 Hill (N. Y.) 127.

51. See *supra*, VI, O, 2, g, (I) *et seq.*

52. Allen *v.* Montgomery R. Co., 11 Ala. 437.

53. See *infra*, VII, D, 1, d *et seq.*; VIII, N, 7, a *et seq.*

54. Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339.

55. Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484.

56. Bucksport, etc., R. Co. *v.* Buck, 68 Me. 81; Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21.

57. Willamette Freighting Co. *v.* Stannus, 4 Oreg. 261.

58. Atlantic De Laine Co. *v.* Mason, 5 R. I. 463.

of the deposit required to be paid when the subscription is made. If the act of incorporation requires the payment of five dollars per share to the commissioners, and without such payment the subscription to be void, one sued for non-payment who has exercised the right of a shareholder by voting for managers cannot set up such omission in defense.[59]

d. Defenses Relating to Conduct or Misconduct of Directors — (I) *That Directors Made Assignment of Right of Action in Fraud of Rights of Corporation.* Where a corporation by its directors assigned one of its stock notes to certain of its directors as security for advances, who afterward brought suit upon it in the name of the corporation for their own benefit, and the corporation was at that time, and had ever since remained insolvent, and defendant, at the time of the assignment and of the bringing of the suit, was a shareholder, it was held that he could not avail himself, by way of defense to the suit, of the fact that the note had been so signed, even if such assignment could be regarded as a fraud upon the corporation.[60]

(II) *That Directors Were Guilty of Various Violations of Charter.* It is no defense to such an action that the directors of the corporation have violated the charter,[61] as by issuing shares to defendant in contravention of its provisions;[62] that they have caused a portion of the roadway of the plank road which the corporation was organized to build to be constructed of gravel instead of plank;[63] or that the corporation has not managed its business in the places required by law.[64] Nor can the shareholder in such an action set up that which, in a direct proceeding by the state, would work a forfeiture of the charter; for such matters cannot be inquired into collaterally, but can be challenged only by the state.[65] But of course it is competent for the legislature to make the individual subscriber a representative of the state, just as the plaintiff is to some extent in an action *qui tam.* It can enact that a particular violation of the charter or governing statute shall take away a given right of action by the corporation, in which case the violation of the charter is of course pleadable as a defense to the given action, and must be tried collaterally. Thus a statute of Missouri, enacted to prevent illegal banking, prohibited the passing of bank-notes of a less denomination than five dollars, and it was held that this violation of its charter might be pleaded in bar of any suit instituted by it, although the result would be to work a forfeiture of its charter *pro tanto.*[66] Under that statute a shareholder sued for his subscription might plead a violation of the act by the corporation in bar of the suit.[67] Referring to this decision, the supreme court of Missouri, in a subsequent case, say: "The only exception to this rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation, is where express legislative permission is granted therefor."[68]

(III) *Nonfeasance, Malfeasance, or Mismanagement by Directors.* The fact that the directors have been guilty of reckless, extravagant, or unwise

59. Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.) 364.

60. Protection Ins. Co. *v.* Ward, 28 Conn. 409.

61. Hannibal, etc., Plankroad Co. *v.* Menefee, 25 Mo. 547.

62. Canal Bank *v.* Holland, 5 La. Ann. 363.

63. Hannibal, etc., Plankroad Co. *v.* Menefee, 25 Mo. 547.

64. Courtright *v.* Deeds, 37 Iowa 503.

65. Smith *v.* Tallassee Branch Cent. Plank-Road Co., 30 Ala. 650; Hanover Junction, etc., R. Co. *v.* Grubb, 82 Pa. St. 36; Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

66. Christian University *v.* Jordan, 29 Mo. 68.

67. North Missouri R. Co. *v.* Winkler, 33 Mo. 354.

68. Martindale *v.* Kansas City, etc., R. Co., 60 Mo. 508.

Setting up the failure of plaintiff, a railroad company, to expend a given amount of money in the construction of its road, or to prosecute such construction as required by its charter, no defense. Thornburgh *v.* Newcastle, etc., R. Co., 14 Ind. 499; Vicksburg, etc., R. Co. *v.* McKean, 12 La. Ann. 638; Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181. See also People *v.* Manhattan Co., 9 Wend. (N. Y.) 351.

That a court will not, in a collateral way, decide a question of misuser of charter see Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370.

management of the affairs of the corporation will not release a shareholder from the obligation of his subscription.[69] The same principle holds good where the misfeasance of the directors has been such as might, in a proceeding by the state, work a forfeiture of the franchises of the corporation.[70] A shareholder is not allowed to shirk his obligation and thereby diminish the fund intended for the security of the public in this way.[71]

e. Defenses Relating to Irregularities in Corporate Action — (I) *In General.* For stronger reasons the fact that irregularities have taken place in the manner in which the managers or the majority of the shareholders have exercised the power of the corporation affords no defense to such an action, such as irregularities in the adoption of by-laws or in the election of officers, where all the shareholders and officers thereof recognize and treat such by-laws and such election as legal and valid;[72] or the fact that after the subscription was made a by-law was adopted requiring the payment of the first instalment before the subscriber would be entitled to vote on corporate matters.[73] Nor can defendant give evidence that there was not a sufficient number of the directors of the bank present, at the time of making a certain order, competent to transact business of that description; and that funds had been withdrawn from the bank under that order, when the charter required a greater number of directors, whereby he as a shareholder had been deprived of a dividend on his stock.[74]

(II) *Irregularity or Illegality in Election of Directors.* Nor will the fact that the directors have been irregularly or even illegally elected be any defense to such an action,[75] as that they have been elected without sufficient notice,[76] or that they have been elected at an election which took place outside the state.[77] The principle which validates the action of *de facto* officers and excludes collateral inquiry into their right to hold office applies in such cases.

f. Defenses Raising Question of Forfeiture of Charter. The general rule is that the shareholder cannot, when sued to enforce his contract of subscription, raise the defense that the charter of the corporation has been forfeited by reason of malfeasance or nonfeasance on the part of the directors or managers, as by failing to enter upon the construction of the work which the corporation was created to perform, within a stated period, since this is a matter which can prop-

That the raising of a sum named is not a condition precedent to making a call see Waterford, etc., R. Co. *v.* Dalbiac, 6 Exch. 443, 20 L. J. Exch. 227, 6 R. & Can. Cas. 753, 4 Eng. L. & Eq. 455.

69. Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448; Chetlain *v.* Republic L. Ins. Co., 86 Ill. 220; Merrill *v.* Reaver, 50 Iowa 404.

70. Smith *v.* Tallassee Branch Cent. Plank-Road Co., 30 Ala. 650.

71. Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Illustrations of the foregoing where the misconduct of the directors presented unavailing defense on the part of the shareholders will be found in Chetlain *v.* Republic L. Ins. Co., 86 Ill. 220; Little *v.* Obrien, 9 Mass. 423; Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286; Lingle *v.* National Ins. Co., 45 Mo. 109; Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53. *Compare* Brown *v.* Union Ins. Co., 3 La. Ann. 177.

72. Ginrich *v.* Patrons' Mill Co., 21 Kan. 61.

73. Chandler *v.* Northern Cross R. Co., 18 Ill. 190.

74. Whittington *v.* Farmers' Bank, 5 Harr. & J. (Md.) 489. In like manner it is no defense to an action on a stock subscription by a company organized to carry on the business contemplated in the subscription, and engaged in that business only, that it might, under the act of incorporation, have carried on other business. Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481. So a subscriber to shares in a New Jersey banking company, who has received a certificate, cannot claim exemption from a suit prosecuted by its receiver on the ground that the associates never chose a board of directors or obtained deposits, but only issued circulating notes and accepted bills of exchange. Dayton *v.* Borst, 7 Bosw. (N. Y.) 115.

75. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280; Central Plankroad Co. *v.* Clemens, 16 Mo. 359.

76. Central Plankroad Co. *v.* Clemens, 16 Mo. 359.

77. Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 86 Am. Dec. 128. The court cited John *v.* Farmers', etc., Bank, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; All Saints Church *v.* Lovett, 1 Hall (N. Y.) 191; Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429.

erly be raised and litigated by the state alone.[78] There are, however, charters under which the commencement of operations within a stated time is a condition precedent to the right to exercise corporate powers,[79] and other charters under which, in case the corporation does not enter upon its operation within a stated period, there is an *ipso facto* forfeiture of the charter,[80] in which case the original charter having become null and void, no action can be maintained on a contract of subscription made thereunder.[81]

g. Defense That Enterprise Has Been Abandoned. This defense has arisen chiefly in actions by railroad companies to enforce their share subscriptions. The cases present the distinction that the mere abandonment or authorization of work will not have the effect of releasing the shareholder, since the very money for which the corporation is suing may be necessary to enable it to resume work.[82]

h. Defense That Corporation Has Adopted Resolution to Wind Up. Nor is it any defense to such an action that before it was brought a resolution to discontinue business and wind up the affairs of the corporation had been passed by the board of directors;[83] since a cesser of corporate business does not amount to a dissolution of the corporation, in the sense which disables it from suing to enforce contracts which have been made with it;[84] and moreover it may still need funds to satisfy its creditors.

i. Defense That Corporation Has Sold or Leased All Its Property. On the same reasons the conclusion is unavoidable that it is no defense to such an action that the corporation has leased or sold its franchises to another, although the lease or sale may be void;[85] nor that, after the commencement of an action on such

78. Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

79. McCully *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 25.

80. Bywaters *v.* Paris, etc., R. Co., 73 Tex. 624, 11 S. W. 856.

81. Greencastle, etc., Turnpike, etc., Co. *v.* Davidson, 39 Pa. St. 435.

82. Dorman *v.* Jacksonville, etc., Plank Road Co., 7 Fla. 265. The partial abandonment of the enterprise will in like manner be no defense (Armstrong *v.* Karshner, 47 Ohio St. 276, 24 N. E. 897) and the same effect will be ascribed to the failure of the company to complete same within a stated portion of its time (Dallas Cotton, etc., Mills *v.* Clancey, (Tex. App. 1891) 15 S. W. 194), but a total abandonment of the enterprise, followed by a long lapse of time, will have this effect (Pittsburgh, etc., R. Co. *v.* Byers, 32 Pa. St. 22, 72 Am. Dec. 770, abandonment of contract of subscription). In some such cases the question whether the lapse of time has been sufficiently great to discharge the subscriber will be submitted to a jury. Delaware River, etc., R. Co. *v.* Rowland, (Pa. 1887) 9 Atl. 929. In others equity will relieve the subscriber. Fountain Ferry Turnpike Road Co. *v.* Jewell, 8 B. Mon. (Ky.) 140.

Abandonment presumed where no call made for more than six years. Pittsburgh, etc., R. Co. *v.* Byers, 32 Pa. St. 22, 72 Am. Dec. 770.

Circumstances presenting evidence to go to the jury on the question of abandonment. Delaware River, etc., R. Co. *v.* Rowland, (Pa. 1887) 9 Atl. 929.

Subscribers relieved.— Abandonment for upwards of nine years, failure to appoint directors, etc.— subscribers relieved in equity. Fountain Ferry Turnpike Road Co. *v.* Jewell, 8 B. Mon. (Ky.) 140. Stock notes given to a railroad company, payable when the cars should commence running, are not enforceable after a period of fourteen years. Blake *v.* Brown, 80 Iowa 277, 45 N. W. 751.

It is no defense that the corporation, a railroad company, has not adequate means to complete the enterprise (McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181), that the railroad was not completed within a stated time (Kansas City, etc., R. Co. *v.* Alderman, 47 Mo. 349), or that the corporation is indebted for more than the amount of the subscription, especially where the action is prosecuted for the benefit of creditor (Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294), or by a creditor (Bish *v.* Bradford, 17 Ind. 490).

Changes in location, route, termini, etc., of the proposed railroad, plank road, etc.— These are subjects not within the scope of this article and therefore some of the cases merely are referred to.

Indiana.—Evansville, etc., R. Co. *v.* Wright, 38 Ind. 64.

Kentucky.— Smith *v.* Gower, 2 Duv. 17.

Massachusetts.— Boston, etc., R. Co. *v.* Wellington, 113 Mass. 79.

Missouri.— Central Plankroad Co. *v.* Clemens, 16 Mo. 359.

Pennsylvania.— Chartiers R. Co. *v.* Hodgens, 77 Pa. St. 187.

83. Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286.

84. Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279; State Nat. Bank *v.* Robidoux, 57 Mo. 446. *Compare* Hill *v.* Fogg, 41 Mo. 563.

85. Ottawa, etc., R. Co. *v.* Black, 79 Ill. 262; Hays *v.* Ottawa, etc., R. Co., 61 Ill. 422;

subscription, a mortgage executed by plaintiff company was foreclosed, and its railroad and its franchises sold to purchasers who took possession;[86] nor that it has been seized by the governor of the state, under a statute, to satisfy the state's lien.[87]

7. CONDUCT SHOWING MEMBERSHIP — ESTOPPEL — a. In General — (I) *STATEMENT OF DOCTRINE.* If a person subscribes for and purchases a certain number of shares, he naturally suffers his name to be entered on the books of the corporation as a subscriber of, or a purchaser of, the stated number of shares, and to be thereby held out to the world as a shareholder — he will be estopped to deny the truth of that representation and to disavow the ownership when it ceases to be a benefit and becomes a burden to him.[88] If he has been held out unwarrantably and wrongfully as a shareholder, he must immediately and publicly disavow the act as soon as he discovers it or he will be taken to have ratified it so far as it affects the rights of creditors.[89] The rule rests upon the principle of estoppel *in pais*, which means that a man will not be permitted to deny the truth of representations which he has made by his conduct, after members of the public have acted upon the same to their disadvantage.[90]

(II) *SOME CONTRACTUAL BASIS NECESSARY.* Some contractual basis is plainly necessary to support this rule as against shareholders in a corporation. In the case of a partnership where the liability is unlimited, it seems that a partner may be charged as such in consequence of acts of estoppel alone.[91] But in a corporation some contractual basis must exist, real or supposed, in order to determine the extent of his interest and consequently of his liability. If he has not been entered on the books of the corporation, or upon any valid subscription paper, as a shareholder in respect of a given number of shares, the mere fact of his attending meetings and doing other acts inconsistent with any other relation than that

Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581.

86. Buffalo, etc., R. Co. *v.* Gifford, 87 N. Y. 294.

87. Mullins *v.* North, etc., R. Co., 54 Ga. 580. Where a shareholder pleaded, as a defense to such an action, that by the terms of his subscription it was to be paid when the road should be completed between certain points, whereupon he was to receive a certificate for a like amount of stock, and that the company had sold and leased the road, his plea was held bad on demurrer, for the reason that if the charter authorized the sale or lease the party subscribing must have known that the power could be exercised; and if there was no such power conferred then the sale and lease were void, and on payment and receipt of his certificate he would hold his stock unimpaired, and there was not a failure of consideration. Hays *v.* Ottawa, etc., R. Co., 61 Ill. 422. See also Ottawa, etc., R. Co. *v.* Black, 79 Ill. 262.

88. *In re* Reciprocity Bank, 22 N. Y. 9, 17 (per Comstock, C. J.); McHose *v.* Wheeler, 45 Pa. St. 32.

89. *Maine.*— Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Chaffin *v.* Cummings, 37 Me. 76.

Massachusetts.—Chase *v.* Merrimack Bank, 19 Pick. 564, 31 Am. Dec. 163.

Missouri.— Kansas City Hotel Co. *v.* Harris, 51 Mo. 464.

New Hampshire.— Haynes *v.* Brown, 36 N. H. 545; New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300.

North Carolina.— Haywood, etc., Plank Road Co. *v.* Bryan, 51 N. C. 82.

Pennsylvania.— McHose *v.* Wheeler, 45 Pa. St. 32.

South Carolina.— Greenville, etc., R. Co. *v.* Coleman, 5 Rich. 118.

See also Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, where the rule and the decision upon which it rests is stated by Swayne, J., which decision was quoted and followed in *Re* Canada Cent. Bank, 25 Can. L. J. N. S. 238, 240. See further the following English cases of joint-stock membership which support the rule. Dickinson *v.* Valpy, 10 B. & C. 128, 8 L. J. K. B. O. S. 51, 5 M. & R. 126, 21 E. C. L. 63; Harvey *v.* Kay, 9 B. & C. 356, 7 L. J. K. B. O. S. 167, 17 E. C. L. 163; Doubleday *v.* Muskett, 7 Bing. 110, 9 L. J. C. P. O. S. 35, 4 M. & P. 750, 20 E. C. L. 58; Ellis *v.* Schmoeck, 5 Bing. 521, 15 E. C. L. 702; Perring *v.* Hone, 4 Bing. 28, 13 E. C. L. 384, 2 C. & P. 402, 12 E. C. L. 639, 12 Moore C. P. 135. See further Duffield *v.* Barnum Wire, etc., Works, 64 Mich. 293, 31 N. W. 310.

90. Hampshire County *v.* Franklin County, 16 Mass. 76, 87, per Parker, C. J. [*quoted* with approval by Collier, C. J., in Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344]; Ellis *v.* Marshall, 2 Mass. 269, 3 Am. Dec. 49; Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81; Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, 307.

91. Rimel *v.* Hayes, 83 Mo. 200; Gates *v.* Watson, 54 Mo. 585; Selby *v.* McCullough, 26 Mo. App. 66.

of a shareholder will not make him such, because there is no basis upon which to determine with how many shares he is to be charged, whether one, ten, or one hundred. To this rule there is an exception where the governing statute or by-law requires a director to be the holder of a stated number of shares. Here as already seen the fact of his serving as a director furnishes a basis for charging him with that number.[92] Where a man's name has been put down on the books of a corporation as the holder of a stated number of shares, if he serves as a director he thereby recognizes the validity of the subscription and ratifies it.[93] So where the governing statute requires the vice-president to be the holder of a certain number of shares, and certain shares are transferred to a person who becomes a director and vice-president, and he assumes the active management of the corporation, here he will be estopped from claiming that the shares were transferred to him without his knowledge or consent.[94]

(III) *What Acts, Facts, or Circumstances Raise This Estoppel and Preclude Person From Denying Relation of Shareholder* — (A) *In General.* These will be catalogued as briefly as possible by saying that according to various holdings they include subscribing for a certain number of shares and subsequently stating that he has taken the shares;[95] signing a subscription paper under which are written the names of the subscribers and the number of shares taken by each, and afterward participating in the election of directors and making partial payments for the shares;[96] subscribing for shares, attending a meeting to effect a temporary organization, adopting articles of incorporation, etc.;[97] voting at corporate elections, serving as a director, this being deemed conclusive evidence of ownership;[98] in case of an unincorporated joint-stock company, describing oneself in a bill in equity as a surviving partner, signing a note with the other members to raise money for the business, signing a power of attorney to sell real estate of the company, attending meetings, etc.;[99] making an informal subscription and afterward acting as a shareholder and accepting the office of director;[1] a shareholder induced to become such by fraud, afterward attending corporate meetings, taking part in the affairs of the corporation, voting to increase the capital stock, to declare a dividend, receiving such dividend, and doing nothing for a period of six months to repudiate the relation;[2] subscribing for shares on the promise of the president of the company to take them off the hands of the subscriber and then retaining them until the venture proves disastrous;[3] in case of a turnpike company, for an incorporator to take an active part in effecting a change in the route of the road and promising to pay his subscription after the change has been made;[4] passive acquiescence in the relation of shareholder for a considerable length of time and until the rights of innocent third persons have supervened;[5] paying calls;[6] paying the necessary deposit by one whose name has

92. See *supra*, IX, A, 1, b, (I).

93. Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654.

94. Brown *v.* Finn, 34 Fed. 124.

Other cases governed by the same principle are: Schenectady, etc., Plank Road Co. *v.* Thatcher, 11 N. Y. 102; Matter of England Joint-Stock Banking Co., 1 De G. M. & G. 576, 16 Jur. 435, 50 Eng. Ch. 444.

95. New Hampshire Cent., etc., R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300.

96. Fry *v.* Lexington, etc., R. Co., 2 Metc. (Ky.) 314.

97. Heald *v.* Owen, 79 Iowa 23, 44 N. W. 210.

98. Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81.

99. Machinists' Nat. Bank *v.* Dean, 124 Mass. 81.

1. Lane *v.* Brainerd, 30 Conn. 565.

2. Duffield *v.* Barnum Wire, etc., Works, 64 Mich. 293, 31 N. W. 310.

3. Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 482, 10 Am. Dec. 273.

4. Owenton, etc., Turnpike Road Co. *v.* Smith, 13 S. W. 426, 11 Ky. L. Rep. 959.

5. Berry *v.* Matthews, 1 Ga. 519; *In re* Reciprocity Bank, 22 N. Y. 9. So in the case of a subscription to preferred stock. Bard *v.* Banigan, 39 Fed. 13.

6. Frost *v.* Walker, 60 Me. 468; Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484; Mississippi, etc., R. Co. *v.* Harris, 36 Miss. 17 (will estop an unregistered transferee); Inter-Mountain Pub. Co. *v.* Jack, 5 Mont. 568 (will estop an original subscriber). On the other hand one who subscribes for shares in a company is a shareholder, although he may have failed to pay calls upon his subscription. Schaeffer *v.* Missouri Home Ins.

been put down as a subscriber without his authorization;[7] paying for the shares for which he subscribed, this fact forming a basis for charging him with a superadded statutory liability;[8] paying calls made by a board of directors not properly constituted;[9] serving as director;[10] in case of an unincorporated joint-stock company, attending meetings, acting as a director, inspecting the works while in progress, etc.;[11] holding a corporate office which, under the governing instrument, can only be held by a shareholder;[12] paying previous calls and acting as a proprietor, notwithstanding misrecitals in the subscription paper;[13] attending corporate meetings, this being *prima facie* evidence of the person being a shareholder,[14] and according to one view conclusive evidence;[15] voting at corporate meetings as a shareholder, either in person[16] or by proxy,[17] this being at least an evidential circumstance tending to prove the relation of shareholder, but subject to explanation;[18] giving a proxy to vote at corporate elections, this being according to the best opinion *prima facie* evidence of the person being a shareholder,[19] but according to one decision estopping him from denying the relation;[20] participating in the management of the corporation in various ways, as by attending meetings, voting at elections, serving as director, paying calls, etc., this estopping the person from denying he is a shareholder, whether proceeded against by the corporation for unpaid assessments, or by a receiver or other trustee for creditors after insolvency.[21] So a person may be estopped to deny that he is a shareholder

Co., 46 Mo. 248; McHose *v.* Wheeler, 45 Pa. St. 32. *Contra*, Fiser *v.* Mississippi, etc., R. Co., 32 Miss. 359; Lewis *v.* Robertson, 13 Sm. & M. (Miss.) 558; Hayne *v.* Beauchamp, 5 Sm. & M. (Miss.) 515.

7. Mississippi, etc., R. Co. *v.* Harris, 36 Miss. 17.

8. Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295. But *compare* Garling *v.* Baechtel, 41 Md. 305.

9. Macon, etc., R. Co. *v.* Vason, 57 Ga. 314.

No estoppel because of payment of the expenses of a preliminary survey in case of a railroad company. Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240.

10. Lane *v.* Brainerd, 30 Conn. 565; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Ruggles *v.* Brock, 6 Hun (N. Y.) 164 (holding that this fact estops the person from denying the corporate existence and the validity of his subscription); Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81 (case presented many other acts of estoppel claimed to be evidential but not conclusive).

11. Maudslay *v.* Le Blanc, 2 C. & P. 409, 12 E. C. L. 643.

12. Haynes *v.* Brown, 36 N. H. 545; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Brown *v.* Finn, 34 Fed. 124. That subscribing to a subscription agreement and acting as president of the company did not show that the person became a shareholder even as against a creditor — an untenable decision. Corwith *v.* Culver, 69 Ill. 502.

13. Cromford, etc., R. Co. *v.* Lacey, 3 Y. & J. 80.

14. Harrison *v.* Heathorn, 12 L. J. C. P 282, 6 M. & G. 81, 6 Scott N. R. 735, 46 E. C. L. 81.

15. Whitfield *v.* Hurst, 31 U. C. 170.

16. See *infra*, note 21.

17. Greenville, etc., R. Co. *v.* Coleman, 5 Rich. (S. C.) 118.

18. Pittsburgh, etc., R. Co. *v.* Stewart, 41 Pa. St. 54. *Compare* Union Sav. Assoc. *v.* Seligman, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776 [*reversing* 11 Mo. App. 142, *following* Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359, and *overruling* Griswold *v.* Seligman, 72 Mo. 110]; Sleeper *v.* Goodwin, 67 Wis. 577, 31 N. W. 335 (where it was held that the fact of voting as a shareholder by one who claimed to hold the shares as collateral security merely was conclusive that he was liable to creditors). *Compare* Fisher *v.* Seligman, 75 Mo. 13; Fisher *v.* Seligman, 7 Mo. App. 383.

19. Ticonic Water Power, etc., Co. *v.* Lang, 63 Me. 480 (delivery of a proxy in escrow); McCully *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 25; Greenville, etc., R. Co. *v.* Smith, 6 Rich. (S. C.) 91; McClelland *v.* Whiteley, 15 Fed. 322, 11 Biss. 444 (not a ratification of an unauthorized placing of the person's name on the stock-book).

20. St. Charles Mfg. Co. *v.* Britton, 2 Mo. App. 290.

21. *Illinois.*— Rutz *v.* Esler, etc., Mfg. Co., 3 Ill. App. 83, acted as director.

Iowa.— Tama Water-Power Co. *v.* Hopkins, 79 Iowa 653, 44 N. W. 797, choking off his objection that the full amount of stock had not been subscribed.

Maryland.— Stillman *v.* Dougherty, 44 Md. 380 (same defense overruled); Garling *v.* Baechtel, 41 Md. 305 (choking off the same defense).

Missouri.— Kansas City Hotel Co. *v.* Harris, 51 Mo. 464.

New York.— Phœnix Warehousing Co. *v.* Badger, 6 Hun 293.

North Carolina.— Haywood, etc., Plank Road Co. *v.* Bryan, 51 N. C. 82, holding him, although he had not paid the statutory deposit.

South Carolina.— Greenville, etc., R. Co. *v.* Woodsides, 5 Rich. 145, 55 Am. Dec. 708.

by receiving dividends,[22] this making him a shareholder and the equities attaching to his title being things with which the company and its creditors in general have nothing to do, whether he holds as a pledgee,[23] or as a trustee for others,[24] and yet he will be liable as a shareholder, at least to creditors; by paying calls, serving as a director, attending meetings, etc.;[25] or by subscribing to the capital stock, participating in meetings of the corporation and in the regulation of its affairs, but without paying the deposit in cash required by the charter.[26]

(B) *Exceptional Cases.* But this rule has not been universally applied. Thus where the governing statute gave the option to the husband of a female shareholder, or to the executor of a deceased shareholder, to become a member on complying with certain requisites, and the husband received dividends and receipted for them in the name of his wife, and attended meetings at which none but shareholders were entitled to be present,[27] and where an executor received a dividend which accrued after the death of his testator,[28] neither of them was held liable to respond to creditors of the company.

(IV) *Whether Principle of Estoppel Works to Exclude Shareholder From Company.* On the same principle a man may lose his shares by estoppel, as against a creditor of another person — not of the corporation — by allowing such other person to use his shares as "qualification shares" for the office of director.[29]

(V) *Operation of Principle of Estoppel Where Shareholder Has Been Released.* This principle will also operate to exclude those who have retired from the corporation, in case they desire to go back when they find that the corporation has become prosperous; and to hold them where, after being released, they have returned, and find themselves in when the corporation collapses. Accordingly it has been held that a shareholder who has practically retired from and been treated by the other shareholders as out of the business, and who has not been called upon to contribute on account of liabilities during a

Illustrations may be found in the following among many other cases:

Kentucky.— Owenton, etc., Turnpike Road Co. *v.* Smith, 13 S. W. 426, 11 Ky. L. Rep. 959.

Maryland.— Hager *v.* Cleveland, 36 Md. 476.

Massachusetts.— Chase *v.* Merrimack Bank, 19 Pick. 564, 31 Am. Dec. 563.

Missouri.— St. Charles Mfg. Co. *v.* Britton, 2 Mo. App. 290.

New York.— Wheeler *v.* Millar, 90 N. Y. 353; Ferris *v.* Strong, 3 Edw. 127.

Ohio.— Dayton, etc., R. Co. *v.* Hatch, 1 Disn. 84, 12 Ohio Dec. (Reprint) 501.

South Carolina.—Christ Church *v.* Simons, 2 Rich. 368.

22. Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Hoare's Case, 3 Beav. 225, 2 Johns. & H. 229; Matter of North of England Joint Stock Banking Co., 3 De G. & Sm. 258.

23. Wheelock *v.* Kost, 77 Ill. 296. See also *infra*, VIII, M, 1, b.

24. See *infra*, VIII, M, 2, a.

25. Pittsburgh, etc., R. Co. *v.* Stewart, 41 Pa. St. 54.

26. Haywood, etc., Co. *v.* Bryant, 51 N. C. 82.

27. Ness *v.* Angas, 6 D. & L. 645, 3 Exch. 805, 13 Jur. 874, 18 L. J. Exch. 470.

28. Ness *v.* Armstrong, 7 D. & L. 73, 4 Exch. 21, 13 Jur. 874, 18 L. J. Exch. 473. See also Bosanquet *v.* Shortridge, 4 Exch. 698, 14 Jur. 71, 19 L. J. Exch. 221.

These cases cannot, it is thought, be appealed to as establishing an exception to the general rule just stated. In a well-reasoned case in equity, involving similar questions, they were treated by Lord St. Leonards as depending upon the terms of a particular statute (7 Geo. IV, c. 46), which, although referring to equitable as well as legal liabilities, did not furnish a particular remedy for equitable liabilities. A man could not, he thought, be proceeded against by scire facias under the particular provisions of that act, unless it could be shown that he was legally liable as a member. Matter of North of England Joint-Stock Banking Co., 1 De G. M. & G. 576, 16 Jur. 435, 50 Eng. Ch. 444.

29. When therefore a shareholder in a national bank placed part of his shares in the hands of a third person to hold for him, under a secret declaration of trust, and allowed such third person to be elected a director in virtue of those shares, and to take the oath required by the national banking law that he was the *bona fide* owner of them, it was held that he was estopped from denying that such actual holder was the owner of the shares, as against a creditor who trusted the holder on the faith of his being such owner. Young *v.* Vough, 23 N. J. Eq. 325.

number of years when the business was unprofitable, is estopped, after the corporation has been put upon a paying basis by the contribution of fresh capital by the other shareholders, to claim the right to share in the profits, when he did not assert his right or proffer his share to the new venture at the time of reorganizing.[30] On the other hand, where a subscriber to the capital stock of a railroad company who had been released from the obligation of his subscription subsequently votes at an annual election for directors, is himself elected a director, acts as a director and as a shareholder, and pays money to the company, his acts warrant the inference that he has resumed his original obligation; but this inference may not prevail where a special contract accounting for his acts is shown.[31]

(VI) *Subscription Prior to Incorporation Good Without Acts of Ratification.* On the other hand, and in conformity with the doctrine elsewhere stated,[32] a subscription to the capital of a proposed corporation will be good, so as to inure to the company when formed and enable it to maintain an action to enforce it, without any further acts of acquiescence or estoppel on the part of the subscriber.[33]

(VII) *Agreement to Take Shares in Future Company Made Good by Ratification.* An action may be maintained by a corporation against an original subscriber, on a promise made before the act of incorporation, if it is shown that he recognized it as binding after the incorporation.[34] Upon similar grounds a person named as a corporator in the charter of a company, who signs a paper agreeing to take stock in a company to be thereafter organized, and who attends the meetings of the company when organized, takes part in its proceedings, and offsets, in a settlement with the corporation, the amount due for his shares against an indebtedness of the corporation to him, is deemed by his conduct to have made himself a shareholder, so that a creditor may charge him in that relation for the company's debt, without showing that he was a shareholder, from the company's books or from the sheriff's return.[35]

(VIII) *Conduct Ratifying Subscription by Unauthorized Person.* Where a mere intermeddler subscribes the name of a person to the capital stock of a corporation, this act of course does not in any manner bind him; but it is not wholly void; it is capable of ratification; and, although mere declarations made to strangers by the party whose name had been thus unwarrantably used to the effect that he had taken such shares have been held sufficient after his

30. Huston's Appeal, 127 Pa. St. 620, 18 Atl. 419.

31. Pittsburgh, etc., R. Co. *v.* Stewart, 41 Pa. St. 54.

32. See *supra*, VI, H, 13, c, (I) *et seq.*

33. Thus a subscriber in a park association who failed to attend a publicly advertised meeting of the subscribers, which appointed a committee to buy the land, procure the charter, call in subscriptions, etc., was held liable for his subscription at the suit of the corporation; the corporation being the legal trustee to receive and administer the funds subscribed. Shober *v.* Lancaster County Park Assoc., 68 Pa. St. 429 [*following* Edinboro' Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421].

34. St. Charles Mfg. Co. *v.* Britton, 2 Mo. App. 290; Christ Church *v.* Simons, 2 Rich. (S. C.) 268.

35. Chaffin *v.* Cummings, 37 Me. 76.

Acting as member of a provisional committee in England.—This of itself does not make one a shareholder. Hole's Case, 3 De G. & Sm. 241; Matter of Direct Exeter, etc., R. Co., 3 De G. & Sm. 205, 14 Jur. 539 note, 6 R. & Can. Cas. 310 [*affirmed* in 2 Macn. & G. 192, 1 Drew. 204, 2 Hall & T. 391, 19 L. J. Ch. 368, 48 Eng. Ch. 148]; Norris *v.* Cottle, 2 H. L. Cas. 647, 14 Jur. 703 [*affirming* Matter of Wolverhampton, etc., R. Co., 2 Macn. & G. 185, 48 Eng. Ch. 143]. But a provisional committeeman who had accepted shares in the company was liable to be made a contributory, although he did not pay the deposit. Hutton *v.* Upfill, 2 H. L. Cas. 674. And where a provisional committeeman declined to take the shares allotted to him, and gave authority to the secretary of the company to withdraw his name from the list of the provisional committee, which, however, was not done; and, although no shares were allotted to him, he continued to attend meetings of the committee and took part in the proceedings and paid various sums of money, in pursuance of resolutions passed at those meetings, toward liquidating the liabilities of the company, he was held liable as a contributory. Matter of Direct Exeter, etc., R. Co., 2 Macn. & G. 176, 48 Eng. Ch. 137 [*affirming* 3 De G. & Sm. 224].

decease to fix upon him the character of a shareholder so as to charge his estate,[36] yet a different effect has been ascribed to conduct tending to show that such person assumed the relation of shareholder and exercised the rights thereto appertaining; as, where he authorized a proxy to vote his shares at a corporate election,[37] or remained silent for a long period after being informed that his name had been thus used,[38] or, long afterward demanded and sued for dividends, alleging that the subscription was authorized by him,[39] or, after being informed that his name had been entered as a shareholder and his deposit paid by another, frequently promised to pay the instalments due on his shares.[40] The doctrine imports something in the nature of a voluntary act on the part of the shareholder. He must have been held out with his knowledge;[41] but this knowledge is in most cases inferred from his conduct, as where he participates in the adoption of by-laws and in other corporate acts.[42]

(IX) *Whether Necessary to Show That Creditor Acted on Faith of Person Sought to Be Charged Being Shareholder.* This question does not of course arise as between the corporation and the alleged shareholder in an action for an assessment; it arises only where the rights of creditors are concerned, and then the question is whether the creditor must have made the advance to the corporation on the faith of the particular member being a shareholder. This is the well-known rule in the case of mere partnerships.[43] It was applied in one English case, often distinguished, where the concern was a mining company operated on the "cost-book" plan.[44] But it is believed that in American corporations, where the question concerns the rights of subsequent creditors, the courts will not speculate as to the motive with which the person gave credit to the corporation, whether on the faith of a particular person being a shareholder or not, and this owing to the difficulty, if not impossibility, of introducing proof as to the state of mind or motive with which persons act.

b. Questions as to Validity of Shares — (I) *Estoppel to Deny Validity.* If shares are void in the sense of being a nullity there can of course be no shareholder with respect of them. But circumstances may exist in which a person will be estopped even to deny the validity of the shares with respect to which it is sought to charge him as a shareholder. Thus it has been held that a person who accepts shares in a company, executes the deed of settlement, for several years receives dividends declared on the shares, and after the company has been ordered to be wound up is called on as a contributory is estopped by his contract and by his conduct from denying the validity of the shares.[45] So where the directors of a company made an authorized issue of shares beyond their capital, but their acts were afterward ratified by the company at a general meeting, the allottees of such shares were bound by the confirmatory resolution, and on the winding up of the company were rightly placed on the list of contributories.[46] So it has been held in this country that one who purchases shares in a corporation, and knowingly suffers his name to appear on the books as a shareholder, can-

36. Rutland, etc., R. Co. *v.* Lincoln, 2 Vt. 206.

37. McCully *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 25.

38. Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128.

39. Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128.

40. Mississippi, etc., R. Co. *v.* Harris, 36 Miss. 17. See also Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654, where defendant had signed a written promise to take a certain number of shares.

41. Fox *v.* Clifton, 6 Bing. 776, 8 L. J. C. P. O. S. 257, 4 M. & P. 676, 31 Rev. Rep. 536, 19 E. C. L. 347.

42. People *v.* Sterling Burial Case Mfg. Co., 82 Ill. 457.

43. Dowzelot *v.* Rawlings, 58 Mo. 75; Bloch *v.* Price, 24 Mo. App. 14. *Compare* Martin *v.* Feewell, 79 Mo. 401; Deering *v.* Flanders, 49 N. H. 225; Graves *v.* Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471.

44. Vice *v.* Anson, 7 B. & C. 409, 14 E. C. L. 187, 3 C. & P. 19, 14 E. C. L. 428, 6 L. J. K. B. O. S. 24, 24 M. & M. 97, 1 M. & R. 113.

45. Hull Flax, etc., Mill Co. *v.* Wellesley, 6 H. & N. 38, 30 L. J. Exch. 5.

46. *In re* New Zealand Banking Corp., L. R. 3 Ch. 131, 18 L. T. Rep. N. S. 2, 16 Wkly. Rep. 381.

not, in a proceeding to enforce his individual liability, under a statute providing that the word "shareholder" shall be understood to mean not only such persons as appear from the books of the corporation to be such, but also every equitable owner, impeach his own title by showing that the stock was improperly purchased by the corporation and issued to him.[47]

(II) *Theory That Shareholder Is Not Estopped to Deny Validity of Shares*—(A) *In General.* So a shareholder is not estopped to deny the validity of certain shares issued under a scheme to increase the capital stock of the corporation, although he voted for the arrangement. For, although a shareholder cannot set up informalities in the issue of stock which the corporation has the power to create,[48] yet where the corporation is absolutely without power to increase its capital stock beyond a certain limit, the acquiescence of the shareholder can neither give it validity nor bind him or the corporation.[49] The distinction is between shares which the corporation had no power whatever to issue and shares which it had the power to issue, although not in the manner in which or upon the terms on which it issued them. The holders of the former class of shares get nothing at all in virtue of their supposed character of shareholders and cannot be assessed in respect of them.[50]

(B) *Notwithstanding Acts of Agents of Company in Misrepresenting Its Capital Stock to Public.* If the shareholder is not in such a case estopped by his own acts from repudiating an *ultra vires* issue of shares, for stronger reasons he is put under no such estoppel by the acts of agents of the company in representing by public advertisements that the company has a capital stock equal to that which would result from the *ultra vires* increase.[51]

(C) *As in Case of Void Amalgamation.* Where an amalgamation of two companies has been attempted, and, in pursuance of the scheme of amalgamation, certain shareholders of one company apply for and have allotted to them their quota of shares in the other company, and the amalgamation is afterward judicially determined to be void, such shareholders of the former company will not be estopped, by their conduct or acquiescence in the arrangement, from afterward denying that they are shareholders in the latter company.[52] Nor in case of a void amalgamation will the fact that two of the directors of the selling company, to whom shares had been allotted in exchange for shares in the purchasing company, acted under the terms of the agreement as directors of the purchasing company, estop them from denying their liability as contributories of the purchasing company.[53]

(D) *Otherwise in Case of Good Amalgamation or Reorganization.* But of course the principle of estoppel under discussion applies in cases where there has been valid consolidation or reorganization. This may be illustrated by a case where, on the reorganization of a national bank, defendant subscribed on the basis of a total subscription of five hundred thousand dollars, while the actual increase of stock was but four hundred and sixty-one thousand dollars. Defendant protested and refused to vote on the stock issued to him, but retained his certificate until the bank passed into the hands of a receiver several months afterward. It was held that his acceptance and retention of the certificate precluded him from contending against his liability.[54]

47. *In re* Reciprocity Bank, 22 N. Y. 9.

48. Pullman *v.* Upton, 96 U. S. 328, 24 L. ed. 818; Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

49. Scovill *v.* Thayer, 105 U. S. 143, 20 L. ed. 968.

50. Lathrop *v.* Kneeland, 46 Barb. (N. Y.) 432; *In re* Tal-y-Drws Slate Co., 1 Ch. D. 247, 45 L. J. Ch. 158, 33 L. T. Rep. N. S. 460, 24 Wkly. Rep. 92.

51. Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968.

52. Hindustan Bank, etc. *v.* Alison, L. R. 6 C. P. 54, 40 L. J. C. P. 1, 23 L. T. Rep. N. S. 616, 19 Wkly. Rep. 505.

53. *In re* London, etc., Ins. Corp., L. R. 4 Ch. 682, 27 L. T. Rep. N. S. 182, 17 Wkly. Rep. 751.

54. Butler *v.* Aspinwall, 33 Fed. 217 [*distinguishing* Eaton *v.* Pacific Nat. Bank, 144 Mass. 260, 10 N. E. 844].

(E) *Evidence Not Sufficient Under This Rule.* On the other hand the mere recital in a bond that the obligor has retained as a loan a certain amount of his subscription in an educational corporation has been held no evidence of the fact of a subscription.[55] But this seems untenable, since the evidence is the solemn admission of the party himself over his own signature, and because a paper itself might be regarded as an informal subscription.[56]

c. When Shareholder Not Estopped From Objecting to Cancellation of His Shares. It has been held that the shareholder is not estopped from objecting to the cancellation of his shares because an amendment to the by-laws, made before he purchased his stock, authorized the directors to set aside certain money for the cancellation of certain shares, or because a subsequent amendment, authorizing a forced cancellation of the shares, was submitted to by other shareholders, and he shared in the benefits accruing to the association.[57]

d. Acquiescence of Corporation Estops It From Denying Validity of Subscription. This principle of estoppel works against the corporation, as well as in its favor and in favor of its creditors. When therefore the directors and other agents of a company have for many years acquiesced in a subscription for stock, made by a person in the name of his children and others, who have exercised acts of ownership over it, and voted on it without objection as their own, the corporation will not afterward be allowed to treat the subject as if it were a fraudulent use by the original subscriber of mere names to secure a greater number of votes than he would be entitled to if the stock stood in his own name.[58] An allotment of shares by directors of a company to subscribers, which was invalid because a sufficient number of directors were not present at the meeting, becomes valid when ratified by a subsequent meeting at which all the directors are present, if the application for the shares has not been revoked or the allotment repudiated.[59]

VII. SHARES CONSIDERED AS PROPERTY.

A. Increasing and Decreasing Capital Stock — 1. In General — a. Corporations No Implied Power to Increase or Diminish Capital. Corporations have no implied power to increase or diminish their capital stock, but can do so only when authorized by the legislature, and then only in the manner authorized.[60] The mere fact that the value of the property owned by the corporation has become enhanced does not authorize an additional issue of shares, either to the original corporators or to subscribers for the stock.[61]

55. Butler University *v.* Schoonover, 114 Ind. 381, 16 N. E. 642, 5 Am. St. Rep. 627.

56. For evidence on which it was held that a finding of a court of admiralty that certain persons were not members of the corporation would not be disturbed see McAdams *v.* Boyer, 37 Fed. 73. Validity of bond and mortgage given for shares before legal organization of the company; invalidity of same as to wife of principal obligor. Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179. Facts stated on which it was held that the relation of a certain corporation to its shareholders was that of a trustee to a partnership; that the capital stock should be treated as partnership assets and divided accordingly. Shorb *v.* Beaudry, 56 Cal. 446.

57. Bergman *v.* St. Paul Mut. Bldg. Assoc., 29 Minn. 275, 13 N. W. 120.

58. Creed *v.* Lancaster Bank, 1 Ohio St. 1.

59. *In re* Portuguese Consol. Copper Mines, 45 Ch. D. 16, 63 L. T. Rep. N. S. 423, 2 Meg. 249, 39 Wkly. Rep. 25.

In respect of the time within which the ratification just spoken of can take place, it was held that it was made within a reasonable time where the delay was from October 22 to January 16, the subscribers not having disaffirmed in the meantime. *In re* Portuguese Consol. Copper Mines, 45 Ch. D. 16, 63 L. T. Rep. N. S. 423, 2 Meg. 249, 39 Wkly. Rep. 25.

60. Grangers' L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325; Sutherland *v.* Olcott, 95 N. Y. 93 [*reversing* 29 Hun (N. Y.) 161]; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Winters *v.* Armstrong, 37 Fed. 508.

61. Cole *v.* Adams, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Under the constitution of Louisiana, which provides for increasing, but not for reducing the capital stock of corporations, corporations have no power to decrease their capital Seignouret *v.* Home Ins. Co., 24 Fed. 332.

Sir Nathaniel Lindley states the law in accordance with the above text, but draws attention to the fact that this does not neces-

b. Constitutional and Statutory Prohibitions Against Fictitious Increase of Capital Stock. Many constitutional and statutory prohibitions against the fictitious increase of capital stock, designed to prevent what is known as "stock-watering," have been established. These, so far as examined by the writer, generally embody three elements, a prohibition against the issue of stock or bonds, and sometimes stock or indebtedness, (1) except in pursuance of a general law; (2) except with the consent of the holders of a majority of the existing shares; or, (3) after a prescribed notice.[62]

c. Statutory Limitations of Amount of Capital Which Corporations May Have. Other statutes are found, applicable to various corporations, which limit the amount of capital which incorporated companies may have. Thus a recent amended act of North Carolina, applicable to all corporations except railroad, banking, and insurance companies, limits the amount of capital stock which all such companies may have to one million dollars.[63]

d. Rights of Shareholders Where Capital Has Been Reduced. Where the capital stock of a national bank had been reduced to avoid a threatened assessment by the comptroller of the currency, rendered necessary by the impairment of the capital by suspended claims, it was held that a shareholder could not, upon these suspended claims being realized, enforce a demand against the bank for a part of them, proportioned to his surrendered shares.[64]

e. Effect of Reducing Capital Stock Upon Liability of Shareholders to Creditors. An act of the legislature authorizing the reduction of the capital stock of a bank to the amount paid in at a certain period will exonerate the share-

sarily exclude a power on the part of the majority of a company to borrow money on the credit of the company against the will of the minority. Lindley Comp. L. (5th ed.) 397, 398 [*citing* to the last point Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & J. 123, 60 Eng. Ch. 96; Australian Auxiliary Steam Clipper Co. *v.* Mounsey, 4 Jur. N. S. 1224, 4 Kay & J. 733, 27 L. J. Ch. 729, 6 Wkly. Rep. 734]. Further as to the power of a corporation to increase its capital stock see Peck *v.* Elliott, 79 Fed. 10, 24 C. C. A. 425, and note to same in 38 L. R. A. 616.

Construction of Tex. Stat. (1879), art. 576, before its amendment, with the conclusion that a corporation could not legally increase its stock beyond double the amount of its original capital stock, regardless of the number of times the increase was made. Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647 [*rehearing denied* in 43 S. W. 929].

62. *Alabama.*— Const. (1875), art. 14, § 6. See also Fitzpatrick *v.* Dispatch Pub. Co., 83 Ala. 604, 2 So. 727.

Arkansas.— Const. (1874), art. 12, § 8.

California.— Const. (1879), art. 12, § 11. It has been held that the effect of this provision was to annul section 359 of the civil code, providing for an increase of stock, through the medium of a meeting, or by the written assent of the holders of three fourths of the capital stock of the corporation. Ewing *v.* Oroville Min. Co., 56 Cal. 649. The increase of the capital stock of a corporation, and the issue of additional shares, to be sold at a price less than the nominal value of the stock, to supply a fund for the actual use of the corporation, is not a "fictitious increase" of the stock, within the meaning of the prohibitory clause of the constitution of California. Stein *v.* Howard, 65 Cal. 616, 6 Pac. 662.

Colorado.— Const. (1876), art. 15, § 9.

Idaho.—Const. (1899), art. 11, § 9.

Indiana.— 2 Rev. Stat. (1888), c. 19, § 3021*e*.

Kansas.— Laws (1883), c. 47, § 1; Laws (1887), c. 117, p. 172.

Louisiana.— Const. (1898), art. 267.

Missouri.— Const. (1875), art. 12, § 8. See also Rev. Stat. (1879), § 938. As to notice of the meeting to increase capital stock under this constitutional and statutory provision see State *v.* McGrath, 86 Mo. 239.

New Jersey.— Laws (1889), c. 105, p. 155.

North Dakota.— Const. (1889), § 138.

Pennsylvania.— Const. (1873), art. 16, § 7; Laws (1889), No. 125.

South Dakota.— Const. (1889), art. 17, § 8.

Texas.— Const. (1876), art. 12, § 6.

Utah.— Const. (1895), art. 12, § 5.

Virginia.— For a construction of a statute authorizing a corporation to increase its capital stock "to such extent as may be requisite to enable them to liquidate all arrears of debts," etc., see Gordon *v.* Richmond, etc., R. Co., 78 Va. 501, 513.

Wisconsin.— Rev. Stat. (1878), § 1826.

63. N. C. Laws (1889), c. 170, p. 143.

64. McCann *v.* Jeffersonville First Nat. Bank, 112 Ind. 354, 14 N. E. 251.

Issuing certificates of indebtedness to shareholders for their surrendered shares upon a reduction of capital. Strong *v.* Brooklyn Crosstown R. Co., 93 N. Y. 426.

Binding effect of an agreement between officers of the corporation and one of its share-

holder from any liability beyond the amount of the reduced stock, as to creditors who have become such since the reduction.[65]

2. Increasing Capital Stock — a. Directors No Implied Power to Increase Capital. The capital of a corporation, fixed by its charter, articles of association, or other governing instrument, cannot be increased by the directors without the sanction of the shareholders, unless expressly authorized thereto by the charter, governing statute, or other valid governing instrument.[66]

b. Shares Issued in Pursuance of Ultra Vires Increase of Capital Deemed to Be Spurious and Void — (I) *In General.* As a corporation has no power to increase its capital beyond the limit fixed by its charter or governing statute, unless thereto specially empowered, any attempt to make such an increase is void; the shares issued in pursuance of such an attempt are spurious; they confer no rights upon the holders of them; such holders cannot participate in the management of the company on a footing with the holders of valid shares; nor can they be subject to the liabilities of the holders of genuine stock; but their contract to pay for the spurious shares is without consideration and cannot be enforced.[67]

(II) *Subscriber May Recover Back Money Which He Has Paid in Purchasing Such Shares.* Moreover the subscriber may recover back the money which he has paid to the corporation in purchasing such spurious shares, as so much had and received by the corporation to his use, upon a consideration which has failed; and it seems that the rule *in pari delicto potior est conditio possidentis* does not apply.[68]

c. Irregularities in Proceedings to Increase Capital — (I) *Departures From Governing Statute.* The provisions of the charter or other governing statute touching an increase of the capital stock of a corporation must govern subsisting contractual requirements.[69] The failure of the corporation to file a certificate of the increase of stock with the secretary of state or other officer, as required by the governing statute, does not invalidate a subscription to the new shares as between the corporation and the shareholders; since the object of the statute is primarily for the protection of the public.[70]

(II) *Irregularities Validated by Acquiescence or Cured by Estoppel* — (A) *In General.* But where the power to make an increase exists, mere irregularities in the mode of making the increase may be validated by acquiescence, or cured on the principle of estoppel, so as to cut off any dissenting shareholder from asserting its invalidity.[71] Shareholders who vote to increase the stock of the corporation to a certain amount, without specifying the time of the

holders to issue reduced shares to such shareholders upon a surrender of his shares. Abbott *v.* Petersburgh Granite Quarrying Co., 17 N. Y. Suppl. 140, 43 N. Y. St. 235.

65. Palfrey *v.* Paulding, 7 La. Ann. 363; Hepburn *v.* Commissioners of Exchange, etc., Co., 4 La. Ann. 87.

Applications of this principle where the corporation is a bank, and its debts consist of its circulating notes. Palfrey *v.* Paulding, 7 La. Ann. 363; Hepburn *v.* Commissioners of Exchange, etc., Co., 4 La. Ann. 87; Bullard *v.* Bell, 4 Fed. Cas. No. 2,121, 1 Mason 243.

66. Newport Cotton Mill Co. *v.* Mims, 103 Tenn. 465, 53 S. W. 736; Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902 (where it is pointed out by Bradley, J., that this does not necessarily exclude the power in the directors to receive additional subscriptions to the authorized capital stock which has not been all filled up).

67. Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968.

68. Knowlton *v.* Congress, etc., Spring Co., 14 Fed. Cas. No. 7,903, 14 Blatchf. 364.

69. Ohio Ins. Co. *v.* Nunnemacher, 15 Ind. 294.

70. Barrows *v.* Natchaug Silk Co., 72 Conn. 658, 45 Atl. 951; Johnston *v.* Allis, 71 Conn. 207, 41 Atl. 816; Naugatuck Water Co. *v.* Nichols, 58 Conn. 403, 20 Atl. 315, 8 L. R. A. 637; Nutter *v.* Lexington, etc., R. Co., 6 Gray (Mass.) 85. It is scarcely necessary to add that informalities in taking the vote to reduce the capital will not operate to defeat the existence of the corporation. Brown *v.* Wyandotte, etc., R. Co., 68 Ark. 134, 56 S. W. 862.

71. Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894; Bailey *v.* Champlain Min., etc., Co., 77 Wis. 453, 46 N. W. 539; Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Stutz *v.* Handley, 41 Fed. 531 [*reversed* on other grounds in 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227]; Payson *v.* Stoever, 19 Fed. Cas. No. 10,863, 2 Dill. 427.

issue of the new shares, waive the irregularity of an issue of various amounts of such shares, from time to time, during a period of six years, by the directors, by accepting dividends and participating in shareholders' meetings during such period, without making any objection to such increase of the stock.[72]

(B) *Illustrations of Foregoing.* Thus unanimous consent will make an increase of the capital stock of a corporation binding upon all the shareholders, although not made with the statutory formalities.[73] And where there was, under the governing statute, authority to increase the capital stock at the discretion of the shareholders, it was held that no formal vote was necessary to make the increase, but that the requisite assent of the shareholders could be shown by their conduct and acquiescence.[74] And this assent may be shown by accepting shares of the increased capital so issued, so as to cut off the right of objecting to the failure of the corporation, to record and publish the fact of the increase.[75] And hence, where all the shareholders of a corporation assent to the action of a shareholders' meeting, in increasing the capital stock, or ratify such action, they cannot afterward raise the objection to such increase that no formal notice of the meeting was given, or that it was held in another state than that in which the corporation was chartered, there being nothing in the charter to prohibit its being so held.[76] Nor will the failure to enter on the minutes of the company a vote of the shareholders by which its capital stock is increased at all affect the validity of the act of increase; since most corporate acts can be proved by parol.[77]

(C) *Shareholders Not Allowed to Set Up Such Irregularities After Insolvency.* An authorized increase of the capital stock of a corporation may be validated by an acquiescence of the shareholders in such a sense that a shareholder will not be allowed, after the insolvency of the corporation, when proceeded against by its assignees in bankruptcy to collect what remains due upon his subscription, to set up the invalidity of the increase of capital stock or of a reorganization of the company, where that has taken place.[78]

(III) *Notice of Meeting to Increase Capital.* Where the governing statute provided that an increase of the capital of a corporation might be authorized "at any meeting called for the purpose," the mere fact that a by-law provided that any business "within the power of the corporation" might be transacted at annual meetings, although the subject-matter thereof was not specified in the notice, did not authorize an increase in the capital stock at an annual meeting, the notice of which did not specify such purpose.[79]

d. Liability of Holders of Shares Issued Upon Increasing Capital Stock — (I) *In General.* The liability of the holders of shares so issued is substantially the same as that of the subscribers to original shares. If the issue is valid and if the subscribers of the new shares have not paid for them, under principles already

72. Barrows *v.* Natchaug Silk Co., 72 Conn. 658, 45 Atl. 951.

Circumstances under which evidence was admissible of the acts of a corporation claiming to be the successor of a precedent corporation, directly connected with the increase of the capital stock in another corporation. Hix *v.* Edison Electric Light Co., 163 N. Y. 573, 57 N. E. 1112 [*affirming* 27 N. Y. App. Div. 248, 50 N. Y. Suppl. 592].

73. Bailey *v.* Champlain Min., etc., Co., 77 Wis. 453, 46 N. W. 539; Poole *v.* West Point Butter, etc., Assoc., 30 Fed. 513.

74. Payson *v.* Stoever, 19 Fed. Cas. No. 10,863, 2 Dill. 427.

75. Stutz *v.* Handley, 41 Fed. 531.

76. Stutz *v.* Handley, 41 Fed. 531 [*reversed* on other grounds, but *affirmed* on this point in 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227].

77. Stutz *v.* Handley, 41 Fed. 531.

For further illustrations see Kansas City Hotel Co. *v.* Hunt, 57 Mo. 126; Pullman *v.* Upton, 96 U. S. 328, 24 L. ed. 818. *Compare* with Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482.

78. Clarke *v.* Thomas, 34 Ohio St. 46; Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902. See also in support of the same conclusion Upton *v.* Jackson, 28 Fed. Cas. No. 16,802, 1 Flipp. 413.

79. Jones *v.* Concord, etc., R. Co., 67 N. H. 119, 38 Atl. 120 [*affirmed* in 67 N. H. 234, 30 Atl. 614, 68 Am. St. Rep. 650, *citing* Jones *v.* Milton, etc., Turnpike Co., 7 Ind. 547; Com. *v.* Smith, 132 Mass. 289; Stebbins *v.* Merritt, 10 Cush. (Mass.) 27; Schenectady, etc., Plank Road Co. *v.* Thatcher, 11 N. Y. 102; Richardson *v.* Vermont, etc., R. Co., 44 Vt. 613; Sherwin *v.* Bugbee, 17 Vt. 337; Warner *v.* Mower, 11 Vt. 385, and

stated,[80] then they are liable to pay for them when called upon so to do by the corporation, by its creditors, or by their representative.[81] But if the new issue is wholly void, as where the corporation has filled up its capital and has exhausted its power to issue new shares,[82] then there can be no recovery against the taker of them by the corporation,[83] and it would seem not by its creditors.[84]

(II) *Authorized Increase Will Not Release Existing Shareholders.* When a corporation is authorized by its charter to increase its capital stock, the power to increase becomes so to speak a part of the contract of subscription, and its exercise will be binding on an existing shareholder, whether or not he assents thereto. The common-law rule[85] that any material alteration in the charter of a corporation without the consent of a shareholder relieves him from liability on his stock subscription does not apply to such a case.[86]

(III) *Liability of Taker of New Shares to Creditors Where Increased Shares Are Canceled.* Nor will there be any liability to creditors on the part of the subscribers of the new shares, where the increase is canceled and the new shares called in before the rights of creditors have attached, or before creditors have suffered any detriment in consequence of the attempted issue.[87]

(IV) *Statutory Individual Liability For Decrease of Such New Shares.* A statutory individual liability of shareholders attaches to them as well in respect of new shares issued to them on an increase of the stock of the corporation, as to their original shares, as for instance a statutory liability for the debts contracted by the corporation prior to the time when the capital stock is paid in. Here, if there is an increase and debts are contracted before it is paid in, the sharetakers will be liable for such debts.[88] So too of a liability imposed by statute upon shareholders for failure to file the proper certificate of payment upon an increase of its capital stock. But such liability is limited to the holders of the increased stock.[89]

(V) *Doctrine That Person Who Takes New Shares at Less Than Par Is Liable to Subsequent Creditors Only.* The supreme court of the United States, reversing the court below,[90] and departing from the general current of authority as it stood at the time of its decision, has taken a distinction with respect to the liability of the subscribers to shares of increased stock which has not been paid for, between the case of prior and subsequent creditors, and hold that, where the shareholder assents to the increase of the capital, and to a gratuitous distribution of it among the existing shareholders, and in pursuance of the arrangement receives his proportion of it as fully paid stock, when it has not been paid for in point of fact, although an obligation arose to pay for it in behalf of creditors whose debts are contracted subsequently to the authorization of the increase, no such obligation arose in favor of the creditor whose debt is contracted prior to such authorization.[91]

distinguishing Rex *v.* Langhorn, 4 A. & E. 538, 6 N. & M. 203, 31 E. C. L. 243].

80. See *supra*, VI, M.

81. Recognized in Coit *v.* North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 S. Ct. 231, 30 L. ed. 420, and in Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 25 L. ed. 227; but the principle not applied in either of these cases.

82. See *supra*, VII, A, 2, b, (I).

83. Oler *v.* Baltimore, etc., R. Co., 41 Md. 583.

84. But the fact of the corporation having issued to others shares of its stock in excess of its power does not constitute a defense to a shareholder whose shares are valid, when sued by the corporation for assessments; it is enough that the corporation has not disabled itself from complying with its contract with him by issuing to him his certificates when he shall have paid the purchase-money. Oler *v.* Baltimore, etc., R. Co., 41 Md. 583.

85. See *supra*, I, K, 1; VI, I, 1, a *et seq.*

86. Fort Edwards, etc., R. Co. *v.* Arpin, 60 Wis. 214, 49 N. W. 828.

87. For an illustration of this see Coit *v.* North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 S. Ct. 231, 30 L. ed. 420.

88. Booth *v.* Campbell, 37 Md. 522.

89. Griffeth *v.* Green, 129 N. Y. 517, 29 N. E. 838, 42 N. Y. St. 101; Veeder *v.* Mudgett, 95 N. Y. 295.

90. Stutz *v.* Handley, 41 Fed. 531.

91. Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227 [*citing* Deadwood First Nat. Bank *v.* Gustin Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18

(VI) *New Doctrine That Corporation Can Increase Its Capital and Sell New Shares at Their Market Value and That Purchasers Will Not Be Held to Make Good.* The supreme court of the United States decided, in the year 1891, two of its members dissenting,[92] that an active corporation which desires to raise means for the prosecution of its business has the power to increase its capital stock and to sell its new shares on the market for the best price it can get; and that if it gets less than par creditors cannot compel the shareholders to pay the residue after the company becomes insolvent.[93]

e. Increasing Capital by Issuing Preference Shares. A company having power to increase its capital to such an amount and upon such terms, and either with or without special privileges or preferences to the holders of the shares in such increased capital, as the company may deem expedient, may raise further capital by issuing preferential shares, which will operate to give the holders thereof an advantage over the common shareholders in any distribution of the assets of the company; and they will enjoy this advantage and priority on the company being wound up.[94]

f. Distribution of New Shares Upon Increase of Capital — (I) *New Stock to Be Distributed Ratably Among Existing Shareholders.* In the absence of a statute or other valid governing instrument making a different rule, the new shares are to be distributed ratably among the existing shareholders; and this is called a stock dividend.[95] Each shareholder, it has been held, has a right to the opportunity to subscribe for and take the new or increased stock in proportion to the old stock held by him; so that a vote at a shareholders' meeting, directing the new stock to be sold, without giving to each shareholder such an opportunity, is void as to any dissenting shareholder.[96] If all the potential capital has not been subscribed for, but the balance is taken up by a particular person to give him the voting power attached to such shares, their issue will be deemed void, and a board of directors elected by such votes will be restrained from taking office.[97] Where the charter provided that shareholders who were such at the time of an increase of capital should be entitled to a *pro rata* share thereof, on payment of the par value of the shares, a subscriber who had transferred his shares prior to an increase was not entitled to participate therein.[98]

Am. St. Rep. 510, 6 L. R. A. 676; Coit *v.* North Carolina Gold Amalgamating Co., 14 Fed. 12; 2 Morawetz Corp. §§ 832, 833].

92. The dissenting members were Mr. Chief Justice Fuller and Justice Lamar. The dissenting opinion of Chief Justice Fuller is worthy of all commendation.

93. Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227 [*reversing* 41 Fed. 531].

94. *In re* Bangor, etc., Slate, etc., Co., L. R. 20 Eq. 59, 32 L. T. Rep. N. S. 389, 23 Wkly. Rep. 785.

95. See on this subject, generally, the following cases:

Illinois.— Eidman *v.* Bowman, 58 Ill. 444, 11 Am. Rep. 90.

Massachusetts.— Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

Minnesota.— Jones *v.* Morrison, 31 Minn. 140, 16 N. W. 854.

New York.— Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196. *Compare* Miller *v.* Illinois Cent. R. Co., 24 Barb. (N. Y.) 312.

Pennsylvania.—Reese *v.* Montgomery County Bank, 31 Pa. St. 78, 72 Am. Dec. 726 (original stock wrongfully withheld); Montgomery Bank *v.* Reese, 26 Pa. St. 143 (original stock remaining untaken).

Vermont.— State *v.* Smith, 48 Vt. 266, but rule does not apply to original stock bought in by the corporation and held as assets.

Wisconsin.— Dousman *v.* Wisconsin, etc., Min., etc., Co., 40 Wis. 418.

96. Jones *v.* Morrison, 31 Minn. 140, 16 N. W. 854. See also Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; State *v.* Smith, 48 Vt. 266.

For a charter and by-laws under which it was held that the shareholders had no absolute right to subscribe for the increased stock in proportion to their original holdings, but that the directors might allot it in such manner as they should regard as most conducive to the interest of the company, see Ohio Ins. Co. *v.* Nunnemacher, 15 Ind. 294.

97. Humboldt Driving Park Assoc. *v.* Stevens, 34 Nebr. 528, 52 N. W. 568, 33 Am. St. Rep. 654.

98. Real Estate Trust Co. *v.* Bird, 90 Md. 229, 44 Atl. 1048, where the transfer took the form of the shareholder signing the agreement with other shareholders, waiving his right to the new shares. To this agreement the corporation was not a party. Thereafter the shareholder transferred his shares to a *bona fide* purchaser, without notice of such agreement, who demanded a transfer of the

(II) *Liability of Corporation to Shareholder For Refusing to Allow Him His Proportion of New Shares.* Where the leading principle of the foregoing text prevails that the original shareholders are entitled to subscribe for the new shares in proportion to their existing holdings, if the corporation or its officers refuse to grant a shareholder this right, he will have an action for damages against the corporation, and the measure of his damages will be the excess of the market value above the par value of the number of shares to which he was entitled, with interest on such excess.[99]

(III) *Corporation Enjoined From Charging Existing Shareholders Bonus on Distribution of New Shares* — (A) *In General.* From this principle it also follows that where there is a statute permitting corporations to increase their capital stock by increasing the number of their shares, which shares are to be allotted *pro rata* to the shareholders according to their respective interests, it is not competent for the corporation to charge a bonus to the shareholders who receive the new shares in distribution, and that equity should enjoin the company from refusing to allow a shareholder to receive his allotment at par without paying a bonus.[1]

(B) *Shareholders Paying Such Bonus Cannot Recover It Back.* But it has been held that where a shareholder pays such a bonus, although under protest, he cannot recover it back, the denial by the corporation of his right to an equal distribution of the new shares without the payment of the bonus not, in the theory of the court, constituting duress.[2]

(IV) *Rule Does Not Apply to Shares of Original Stock Bought In.* The foregoing rule, which requires a ratable distribution of the new shares where the capital is increased, does not apply to the case where the corporation buys in the shares of its own original stock and holds them as assets or sells them for the payment of its liabilities or for the general benefit.[3]

(V) *Remedy of Corporation Against Shareholders Who Fail to Take Their Proportion of New Shares.* When an increase of stock by a mining company has been determined on, in the manner provided by the statute,[4] and the shareholders decline to pay for part of the stock, the authority of the company to dispose of such stock is complete, and the agreement to take shares may be enforced by action, although the whole of the increased stock is never taken.[5]

(VI) *Corporation May Impose Limit of Time Within Which New Shares Must Be Taken.* The corporation may impose a reasonable limit of time within which the existing shareholders must subscribe for and take the new shares. When therefore the charter of a corporation provided for sixty days' notice of an authorization of any increase of the capital stock, within which time any shareholder might have the privilege of taking additional shares, it was held that any shareholder not applying and tendering payment within such time would forfeit the privilege.[6]

(VII) *Not Necessary to Bind Subscribers to New Shares That Entire Amount of Increase Should Have Been Subscribed.* The rule which

shares to him on the books of the corporation before the increase. It was held that he was entitled to share in the increase, unaffected by the release. But a purchaser of stock in a corporation, from one who has subscribed to new stock which such corporation has been authorized and has resolved to issue as an increase of capital, although becoming entitled to the rights of his vendor under the subscription to the new stock, is not entitled to a certificate of such stock where no payment therefor has been made. Baltimore City Pass. R. Co. *v.* Hambleton, 77 Md. 341, 26 Atl. 279.

99. Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

1. Cunningham's Appeal, 108 Pa. St. 546, Paxson, J., dissenting as to the remedy in equity..

2. De la Cuesta *v.* Insurance Co. of North America, 136 Pa. St. 62, 658, 20 Atl. 505, 26 Wkly. Notes Cas. (Pa.) 377, 9 L. R. A. 631, Sterrett and Clark, JJ., dissenting.

3. State *v.* Smith, 48 Vt. 266.

4. Swan & S. Stat. Ohio 237.

5. Clarke *v.* Thomas, 34 Ohio St. 46.

6. Hart *v.* St. Charles St. R. Co., 30 La. Ann. 758.

applies in the case of original subscribers to capital stock,[7] that the subscribers do not become liable until the entire amount intended to be raised is subscribed for, does not, it seems, apply to subscriptions to additional shares issued upon the increase of capital, since in such a case there is no implied condition that the whole number of additional shares authorized by the vote to increase capital shall be taken.[8]

g. Power of Corporation to Rescind Its Vote to Increase Capital. Where the corporation votes to increase its share capital to accomplish a particular object, until the shares are actually issued, it obviously retains the power to rescind its vote; and in such a case the existing shareholder cannot maintain a suit in equity to compel the corporation to issue to him his proportion of the intended new shares.[9]

h. Increase and Reduction of Capital Stock of National Banks. The comptroller of the currency has power to assent to an increase of the capital stock of a national bank less than that originally voted by the directors, but equal to the amount actually subscribed and paid for by the shareholders under that vote; and where the entire amount cannot be raised, the amount can be reduced by the concurrent action of the association and the comptroller of currency.[10]

3. Reducing Capital Stock — a. Capital Stock Can Be Diminished Only in Manner Prescribed by Law. A reduction of the capital stock can take place only when prescribed by law and in the manner prescribed by law.[11]

b. Must Be Done at Corporate Meeting Duly Called and Notified. Statutes providing for a reduction of the capital stock of corporations generally prescribe that it must be done at a meeting of the shareholders upon a notice specifying the object of the meeting and the proposed change, which notice shall be published in a prescribed manner.[12]

c. Invalidity of Secret Contrivances Resulting in Diminution of Capital Stock. One object of requiring capital stock to be diminished only at corporate meetings formally called, is to insure publicity, and warn the public dealing with the corporation of the intended change. This is incompatible with secret arrangements and contrivances reducing capital stock by buying in the shares, or by other devices, so as to release shareholders from their obligations to creditors.[13]

7. See *supra*, VI, H, 14, a *et seq.*

8. Avegno *v.* Citizens' Bank, 40 La. Ann. 799, 5 So. 537; Greenbrier Industrial Exposition *v.* Ocheltree, 44 W. Va. 626, 30 S. E. 78; Aspinwall *v.* Butler, 133 U. S. 595, 10 S. Ct. 417, 33 L. ed. 779. *Compare* Clarke *v.* Thomas, 34 Ohio St. 46; Thayer *v.* Butler, 141 U. S. 234, 11 S. Ct. 987, 35 L. ed. 711; Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 11 S. Ct. 984, 35 L. ed. 702; Delano *v.* Butler, 118 U. S. 634, 7 S. Ct. 39, 30 L. ed. 260.

9. Terry *v.* Eagle Lock Co., 47 Conn. 141.

As to the power to recall cash dividends see *infra*, VII, B, 1, a, (III), (A) *et seq.*

10. Aspinwall *v.* Butler, 133 U. S. 595, 10 S. Ct. 417, 33 L. ed. 779; Delano *v.* Butler, 118 U. S. 634, 7 S. Ct. 39, 30 L. ed. 260.

11. Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797.

12. See for instance 2 Nev. Comp. Laws, §§ 3401, 3406–3408, 3544.

13. Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797. See also *supra*, VI, L, 2, d.

Reducing capital by order of court under English Companies Act.—*In re* Direct Spanish Tel. Co., 34 Ch. D. 307, 56 L. J. Ch. 353, 55 L. T. Rep. N. S. 804, 35 Wkly. Rep. 209. For the practice of reducing share capital with the sanction of the court under this statute see also *In re* General Min. Co., 6 Ir. Eq. 213. A statement of the practice is made in condensed form in Lindley Comp. L. (5th ed.) 402 *et seq.* The same author explains the manner of reducing paid-up capital under the Companies Act of 1880. Conclusiveness of the registration of an order of court confirming the resolution to reduce capital under the English Companies Act (1867), § 15. Ladies' Dress Assoc. *v.* Pulbrook, 68 L. J. Q. B. 871. Preliminary expenses not "lost capital" under a statute authorizing a reduction "to cancel any lost capital." *In re* Abstainers, etc., Ins. Co., [1891] 2 Ch. 124, 60 L. J. Ch. 510, 64 L. T. Rep. N. S. 256, 39 Wkly. Rep. 574. When reduction of common stock sanctioned apart from any reduction of preferential capital. *In re* Agricultural Hotel Co., [1891] 1 Ch. 396, 60 L. J. Ch. 208, 63 L. T. Rep. N. S. 748, 39 Wkly. Rep. 218 [*following In re* Gatling Gun, 43 Ch. D. 628, 59 L. J. Ch. 279; *In re* Quebrada R., etc., Co., 40 Ch. D. 363, 58 L. J. Ch. 332, 60 L. T. Rep. N. S. 482, 1 Meg. 122; *In re* Barrow Hæmatite Steel Co., 39 Ch. D. 582; *In re* American Pastoral Co., [1890] W. N. 62, and

B. Dividends — 1. Generally — a. What Is a Dividend — (I) *In General.* A dividend is that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively.[14]

(II) *Not a Debt Until Declared.* A dividend is not a debt until it has been declared, but is a mere potentiality representing the right of the shareholder to a proportionate share of the profits of the corporate venture, when the same is declared to be payable, by the board of directors or otherwise, in pursuance of the governing statute or instrument. The obligation of the corporation, or of its board of directors, to declare a dividend cannot be treated as the dividend itself.[15]

(III) *Thereafter a Trust Fund Held by Corporation For Its Shareholders* — (A) *In General.* According to one theory a declaration of a dividend by a corporation is in legal contemplation a separation of the amount thereof from the assets of the corporation, which thereafter holds such amount as the trustees of those who are the shareholders at the time of the declaration of the dividend.[16] Whether this trust-fund theory is sound or not, a dividend, when declared, is certainly a common debt due to each shareholder in proportion to the number of his shares, for which he may maintain an ordinary action at law.[17]

(B) *Corporation Cannot Appropriate Unpaid Dividends.* If the dividend, upon the fact of its declaration, becomes a trust fund held by the company for the shareholder, it must then be treated in equity as the property of the shareholder, and cannot be applied by the directors to any purpose, not authorized by the charter or the fundamental contract, without the consent of the shareholder.[18] For example it cannot be set off against a contemporaneous assessment upon the shares;[19] nor can it be treated as a common debt by the receiver, but it passes into his hands as a trust fund, charged in equity with a lien in favor of the shareholder;[20] nor has the corporation any power to take it out of the account of the shareholder and credit it to the surplus fund, especially as against one who has sold his shares and reserved the declared dividend.[21] To this statement of doc-

declining to follow *In re* Union Plate Glass Co., 42 Ch. D. 513, 58 L. J. Ch. 767].

When a national banking corporation cannot retain in its treasury any part of the amount realized, it may be compelled to distribute the difference among its shareholders. Seeley *v.* New York Nat. Exch. Bank, 8 Daly (N. Y.) 400 [*affirmed* in 78 N. Y. 608].

14. King *v.* Paterson, etc., R. Co., 29 N. J. L. 82.

Dividends, technically speaking, are generally confined to the payment of the net earnings of a corporation among the shareholders; but the term "dividends" is not confined in law to the division simply of net earnings, but applies as well to a division of the capital. Larwill *v.* Burke, 19 Ohio Cir. Ct. 513, 10 Ohio Cir. Dec. 605.

Nature of a dividend by mutual life-insurance company see Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4.

15. Lockhart *v.* Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156 [*citing In re* London India Rubber Co., L. R. 5 Eq. 519, 37 L. J. Ch. 235, 17 L. T. Rep. N. S. 530, 16 Wkly. Rep. 334]. To the same effect see Taft *v.* Hartford, etc., R. Co., 8 R. I. 310, 5 Am. Rep. 575; Henry *v.* Great Northern R. Co., 1 De G. & J. 606, 3 Jur. N. S. 1133, 27 L. J. Ch. 1, 6 Wkly. Rep. 87, 58 Eng. Ch. 470; Stevens *v.* South Devon R. Co., 9 Hare 313, 21 L. J. Ch. 816, 41 Eng. Ch. 313. Therefore a holder of the preferred and guaranteed shares of a corporation is not a creditor of it, in such a sense that he can make its directors liable to him under a statute for their default in filing certain annual reports. Lockhart *v.* Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

16. McGill *v.* Holmes, 23 Misc. (N. Y.) 524, 52 N. Y. Suppl. 840. To the effect that a dividend after it has been declared is held by the corporation as a trust fund for its creditors see King *v.* Paterson, etc., R. Co., 29 N. J. L. 82; Le Roy *v.* Globe Ins. Co., 2 Edw. (N. Y.) 657. But *compare* Lowne *v.* American F. Ins. Co., 6 Paige (N. Y.) 482.

17. See *infra*, VII, B, 6, b, (I).

18. Reasoning in March *v.* Eastern R. Co., 43 N. H. 515.

19. *Ex p.* Winsor, 30 Fed. Cas. No. 17,884, 3 Story 411.

20. Matter of Le Blanc, 4 Abb. N. Cas. (N. Y.) 221.

21. Beers *v.* Bridgeport Spring Co., 42 Conn. 17.

trine there is a well-recognized exception founded upon a banker's lien upon any assets of his customer in his hands for any unpaid balance; so that dividends declared but not paid by a banking corporation remain pledged for the payment of any just debt due to the bank from the shareholder.[22]

(C) *Corporation Cannot Forfeit or Confiscate Unpaid Dividends at Its Mere Pleasure.* For the same reason, after a corporation has declared a dividend, so that it becomes a debt due from it to the shareholder, it cannot forfeit or confiscate this debt at its mere pleasure.[23]

(D) *Right of Set-Off For Debts Due by Shareholder to Corporation.* As the dividend when declared becomes so much money owing by the corporation to the shareholder, if the shareholder is at the time indebted to the corporation, the latter has on principle a right to apply the dividend in liquidation of the debt. In other words it has the same right of set-off that any other creditor has.[24] But this right of set-off rests upon the mutuality of indebtedness; and hence where the shares have been assigned, although not on the books of the company, prior to the declaration of the dividend, the corporation has no right of set-off as against the assignee, who becomes the equitable owner, provided it has knowledge of the assignment prior to the declaration of the dividend.[25] But this right of set-off obviously exists only where a dividend has been declared; and conversely where no dividend has been declared and the shareholder is indebted to the corporation in respect of his shares by a bond and mortgage he cannot properly refuse to pay his interest because the directors do not declare a dividend; nor will the collection of such interest be restrained until the directors do make a dividend. This conclusion rests upon the principle that the propriety of declaring a dividend rests primarily in the discretion of the directors.[26]

(E) *Unpaid Dividends Cannot Be Appropriated by State.* For the same reason a dividend declared but not paid, but remaining unclaimed, cannot be arbitrarily appropriated by the state by enacting a statute that such a dividend shall not, after a stated period of time, be recovered or claimed by an action by suit, but shall be paid by the corporation to the trustees of the state university; since such a statute is merely a legislative confiscation, a taking of

22. Hagar *v.* Union Nat. Bank, 63 Me. 509; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Bates *v.* New York Ins. Co., 3 Johns. Cas. (N. Y.) 238.

23. When therefore in reorganizing a corporation whose franchises were about to expire, under a scheme by which the new corporation succeeded to its franchises and obligations, a provision inserted in the charter of the new company, forfeiting dividends not claimed within three years from the time when declared, was not binding upon the old shareholders, except from the time when, expressly or by implication, they consented thereto by assuming the quality of shareholders in the new company. Armant *v.* New Orleans, etc., R. Co., 41 La. Ann. 1020, 7 So. 35.

Where no formal dividends were declared, but, under an arrangement among the shareholders, each shareholder drew out for his private purposes certain annual amounts, his indebtedness for the excess so drawn might be made a lien on the shares and his shares applied to its payment. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282, 21 Atl. 169, 170, 27 Wkly. Notes Cas. (Pa.) 95.

24. *Ex p.* Winsor, 30 Fed. Cas. No. 17,884, 3 Story 411, where this principle is recognized by Story, J.

25. Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

26. Ely *v.* Sprague, Clarke (N. Y.) 351.

Theory that unpaid dividends are assets for creditors of corporation.— One case puts forth the theory that unpaid dividends become, in the event of the insolvency of the corporation, assets for its creditors. Curry *v.* Woodward, 44 Ala. 305. But this is plainly untenable, since it converts a debt of the corporation into an asset and confiscates the property of the particular shareholder for the payment of other creditors.

Where a shareholder in a banking corporation has indorsed the notes of a third person which are held by the bank, the bank cannot exercise a right of set-off in respect to these notes against dividends due by it to the shareholder, where the makers of the notes are not shown to be insolvent or beyond the jurisdiction of the court, although it is conceded that the bank might under such circumstances deduct the amount of the notes, the makers of which are insolvent or nonresident, without a previous protest or notice of action to recover the amount of the same. Texarkana First Nat. Bank *v.* De Morse, (Tex. Civ. App. 1894) 26 S. W. 417.

the property of one man, or of one legal person, and giving it to another without just compensation.[27]

b. Declaration of Dividends Rests in Discretion of Directors, and Not Compelled in Equity — (I) *In General.* Except where, under the governing statute or instrument, the directors are overruled by the shareholders, the propriety or expediency of declaring and paying dividends rests in their sound discretion,[28] and the courts will not interfere to compel them to declare and pay a dividend, unless they are guilty of bad faith, or of a wilful abuse of this discretion,[29] or what is substantially the same thing unless in refusing so to do they have acted unreasonably, capriciously, or fraudulently.[30]

(II) *Circumstances Under Which Dividends Compelled.* On the other hand courts of equity have power, considered as mere power or jurisdiction, at the suit of a minority shareholder of a corporation, to order a dividend of its assets, where the safety or interest of the minority requires it; and in determining whether to exercise such power in a particular case the object of the corporation and the situation of its affairs must be taken into consideration.[31] Courts will not allow the directors of a corporation to exercise their discretion oppressively in refusing to declare a dividend, when the net profits and character of the business clearly warrant it.[32] Applying these principles, it was held by the court of errors and appeals of New Jersey that a minority shareholder in a trading corporation is entitled, where a majority of the directors have voted themselves inordinate salaries, withheld proper information from him, refused to declare dividends, and conveyed the assets to another corporation controlled by themselves, to have such conveyances and the resolutions fixing salaries set aside, to a decree securing him proper access to the books, and the right to a dividend to be declared out of

27. State University *v.* North Carolina R. Co., 76 N. C. 103, 22 Am. Rep. 671. See also Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650. But *compare* State University *v.* Maultsby, 43 N. C. 257, where a similar statute was regarded as merely changing the custodian of the trust fund from an administrator to the state university, to be held by the latter for the benefit of the creditors and next of kin.

28. *California.*— Excelsior Water, etc., Co. *v.* Pierce, 90 Cal. 131, 27 Pac. 44.

Massachusetts.— Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705.

New Jersey.— King *v.* Paterson, etc., R. Co., 29 N. J. L. 82; Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162.

New York.— Burden *v.* Burden, 159 N. Y. 287, 54 N. E. 17 [*affirming* 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499]; Williams *v.* Western Union Tel. Co., 93 N. Y. 162; Ely *v.* Sprague, Clarke 351.

United States.— Union Pac. R. Co. *v.* U. S., 99 U. S. 402, 25 L. ed. 274.

England.— *In re* Mercantile Trading Co., L. R. 4 Ch. 475, 20 L. T. Rep. N. S. 502, 17 Wkly. Rep. 654.

See 12 Cent. Dig. tit. "Corporations," § 1289.

29. *Alabama.*— Wolfe *v.* Underwood, 96 Ala. 329, 11 So. 344, not compelled to distribute earnings not shown to be in excess of the amount which the directors might, in the exercise of their discretion, regard as necessary or proper for the carrying on of the business of the company, and the meeting of prospective contingencies.

Connecticut.— Pratt *v.* Pratt, 33 Conn. 446.

Louisiana.— State *v.* State Bank, 6 La. 745.

Michigan.— Hunter *v.* Roberts, etc., Co., 83 Mich. 63, 47 N. W. 131.

New York.— McNab *v.* McNab, etc., Mfg. Co., 62 Hun 18, 16 N. Y. Suppl. 448, 41 N. Y. St. 906 (dividend not compelled in the absence of proof that the directors have acted unreasonably or capriciously in refusing to order a larger dividend); Karnes *v.* Rochester, etc., R. Co., 4 Abb. Pr. N. S. 107; Scott *v.* Eagle Fire Co., 7 Paige 198.

Pennsylvania.— McLean *v.* Pittsburgh Plate Glass Co., 159 Pa. St. 112, 28 Atl. 211, 33 Wkly. Notes Cas. 459; McKean *v.* Philadelphia Contributionship, 6 Pa. Dist. 40, 18 Pa. Co. Ct. 657.

Wisconsin.— Morey *v.* Fish Bros. Wagon Co., 108 Wis. 520, 84 N. W. 862.

United States.— New York, etc., R. Co. *v.* Nickals, 119 U. S. 296, 7 S. Ct. 209, 30 L. ed. 363.

England.— Stevens *v.* South Devon R. Co., 9 Hare 313, 21 L. J. Ch. 816, 41 Eng. Ch. 313.

Compare Atty.-Gen. *v.* State Bank, 21 N. C. 545.

See 12 Cent. Dig. tit. "Corporations," § 1289.

30. McNab *v.* McNab, etc., Mfg. Co., 62 Hun (N. Y.) 18, 16 N. Y. Suppl. 448, 41 N. Y. St. 906.

31. Fougeray *v.* Cord, 50 N. J. Eq. 185, 24 Atl. 499.

32. Storrow *v.* Texas Consol. Compress, etc., Assoc., 87 Fed. 612, 31 C. C. A. 139.

all net profits not required in the legitimate business of the company, although the assets have been reconveyed pending the suit.[33]

(III) *Declaration of Dividends Not Restrained in Equity.* For the reason that the declaration of a dividend ordinarily rests in the sound discretion of the directors, the declaration and payment of it will not ordinarily be restrained in equity.[34]

(IV) *Discretion of Directors as to Time and Place of Payment*— (A) *In General.* In the exercise of their discretion with respect to the declaring of dividends, the directors may, it has been held, fix the time and place of payment within such limitations as reason and good faith to the shareholders may require. They may make them payable at a banking house in good credit, giving proper notice to the shareholders of the deposit made there to their credit.[35]

(B) *Who Bears Loss When Payable at Bank Which Fails.* If the shareholder after receipt of notice neglects to draw the money within a reasonable time, and the bank fails, the loss will fall on the shareholder, and not on the company. But of course the company must show that due notice was given to the shareholder.[36]

c. Reclamation of Dividends Illegally Declared — (I) *In General.* A resolution by the board of directors of a corporation to pay a dividend at a future time may be rescinded at a subsequent meeting, held before the dividend becomes payable, if the fact that it has been declared has not been made public, or in any manner communicated to the shareholders, and no fund has been set apart for its payment.[37] If a dividend has been illegally declared in the sense that its declaration is *ultra vires*, as where it is a dividend out of assets when there is no surplus to divide, then it seems that it may be rescinded by the corporation even after it has been paid, and that the corporation may recover it of the shareholders as so much money paid to their use under a mutual mistake.[38] It has been well reasoned that shareholders among whom assets of the corporation have been distributed by its officers, without authority from the corporation, or when acting outside the scope of their ordinary powers, are technically at least guilty of a conversion of such assets.[39] On plainer grounds a dividend declared under such circumstances cannot be recovered from the corporation in an action at law.[40] If such a dividend is paid out of capital, and the corporation subsequently becomes insolvent, the right to reclaim it is more clear on the ground that the capital of the corporation is a trust fund for its creditors, which fund cannot be lawfully distributed in this way, to its shareholders in advance of its creditors.[41] This right of reclamation, it has been held, passes to the assignee of the corporation, if the terms of the assignment are sufficiently comprehensive to embrace it.[42]

33. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756, 26 Atl. 886.

That a court of equity may require the directors of a banking corporation to pay dividends out of surplus earnings where dividends have been suspended for the purpose of oppressing the minority shareholders see Hiscock *v.* Lacy, 9 Misc. (N. Y.) 578, 30 N. Y. Suppl. 860, 62 N. Y. St. 228. Further as to the circumstances under which the declaration and payment of a dividend will be compelled see Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330; Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, 1 Atl. 362; Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157; Brown *v.* Buffalo, etc., R. Co., 27 Hun (N. Y.) 342; Hiscock *v.* Lacy, 9 Misc. (N. Y.) 578, 30 N. Y. Suppl. 860, 62 N. Y. St. 228.

34. Lee *v.* Neuchatel Asphalte Co., 41 Ch. D. 1, 58 L. J. Ch. 408, 61 L. T. Rep. N. S. 11, 1 Meg. 140, 37 Wkly. Rep. 321.

35. King *v.* Paterson, etc., R. Co., 29 N. J. L. 82.

36. King *v.* Paterson, etc., R. Co., 29 N. J. L. 82.

37. Ford *v.* Easthampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036, 35 Am. St. Rep. 462, 20 L. R. A. 65.

38. Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165, per Simpson, J.

39. McKusick *v.* Seymour, 48 Minn. 172, 50 N. W. 1116.

40. Slayden *v.* H. J. Seip Coal Co., 25 Mo. App. 439.

41. Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Main *v.* Mills, 16 Fed. Cas. No. 8,974, 6 Biss. 98.

42. Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Main *v.* Mills, 16 Fed. Cas. No. 8,974, 6 Biss. 98.

It is immaterial whether the creditors who complain of such a dividend are prior or subsequent creditors, although the rights of a prior creditor undoubtedly rest on a stronger footing than do those of a subsequent creditor, on the ground that such a dividend has the effect of a fraudulent conveyance or diversion of the property of the corporation out of which he has the right to have his debts satisfied.[43] The assets of the corporation thus improperly diverted into the hands of the shareholders remain a trust fund out of which they are entitled to have their debts satisfied, and the directors who thus receive it are technically guilty of a conversion of it.[44] But laying aside this honest doctrine, it has been held that no trust in moneys paid as dividends out of the capital of a corporation, when there are no net profits to divide, attaches to them in the hands of shareholders who receive the dividends in good faith.[45] So in England a dividend voted at a general meeting of a corporation in accordance with its articles of association will not be withheld upon the voluntary winding-up of the company, on the ground that the assets were overestimated and that such distribution could not be made without payment out of the capital, where it was not impossible for reasonable men at the time of the general meeting to take the view then taken as to the value of the estate.[46]

(II) *When Right to Recall Unlawful Dividend Lost by Laches and Efflux of Time.* It has been held that neither a corporation nor the holders of stock or scrip therein can compel an accounting for dividends received on preferred stock, on the ground that the issue of such stock was *ultra vires*, after they have received full value for the stock, authorized its issue, paid dividends on it, and in many ways treated it as valid for twenty-two years.[47]

d. Rights in Distribution of Dividends — (I) *No Discrimination Among Shareholders of Same Class* — (A) *Rule Stated.* The directors of a corporation have no power, in the distribution of dividends, to discriminate among shareholders of the same class.[48]

(B) *But Shareholders Discriminated Against Cannot Recoup Against Others.* But the shareholder whose right to participate in a dividend has been wrongfully denied cannot maintain an action against another shareholder who has participated therein. He cannot in this way follow the assets of the corporation into the hands of other shareholders who have received it in the form of dividends, until he has established his right as a creditor of the company and exercised his legal remedies against it.[49]

(II) *Dividends in Liquidation.* These rest on a different footing from dividends of profits made to shareholders while the company is a going concern.

43. Beyer *v.* Continental Trust Co., 63 Mo. App. 521.

44. McKusick *v.* Seymour, 48 Minn. 172, 50 N. W. 1116.

45. McDonald *v.* Williams, 174 U. S. 397, 19 S. Ct. 743, 43 L. ed. 1022.

46. *In re* Peruvian Guano Co., [1894] 3 Ch. 690, 63 L. J. Ch. 818, 71 L. T. Rep. N. S. 611, 1 Manson 423, 8 Reports 544, 43 Wkly. Rep. 170.

In a bill for such a reclamation, not necessary to aver that any of the present debts existed when the dividend was declared, or that the assets are not enough to pay the debts proved. Williams *v.* Boice, 38 N. J. Eq. 364.

In England a liquidator cannot recover dividends improperly paid out of capital, although it is not shown that the company is insolvent as regards its creditors. *In re* Wales Nat. Bank, [1899] 2 Ch. 629, 68 L. J. Ch. 634, 81 L. T. Rep. N. S. 363, 48 Wkly. Rep. 99.

That no dividend can properly be declared by a mutual life-insurance company until after a valuation of its assets and liabilities showing an excess of assets over liabilities see Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4.

Construction of Iowa statute authorizing a reclamation of dividends immaturely declared. Miller *v.* Bradish, 69 Iowa 278, 28 N. W. 594.

47. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

48. Hill *v.* Atoka Coal, etc., Co., 124 Mo. 153, 25 S. W. 926, 32 S. W. 111, 21 S. W. 508; Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196.

49. Peckham *v.* Van Wagenen, 83 N. Y. 40, 38 Am. Rep. 392 [*affirming* 45 N. Y. Super. Ct. 328]. *Compare In re* Le Blanc, 75 N. Y. 598; Butterworth *v.* Gould, 41 N. Y. 450; Patrick *v.* Metcalf, 37 N. Y. 332; Le Roy *v.* Globe Ins. Co., 2 Edw. (N. Y.) 657.

They are not of course discretionary with the directors, who are usually displaced by an assignee, receiver, or other representative of the creditors; and they are declared in accordance with the principles of administration in equity, or under rules specially enacted by statute, which in general are the same as those in equity. These are: (1) That valid lien creditors are first to be paid according to their respective priorities. (2) That general creditors are next to be paid *pro rata*. (3) That what is left,[50] if anything, shall be divided among the shareholders in such a manner as to produce as far as possible equality among them.[51] This of course means a *pro rata* division among all shareholders standing on an equal footing. Thus, if some of the shareholders have paid for their shares in full while others have paid in part only, those who have paid in full are entitled to a return of the excess paid by them above that paid by the others, before any division of the balance takes place. This balance is then to be divided ratably among the shareholders; and this has been held to be the proper mode of distribution, although the corporation has been in operation for many years, making dividends of profits in proportion to the amounts paid in by the respective shareholders.[52]

2. Validity and Propriety of Dividends — a. Dividends Can Be Made Only Out of Profits, Except Dividends in Liquidation — (i) *In General.* With the exception of dividends in liquidation, dividends can be declared and paid only where there are profits to divide; and it is elsewhere seen that if the directors violate this principle they become personally liable, under statutes and constitutional provisions.[53] The reason is that the capital stock of a corporation being a trust fund for its creditors the law does not tolerate the conclusion that this trust fund can be divided among the shareholders, leaving the creditors in the lurch. Moreover each shareholder is entitled to have this fund preserved unimpaired for the purpose of carrying on the business which the corporation was organized to perform.[54]

50. Shareholders are not entitled to any division of the profits and moneys of a corporation until its debts are paid. Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365.

51. See *infra*, 2 Thompson Corp. § 2145.

52. Krebs *v.* Carlisle Bank, 14 Fed. Cas. No. 7,932, 2 Wall. Jr. 33.

Time to object to order directing receiver to pay dividend.—It has been held that where an order directing a receiver to pay a certain dividend is neither objected to nor appealed from until after the entry of the final decree in the cause, and after the dividend has been thereupon paid and its payment confirmed by the court, the validity of the order cannot be questioned on appeal from the final decree. Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328.

Ratification by the shareholders, by mere silence and acquiescence, of an assignment for creditors, providing that any surplus should be divided among the shareholders. State *v.* Mitchell, 104 Tenn. 336, 58 S. W. 365.

The rights of a creditor in a dividend declared by an insolvent banking corporation, which has been placed in liquidation by proceedings taken by the bank commissioners, is to be computed upon the original claim, proved by the creditor, without deducting any amount which he may have collected from the shareholders, but subject to the qualification that he cannot receive from both sources more than the aggregate amount of his claim. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147, 56 Pac. 787, 71 Am. St. Rep. 36, 45 L. R. A. 863.

An objecting shareholder of a constituent corporation to whom the consolidated corporation had agreed to pay in specified instalments the amount of an award of the value of her stock, bonds to the amount of the award being deposited with a trustee as security for performance of an agreement, is entitled, if the consolidated corporation becomes insolvent, to share as a general creditor for the balance due, and is also entitled to all dividends, if any, up to the amount of her claim upon the bonds so deposited. Matter of Snyder, 29 Misc. (N. Y.) 1, 59 N. Y. Suppl. 993.

The liquidator of an insolvent corporation which was a shareholder and also a creditor of another insolvent corporation is not entitled to share in the dividend declared by the liquidator of the latter corporation, until it has paid the call made upon its stock before either corporation went into liquidation, where the court has held that the claim cannot be offset against its liability on the call. *In re* Auriferous Properties, [1898] 2 Ch. 428, 67 L. J. Ch. 574, 79 L. T. Rep. N. S. 71, 5 Manson 260, 47 Wkly. Rep. 75.

Equalizing shareholders in respect of dividends in liquidation where some were permitted to pay their indebtedness to the corporation in its shares, and dividends were made among the others. Conococheague Bank *v.* Ragan, 7 Gill & J. (Md.) 341.

53. See *infra*, IX, P, 9, a *et seq.*

54. Slayden *v.* H. J. Seip Coal Co., 25 Mo. App. 439. In this line of thought it has been held that a savings-bank, organized under a statute which authorizes it to pay dividends

(II) *Payable in What Commodity.* It has been held that a banking company cannot declare a dividend payable in depreciated bank-notes; but the soundness of the decision is not apparent, provided all its shareholders are treated alike.[55]

(III) *Dividends May Be Declared at Meetings Held Outside State.* The declaration and payment of dividends by the directors of a corporation is generally looked upon as a mere matter of business detail and management, and not as being a statutory act in the sense that it cannot be done outside the state. No valid reason exists for holding that it must be done within the state. But if it is done at a corporate meeting held outside the state it becomes valid if ratified at a subsequent meeting held within the state. If the shares of a member have been forfeited for the non-payment of an assessment laid at such meeting held outside the state he cannot collect the dividends so declared. He must take as a whole what took place at the meeting, validated as it was by subsequent ratification; he cannot refuse to pay his assessment, and at the same time retain his shares and get his dividend.[56]

(IV) *Payment of Interest on Shares.* Payment of interest to shareholders on their shares is *ultra vires* unless specially authorized by charter or statute;[57] and it has been held that payment to shareholders, out of the capital of a corporation having no profits, of interest on the amounts paid in on their shares, is *ultra vires*, notwithstanding a provision of the charter that interest shall be paid until otherwise determined by the directors, but that no dividend or bonus shall be payable except out of the profits.[58] But in England a company limited by shares may, if authorized by its articles of association, pay interest out of capital to shareholders who have paid up their shares in advance of calls.[59]

from "surplus profits" may not declare and pay dividends based on accrued interest not actually collected, however certain it is that such interest will be paid. People *v.* San Francisco Sav. Union, 72 Cal. 199, 13 Pac. 498.

Rule for ascertaining what are profits to be divided.— See the rule laid down by Lord Romilly, in Corry *v.* Londonderry, etc., R. Co., 29 Beav. 263, 7 Jur. N. S. 508, 30 L. J. Ch. 290, 4 L. T. Rep. N. S. 131, 9 Wkly. Rep. 301. For a definition of net earnings in the sense of surplus profits see Union Pac. R. Co. *v.* U. S., 99 U. S. 402, 25 L. ed. 274, also note in 99 Am. Dec. 762. This subject has been sometimes defined by statute. Ohio Laws (1888), p. 182. An interesting discussion of the question what may be divided by directors as profits, without incurring a personal liability under such a statute, may be found in Excelsior Water, etc., Co. *v.* Pierce, 90 Cal. 131, 27 Pac. 44. For an illustrative English case involving the question what are profits to divide and what not see *In re* Bridgewater Nav. Co., [1891] 2 Ch. 317 [*modifying* [1891] 1 Ch. 155]. See also Bouch *v.* Sproule, 12 App. Cas. 385, 56 L. J. Ch. 1037, 57 L. T. Rep. N. S. 345, 36 Wkly. Rep. 193. Dividing a sum derived from a sale of part of the undertaking. Lubbock *v.* Bank of South Africa, 2 Ch. 198, 61 L. J. Ch. 498, 67 L. T. Rep. N. S. 74, 41 Wkly. Rep. 103. Dividend by a consolidated corporation out of earnings of one of the precedent corporations. Chase *v.* Vanderbilt, 37 N. Y. Super. Ct. 334. Purchase of the shares of a member to be paid for out of corporate earnings. Schilling, etc., Brewing Co. *v.* Schneider, 110 Mo. 83, 19 S. W. 67. Construction of a statute of California prohibiting payment to shareholders of any part of the capital stock before dissolution or expiration of term of corporate existence. Kohl *v.* Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520.

55. Ehle *v.* Chittenango Bank, 24 N. Y. 548.

56. Freeman *v.* Machias Water Power, etc., Co., 38 Me. 343.

57. See *infra*, VII, C, 1, a *et seq.*

58. *In re* Sharpe, [1892] 1 Ch. 154.

59. Lock *v.* Queensland Invest., etc., Co., [1896] A. C. 461, 65 L. J. Ch. 798, 75 L. T. Rep. N. S. 3, 45 Wkly. Rep. 65. In that country the provisions of the articles of association of a limited company that the directors might receive payment from any shareholder of any part of the amount remaining unpaid on his shares, upon such terms as they might determine, and, if they should see fit, pay out of the capital interest on sums paid on shares in advance of calls, were held to be valid; and it was held that in the absence of profits such interest might lawfully be paid out of capital. Lock *v.* Queensland Invest., etc., Co., [1896] 1 Ch. 397, 65 L. J. Ch. 301, 73 L. T. Rep. N. S. 708. In this country, under the provisions of a railway charter that interest might be paid on share subscriptions from the time of paying the subscription to the making of the first dividend, the running of interest cannot be stopped by declaring a stock dividend, even though the company may have had sufficient resources to justify the

(v) *When Dividends Can Be Properly Declared and Paid* — (a) *In General.* In England an ordinary trading company may lawfully pay a dividend to the shareholders out of current profits, without setting aside a sum sufficient to cover depreciation in the value of the fixed capital.[60] In the same country it has been held that a corporation formed to invest its capital in stocks and securities, the receipts from the income of which are made applicable to paying a dividend, may declare a dividend, notwithstanding some of the investments have declined in price and others have proved worthless so as to impair the capital; since a corporation may sink its capital in the purchase of property producing income and divide that income without making provision for keeping up the value of the capital, and the capital may be lost, but the excess of current receipts over current expenses may still be applied in payment of a dividend.[61] In the same country a sum derived from the sale of part of the undertaking of a banking company, remaining after deducting from the proceeds of sale and paid-up capital and incidental expenses, is profit on capital, which, after appropriating the proper amount to the reserve fund, may be distributed as dividends.[62] In the same country profits shown by the profit-and-loss account of a corporation may be applied in payment of a dividend on preferred shares fully paid up in cash, of which a large portion is paid to the vendor of the business of the company in addition to all the ordinary shares, although, according to a valuation, the assets of the company, including good-will, fall far short of the nominal capital, where the loss which has accrued does not arise from the company's having received a price less than it originally gave for a portion of its assets.[63] In the same country a mining company which has paid interest on debentures, during a time when the mine was closed by its falling in, out of the capital, is not bound to apply profits in replacing the amount so paid before declaring a dividend to shareholders.[64] This procession of decisions upholding the payment of dividends out of capital may be concluded by a holding to the effect that a land company which for the purpose of equalizing a bad debt has brought into its profit-and-loss account in a previous year the appreciation of its land is not bound in a subsequent year to bring into such account a depreciation in the lands, so as to prevent the declaration and payment of a dividend from the profit of that year.[65] Seemingly in line with the foregoing, it has been held that a mutual insurance company may, in the absence of any statute, rule, or resolution of the company forbidding the same, declare and pay dividends to its members where in the judgment of the members it is safe and prudent to do so, although the effect will be to reduce the assets of the company provided for indemnity against losses.[66]

(b) *Dividends Permissible Without Establishing Sinking Fund or Providing For Waste and Depreciation of Property.* It may be collected from an important decision by the English court of appeal that where the tangible property of the corporation from its very nature is subject to a continuing waste and depreciation — as in the case of a mining property — it will not be *ultra vires* or a breach of trust on the part of the directors to declare and pay dividends out of profits, without providing for a sinking fund to meet such depreciation, or with-

declaration and payment of the cash dividend. Hardin County *v.* Louisville, etc., R. Co., 92 Ky. 412, 17 S. W. 860, 14 Ky. L. Rep. 401.

60. *In re* Kingston Cotton Mill Co. No. 2, [1896] 1 Ch. 331, 65 L. J. Ch. 290, 73 L. T. Rep. N. S. 745, 44 Wkly. Rep. 363 [*reversed* on other grounds in [1896] 2 Ch. 279].

61. Verner *v.* General, etc., Invest. Trust Co., [1894] 2 Ch. 239, 63 L. J. Ch. 456, 70 L. T. Rep. N. S. 516, 1 Manson 136, 7 Reports 170.

62. Lubbock *v.* British Bank of South America, [1892] 2 Ch. 198, 61 L. J. Ch. 498, 67 L. T. Rep. N. S. 74, 41 Wkly. Rep. 103.

63. Wilmer *v.* McNamara, [1895] 2 Ch. 245, 64 L. J. Ch. 516, 72 L. T. Rep. N. S. 552, 13 Reports 513, 43 Wkly. Rep. 519.

64. Bosanquet *v.* St. John D'El Rey Min. Co., 77 L. T. Rep. N. S. 206.

65. Bolton *v.* Natal Land, etc., Co., [1892] 2 Ch. 124, 61 L. J. Ch. 281, 65 L. T. Rep. N. S. 786.

66. McKean *v.* Biddle, 181 Pa. St. 361, 37 Atl. 528.

out applying the profits to the capital, so as to keep the value of the assets equal to the nominal amount of the capital.[67]

(VI) *When Dividends Cannot Be Properly Declared and Paid.* Dividends upon common stock cannot be properly declared and paid to the exclusion of annually accruing interest on the bonded debt of the corporation, but the interest charged must be paid first.[68] A so-called "land company" formed for the purpose of selling lands to the best advantage as the owners' agent, one fourth conveyed to it absolutely being paid for with its stock, the remainder conveyed in consideration of its scrip to be sold by it in trust for the benefit of its scrip-holders until they are paid the face value of their scrip, when the remainder is to belong to the corporation absolutely, is guilty of a breach of trust in making a dividend among its shareholders of scrip paid to it for, or bought with, the proceeds of land sold.[69]

(VII) *When Declaration of Dividends Not Obligatory*—(A) *In General.* From what has preceded, it must be concluded that in general the declaration of a dividend, even where there are profits which may be divided, is not obligatory; since the directors or a majority of the shareholders may, in the exercise of a sound discretion, refrain from dividing their surplus in order to use it for betterments, and instead of making a cash dividend may issue to their shareholders a stock dividend without violating the law.[70]

(B) *Property Not Divided Compulsorily Because Corporation Has No Power to Hold It.* A conveyance of property to a corporation which it is incompetent, under its charter or governing statute, to take and hold, is not void but voidable only, by the state, at its election in a proceeding in the nature of office found. A court of equity will not therefore at the suit of a shareholder take such property from the assets of the corporation and divide it among the shareholders.[71]

(VIII) *Liability of Directors For Improperly Declaring Dividends.* This subject is dealt with elsewhere, under the subtitle of directors. If the capital stock of a corporation is a trust fund for its creditors, then unquestionably the directors are quasi-trustees for the creditors, and ought to be held liable to them or to a representative of the corporation acting in their behalf for dividends improperly declared and paid to the shareholders. It has been so held, even in England, where the so-called "trust-fund doctrine" does not obtain.[72] This is obviously not a breach of trust toward the shareholders who receive the unlawful dividends, since they could not directly or indirectly be allowed to recover them again.[73]

(IX) *Ratification by Shareholders of Unlawful Declaration of Dividend.* Although the declaration of a dividend, whatever form it may take,

67. Lee *v.* Neuchatel Asphalte Co., 41 Ch. D. 1, 58 L. J. Ch. 408, 61 L. T. Rep. N. S. 11, 1 Meg. 140, 37 Wkly. Rep. 321.

68. Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 14 S. Ct. 968, 38 L. ed. 793.

69. Rogers *v.* New York, etc., Land Co., 134 N. Y. 197, 32 N. E. 27, 48 N. Y. St. 263.

Circumstances under which a final dividend cannot be sanctioned, where the articles of incorporation provide for the submission of accounts up to a date within three months, and reports thereon, except at the annual general meeting, etc. Nicholson *v.* Rhodesia Trading Co., [1897] 1 Ch. 434, 66 L. J. Ch. 251, 76 L. T. Rep. N. S. 147.

70. Howell *v.* Chicago, etc., R. Co., 51 Barb. (N. Y.) 378. Where the charter of a merchants' exchange company authorized the corporation to divide the profits of the exchange among its shareholders at such times as might be deemed expedient, it was held that this did not compel a division of the profits, or prevent their accumulation; and that such accumulation might legally be invested in the exchange itself so as to be capable of distribution as a dividend. Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

71. Burden *v.* Burden, 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499.

72. *In re* National Funds Assur. Co., 10 Ch. D. 118, 48 L. J. Ch. 163, 39 L. T. Rep. N. S. 420, 27 Wkly. Rep. 302; Evans *v.* Coventry, 8 De G. M. & G. 835, 2 Jur. N. S. 557, 25 L. J. Ch. 489, 4 Wkly. Rep. 466, 57 Eng. Ch. 645. *Compare* Hallett *v.* Dowdall, 18 Q. B. 2, 16 Jur. 462, 21 L. J. Q. B. 98, 83 E. C. L. 2; *In re* Mercantile Trading Co., L. R. 4 Ch. 475, 20 L. T. Rep. N. S. 502, 17 Wkly. Rep. 654. See also the decree in 8 De G. M. & G. 846.

73. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

may be *ultra vires* or unlawful as against the shareholders, yet it may be cured so far as they are concerned by ratification.[74]

3. STOCK AND SCRIP DIVIDENDS — a. Stock Dividends Generally Lawful. In the absence of a statute restraining such action, it is within the discretion of the directors of a corporation, or at least within the power of the corporation itself, to issue additional shares of stock to represent its surplus profits, and to divide such shares *pro rata* among its shareholders, provided that by so doing it does not increase its aggregate capital stock beyond the limit allowed by its charter or governing statute.[75]

b. What Are Not Stock or Scrip Dividends. It has been held that a cash dividend, declared out of profits by a corporation, indebted nearly to the amount of such profits for permanent improvements, which is exactly sufficient to pay for the proportion of new stock at par, issued at the same time and allotted to each shareholder, for subscription, and which the shareholders may elect to invest in the new stock, or may retain, selling the right to subscribe for the new stock which is worth more than par, is not a stock dividend; but is to be treated, as between a life-tenant and a remainder-man, as income.[76]

c. Rescission of Resolution Declaring Stock Dividend. A shareholder does not acquire a vested right in a proportionate share of stock, which by a resolution of the board of directors has been directed to be distributed as dividends, so as to prevent a rescission of the resolution, where no step has been taken to separate the stock from the general property of the company by the execution of a power of attorney to transfer or otherwise.[77]

d. Rights in Distribution of Stock Dividends. A resolution of a corporation increasing its capital stock "to secure the services of new parties in the working

74. When therefore the legality of the adoption of a resolution at an annual meeting of the shareholders to pay interest on their stock was called in question, it was held that the act, if illegal, could be cured by a subsequent ratification, and that such a ratification might be inferred from the act of the corporation in paying the interest of the shareholders in pursuance of the resolution, and from the subsequent passing of a vote to issue certificates for the payment of such interest, and the action of the treasurer in issuing the same. Richardson *v.* Vermont, etc., R. Co., 44 Vt. 613. But it has been held that the acceptance by a shareholder of a dividend declared upon his stock is not a ratification of the illegal conduct of the directors in holding a meeting outside the limits of the state, in direct violation of a statute, at which they vote to appropriate to themselves certain stock. Hilles *v.* Parrish, 14 N. J. Eq. 380.

75. Williams *v.* Western Union Tel. Co., 93 N. Y. 162 [*reversing* 48 N. Y. Super. Ct. 349, 9 Abb. N. Cas. (N. Y.) 419 (*reversing* 9 Abb. N. Cas. (N. Y.) 437, 61 How. Pr. (N. Y.) 216)]. See also the following cases:

Massachusetts.— Rand *v.* Hubbell, 115 Mass. 461, 15 Am. Rep. 121; Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705.

New York.— Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196; Howell *v.* Chicago, etc., R. Co., 51 Barb. 378.

Pennsylvania.— Com. *v.* Pittsburg, etc., Co., 74 Pa. St. 83; Brown *v.* Lehigh Coal, etc., Co., 49 Pa. St. 270.

United States.— Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737.

England.— Mills *v.* Buenos Ayres Co. Northern R. Co., L. R. 5 Ch. 621, 23 L. T. Rep. N. S. 719, 19 Wkly. Rep. 171; *In re* Barton, L. R. 5 Eq. 238.

That a railroad company might divide among its shareholders the shares of its capital stock owned by the state, and assign to it in exchange of its bonds, notwithstanding a general statute forbidding the railroad company to declare a stock dividend without authority of the legislature, see Com. *v.* Boston, etc., R. Co., 142 Mass. 146, 7 N. E. 716.

76. Davis *v.* Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801.

Construction of a statute authorizing a bank to retain a certain share of the "dividends" upon stock owned by the state toward certain unpaid stock of the state, with the conclusion that a portion of the capital stock divided among the shareholders was not dividends within the meaning of the statute. Atty.-Gen. *v.* State Bank, 21 N. C. 545.

That a dividend based upon new stock created and sold as a premium is not a "dividend" within the meaning of a statute relating to the taxation of dividends see State *v.* Franklin Bank, 10 Ohio 91.

When a railroad company may issue bonds in lieu of cash dividends, declaring and paying dividends for four years at one time in this manner. Wood *v.* Lary, 47 Hun (N. Y.) 550.

77. Dock *v.* Schlichter Jute Cordage Co., 167 Pa. St. 370, 31 Atl. 656.

department," and giving a portion of the increase to three shareholders and the balance to the "old firm" out of which the old corporation was organized, to be disposed of as thought proper by the present directors, who compose the members of such firm, gives the beneficial ownership of such stock to the firm, instead of making them trustees for the corporation.[78]

e. Shares Issued in Distribution of Stock Dividend Deemed to Be "Paid-Up Capital Stock." For the purpose of determining the validity of a debt contracted by a corporation in the face of a provision of its charter limiting its indebtedness to one-half the amount of its "paid-up capital stock," it has been held that where, at a time when the corporation is earning large profits, it divides them among its shareholders in the form of stock dividends, the increase of its capital in this manner being authorized by the shareholders, the whole of its capital stock, comprising both the amount of the original subscription and the amount added thereto by such stock dividends, is to be regarded as "paid-up capital stock."[79]

4. Right to Dividends as Between Successive Owners of Shares — a. Dividend Belongs to Owner of Shares at Time Dividend Is Declared. The general rule, stated in the briefest way, is that a dividend belongs to the one who is the owner of the stock at the time when the dividend is actually declared, irrespective of the time when it is earned, although it may be made payable at a future date.[80]

b. Right to Undivided Profits Passes With Transfer of Shares. The profits and surplus funds of the corporation, whensoever they may accrue, are, until separated from the capital by the declaration of a dividend, a part of the stock itself, and will pass with the stock under that name in a transfer or bequest.[81] The purchaser of a share of stock in a corporation takes the share with all its incidents, one of which is the right to receive all future dividends declared on such share.[82] Nor does it make any difference at what times or from what sources the profits thus divided may have accrued; they are an incident to the share, to which the purchaser becomes at once entitled, provided he remain a member of the corporation until a dividend is made.[83] In still other words a shareholder in

78. Knapp *v.* Knapp, 127 Mo. 53, 29 S. W. 885.

79. Cunningham *v.* German Ins. Bank, 101 Fed. 977, 41 C. C. A. 609.

80. *Connecticut.*— Phelps *v.* Farmers', etc., Bank, 26 Conn. 269.

Indiana.— Bright *v.* Lord, 51 Ind. 272, 19 Am. Rep. 732.

Maine.— Goodwin *v.* Hardy, 57 Me. 143, 99 Am. Dec. 758.

Massachusetts.— *In re* Foote, 22 Pick. 299.

New Hampshire.— March *v.* Eastern R. Co., 43 N. H. 515.

New York.— Hyatt *v.* Allen, 56 N. Y. 553, 15 Am. Rep. 449; Brundage *v.* Brundage, 65 Barb. 397; Jones *v.* Terre Haute, etc., R. Co., 29 Barb. 353, 17 How. Pr. 529; Hill *v.* Newichawanick Co., 48 How. Pr. 427; Clapp *v.* Astor, 2 Edw. 379. *Compare* Currie *v.* White, 6 Abb. Pr. N. S. 352, 37 How. Pr. 330.

Contra, Burroughs *v.* North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611.

See 12 Cent. Dig. tit. "Corporations," § 569.

Right to dividends under particular conditions of fact.— State of facts under which neglect to pay instalments forfeited right to dividend. Baltimore Mar. Bank *v.* Biays, 4 Harr. & J. (Md.) 338. State of facts under which a dividend received by A, vendor of shares, belonged to B, vendee, who could recover it from A in an action for money had and received. Harris *v.* Stevens, 7 N. H. 454. State of facts under which a purchaser of shares declined to execute his contract of purchase, because the vendor claimed a dividend, whereby the purchaser lost his hold both on the shares and the dividend. Phinizy *v.* Murray, 83 Ga. 747, 10 S. E. 358, 20 Am. St. Rep. 342, 6 L. R. A. 426. Circumstances under which the secretary of a company, who received in addition to a fixed salary dividends on certain stock as additional compensation was not estopped, on quitting the service of the company, from claiming the dividends accruing up to the time when he left such service. Crane Bros. Mfg. Co. *v.* Adams, 142 Ill. 125, 30 N. E. 1030. That a contract to pay for services in shares is fulfilled by issuing the agreed amount of shares exclusive of dividends see Southwestern R. Co. *v.* Papot, 67 Ga. 675.

81. Phelps *v.* Farmers', etc., Bank, 26 Conn. 269; Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365; Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483; Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196; Marble *v.* Van Wert Nat. Bank, 3 Ohio Cir. Ct. 464. *Compare* Burroughs *v.* North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611.

82. March *v.* Eastern R. Co., 43 N. H. 515.

83. March *v.* Eastern R. Co., 43 N. H. 515.

a corporation has an interest in proportion to the amount of his stock, in all the corporate property, and has a right to share in any surplus of profits arising from its use and employment in the business of the company; and this right does not depend upon the time when he became a shareholder, but attaches whenever he acquires the stock, and entitles him to all subsequent dividends.[84]

c. Dividend Declared Does Not Pass With Future Transfer of Shares — (I) *In General.* A dividend when declared becomes the separate property of the shareholder, and wholly disconnected from his shares. It therefore does not pass with a subsequent transfer of the shares, unless the contract of transfer expressly so provides.[85] And this is so without reference to the date at which the dividend is made payable, for it is the declaration of the dividend that creates the segregation and establishes the debt from the corporation to the shareholder.[86]

(II) *Dividends Declared Previously to Transfer but Payable Thereafter.* It also results from the foregoing that, in the absence of any provision to the contrary in the contract for the sale or transfer of the shares, a dividend declared previously to such sale or transfer belongs to the seller of the shares, although for the convenience of the company it may be made payable thereafter.[87]

(III) *Custom of Brokers Not Admissible to Alter These Principles.* A custom of brokers by which dividends declared but not paid belong to the purchaser of shares is not admissible to alter the legal rights to such a transaction, as fixed by the foregoing rules.[88]

(IV) *Rules of Stock Exchange Are So Admissible With Respect to Their Members.* But where the parties to the transaction are members of a stock exchange, which has adopted rules on the subject different from the rule of the law, these rules may be regarded as entering into any contract made between the members of the body, and as superseding as to them the rule of the law.[89]

(V) *Application of These Principles to "Option" Sales of Shares.* When therefore an "option" of stock is sold, that is to say, when the owner of stock makes a contract with another by which he gives him the option of purchasing from him the stock at or before a certain date, and that other elects to accept the shares on the last day of the option, he will not get a dividend which has been declared between the date of the contract and the expiration of the option, unless it passes to him by the express terms of the agreement.[90] But

84. Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196. See also Jones *v.* Morrison, 31 Minn. 140, 16 N. W. 854; Williams *v.* Western Union Tel. Co., 93 N. Y. 162; Hyatt *v.* Allen, 56 N. Y. 553, 15 Am. Rep. 449; Clapp *v.* Astor, 2 Edw. (N. Y.) 379; *In re* Barton, L. R. 5 Eq. 238. See for illustration a case where a person became a shareholder on December 16, and thereby acquired the right to a dividend declared on December 17 (Jones *v.* Terre Haute, etc., R. Co., 29 Barb. (N. Y.) 353, 17 How. Pr. (N. Y.) 529); also a case where shares were sold at auction on August 1, and a deposit was paid by the purchaser, and by the conditions of the sale the purchase was to be completed on August 29, which was done and a transfer signed; in the meanwhile on August 24 a dividend was declared, which was held to belong to the purchaser (Black *v.* Homersham, 4 Ex. D. 24, 48 L. J. Exch. 79, 39 L. T. Rep. N. S. 671, 27 Wkly. Rep. 171).

85. Hopper *v.* Sage, 112 N. Y. 530, 20 N. E. 350, 21 N. Y. St. 491, 8 Am. St. Rep. 771.

86. Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347. But in seeming disregard of this principle, it has been held that where, at the time of the sale of shares, a dividend has been declared by the directors, payable on a day subsequent to the sale, the sale, in the absence of a stipulation on the point, carries to the vendee the right to the dividends. Burroughs *v.* North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611. See also Curry *v.* Woodward, 44 Ala. 305.

87. Hopper *v.* Sage, 112 N. Y. 530, 20 N. E. 350, 21 N. Y. St. 491, 8 Am. St. Rep. 771; Jones *v.* Terre Haute, etc., R. Co., 29 Barb. (N. Y.) 353, 17 How. Pr. (N. Y.) 529; De Gendre *v.* Kent, L. R. 4 Eq. 283. Where a contract is made for the sale of stock on which a dividend has been declared, payable upon a day subsequent to the agreed time of delivery of the stock, such dividend does not pass to the buyer. Spear *v.* Hart, 3 Rob. (N. Y.) 420.

88. Spear *v.* Hart, 3 Rob. (N. Y.) 420, per Monell, J.

89. Hopper *v.* Sage, 112 N. Y. 530, 20 N. E. 350, 21 N. Y. St. 491, 8 Am. St. Rep. 771.

90. Bright *v.* Lord, 51 Ind. 272, 19 Am. Rep. 732.

where A agreed with B to accept from bearer, at any time within thirty days, certain shares of stock at a certain price, A to be "entitled to all dividends or extra dividends declared during the time," it was held that A was not entitled to a dividend which had been previously declared, but which was payable during the thirty days.[91]

(VI) *Same Rule With Respect to Interest-Bearing Shares.* The same rule applies with respect to interest-bearing shares. Where interest has accrued upon such shares, and has been carried to the account of the shareholder, it does not pass by a sale or transfer of the shares, unless the contract of sale or transfer so provides.[92]

(VII) *To Whom Belongs in Case of Unrecorded Transfer of Shares.* In the case where a transfer of the shares has actually been made but has not been recorded a dividend thereafter declared no doubt belongs to the transferee of the shares as between him and the transferrer.[93] But if the corporation, without notice of the transfer, pass the dividend in good faith to the transferrer, it seems that it will be protected.[94]

(VIII) *Contract With Shareholder Respecting Dividends Extends Only to Dividends Which Have Been Declared.* From the foregoing principles it follows that a contract made by a shareholder in reference to dividends and profits upon his stock includes only dividends or profits ascertained and declared by the company and allotted to the shareholders, and not profits to be ascertained by third persons or courts of justice, upon an investigation of the accounts and transactions of the company.[95]

(IX) *Authority of Agent to Sell Shares Does Not Authorize Him to Sell Dividends.* It also follows from the foregoing principles that an authorization given to an agent to sell shares does not include an authority, either real or apparent, to dispose of a dividend previously declared.[96]

d. Right to Stock Dividends as Between Successive Shareholders. As between successive proprietors of the shares, the right to stock dividends stands on precisely the same footing as the right to a cash dividend;[97] it belongs to those who are the holders of the stock at the time of the declaration of the dividend, without regard to the source from which, or the time during which, the funds divided were acquired by the corporation.[98]

e. What Scrip-Holders Are Entitled to Dividends Where There Has Been Succession to Ownership. It seems that the holders of scrip certificates convertible into stock stand on the same footing as the purchaser or assignee of the stock in respect of the right to dividends; they are only entitled to such dividends as accrue on the shares which they acquire by the conversion of their scrip, and which are declared subsequently to such conversion.[99]

f. Right to Dividends in Cases Where Shares Have Been Pledged After Extinguishment of Debt — (I) *In General.* It seems that the right to dividends is in the pledgee during the period of the pledge and until the payment of the debt for which the pledge was made, unless the contract of pledge otherwise provides. After the debt is satisfied the pledgee loses all interest in the dividends, and cannot thereafter object that they have been paid to another instead of to the pledger.[1]

91. Hopper *v.* Sage, 112 N. Y. 530, 534, 20 N. E. 350, 21 N. Y. St. 491, 8 Am. St. Rep. 771.

92. Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489.

93. Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

94. McSherry, J., in Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412; Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 780, 14 Am. Dec. 526 (per Savage, C. J.).

95. Hyatt *v.* Allen, 56 N. Y. 553, 15 Am. Rep. 449.

96. Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347.

97. See *supra*, VII, B, 4, a *et seq.*

98. Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483.

For illustrations see Coleman *v.* Columbia Oil Co., 51 Pa. St. 74.

99. See for illustration Brown *v.* Leigh Coal, etc., Co., 49 Pa. St. 270.

1. Cross *v.* Eureka Lake, etc., Canal Co.,

(II) *How in Case of Renewal of Note Secured by Such Pledge.* The renewal of a note secured by a pledge of corporate stock, upon which a new contract of pledge is given and the old contract and note returned, is, where the book entries of the pledge indicate that such was the intention, an extinguishment of the original contract of pledge, so far as to deprive the pledgee of dividends accruing before the renewal.[2]

(III) *Liability of Corporation to Pledgee For Paying Dividends to Pledger.* The pledgee being entitled to the dividends during the period of the pledge, the corporation becomes liable to him, where it appears from the books of the corporation that he is the owner of the shares, in case the corporation pays dividends to the pledger; and it has been held that the corporation is not relieved from such liability by the fact that the pledgee received part payment of the debt, surrendered to the pledger a note evidencing the same and accepted another for the balance, so long as he retained the stock as collateral and had no knowledge that the dividends had been so paid.[3] And although the transfer to the pledgee may not have been made on the books of the corporation, yet it has been held that if the corporation has knowledge of the transfer and subsequently declares a dividend, such dividend belongs to the pledgee and cannot be retained by the corporation as a set-off against an indebtedness due to the corporation by the pledger prior to the transfer in pledge.[4] Nor can the corporation in such a case exonerate itself from the liability to pay dividends to the pledgee, by setting up a by-law providing that transfers of stock must be made on the books of the corporation.[5]

5. Right to Dividends as Between Life-Tenant and Remainder-Man — a. In General. This subject relates to the law of wills and the succession of estates, and demands no more than a brief treatment in an article on the law of corporations.[6]

b. Stock Dividends Declared Out of Profits of Business Go to Life-Tenant — (I) *In General.* The leading principle is that dividends which are declared out of the profits of the business of the corporation or out of its mere income go to the life-tenant and not to the remainder-man, as accretions of the property of the corporation, although paid in new shares instead of cash.[7] In other words a cash dividend is not changed to a stock dividend and to be considered an accretion of capital, because the person receiving the dividend takes stock in the place of cash.[8]

(II) *View That Extra Dividends, Bonuses, Etc., Declared From Profits Go to Life-Tenant.* Many courts take substantially this view, and, looking through the mere form of corporate action to the substance, and regardless of the question whether the particular dividend has been declared in cash, in

73 Cal. 302, 14 Pac. 885, 2 Am. St. Rep. 808; Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412; Hill *v.* Newichawanick Co., 8 Hun (N. Y.) 459 [*affirmed* in 71 N. Y. 593].

2. Fairbank *v.* Merchants' Nat. Bank, 132 Ill. 120, 22 N. E. 524.

3. Boyd *v.* Conshohocken Worsted Mills, 149 Pa. St. 363, 24 Atl. 287.

4. Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

5. Central Nebraska Nat. Bank *v.* Wilder, 32 Nebr. 454, 49 N. W. 369.

6. The subject is treated *in extenso* in 2 Thompson Corp. § 2192 *et seq.*

Where the estate consists in whole or in part of shares in a corporation, and the will is silent on the precise subject, as it ought never to be, the difficulty lies in discriminating between those stock dividends which represent the natural growth or increase in the value of the permanent property of the corporation, and those which represent mere profits of the business or income accruing from the business of the corporation. Great as the difficulty is in many cases, the courts are obliged to confront it and to solve it. The same difficulty of discriminating between the rights of the life-tenant and the remainder-man arises in cases where the estate is invested in property other than corporate shares; and the principle on which the judges have proceeded in such cases may be illustrated by *In re* Foster, 45 Ch. D. 629, 60 L. J. Ch. 175, and *In re* Sheldon, 39 Ch. D. 50, 58 L. J. Ch. 25, 59 L. T. Rep. N. S. 133, 37 Wkly. Rep. 26. See also Porter *v.* Baddeley, 5 Ch. D. 542.

7. Hite *v.* Hite, 93 Ky. 257, 20 S. W. 778, 14 Ky. L. Rep. 385, 40 Am. St. Rep. 189, 19 L. R. A. 173.

8. Waterman *v.* Alden, 42 Ill. App. 294 [*reversed* on other grounds in 144 Ill. 90, 32 N. E. 972].

scrip, or in new shares, inquire whether it is a dividend arising from earnings or profits, or from the capital of the company. If it is found that it has arisen from earnings or profits it goes to the life-tenant, although it is a dividend of new shares;[9] but if it is found that it is a dividend of the capital of the company it will go to the remainder-man, although it has been declared in cash.[10] This rule is generally known in America as "the Pennsylvania rule." The early English rule was that extra dividends, or additions to the usual annual dividend, whether paid in cash or in capital stock, went to the *corpus* of the trust.[11] But this rule was abandoned as unjust, and it is uniformly held in that country,[12] and frequently in this country,[13] that cash dividends, extra dividends, or bonuses, declared from the earnings, are to be regarded as income, and go to the life-tenant. And such is the rule, although the dividends or bonuses were earned before the creation of the trust, but declared afterward.[14] Nor is the mere name by which a dividend is called by the directors, at the time when they declare it, a controlling circumstance in determining its character; but the court will look to its real substance, and will for example declare it a dividend out of income and hence belonging to the life-tenant, although it is called in the resolution by which it is declared a "special bonus."[15]

c. Dividends Declared Out of Accretions to Capital Go to Remainder-Man. A stock dividend declared out of profits resulting from the sale of real estate owned by the corporation at the time of the testator's death belongs to the remainder-man.[16] New shares issued by a corporation to increase its capital stock, which represent the increase in value of the property of an association, resulting from the development of its business, and which are not strictly speaking the products of the stock dividends and do not represent surplus earnings in the ordinary sense, and which are apportioned *pro rata* among existing shareholders, constitute capital, and not income or dividends, as between a person entitled to the income or dividends of the original shares during life and a person entitled at her death to the reconveyance of the stock.[17] In like manner a privilege offered by a corporation to its shareholders to take at par additional shares which are worth more than the existing common shares is held to be an incident of the old stock and therefore a part of the capital of the corporation, and the new shares belong to the remainder-man.[18]

9. Peirce *v.* Burroughs, 58 N. H. 302; Lord *v.* Brooks, 52 N. H. 72; Van Blarcom *v.* Dager, 31 N. J. Eq. 783; Ashhurst *v.* Field, 26 N. J. Eq. 1; Van Doren *v.* Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Simpson *v.* Moore, 30 Barb. (N. Y.) 637; Clarkson *v.* Clarkson, 18 Barb. (N. Y.) 646; Matter of Pollock, 3 Redf. Surr. (N. Y.) 100; Woodruff's Estate, Tuck. Surr. (N. Y.) 58; Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116; Biddle's Appeal, 99 Pa. St. 278; Wiltbank's Appeal, 64 Pa. St. 256, 3 Am. Rep. 585; Earp's Appeal, 28 Pa. St. 368. The New York decisions above cited seem to be overruled by *In re* Kernochan, 104 N. Y. 618, 11 N. E. 149.

10. Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164.

11. Hooper *v.* Rossiter, McClel. 527, 13 Price 774; Preston *v.* Melville, 16 Sim. 163, 39 Eng. Ch. 163; Witts *v.* Steere, 13 Ves. Jr. 363; Paris *v.* Paris, 10 Ves. Jr. 185; Brander *v.* Brander, 4 Ves. Jr. 800.

12. Bates *v.* Mackinley, 31 Beav. 280, 8 Jur. N. S. 299, 31 L. J. Ch. 389, 5 L. T. Rep. N. S. 783; Wright *v.* Tuckett, 1 Johns. & H. 266; Murray *v.* Glasse, 17 Jur. 816; Johnson *v.* Johnson, 15 Jur. 714; Cuming *v.* Boswell, 2 Jur. N. S. 1005, 4 Wkly. Rep. 752; Price *v.* Anderson, 15 Sim. 473, 38 Eng. Ch. 473.

13. Reed *v.* Head, 6 Allen (Mass.) 174; Cogswell *v.* Cogswell, 2 Edw. (N. Y.) 231; Ware *v.* McCandlish, 11 Leigh (Va.) 595.

14. Bates *v.* Mackinley, 31 Beav. 280, 8 Jur. N. S. 299, 31 L. J. Ch. 389, 5 L. T. Rep. N. S. 783.

15. *In re* Alsbury, 45 Ch. D. 237, 60 L. J. Ch. 29, 63 L. T. Rep. N. S. 576, 2 Meg. 346, 39 Wkly. Rep. 136. And so where it is called in the resolution a "premium." *In re* Warren, 11 N. Y. Suppl. 787, 33 N. Y. St. 584.

16. Hite *v.* Hite, 93 Ky. 257, 14 Ky. L. Rep. 385, 40 Am. St. Rep. 189, 20 S. W. 778, 19 L. R. A. 173, dividend declared out of profits resulting from the sale of real estate owned by the corporation at the time of the testator's death belongs to the remainder-man.

17. Spooner *v.* Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461.

18. Hite *v.* Hite, 93 Ky. 257, 20 S. W. 778, 14 Ky. L. Rep. 385, 40 Am. St. Rep. 189, 19 L. R. A. 173, holding that life-tenants who have availed themselves of such an option

d. Distinction Between Undivided Profits Which Have Accumulated During Lifetime of Testator and Those Accumulating After His Death — (I) *In General.* The rule, often called "the Pennsylvania rule," on this subject is that "when the stock of a corporation is by the will of a decedent given in trust, the income thereof for the use of the beneficiary for life, with remainder over, the surplus profits, which have accumulated in the lifetime of the testator but which are not divided until after his death, belong to the *corpus* of his estate, whilst the dividends of earnings made after his death are income and are payable to the life-tenant, no matter whether the dividend be in cash, scrip, or stock." [19]

(II) *Question of Value, How Determined Under Pennsylvania Rule.* Under the Pennsylvania rule the question of value is to be determined, not by the fluctuations of the stock market, but by an estimation of the actual assets held by the corporation, although it is conceded that the market value may aid in the ascertainment of the actual value, and is therefore properly received in evidence on that issue.[20]

(III) *Application of Pennsylvania Rule Where Life-Tenant Dies Before Declaration of Stock Dividend.* In the case supposed by this caption the new shares were held to belong to the *corpus* of the estate, and to be accounted for as capital, and this was held to work no injustice to the life-tenant, since he got a dividend on the new shares as well as on the old, and was better off than before.[21]

(IV) *Profits Accruing From Discovery of Minerals After Death of Shareholder.* In the case indicated by this caption a shareholder in an unincorporated land company had died and his shares were held by his executor. While thus held a supposed discovery of a valuable lot of copper upon the land was made, and this created a great "boom," under the operation of which a small portion of the land was sold for a sum so large that the directors of the company were able to declare a cash dividend of nineteen dollars and fifty cents per share, amounting, upon the shares held by the trustee of the deceased member, to the sum of one hundred and eight thousand eight hundred and forty-nine dollars. It was held that this enormous dividend was income, and belonged to the life-tenant, although the contrary would seem to have been the better conclusion.[22]

should not be required to restore to the estate the shares so acquired, but the value of them should be ascertained at the time when the options were given, and the life-tenants should be required to account to the estate for the profit thereby realized, as a part of the capital of the estate, and that premiums paid for the bonds in which the capital of the estate is invested cannot be charged to the life-tenants, and the amount thereof restrained from the income and added to the capital, for the purpose of meeting the loss which will occur when the bonds mature and drop to par. According to a holding of an orphans' court in Pennsylvania moneys received from the sale of options to purchase stock of a new railroad corporation, the bonds of which are guaranteed by a corporation in which stock is held by the estate, are principal, and not income going to the life-tenant. *In re* Thomson, 1 Pa. Dist. 139, 11 Pa. Co. Ct. 198, 30 Wkly. Notes Cas. (Pa.) 23.

19. Smith's Estate, 140 Pa. St. 344, 352, 31 Atl. 438, 27 Wkly. Notes Cas. (Pa.) 420, 23 Am. St. Rep. 237, per Clark, J. [*following* Earp's Appeal, 28 Pa. St. 368, which is the leading case in Pennsylvania on the question]. *Compare* Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116; Biddle's Appeal, 99 Pa. St. 278; Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164; Wilthank's Appeal, 64 Pa. St. 256, 3 Am. Rep. 585; McKeen's Appeal, 42 Pa. St. 479. In the leading Pennsylvania case on this subject, the distinction was said to lie in the fact that the testator had not made a bequest of the stock itself to the applicants, but had given them only the income of it for life, so that their interests necessarily commenced after the death of the testator, and so that they had no right whatever to claim the income which had accumulated after his death. On the other hand profits arising since his death went to them as income, within the meaning of the will. Earp's Appeal, 28 Pa. St. 368, 374.

20. Smith's Estate, 140 Pa. St. 344, 357, 21 Atl. 438, 27 Wkly. Notes Cas. (Pa.) 420, 23 Am. St. Rep. 237; Biddle's Appeal, 99 Pa. St. 278; Moss' Appeal, 83 Pa. St. 364, 24 Am. Rep. 164.

21. Smith's Estate, 140 Pa. St. 344, 21 Atl. 438, 27 Wkly. Notes Cas. (Pa.) 420, 23 Am. St. Rep. 237.

22. *In re* Oliver, 136 Pa. St. 43, 20 Atl. 527, 26 Wkly. Notes Cas. (Pa.) 392, 20 Am. St. Rep. 894, 9 L. R. A. 421.

e. Ordinary Cash Dividends Presumptively Go to Life-Tenant — (I) *In General.* This proposition is clear when it is considered that a corporation, while a going concern, has no power to declare dividends, except out of profits or earnings, from which it follows that a cash dividend cannot be presumed to have been made out of capital. The true rule is therefore said to be "that, when a dividend upon its stock is declared by a corporation, it belongs to the person holding the stock at the time of the declaration, whether the holder be a life-tenant or remainder-man, without regard to the source from which or the time during which the profits and earnings divided were acquired by the company."[23]

(II) *Illustration of Rule.* Thus dividends made in cash by a manufacturing corporation, although made out of money received from the sale of patent rights and a large amount of materials, have been held income and not capital.[24] So cash dividends made by land company, whose business is the sale of lands which are the corporate property, have been held, in the absence of any facts necessarily pointing to the contrary conclusion, to be income and not capital of a trust fund created by the will of a shareholder.[25]

(III) *Cash Dividend Issued to Pay Invalid Stock Dividend.* Where the directors of a corporation vote a cash dividend for the purpose of paying for new stock to be issued to its shareholders, the whole transaction constituting a stock dividend, if the issue of the stock is void because of non-compliance with the provisions of a statute, the cash dividend will fall also, and cannot be claimed by a person entitled to the income of certain shares of stock.[26]

(IV) *Cash Dividend Declared Out of Capital Goes to Remainder-Man.* In the operation of this rule, which looks through the form to the substance of the matter, it has been held that if a cash dividend is declared from a sale of the franchises and permanent property of the corporation it will be regarded as capital and will go to the remainder-man, notwithstanding the form in which it was declared.[27]

f. Dividend Payable Out of Old Shares. Where a dividend, declared to be made out of the earnings of the corporation, is not made in the form of cash, but in old shares of the corporation itself, in which it has invested the amount, it has been held income of the shares previously held by the shareholders.[28]

g. Stock Dividend Where Shares Have Been Reduced in Consequence of Losses and Then Reissued After Recovery. Where a banking corporation lawfully reduced the par value of its shares, in consequence of certain supposed losses, and upon recovery of the sum supposed to have been lost issued additional stock to its shareholders to represent the restored value, it was held that the new stock thus issued belonged to the *corpus* of the estate of a deceased shareholder and did not go to the life-tenant.[29]

h. What Dividends Pass to Specific Legatee. Under the foregoing principles a specific legatee of corporate shares is entitled to all dividends which are declared after the death of the testator.[30] To this rule one English case adds the qualification that a dividend earned before the death of the testator and which ought to have been declared before goes to the *corpus* of his estate, and does not follow the shares of the specific legatee.[31] Another English case holds that dividends payable after the death of the testator go to the specific legatee, although the

23. Richardson *v.* Richardson, 75 Me. 570, 575, 46 Am. Rep. 428.
24. Harvard College *v.* Amory, 9 Pick. (Mass.) 446.
25. Reed *v.* Head, 6 Allen (Mass.) 174; Balch *v.* Hallet, 10 Gray (Mass.) 402.
26. Rand *v.* Hubbell, 115 Mass. 461, 15 Am. Rep. 121.
27. Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116; Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164.
28. Leland *v.* Hayden, 102 Mass. 542.
29. Parker *v.* Mason, 8 R. I. 427.
30. Browne *v.* Collins, L. R. 12 Eq. 586; Ibbotson *v.* Elam, L. R. 1 Eq. 188, 35 Beav. 594, 12 Jur. N. S. 114, 14 Wkly. Rep. 241; Jacques *v.* Chambers, 2 Coll. 435, 11 Jur. 295, 16 L. J. Ch. 243, 4 R. & Can. Cas. 205, 33 Eng. Ch. 435; Wright *v.* Warren, 4 De G. & Sm. 367.
31. Browne *v.* Collins, L. R. 12 Eq. 586.

resolution declaring them may have been passed in the testator's lifetime.[32] Although this case is said by Sir Nathaniel Lindley[33] to have turned on the special wording of the company's deed of settlement, yet it reaches the result which would be reached in most American courts in respect of ordinary dividends. The rule elsewhere stated[34] that the severance of title in respect of the dividend takes place at the date when it is declared without reference to the date when it is made payable would take it to the general estate if it were declared prior to the death of the testator, and to the specific legatee if declared after his death. Most of the English cases conform to this theory, and unite in holding that dividends declared before the death of the testator belong *prima facie* to his general estate, and do not pass to a specific legatee, although he may die before the date at which they are payable.[35]

i. Doctrine That Question Is to Be Determined by Form of Corporate Action — (I) *Statement of Doctrine.* Contrary to a view put forth in cases already considered, that the courts will look through the form and determine the question according to the substance,[36] the doctrine of one authoritative court is that the question whether a dividend belongs to the *corpus* of an estate and goes to the remainder-man, or is to be regarded as mere income and goes to the life-tenant, depends upon the substance and intent of the action of the corporation, as shown by the vote by which the dividend is declared.[37] The doctrine rests upon the view that it would be impracticable for the courts, in determining the comparative rights of different persons in particular shares of stock, to go behind the votes of the corporation and its directors, and investigate the accounts and affairs of the corporation, in order to ascertain how the corporation acquired the fund out of which the dividend was declared.[38]

(II) *Cash Dividends, However Large, Are Income; Stock Dividends, However Made, Are Capital.* The logical result of this doctrine is that cash dividends, however large, are income and go to the life-tenant and that stock dividends, however made, are capital and go to the remainder-man.[39]

(III) *Undivided Earnings Are Capital.* Another result of this view is that undivided earnings of the corporation are likewise regarded as capital; and hence that as between the life-tenant and remainder-man the interest in such earnings represented by each certificate of stock is an interest in the capital, and

32. Clive *v.* Clive, Kay 600, 23 L. J. Ch. 981.

33. Lindley Comp. L. (5th ed.) 545, note *i*.

34. See *supra*, VII, B, 4, a.

35. De Gendre *v.* Kent, L. R. 4 Eq. 283; Lock *v.* Venables, 27 Beav. 598; Wright *v.* Tuckett, 1 Johns. & H. 266; Clive *v.* Clive, Kay 600, 23 L. J. Ch. 981.

36. *In re* Warren, 11 N. Y. Suppl. 787, 33 N. Y. St. 584; *In re* Alsbury, 45 Ch. D. 237, 60 L. J. Ch. 29, 63 L. T. Rep. N. S. 576, 2 Meg. 346, 39 Wkly. Rep. 136.

37. Adams *v.* Adams, 139 Mass. 449, 1 N. E. 746; Leland *v.* Hayden, 102 Mass. 542; Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705; Gibbons *v.* Mahon, 136 U. S. 549, 34 L. ed. 525 [*affirming* 4 Mackey (D. C.) 130, 54 Am. Rep. 262]; *In re* Barton, L. R. 5 Eq. 238; Price *v.* Anderson, 15 Sim. 473, 38 Eng. Ch. 473. The question has given rise to great perplexity in the English equity courts. Sir Nathaniel Lindley throws many of the cases into contrast in a note, thus: "Compare (1) Hopkins' Trusts, 18 Eq. 696; Plumbe *v.* Neild, 6 Jur. N. S. 529; Price *v.* Anderson, 15 Sim. 473; Preston *v.* Melville, 16 Sim. 163, and Barclay *v.* Wainwright, 14 Ves. 66, in which the payments were held to be income, with (2) Straker *v.* Wilson, 6 Ch. 503; Barton's Trusts, 5 Eq. 238; Ward *v.* Combe, 7 Sim. 634; Witts *v.* Steer, 13 Ves. 363; Paris *v.* Paris, 10 Ves. 185; Brander *v.* Brander, 4 Ves. 800, in which the payments were held to be capital. See also Cuming *v.* Boswell, 2 Jur. N. S. 1005, where the House of Lords held that, upon the true construction of a Scotch deed, bonuses belonged to an infant's estate, and not to the person who, on his death under twenty-one, became entitled to the stocks which yielded them." Lindley Comp. L. (5th ed.) 545.

38. Rand *v.* Hubbell, 115 Mass. 461, 15 Am. Rep. 121, 134.

39. Adams *v.* Adams, 139 Mass. 449, 1 N. E. 746; Leland *v.* Hayden, 102 Mass. 542; Daland *v.* Williams, 101 Mass. 571; Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705. *Compare* Sohier *v.* Burr, 127 Mass. 221; Heard *v.* Eldredge, 109 Mass. 258, 12 Am. Rep. 687; Balch *v.* Hallet, 10 Gray (Mass.) 402; *In re* Barton, L. R. 5 Eq. 238; Hooper *v.* Rossiter, McClel. 527, 13 Price 774.

not an interest in the income.[40] Moreover as the corporation may, in the absence of a restraining statute, treat its undivided earnings either as capital or income, that is, turn them into its property or business, or distribute them in cash dividends,[41] it follows that it may, during the entire life of the life-tenant of its shares, turn its earnings into capital and issue stock dividends to represent the increase, which dividends, under the operation of this rule, will be reserved for the remainder-man, leaving the life-tenant to starve and defeating the plain intent of the testator.

(IV) *Stock Dividend Capital, Although Derived From Net Earnings.* It results from this view that when the vote of the corporation is to distribute to each shareholder a certain number of additional shares in the corporation, in proportion to the amount of shares already held by him, the shares so distributed are received by the shareholder as capital, and not as income, although the means of making the dividend are derived from net earnings of the corporation; and hence if such new shares go to the trustee in such a trust as we are considering he must hold them for the remainder-man.[42] If therefore a joint-stock association increases its capital stock, to represent profits actually invested in extending its business and increasing the value of its plant, and apportions the new shares *pro rata* among its existing shareholders, the new shares become capital and not income, for the purposes of such a trust as those under consideration.[43]

(V) *Dividends Accruing During Lifetime of Life-Tenant, but Not Declared Until After His Death, Go to Remainder-man.* Under the operation of this rule, and contrary to the rule in Pennsylvania, dividends on corporate shares belonging to an estate, which are declared after the death of the life-tenant, pass to the remainder-man as a part of the *corpus* of the estate, although in point of fact they represent profits which accrued prior to his death.[44]

(VI) *Corporation Voting Cash Dividend Convertible Into Contemporaneous Stock Dividend.* In a jurisdiction where this rule obtains, it has been held that if a corporation votes to create new shares and at the same time declares a dividend payable in cash to the shareholders, and authorizes its treasurer to receive this dividend in payment for such shares, and to issue certificates of stock in return, the dividend is, as between the owners of successive interests in the shares, capital and not income, although the corporation is not allowed by the law of the state in which it is established to make stock dividends.[45]

(VII) *Increase in Value of Shares Is Capital.* It follows that the enhanced price for which stocks may sell by reason of dividends earned but not declared, inures, under the modern rule, to the benefit of the remainder-man.[46]

40. Gifford *v.* Thompson, 115 Mass. 478; Rand *v.* Hubbell, 115 Mass. 461, 15 Am. Rep. 121.

41. Rand *v.* Hubbell, 115 Mass. 461, 15 Am. Rep. 121.

42. *Connecticut.*— Brinley *v.* Grou, 50 Conn. 66, 47 Am. Rep. 618.

Maine.— Richardson *v.* Richardson, 75 Me. 570, 574, 46 Am. Rep. 428.

Massachusetts.— Gifford *v.* Thompson, 115 Mass. 478; Rand *v.* Hubbell, 115 Mass. 461, 15 Am. Rep. 121, 135; Leland *v.* Hayden, 102 Mass. 542; Daland *v.* Williams, 101 Mass. 571; Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705; Atkins *v.* Albree, 12 Allen 359.

Rhode Island.— Greene *v.* Smith, 17 R. I. 28, 19 Atl. 1081; *In re* Brown, 14 R. I. 371, 51 Am. Rep. 397.

United States.— Gibbons *v.* Mahon, 136 U. S. 549, 10 S. Ct. 1057, 34 L. ed. 525.

England.— *In re* Barton, L. R. 5 Eq. 238, 243; *In re* Bouch, 29 Ch. D. 635 [*reversed* in 12 App. Cas. 385, 56 L. J. Ch. 1037, 57 L. T. Rep. N. S. 345, 36 Wkly. Rep. 193].

Compare In re Kernochan, 104 N. Y. 618, 11 N. E. 149.

43. Spooner *v.* Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461.

44. Quinn *v.* Madigan, 65 N. H. 8, 17 Atl. 976. This seems to be the rule in New York. *In re* Warren, 11 N. Y. Suppl. 787, 33 N. Y. St. 584.

45. Daland *v.* Williams, 101 Mass. 571.

Further illustrations of the so-called Massachusetts rule may be found in the following cases: Davis *v.* Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801; Rand *v.* Hubbell, 115 Mass. 461, 15 Am. Rep. 121: Leland *v.* Hayden, 102 Mass. 542.

46. Scolefield *v.* Redfern, 2 Dr. & Sm. 173, 9 Jur. N. S. 485, 32 L. J. Ch. 627, 8 L. T. Rep. N. S. 487, 11 Wkly. Rep. 453.

So where the corporation upon increasing its capital stock issues new shares in exchange for its old ones, these new shares are not regarded as income, but go to the remainder-man.[47]

(VIII) *Dividends in Winding-Up Under This Rule.* Under this rule of considering the form of the corporate action merely, it is held that when a corporation dissolves and winds up its affairs, and makes to its shareholders a dividend in cash, arising from all its assets, consisting in part of undivided earnings, the entire amount divided will be capital and not income.[48]

(IX) *Dividend Arising From Proceeds of Condemnation of Land Belong to Corporation.* It has been ruled in Massachusetts that where the property of a corporation consists wholly of real estate and a part of it is taken under the right of eminent domain, and the compensation paid to the corporation therefor is by it distributed as a cash dividend to its shareholders, such a dividend belongs to the capital, and not to the income of a trust fund invested in the shares.[49]

j. Profits Turned Into Capital and Afterward Divided. Two decisions of the house of lords sanction the view that if a company has no power to increase its capital, but accumulates profits, which it uses as capital, but which it afterward divides among its shareholders, such divided profits are capital, and do not go to the life-tenant of the shares, but are held for the remainder-man.[50]

k. Premiums Accruing From Sale of New Shares. In like manner it has been held in Massachusetts that when a corporation votes to increase its capital stock, and to allow the holders of the old shares to subscribe for the new ones *pro rata*, and that any new shares not so taken shall be sold by the directors, and the premiums realized by the sale paid over to the parties entitled to the right of subscribing for the shares, the sum received by the directors upon such sale is capital to the shareholder.[51] So under the Pennsylvania rule the profits accruing from a sale of shares of increased stock taken by trustees holding old stock, which gave them a right to take it, is capital and not income, as between life-tenant and remainder-man.[52]

l. Profits Arising From Options to Take New Shares. It is held that if the corporation increases its capital stock and allows each shareholder the option of taking at par as many new shares as he held of the old, and the trustees under a will bequeathing the income, profit, and products of certain stock in the company to a person for life with remainder over, sell a part of their option to take new shares and with the proceeds of such sale buy some of the new shares, these shares will be capital and will go to the remainder-man. The view is that the option to take new shares is not a profit.[53]

47. Greene *v.* Smith, 17 R. I. 28, 19 Atl. 1081.

48. Gifford *v.* Thompson, 115 Mass. 478. Thus stock dividends arising from the sale of a part of the assets of a corporation, being capital and not income, belong to the remainder-man and not to the life-tenant. Matter of Skillman, 9 N. Y. Suppl. 469, 29 N. Y. St. 217, 2 Connoly Surr. (N. Y.) 161.

49. Heard *v.* Eldredge, 109 Mass. 258, 12 Am. Rep. 687. This decision is a flat denial of the doctrine of the leading case in Massachusetts, in which the opinion was written by the same judge (Chapman, C. J.), in which the doctrine is laid down thus: "A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital." Minot *v.* Paine, 99 Mass. 101, 108, 96 Am. Dec. 705. It shows that the Massachusetts court does not follow the unjust and arbitrary rule which it has laid down for the government of this subject. See 2 Thompson Corp. § 2221, where Heard *v.* Eldredge, 109 Mass. 258, 12 Am. Rep. 687, is explained and commented on.

What is the "natural increase," and not "an extraordinary accumulation of the corpus," within the meaning of the Georgia code, illustrating the difficulty of a legislature undertaking to interpret wills. Millen *v.* Guerrard, 67 Ga. 284, 44 Am. Rep. 720.

50. Bouch *v.* Sproule, 12 App. Cas. 385, 56 L. J. Ch. 1037, 57 L. T. Rep. N. S. 345, 36 Wkly. Rep. 193 [*reversing* 29 Ch. D. 635]; Irving *v.* Houstoun, 4 Paton Sc. App. 521.

51. Atkins *v.* Albree, 12 Allen (Mass.) 359.

52. Smith's Estate, 140 Pa. St. 344, 21 Atl. 438, 27 Wkly. Notes Cas. (Pa.) 420, 23 Am. St. Rep. 237.

53. Hite *v.* Hite, 93 Ky. 257, 20 S. W. 778, 14 Ky. L. Rep. 385, 40 Am. St. Rep. 189, 19

6. Remedies to Compel Payment of Declared Dividends — a. Shareholder Cannot Sue For Dividend Until It Has Been Declared. From what has preceded it follows that except in the case of preferential or guaranteed stock, elsewhere considered, a shareholder cannot ordinarily sue the corporation for his share of accumulated profits until a dividend has been declared, a matter which generally rests within the sound discretion of the directors, which discretion the courts will not control unless it has been plainly abused.[54]

b. Shareholder May Sue Corporation at Law to Recover Dividend Which Has Been Declared — (i) *In General.* But when a dividend has been declared it becomes a debt due from the corporation,[55] to each shareholder in proportion to the number of his shares, and he may sue and recover the same at law.[56] The resolution declaring the dividend is a written admission on the part of the corporation of an indebtedness to each particular shareholder, payable in the legal currency of the country, unless otherwise specified in the resolution.[57] Where a dividend has been declared by the directors of a corporation, whether that declaration was by resolution or by proceedings to divide up without any formal action on behalf of the company, the remedy for a shareholder is one at law to sue the company for his proportion of the funds or for his dividend; and, if the company has allowed the directors to retain the money, then an implied promise would inure to the benefit of the shareholder against them to recover on that promise.[58]

(ii) *Unavailing Defenses to Such Actions.* It follows that it will be no defense to such an action to show that the earnings of the corporation were received in property other than legal currency.[59] Nor can the corporation set up as a defense to such an action that it has been compelled to part with its surplus funds in the payment of an illegal tax under duress of a threatened levy.[60]

(iii) *Limitation of Such Actions.* Dividends declared on the capital stock of a corporation and payable on demand are not subject to the running of prescription or limitation until there has been a demand and refusal.[61] The reason is that, although the declaration of a dividend creates a debt of the corporation in favor of the shareholder, it is a debt payable only on demand, and has been compared to the obligation of a bank to its depositors.[62] Other cases rest their holdings upon the trust relation which exists between the company and its share-

L. R. A. 173; Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164; *In re* Thomson, 1 Pa. Dist. 139, 11 Pa. Co. Ct. 198, 30 Wkly. Notes Cas. (Pa.) 23. Seemingly opposed to above conclusion is Wiltbank's Appeal, 64 Pa. St. 256, 3 Am. Rep. 585. See also MacLaren *v.* Starinton, 3 De G. F. & J. 202, 64 Eng. Ch. 159; Plumbe *v.* Neild, 6 Jur. N. S. 529, 29 L. J. Ch. 618, 8 Wkly. Rep. 337. *Compare* Wiltbank *v.* Insurance Co., 7 Phila. (Pa.) 327.

54. Beveridge *v.* New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 20 N. Y. St. 962, 2 L. R. A. 648.

55. Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347.

56. Beers *v.* Bridgeport Spring Co., 42 Conn. 17; Keppel *v.* Petersburg R. Co., 14 Fed. Cas. No. 7,722, Chase 167.

57. Ehle *v.* Chittenango Bank, 24 N. Y. 548; Scott *v.* Central R., etc., Co., 52 Barb. (N. Y.) 45.

58. Larwill *v.* Burke, 19 Ohio Cir. Ct. 605, 10 Ohio Cir. Dec. 513.

59. Ehle *v.* Chittenango Bank, 24 N. Y. 548; Scott *v.* Central R., etc., Co., 52 Barb. (N. Y.) 45.

60. Kimball *v.* Corn Exch. Nat. Bank, 1 Ill. App. 209.

61. *Kentucky.*— Louisville Bank *v.* Gray, 84 Ky. 565, 2 S. W. 168, 8 Ky. L. Rep. 664.

Louisiana.— Armant *v.* New Orleans, etc., R. Co., 41 La. Ann. 1020, 7 So. 35; De St. Romes *v.* Levee Steam Cotton Press, 20 La. Ann. 381.

Maryland.— State *v.* Baltimore, etc., R. Co., 6 Gill 363, 387.

Ohio.— Larwill *v.* Burke, 19 Ohio Cir. Ct. 605, 10 Ohio Cir. Dec. 513.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 339, 70 Am. Dec. 128.

See also Keppel *v.* Petersburg R. Co., 14 Fed. Cas. No. 7,722, Chase 167, 213, where it was held that dividends being payable only on demand, interest can be allowed only from that date.

62. Armant *v.* New Orleans, etc., R. Co., 41 La. Ann. 1020, 7 So. 35. See also Brown *v.* Pike, 34 La. Ann. 576.

holders, which in effect amounts to the same thing;[63] for there must be an initial point at which the possession of the company becomes one *animo domini*.

c. Remedy in Equity to Recover Declared Dividend. Where a dividend has been declared, and the corporation or the directors afterward attempt to reappropriate and refuse to pay it, the shareholders may invoke the aid of a court of equity to compel its payment. The foundation of the jurisdiction is the principle elsewhere stated, that the corporation is regarded as a trustee, and the directors as trustees, in theory of equity, of the dividend, for the shareholders.[64] In another case it is held that after a dividend has been declared the shareholder can maintain a bill in equity for an accounting, if the corporation refuses to pay him his share of the dividend.[65] Where the directors declared a dividend of seventy per cent to be credited to the shareholders *pro rata*, and to be paid without interest at such time as should be directed by the board, and certain shareholders sued in equity to compel its payment, it was held that the corporation could not withhold payment indefinitely, but must pay the dividend within a reasonable time, and that the shareholders were entitled to the aid of equity to compel its payment.[66]

d. Parties to Actions to Compel Payment of Dividends. The corporation is necessarily the principal defendant, and therefore the action cannot be brought against its treasurer.[67] Where the shares have been illegally transferred, the corporation is also a necessary party defendant in an action brought for the purpose of discovering the true owner, and having the shares retransferred to him, and having an account of the dividends in his behalf. The holder of the shares is also a necessary party defendant in such an action.[68]

e. Necessity of Demand. It may be assumed that unless there is a statute dispensing with a demand in actions for the recovery of money, a shareholder must prove a demand before he can maintain an action for a dividend.[69]

f. Effect of Pendency of Action For Conversion of Shares. One who has brought an action against the corporation for the conversion of his shares cannot, while such action is pending, maintain an action against the corporation for dividends on the shares; nor can his assignee who stands in his shoes maintain such an action. The reason is that the two actions are inconsistent; the former proceeds on the ground that through the tortious action of the corporation he has lost his title to his shares, while the latter proceeds on the ground that he still has title and is hence entitled to dividends.[70] But he may proceed in equity to be restored to his rights as a shareholder and to be paid any accrued dividends.[71]

g. When Shareholder of Lessee Corporation Cannot Sue For Dividend. Where two corporations agreed together for a lease of the property of one of them to the other, the lessor guaranteeing a certain dividend, and agreeing to make certain quarterly payment, it was held that a shareholder of the lessee corporation could not, on behalf of himself and other shareholders of such corporation, maintain an action against the lessor corporation to enforce the agreement and to compel the payment of his dividend.[72] The reason was that the promise was made to the lessee corporation, and not to its shareholders.[73]

63. Louisville Bank *v.* Gray, 84 Ky. 565, 2 S. W. 168, 8 Ky. L. Rep. 664.

64. Beers *v.* Bridgeport Spring Co., 42 Conn. 17; Gordon *v.* Richmond, etc., R. Co., 81 Va. 621.

65. Cook County Brick Co. *v.* Kaehler, 83 Ill. App. 448.

66. Beers *v.* Bridgeport Spring Co., 42 Conn. 17.

67. French *v.* Fuller, 23 Pick. (Mass.) 108.

68. Southwestern R. Co. *v.* Thomason, 40 Ga. 408.

69. Scott *v.* Central R., etc., Co., 52 Barb. (N. Y.) 45.

70. Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207. Cases depending upon particular circumstances. Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491; Bank of Commerce *v.* Dalrymple, 16 Md. 17; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Soeding *v.* Bonner, etc., Iron Co., 35 Mo. App. 349; Moss' Appeal, 43 Pa. St. 23.

71. See *infra*, VII, D, 7, a *et seq.*

72. Harkness *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 174 [*approved* in 112 N. Y. 25, 19 N. E. 489, 20 N. Y. St. 962, 2 L. R. A. 648].

73. The court cited and relied on Wheat *v.* Rice, 97 N. Y. 296, where a promise to as-

C. Interest-Bearing, Preferred, and Guaranteed Stock — 1. Interest-Bearing Stock — a. Corporation Cannot Contract to Pay Interest on Its Shares. The better view is that a corporation cannot contract to pay interest or dividends on the shares of its capital stock in excess of its earnings, unless expressly authorized to do so by statute.[74]

b. Corporation Cannot Guarantee Dividends on Shares of Another Company. Nor in the absence of express legislative authorization can a corporation guarantee dividends on the shares of another company.[75]

c. Corporation May Guarantee "Interest Dividends" Payable Out of Profits. But a corporation may agree to pay to each shareholder interest on sums which he pays in upon his share subscription, under the name of "interest dividends," until the undertaking of the corporation is completed and goes into operation, payable whenever the surplus earnings enable it to do so.[76]

d. What Is "Preferred Stock" — (I) *In General.* Preferred stock is not an indebtedness of the corporation, or an absolute agreement to pay certain dividends upon its shares, but is merely a pledge of its profits in favor of certain shares in preference to the others, in other words an agreement to give a preference to particular shares over the other shares in the division of profits, but only in case there shall be profits to divide. Hence if it appears in any case that no profits have been earned the holders of preferred stock cannot maintain actions against the company to enforce payment of the guaranteed dividends.[77]

(II) *Preferred Stock Constituting Lien Upon Property and Franchises.* Of course the equity of what passes under the designation of preferred stock depends upon the terms of the statute under which it is issued or the terms of the contract embodied in the resolution under which it is issued, as expressed in the share certificates or otherwise. What is called preferred stock may be an indebtedness of the corporation, and even a lien upon its property and franchises, cutting under other liens. Thus the preferred stock authorized by a statute of Maryland[78] differs radically from the preferred stock described in the preceding paragraph, in that by the terms of the statute it is made a "lien on the franchises and property" of the corporation, with priority over subsequent mortgages or other encumbrances.[79]

e. "Interest Certificates" Not Shares — (I) *In General.* It has been held that "interest certificates" issued by a corporation to its shareholders, and made assignable by their terms, are not shares, although payable at the option of the company out of future earnings, so as to pass in a will under the description of "shares."[80]

sume the debts of a copartnership was held not a promise to any one of its creditors.

74. Ohio Dental Surgery College *v.* Rosenthal, 45 Ohio St. 183, 12 N. E. 665; Painesville, etc., R. Co. *v.* King, 17 Ohio St. 534; Pittsburgh, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126; *In re* Sharpe, [1892] 1 Ch. 154.

75. Rhorer *v.* Middlesboro Town, etc., Co., 103 Ky. 146, 44 S. W. 448, 19 Ky. L. Rep. 1788; Memphis Grain, etc., Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

76. Richardson *v.* Vermont, etc., R. Co., 44 Vt. 613.

77. Taft *v.* Hartford, etc., R. Co., 8 R. I. 310, 332, 5 Am. Rep. 575. A statute authorizing a railroad company to issue shares of stock to be applied to the payment of interest on instalments paid in by subscribers to the stock, until an income should be realized from the road, was construed in Manice *v.* Hudson River R. Co., 3 Duer (N. Y.) 426.

Preferred stock of a railroad company is not an indebtedness which can be considered in determining whether its obligations are such as to prevent its operating an additional train. People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 52 N. E. 292 [*affirming* on rehearing, (Ill. 1896) 45 N. E. 824, 35 L. R. A. 656].

78. Md. Code, art. 23, § 294.

79. Heller *v.* National Mar. Bank, 89 Md. 602, 43 Atl. 800, 73 Am. St. Rep. 212, 45 L. R. A. 438.

80. Brundage *v.* Brundage, 60 N. Y. 544 [*affirming* 65 Barb. (N. Y.) 397, 1 Thomps. & C. (N. Y.) 82, and *distinguishing* Burroughs *v.* North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611; Clive *v.* Clive, Kay 600, 23 L. J. Ch. 981].

(II) *Protection of Corporation in Case of Loss of Such Certificate.* It has been held that a corporation which has issued negotiable certificates for an extra dividend, making them payable at a time fixed therein, or sooner at its option, and elects to redeem them sooner, cannot refuse to pay a shareholder the amount of a lost certificate. It may protect itself by exacting indemnity, as in case of lost commercial paper.[81]

2. Issuing Preferred Stock — a. Power to Issue Preferred Stock as Against Dissent of Common Shareholders — (I) *In General.* The power to issue preferred shares does not exist unless it is expressly given by a previously existing and valid statute, or by the unanimous consent of all the shareholders, anything less than unanimous consent not being sufficient.[82] The subject has been controlled in some of the states by constitutional, and in many of them by statutory, provisions.[83] No implied power exists in a corporation thus to create inequalities among its shareholders. No such power is granted in a clause in a charter conferring "such additional powers as may be convenient for the due and successful execution of the powers granted." Such a clause will not legalize a guaranty of a specific dividend on the shares of the corporation, at a premium, to induce a subscription, even though the guaranty be in part in consideration of services rendered by the subscriber to the company.[84]

(II) *No Such Power as Against Unregistered Shareholders.* The rule of the preceding section extends so far that, although all the registered shareholders consent to the issue of preferred shares, their action will not be allowed so to operate as to affect the rights of any purchaser of common shares who has not as yet been registered as an owner of them on the books of the corporation.[85]

81. Butler *v.* Glen Cove Starch Mfg. Co., 18 Hun (N. Y.) 47.

82. Ashbury *v.* Watson, 30 Ch. D. 376, 54 L. J. Ch. 985, 54 L. T. Rep. N. S. 27, 33 Wkly. Rep. 882; Hutton *v.* Scarborough Cliff Hotel Co., 2 Dr. & Sm. 514, 11 Jur. N. S. 849, 13 L. T. Rep. N. S. 57, 13 Wkly. Rep. 1059 [*affirmed* in 9 Jur. N. S. 551, 34 L. J. Ch. 643]; Lindley Comp. L. (5th ed.) 396. See also Guinness *v.* Ireland Land Corp., 22 Ch. D. 349, 52 L. J. Ch. 177, 47 L. T. Rep. N. S. 517, 31 Wkly. Rep. 341. *Compare* Painesville Nat. Bank *v.* King Varnish Co., 8 Ohio Cir. Ct. 563.

In Pennsylvania an alteration of a charter authorizing the issue of preferred stock does not release common shareholders from their liability as such, the theory being that such an alteration is in pursuance of the common design, and is impliedly assented to by the shareholder in advance at the time of his subscription. Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339. It follows that an acceptance of such an amendment by a majority of the shareholders will bind the minority and empower the directors to issue the preferred shares, notwithstanding the opposition of individual shareholders. Curry *v.* Scott, 54 Pa. St. 270. *Compare* McManus *v.* Philadelphia, etc., R. Co., 58 Pa. St. 330. See on analogous theories Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500; Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.) 364; Irvin *v.* Susquehanna, etc., Turnpike Co., 2 Penr. & W. (Pa.) 466, 23 Am. Dec. 53; Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184.

83. By the constitution of Alabama it is provided: "No corporation shall issue preferred stock without the consent of the owners of two thirds of the stock of said corporation." Ala. Const. (1875), art. 13, § 9. By the constitution of Missouri "No Corporation shall issue preferred stock without the consent of all the stockholders." Mo. Const. (1875), art. 12, § 10. Statutory grants of this power (Ala. Acts (1883–1889), No. 98, p. 86) and statutory prohibitions of it (Minn. Gen. Laws (1887), c. 49, p. 104) exist; but it has been found impracticable to collect them. A statutory authority to issue preferred stock does not, it has been held, include a grant of power to issue common stock. Covington, etc., Bridge Co. *v.* Sargent, 1 Cinc. Super. Ct. 354. A contract by a corporation to repay a loan in preferred stock which it had no authority to issue, being a nullity, is not renewed by a subsequent act authorizing it to issue preferred stock, but which does not empower it to renew that contract. Anthony *v.* Household Sewing Mach. Co., 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575. That a note given in payment for a subscription for preferred stock is valid, etc., see Magee *v.* Badger, 30 Barb. (N. Y.) 246.

Formalities in the mode of issue.— When a departure from the statutory mode of issue invalidates the issue see American Tube Works *v.* Boston Mach. Co., 139 Mass. 5, 29 N. E. 63.

84. Memphis Grain, etc., Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

85. Campbell *v.* American Zylonite Co., 122 N. Y. 455, 25 N. E. 853, 34 N. Y. St. 38,

(III) *Whether Such Power Included in Power to Borrow.* Corporations have undoubtedly a general power to borrow money, and may borrow even from their own shareholders, and from them alone;[86] but whether the existence of this power includes the power to issue shares to the lender of money to the corporation has been answered in the negative by one authoritative court[87] and in the affirmative by another.[88]

(IV) *Power May Be Reserved in Articles of Association.* There is no doubt that where the governing statute authorizes it, and probably where it does not forbid it, a corporation may assume this power, by a clause to that effect in its articles of association or other instrument of incorporation, so that a majority may order such shares to be issued contrary to the will of the minority.[89]

(V) *Power May Be Assumed at Outset in Its By-Laws.* It seems that a corporation created by a special charter may, by by-laws adopted in advance of its receiving subscriptions to its shares, divide its stock into classes, preferring one class over another.[90]

(VI) *Corporation Cannot Divide Its Shareholders Into Different Classes After Subscription*—(A) *In General.* But, although a corporation may possibly do this by a by-law in the first instance and before any subscriptions have been taken, it cannot, after its shares have been subscribed for and distributed, divide its existing shareholders into different classes, giving to one class a preference over the other, without precedent legislative authority or unanimous consent.[91]

(B) *Such Power Not Conferred by Power to Alter By-Laws.* A power thus to create inequality among the shareholders against the will of the minority of them is not conferred by a power to make, repeal, or alter by-laws;[92] since no corporation has power to establish by-laws which impair vested rights.[93] And this is so, although, in the light of what has subsequently transpired, the agreement may appear to have been exceedingly unconscionable; for an unconscionable arrangement will not be disturbed where there has been a ratification of it with knowledge of all its bearings, if time has been had for consideration.[94]

(C) *Such Change Not Valid as Against Unregistered Shareholders, Although All Registered Shareholders Consent.* Such being the governing principle, an agreement signed by all the registered shareholders, whereby, in order to raise money to pay debts, forty per cent of the stock is to be surrendered and sold, and new shares issued in lieu thereof, entitled to preferential dividends of ten per cent per annum, is void even as against an unregistered pledgee of the common stock, and as against one who purchases the same from him after default in the payment of the debt for which they are pledged.[95]

11 L. R. A. 596 [*reversing* 55 N. Y. Super. Ct. 562, 3 N. Y. Suppl. 822].

86. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 177 (per Folger, J.); Curtis *v.* Leavitt, 15 N. Y. 9.

87. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

88. This holding was that if a corporation has power to borrow money on bond and mortgage it may, as a mode of borrowing, issue new shares and give to the holders of them a preference over the holders of its common shares. West Chester, etc., R. Co. *v.* Jackson, 77 Pa. St. 321.

89. Harrison *v.* Mexican R. Co., L. R. 19 Eq. 358; *In re* Bridgewater Nav. Co., 39 Ch. D. 1, 57 L. J. Ch. 809, 58 L. T. Rep. N. S. 476, 36 Wkly. Rep. 769; *In re* South Durham Brewery Co., 31 Ch. D. 261, 55 L. J. Ch. 179, 53 L. T. Rep. N. S. 928, 34 Wkly. Rep. 126.

That a limited company in England, authorized to issue preferential shares, may issue such shares to its members as fully paid up, in consideration of an equivalent number of common shares, see *In re* County Palatine Loan, etc., Co., L. R. 9 Ch. 54; Eichbaum *v.* Chicago Grain Elevators, [1891] 3 Ch. 459, 61 L. J. Ch. 28, 40 Wkly. Rep. 153. *Compare* Trevor *v.* Whitworth, 12 App. Cas. 409, 57 L. J. Ch. 28, 57 L. T. Rep. N. S. 457, 36 Wkly. Rep. 145.

90. *Dictum* of Folger, J., in Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 178, 179.

91. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

92. Kent *v.* Quicksilver, Min. Co., 78 N. Y. 159.

93. Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156. See also *supra*, V, C, 8.

94. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

95. Campbell *v.* American Zylonite Co., 122 N. Y. 455, 25 N. E. 853, 34 N. Y. St. 38, 11 L. R. A. 596.

(VII) *Such Preferences Validated by Laches and Estoppel* — (A) *In General.* But, even though the issuing of preferential shares may be illegal under the foregoing principle, yet they may become legal by laches, acquiescence, and by the operation of the principle of estoppel with respect to those who are entitled to question the transaction.[96]

(B) *Shareholder Proceeding in Time May Rescind.* Under any theory one who agrees to take preferred shares may rescind the agreement on discovering that the issue will be illegal, if he proceeds in time, and may recover back the money which he has paid under it, notwithstanding a statute may have been subsequently enacted under which preferred shares were issued and tendered to him.[97]

(VIII) *Doctrine That Persons Accepting Preferred Shares Are Estopped From Disputing Their Validity.* Where persons accept preferred shares which have been illegally issued and receive interest upon them for several years, they and their assigns thereby become estopped from questioning the power of the corporation to issue such shares.[98]

b. Privilege of Taking Preferred, in Exchange For Common, Stock Must Be Exercised Within Reasonable Time. Under a scheme by which preferred shares are issued for common shares, but in which no time is designated for making the exchange, it must be made within a reasonable time, and the period of thirty-three years after the date when the privilege was conferred is not a reasonable time.[99]

3. Rights of Preferred Shareholders — a. Question of Interpretation of the Contract — (I) *In General.* An examination of the cases shows in most instances that the questions which have arisen with respect to the rights of preferential shareholders are questions of interpretation, depending upon the terms of the particular constating instrument, let us say the governing statute, the by-law, the vote of the shareholders at general meeting, the resolution of the directors, and the recitals in the certificate of preferential shares, rather than upon the general principles of law.[1]

96. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159 [*affirming* 12 Hun (N. Y.) 53]; Hoyt *v.* Quicksilver Min. Co., 17 Hun (N. Y.) 169; Hill *v.* Cincinnati Hotel Co., 11 Ohio Dec. (Reprint) 281, 25 Cinc. L. Bul. 425. To the contrary see Reed *v.* Boston Mach. Co., 141 Mass. 454, 5 N. E. 852; American Tube-Works *v.* Boston Mach. Co., 139 Mass. 5, 29 N. E. 63. *Compare* Bard *v.* Banigan, 39 Fed. 13, 17, per Shipman, J., where the Massachusetts cases just cited were criticized by a distinguished federal judge who found himself "not favorably impressed" with them. That the decision thus criticizing them was affirmed by the supreme court of the United States see Banigan *v.* Bard, 134 U. S. 291, 10 S. Ct. 565, 33 L. ed. 932. See as to the general principle of the foregoing text Veeder *v.* Mudgett, 95 N. Y. 295; Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523. *Compare* Sheldon Hat Blocking Co. *v.* Eickemeyer Hat Blocking Mach. Co., 90 N. Y. 607; Aspinwall *v.* Sacchi, 57 N. Y. 331; Eaton *v.* Aspinwall, 19 N. Y. 119. And to the contrary see Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

97. Anthony *v.* Household Sewing Mach. Co., 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575.

98. Branch *v.* Jesup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 297. *Contra*, Reed *v.* Boston Mach. Co., 141 Mass. 454, 5 N. E. 852; American Tube-Works *v.* Boston Mach. Co., 139 Mass. 5, 29 N. E. 63.

99. Holland *v.* Cheshire R. Co., 151 Mass. 231, 24 N. E. 206, where it was also held that the appointment by the corporation of a committee, twenty years after a vote authorizing shareholders to exchange common for preferred stock, to investigate the claims of holders of common stock, with authority to settle the same by purchase or otherwise, and a purchase by the committee of common stock, giving in exchange therefor shares of preferred stock previously bought in by the company and held as part of the assets, did not constitute an exchange of stock under the original arrangement.

1. Cases could be cumulated depending upon the terms of such instruments rather than on any general principle of law, but a detailed examination of them would be of little value. Among such cases are the following:

Georgia.— Totten *v.* Tison, 54 Ga. 139.

Maine.— Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, 1 Atl. 362.

New York.— Thompson *v.* Erie R. Co., 11 Abr. Pr. N. S. 188, 42 How. Pr. 68.

Pennsylvania.—Culver *v.* Reno Real Estate Co., 91 Pa. St. 367.

United States.— Bailey *v.* Hannibal, etc., R. Co., 2 Fed. Cas. No. 736, 1 Dill. 174; St. John *v.* Erie R. Co., 21 Fed. Cas. No. 12,226, 10 Blatchf. 271; Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212.

Interpretation of the phrase "dividends ac-

(II) *Contract Creating Preference May Consist of By-Law.* A by law providing for the payment of dividends on the preferred stock of a company, establishes a contract between the company and its preferred shareholders.[2]

b. Preferred Stock Gives Right to Interest Chargeable Upon Profits. The view of some of the English courts that a preferred and guaranteed dividend authorized by an act of parliament is substantially interest, chargeable exclusively upon profits,[3] has been adopted in this country, and the conclusion thus expressed has been reached: "The guaranty of a dividend by a railway company is considered by the courts, . . . to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend, and not a debt, which is thus preferred and guaranteed."[4]

c. Entitles Holder to Dividends Only in Case They Are Earned. The ordinary species of preferred stock amounts merely to an engagement to divide earnings among the preferred shareholders in preference to those who are not preferred. If there are no earnings in a particular year they get no dividend in that year. Whether there are earnings in a particular year which can be divided among the preferred shareholders is a matter for the directors to determine in the first instance in the exercise of a sound and honest business discretion, and subject to the control of the courts in case their discretion is abused, as hereafter shown.[5] Such a claim makes the holder of the share certificate a shareholder and not a creditor.[6] When therefore no profits have been earned out of which a preferred dividend can be paid, the holder of preferred shares on which a dividend is guaranteed at a certain rate per annum "before any dividend shall be paid on other stock of said company" cannot maintain an action of assumpsit for the recovery of the annual dividend thus guaranteed.[7]

d. Right of Preferred Shareholders to Dividends Not Absolute, but Subject to Just Discretion of Directors. The right of the holder of preferred shares is not an absolute right to a dividend, unless the contract so states; but it is a qualified right controlled by the sound discretion of the directors, subject to judicial superintendence where there are profits which, considering the entire situation of the company, its public duties, if any, can be divided, and which ought to be divided.[8] A declaration of a dividend out of net profits, contrary to the judgment of the directors, is not required by the fact that the directors have guaranteed the payment of dividends upon preferred shares in accordance with a statute which permits a guaranty of such dividends, payable cumulatively out of net profits.[9]

cruing."— Parks *v.* Automatic Bank Punch Co., 14 Daly (N. Y.) 424, 14 N. Y. St. 710.

Interpretation of the phrase "interest dividends," payable "when able."— Barnard *v.* Vermont, etc., R. Co., 7 Allen (Mass.) 512. *Compare* Cunningham *v.* Vermont, etc., R. Co., 12 Gray (Mass.) 411.

Rights of preferred shareholders as against schemes of arrangement under the English Railway Act of 1867. *In re* Neath, etc., R. Co., [1892] 1 Ch. 349.

2. Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330; Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, 1 Atl. 362.

3. Henry *v.* Great Northern R. Co., 1 De G. & J. 606, 3 Jur. N. S. 1133, 27 L. J. Ch. 1, 6 Wkly. Rep. 87, 58 Eng. Ch. 470. See also Matthews *v.* Great Northern R. Co., 5 Jur. N. S. 284, 28 L. J. Ch. 375, 7 Wkly. Rep. 233; Crawford *v.* North-eastern R. Co., 3 Jur. N. S. 1093.

4. Taft *v.* Hartford, etc., R. Co., 8 R. I. 310, 335, 5 Am. Rep. 575.

5. New York, etc., R. Co. *v.* Nickals, 119 U. S. 296, 7 S. Ct. 209, 30 L. ed. 363.

6. State *v.* Cheraw, etc., R. Co., 16 S. C. 524.

7. Taft *v.* Hartford, etc., R. Co., 8 R. I. 310, 5 Am. Rep. 575.

8. Field *v.* Lamson, etc., Mfg. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136; Feld *v.* Roanoke Invest. Co., 123 Mo. 603, 27 S. W. 635; McLean *v.* Pittsburgh Plate Glass Co., 159 Pa. St. 112, 28 Atl. 211, 33 Wkly. Notes Cas. (Pa.) 459; New York, etc., R. Co. *v.* Nickals, 119 U. S. 296, 7 S. Ct. 209, 30 L. ed. 363.

9. Field *v.* Lamson, etc., Mfg. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136.

Right of directors to expend profits.— It has been held that holders of preferred stock in a corporation, evidenced by certificates providing that such holders are entitled to dividends out of the net earnings of each year when declared by the board of directors, to the extent of a certain percentage, before

e. What Are "Net Earnings" to Be Appropriated in Dividends on Preferred Shares — (I) *In General.* This question has been answered thus by Sir George Jessel, M. R.: "That means this, that the preference shareholders only take a dividend if there are profits for that year sufficient to pay their dividend. . . . They are, so to say co-adventurers for each particular year, and can only look to the profits of that year." If they are lost for that year, they are lost forever. "'Profits for the year' of course mean the surplus receipts, after paying the expenses and restoring the capital to the position it was in on the 1st of January of that year."[10] Similarly the following definition by Mr. Justice Blatchford has been often quoted: "Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go towards dividends, which, in that way, are paid out of the net earnings."[11] Net earnings are what is left after paying current expenses and interest on debt and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay.[12]

(II) *Preferential Dividends Do Not Cumulate.* It is to be inferred from the preceding paragraph that the right of preferred shareholders to dividends is ordinarily confined to the profits in each particular year; that such dividends do not cumulate; so that if they cannot be paid in a particular year they are not chargeable on the profits of the next year, so as to be payable out of such profits to the prejudice of the common shareholders.[13]

f. Earnings Not Withheld From Preferred Shareholders in Order to Cumulate Fund For Liquidation of Debts Secured on Corporate Property and Maturing in Future. If a corporation has a funded interest-bearing debt which represents so much borrowed capital, and is able to maintain its plant in a suitable

payment of dividends to the holders of common stock, but that such dividends are not cumulative, are not entitled to any dividends when the board of directors determines that it is for the interest of the corporation to expend the profits in the enlargement, extension, and increase of its works and business, instead of in declaring dividends. McLean *v.* Pittsburgh Plate Glass Co., 159 Pa. St. 112, 28 Atl. 211, 33 Wkly. Notes Cas. (Pa.) 459.

Effect of failure to pay interest.— Where a shareholder in another corporation has exchanged his shares for preferred shares in the particular corporation, and the preferred shares call for the payment of interest semi-annually, the failure to pay such interest is not a substantial breach of the contract, entitling the holder of the shares to a rescission of the exchange. Feld *v.* Roanoke Invest. Co., 123 Mo. 603, 27 S. W. 635.

10. Dent *v.* London Tramways Co., 16 Ch. D. 344, 353, 50 L. J. Ch. 190, 44 L. T. Rep. N. S. 91. To a similar effect see Morawetz Corp. (2d ed.) § 459.

11. St. John *v.* Erie R. Co., 21 Fed. Cas. No. 12,226, 10 Blatchf. 271, 279 [*affirmed* in 22 Wall. (U. S.) 136, 22 L. ed. 743]. In Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 233, 239, it is said in discussing this question that "rights were to be governed and regulated each year by the pecuniary condition of the corporation at the close of the year." This is in conformity with the definition of profits as given in People *v.* Niagara County, 4 Hill (N. Y.) 20, by Bronson, J.: "Profits generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account." See also the reasoning in Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, 452, 1 Atl. 362; New York, etc., R. Co. *v.* Nickals, 119 U. S. 296, 7 S. Ct. 209, 30 L. ed. 363.

12. Warren *v.* King, 108 U. S. 389, 2 S. Ct. 789, 27 L. ed. 769.

It follows from the above principles that a by-law which describes preferred stock as "non-cumulative" means that the arrearages of one year cannot be paid out of the earnings of a subsequent year. Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 10 Atl. 328. 1 Am. St. Rep. 330; Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, 1 Atl. 362.

13. Staples *v.* Eastman Photographic Materials Co., [1896] 2 Ch. 303, 65 L. J. Ch. 682, 74 L. T. Rep. N. S. 479. *Compare* Bishop *v.* Smyrna, etc., R. Co., [1895] 2 Ch. 265, 64 L. J. Ch. 617, 72 L. T. Rep. N. S. 773, 2 Manson 429, 43 Wkly. Rep. 647, where it is held that money standing to the revenue account of a limited company at the date of "commencement of its liquidation, representing net profits earned by it to that date" is applicable to the payment of arrears of dividend due at that date to the preferred shareholders, in priority to a deficit on the capital account and the cost of liquidation.

condition for the conduct of its business and to pay the interest on such funded debt, the directors will ordinarily not be justified in allowing profits to accumulate in a reserve fund for the purpose of liquidating the funded debt when it matures, to the exclusion of the right of preferred shareholders to their dividends; provided that the property upon which its funded debt is secured is amply sufficient to enable it to renew the same at maturity, as is generally done. The contrary rule, it has been pointed out, would in the case of many if not most of the American railways result in withholding the dividends from preferred shareholders indefinitely. The hardship is especially apparent when the rule is recollected[14] that where the dividends for a particular year are passed because there are no net earnings to divide the right to that dividend is lost forever.[15]

g. Effect of Guaranty of Dividends — (i) *Doctrine That Guaranty of Stated Dividend Creates Absolute Debt.* There has been a difference of judicial opinion on the question whether a guaranty of a dividend by a corporation is tantamount to an agreement to pay annual interest on the shares at a stated sum, and hence creates an absolute debt, or whether it is tantamount to an agreement to pay a stated dividend on the shares in preference to any dividend on the common shares, in case there shall be profits to divide. It should seem that there ought not to have been any difference of judicial opinion on such a question, since to construe such an engagement merely as an agreement to make a dividend out of profits in case there shall be profits which can be divided leaves the preferential shares on no better footing than though the dividend upon them had not been guaranteed, in other words leaves the question whether such a dividend shall be declared and paid, for the determination of the directors of the corporation in the exercise of their discretion. The sound view plainly is that where the corporation guarantees, as is sometimes the case, not only interest on the stock, but also agrees to receive back or otherwise liquidate the principal of the shares at par, at a date named, then the certificates become substantially an interest-bearing bond of the corporation, and the holder of it becomes to the fullest extent a creditor, although he may also have rights pertaining to a shareholder, such as the right to vote at corporate meetings. It has been pointed out that under some schemes what has been called "preferred stock" is really an interest-bearing debenture of the corporation, which creates the relation of debtor and creditor between the corporation and the so-called shareholder.[16] Where, in addition to the guaranty of interest at the rate named, the stock is payable in full on a dissolution of the corporation next after the payment of debts, there is no room for any hesitation in holding that the guaranty of interest is absolute and wholly independent of the question whether there are profits in any year whatever on which a dividend could be properly declared;[17] for here the share certificate is in the nature of an interest-bearing debenture.

14. See *supra*, VII, C, 3, d; VII, C, 3, e, (I).

15. See Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330, where the hardship and injustice of such a rule is forcibly and unanswerably pointed out by Peters, C. J.

Scheme of preference under which preferred shareholders had a right to participate with the common shareholders in any surplus after receiving their preferred dividends. Bailey *v.* Hannibal, etc., R. Co., 2 Fed. Cas. No. 736, 1 Dill. 174.

Scheme of preference under which a dividend on the preferred shares might be paid although the capital of the company was impaired. Cotting *v.* New York, etc., R. Co., 54 Conn. 156, 5 Atl. 851.

Right to preferential dividend in case of changes of ownership.— Scheme of preference under which it was held that holders of preferred stock were entitled to such dividends, up to seven per cent, as the profits of a particular year would yield, before any dividends were paid to the common shareholders, although the deficiency of profits in one year was not to be made up in another year; and that when a holder of preferred stock failed to claim his rights in certain years a subsequent owner thereof could claim reimbursement. Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 233.

16. Such was the case in Williams *v.* Parker, 136 Mass. 204; West Chester, etc., R. Co. *v.* Jackson, 77 Pa. St. 321; and in Burt *v.* Rattle, 31 Ohio St. 116.

17. Williams *v.* Parker, 136 Mass. 204, per Field, J.

(II) *Doctrine That Guaranty Is Guaranty of Dividends Only in Case There Are Profits That Can Be Divided.* There are, however, holdings to the effect that a general guaranty of dividends by a railroad company on its preferred stock is not a guaranty of payment in any event, but only in the event that the dividends are earned.[18] It has also been held that the holders of preferred stock or preference shares of a corporation are entitled to dividends when there are profits out of which dividends may be declared, and not otherwise, although the resolution of the directors under which the stock is issued provides that "a semi-annual dividend of five per cent., payable upon the first days of March and September in each year, shall be guaranteed by the company," and although the certificate of stock contains the recital "five per cent. semi-annual dividend guaranteed";[19] the reason being that such a construction of the contract would place the preferred in antagonism to the general shareholders, and would be contrary to public policy.[20]

(III) *Such Guaranty May Make Right to Dividends Cumulative.* Such a guaranty may, however, have the possible effect of making the right to the dividends cumulative, that is, of making the profits of one year make up the deficiencies of the preceding years.[21]

(IV) *Whether Preferential Share Certificate Is Certificate of Stock or of Indebtedness* — (A) *In General.* This question must be answered by the terms of the governing statute, or the resolution under which the preferred shares are issued, and of the recitals in the share certificates, all these elements entering into and forming a part of the contract. It has been ruled that where a resolution adopted by shareholders of a railroad company authorizing the issue of preferred stock recites that it is to be issued under an act which authorizes the issue of preferred stock, and not of certificates of indebtedness, referring to it by its title and date, which resolution is made a part of the certificates thereafter issued, such certificates will be held to be certificates of stock, unless, considering the whole transaction, it is clear that the purpose was to create a debt, and unless a debt was in fact created.[22]

(B) *Guaranteed Stock Creates Lien Superior to General Creditors.* Where a manufacturing corporation providing for the issue of preferred stock to pay debts issues certificates of preferred stock, so-called, certifying that the corporation guaranteed to holders the payment of four per cent semiannual dividends, and the final payment of the entire amount at a specified time, with the right to convert the preferred stock into common stock; and the company at the same time executed and delivered to a trustee its bond and mortgage to secure the holders of such certificates, it was held that the holders of the certificates did not thereby become shareholders or members of the corporation, but its creditors; and that as such creditors they had a lien upon the mortgage property superior to that of general creditors of the corporation or of its assignees.[23]

h. Preferred Shareholders Not Entitled to Priority — (I) *Over Creditors.* Excluding from consideration the holders of shares upon which dividends are guaranteed by the corporation,[24] it may be stated generally that preferred shareholders occupy the status of shareholders or members and that their right of preference is only a right of preference in the distribution of dividends over the common shareholders. It seems that such a shareholder has no preference over creditors upon the winding-up of the corporation;[25] but that his rights are to

18. Miller *v.* Ratterman, 47 Ohio St. 141, 24 N. E. 496.

19. Lockhart *v.* Van Alstyne, 31 Mich. 76, 19 Am. Rep. 156.

20. Lockhart *v.* Van Alstyne, 31 Mich. 76, 19 Am. Rep. 156, opinion by Cooley, J.

21. Prouty *v.* Michigan Southern, etc., R. Co., 4 Thomps. & C. (N. Y.) 230, opinion by Daniels, J.

22. Miller *v.* Ratterman, 47 Ohio St. 141, 24 N. E. 496.

23. Burt *v.* Rattle, 31 Ohio St. 116.

24. See *supra*, VII, C, 1, c.

25. *In re* London India Rubber Co., L. R. 5 Eq. 519, 37 L. J. Ch. 235, 17 L. T. Rep. N. S. 530, 16 Wkly. Rep. 334; Griffith *v.* Paget, 6 Ch. D. 511, 46 L. J. Ch. 493, 37 L. T. Rep. N. S. 141, 25 Wkly. Rep. 523.

have his preferred dividend, in case there is a surplus which can properly be divided among shareholders, and there can be no such surplus so long as debts of the corporation remain unpaid as they mature.[26] And creditors who surrender their debentures for preferred stock remit themselves to this position; for by so doing they cease to be creditors and become shareholders.[27]

(II) *Over Other Shareholders in Final Winding-Up and Distribution.* Nor does a mere right to a preference in receiving dividends out of profits give a right of preference over other shareholders in the distribution of the company's assets on a final winding-up. The preferred shareholder is still a shareholder, and is entitled to whatever preference his contract gives him and to no more.[28]

i. Preferred Shares May Be Issued Without Right to Vote. Ownership of shares in a corporation carries with it as a general rule the right to vote with respect to the same at any meeting of shareholders. But to this rule there may be exceptions; the voting power can be lawfully separated from shares;[29] and it has been held competent for a railroad company, in issuing certificates of preferred stock, to stipulate therein that the holders shall not have or exercise the right to vote the same, as the owners of the same, at any meeting of the holders of the capital stock of the company.[30]

4. Remedies of Preferred Shareholders — a. Action at Law. An action at law has been allowed against a corporation on a contract to make a dividend of its earnings;[31] and in a plain case of the breach of such a contract no reason is perceived why such an action would not lie. But manifestly such an action does not lie where the nature of the contract or its judicial construction is such as to leave the question of the propriety of declaring the dividend to the discretion of the directors.[32]

b. Remedy in Equity — (I) *In General* — (A) *Propriety of Remedy.* The contract which gives the preferred shareholders a right to the dividend out of the net earnings impresses any net earnings in the hands of the directors, for the particular year, with a trust in behalf of the preferred shareholders, to the extent required by the terms of the contract. If the directors refuse to perform that trust by making the distribution, a court of equity will obviously, in a suit in which the parties in interest are made defendants, compel them so to do.[33] But this is not so where the contract, as judicially construed, leaves the question of declaring and paying the preferred dividend to the discretion of the directors. In such a case it was held that a court of equity would not compel the declaration of a dividend on preferred shares out of net profits from which the directors had a right to make the dividend payable cumulatively where,

26. Warren *v.* King, 108 U. S. 389, 2 S. Ct. 789, 27 L. ed. 769 [*affirming* 2 Fed. 36], holding that the preferred shareholders had no claim on the property superior to that of creditors whose debts were contracted by the company subsequently to the issue of the preferred stock, and that their only valid claim was one to a priority over the holders of common stock.

27. St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136, 22 L. ed. 743 [*affirming* 21 Fed. Cas. No. 12,226, 10 Blatchf. 271].

28. Griffith *v.* Paget, 6 Ch. D. 511, 46 L. J. Ch. 493, 37 L. T. Rep. N. S. 141, 25 Wkly. Rep. 523.

The separate assent of the preferred shareholders, as a class, is not necessary to an "arrangement" under section 12 of the English Companies Act of 1867. *In re* Brighton, etc., R. Co., 44 Ch. D. 28, 59 L. J. Ch. 329, 62 L. T. Rep. N. S. 353, 38 Wkly. Rep. 321.

29. See *supra*, IV, F, 18.

30. Miller *v.* Ratterman, 47 Ohio St. 141, 24 N. E. 496.

31. Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491. *Compare* Taft *v.* Hartford, etc., R. Co., 8 R. I. 310, 5 Am. Rep. 575, which was an action of assumpsit.

32. Field *v.* Lamson, etc., Mfg. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136, holding that the right to dividends on preferred stock, which are payable out of net profits, cannot be enforced in an action at law, even if there are net profits out of which they might be paid, if no dividend has been declared.

33. This was done in Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330. See also Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157; New York, etc., R. Co. *v.* Nickals, 119 U. S. 296, 7 S. Ct. 209, 30 L. ed. 363 [*reversing* 15 Fed. 575, 21 Blatchf. 177]; Mackintosh *v.* Flint, etc., R. Co., 32 Fed. 350; Ashbury *v.* Watson, 30

for half the time for which the dividends were claimed, there were no net profits, and where the condition of the corporation was such that the court could not say that the payment of dividends might not injure the concern or that the withholding of them might not be judicious.[34]

(B) *Scope of Remedy.* Where the dividends are not paid upon preferred stock in pursuance of the terms of a contract, the holders of such stock may maintain an equitable action to compel a specific performance of the contract and to restrain the payment of dividends on the common stock until the arrears of their preferred dividends shall have been paid.[35]

(II) *Remedy in Equity of Holders of Guaranteed Stock.* So, it has been held, that a suit in equity may be maintained by the holders of guaranteed stock to compel the corporation to allow them to participate, equally with the holders of the common stock, in any larger dividends declared in favor of the latter after the payment to plaintiffs of the preferential or guaranteed dividends;[36] that such a suit is to be treated as a creditor's bill, in such a sense that the remedy accorded by the decree settling the rights of the parties accrues in favor of all the guaranteed shareholders, whether parties to the suit or not; that a reference should be made to a commissioner to ascertain, state, and report who are the other holders of guaranteed stock, and in what shares money dividends are coming to them under the decree settling the rights of the parties; and further, that proper steps should be taken for the allowance of counsel fees against the guaranteed shareholders not already represented by counsel.[37]

D. Transfers of Shares — 1. Right of Alienation of Shares — a. In General. The *jus disponendi*, being an incident of the ownership of property, the general rule (subject to exceptions hereafter pointed out and discussed) is that every owner of corporate shares has the same uncontrollable right to alien them which attaches to the ownership of any other species of property.[38] A shareholder is under no obligation to refrain from selling his shares, at the sacrifice of his personal interest, in order to secure the welfare of the corporation, or to enable another shareholder to make gains and profits.[39]

b. Correlative Right to Purchase Shares. The correlative right to purchase corporate shares rests upon similar grounds; the right to become the possessor, by lawful means, of this species of property is as clear a right as the right to

Ch. D. 376, 54 L. J. Ch. 985, 54 L. T. Rep. N. S. 27, 33 Wkly. Rep. 882.

34. Field *v.* Lamson, etc., Mfg. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136. Much to the same effect see McLean *v.* Pittsburgh Plate Glass Co., 159 Pa. St. 112, 28 Atl. 211, 33 Wkly. Notes Cas. (Pa.) 459.

35. Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157.

36. Gordon *v.* Richmond, etc., R. Co., 78 Va. 501.

37. Gordon *v.* Richmond, etc., R. Co., 81 Va. 621.

Parties to suit.— An action to secure the application of future earnings of a corporation to the payment of dividends due holders of preferred stock is properly brought by one of the holders of such stock on his own behalf, and on the behalf of others having like grounds of complaint. Common shareholders are not proper parties defendant. Prouty *v.* Michigan Southern, etc., R. Co., 4 Thomps. & C. (N. Y.) 230.

Minutes of corporation as evidence.— Minutes of the corporation showing the resolution of the directors authorizing the issue of the preferred shares are evidence. Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157.

Laches of common shareholders preventing them from undoing a scheme by which preferred shares have been issued. Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212.

38. Trisconi *v.* Winship, 43 La. Ann. 45, 9 So. 29, 26 Am. St. Rep. 175; Smith *v.* Nashville, etc., R. Co., 91 Tenn, 221, 18 S. W. 546.

Transferability of shares in an unincorporated joint-stock company.— Such shares are protected as equitable interests, and so is the title of a transferee thereto. Durkee *v.* Stringham, 8 Wis. 1.

Right of state to transfer its shares.— If the state holds shares in a corporation, it will have the same right to transfer them as that possessed by any other shareholder. La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420.

39. Lamb Knit-Goods Co. *v.* Lamb, 119 Mich. 568, 78 N. W. 646 (shareholder cannot be compelled to surrender to the corporation certain shares of the stock which he has sold and transferred to his wife for a *bona fide* consideration, and which have been transferred to her on the books of the company); Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 163 U. S. 31, 16 S. Ct. 917, 41 L. ed. 60.

become the possessor of any other species of property; nor can the motive influencing the party who makes such a purchase become the subject of a judicial inquiry, where the motive is not in itself unlawful. Accordingly it has been held that parties who are interested in opposition to a corporation have the right to purchase its stock in order to defeat a contract which it is about to make; and in general it is competent for one person to obtain a controlling interest in a corporation by buying all or a majority of its shares.[40]

c. **Right of Directors to Transfer Their Shares.** The right to transfer his shares is incident to every shareholder, and is as much the right of a director as of any other member. His exercise of this right will not be affected by his knowledge of the fact that a call upon the shares is imminent, unless there is some equity against him as director, such as having been party to a postponement of the call to enable him to get rid of his shares and so evade liability.[41]

d. **Purpose of Transfer.** In the absence of allegations of fraud, the purpose with which stock has been transferred will not be inquired into; and it has been held that the transferee of stock upon the corporate records is qualified to vote and become a director, although the transfer was made for the express and sole purpose of so qualifying him.[42]

e. **Transfers in Fraud of Creditors of Transferrer.** Transfers of corporate shares, made upon secret trusts for the transferrer, and intended to hinder, delay, and defraud his creditors, rest on much the same footing as other fraudulent transfers of personalty made with the same motive. Such a transfer is good as between the parties; and hence equity will not declare a trust and order a return of the shares at the interest of one who has transferred them for the purpose of cheating his creditors.[43] If the transferee himself becomes insolvent, a court will not aid the transferrer in getting back his shares, especially where it appears that the creditors of the fraudulent assignee have given him credit on the faith of his being the owner of them.[44]

f. **Power of Corporations to Restrain or Prevent Transfers of Their Shares.**[45] — (1) *In General.* It follows from the foregoing that a corporation has no power to prevent or to restrain transfers of its shares, unless such power is expressly conferred in its charter or governing statute. This conclusion follows from the further consideration that by-laws or other regulations restraining such transfers, unless derived from authority expressly granted by the legislature, would

40. Pittsburgh Library Assoc. *v.* Mercantile Library Hall Co., 189 Pa. St. 479, 42 Atl. 142, company organized to construct a building for a library.

41. *In re* Cawley, 42 Ch. D. 209. It has even been held competent for the directors of a corporation to transfer their shares to a so-called "trust" for the purpose of enabling the latter to acquire a majority of the stock of the company and to wreck it. Trisconi *v.* Winship, 43 La. Ann. 45, 9 So. 29, 26 Am. St. Rep. 175.

42. *In re* Argus Printing Co., 1 N. D. 434, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L. R. A. 781.

Temporary transfers to secure incidental benefits.— Where the charter of a corporation organized to erect and maintain a theater provided that every five shares of stock should entitle the holder to a free ticket of admission, and that the directors should set apart a certain portion of the house for the exclusive use of such shareholders; and certain shareholders holding large amounts of the stock made transfers of small lots to other persons, with the understanding that the same stock was to be retransferred at the end of the season, it was held that the temporary transferees did not become owners of the stock in the sense which entitled them to the tickets; but that such transfers were illegal and would be enjoined. Baker's Appeal, 108 Pa. St. 510, 1 Atl. 78, 56 Am. Rep. 231.

43. Hukill *v.* Yoder, 189 Pa. St. 233, 42 Atl. 122, 43 Wkly. Notes Cas. (Pa.) 347.

44. Hirsch *v.* Norton, 115 Ind. 341, 17 N. E. 612. One court has held that the failure to protect such a transfer by the proper entry in the books of the corporation is *prima facie* evidence of a secret trust to the use of the transferrer, which, unexplained, becomes conclusive and renders the transfer void as against creditors as a matter of law. Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424. That the fraudulent vendee could not deny his title to the shares which he had received and sold because the indorsement upon the certificate by the fraudulent vendor was of the within "share" see Skowhegan Bank *v.* Cutler, 52 Me. 509.

45. Lien of corporation on its shares see *infra*, VII, D, 2.

be regarded as impositions in restraint of trade.[46] From this the conclusion easily follows that a charter power to "regulate" the transfer of shares does not include the power to prevent such transfers, or to prescribe to whom the owner may sell and to whom not, or on what terms.[47]

(II) *By-Laws Restraining Free Transfer of Shares*—(A) *In General.* From the foregoing it follows that in the absence of express authority in the charter or other governing statute or of the unanimous consent of the shareholders, a by-law or notice restraining the free transfer of the shares of the members of the corporation is inoperative and void.[48] An unauthorized by-law forbidding a shareholder to sell his shares without first offering them to the corporation for a period of thirty days is not binding upon an assignee of the stock as a personal contract, although his assignor knew of the by-law and took part in its adoption.[49] A new certificate of shares issued to their holders, after complying with such a by-law, which certificate does not contain any recital of any restrictions upon its transfer, is not subject to the by-law.[50] A transfer of shares to the real owner, by one in whose name they had been issued to give him an opportunity to acquire them, and who does not choose to do so, is not a "sale" of them within the meaning of such a by-law.[51]

(B) *By-Laws or Agreements Not to Transfer Are Not Operative as Against Rights of Third Persons.* An agreement among the members of a corporation, although unanimous, would not be operative as against the rights of third persons purchasing shares of the company without notice of it. Nor can a by-law which provides that transfers of stock shall not be valid unless approved by the board of directors be made available to defeat the rights of third persons.[52]

(C) *By-Laws Reserving Options to Company to Purchase.* Such a by-law is capable of being waived by the corporation and its members, and a waiver will be presumed, or it will be presumed that an offer was tendered to the other members as required by the by-law and declined, from the fact that the corporation permitted the transfer to be made, especially after the lapse of several years without any objection.[53]

(D) *By-Laws Requiring Small Fee For Registration Not Invalid.* A by-law requiring a small fee for the making of a transfer of shares on the books of the corporation is not invalid, notwithstanding a statutory provision that the corporation shall, on application by a transferrer of its shares, enter the name of the transferee on its register of shareholders, in the same manner as if the application had been made by the transferee.[54]

(E) *By-Laws Restraining Transfers Not Applicable to Sales of Delinquent Shares For Assessments.* By-laws providing that the transfers of the stock for an irrigation company shall be made only with the land of which it was issued do not apply to a sale of delinquent stock for assessment, as the purchaser is not a transferee of the former owner of the stock.[55]

g. Transfer of Shares by Minor. A sale by a minor of his shares not being void, but voidable only, the company must register the transfer if it has not been avoided by the minor at the date of the application for registration.[56]

46. Moore *v.* Bank of Commerce, 52 Mo. 377; Chouteau Spring Co. *v.* Harris, 20 Mo. 382.

47. Chouteau Spring Co. *v.* Harris, 20 Mo. 382.

48. Moore *v.* Bank of Commerce, 52 Mo. 377; Chouteau Spring Co. *v.* Harris, 20 Mo. 382; Kinnan *v.* Sullivan County Club, 26 N. Y. App. Div. 213, 50 N. Y. Suppl. 95; *In re* Klaus, 67 Wis. 401, 29 N. W. 582.

49. Ireland *v.* Globe Milling Co., 21 R. I. 9, 41 Atl. 258, 79 Am. Rep. 769.

50. Matter of David Jones Co., 67 Hun (N. Y.) 360, 22 N. Y. Suppl. 318, 51 N. Y. St. 829.

51. Victor G. Bloede Co. *v.* Bloede, 84 Md. 129, 34 Atl. 1127, 57 Am. St. Rep. 373, 33 L. R. A. 107.

52. Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398.

53. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551, 23 Atl. 795.

54. Giesen *v.* London, etc., Mortg. Co., 102 Fed. 584, 42 C. C. A. 515, holding that such a by-law cannot be said to be unreasonable.

55. Spurgeon *v.* Santa Ana Valley Irrigation Co., 120 Cal. 71, 52 Pac. 140, 39 L. R. A. 701.

56. Smith *v.* Nashville, etc., R. Co., 91 Tenn. 221, 18 S. W. 546.

h. Transfers of Shares After Dissolution. By the dissolution of a corporation the transferable nature of the stock is destroyed, and a subsequent sale by a holder of stock at the time of the dissolution transfers only the right to the balance which may be found due him after paying all his debts due the corporation.[57]

2. Lien of Corporation on Its Shares — a. Corporation Has No Implied Lien. A corporation has at common law no lien upon its shares which it can assert against its shareholder, restraining a free alienation of the shares; but wherever such a lien is claimed, authority to impose it must be sought for in legislation.[58] In the case of a corporation as distinguished from a partnership, there is nothing in the mere relation of the shareholder to the company which should give rise to such a lien.[59] The denial of such a lien has also been put upon the ground that a different rule would subvert the wholesome principle of the common law against secret liens.[60]

b. Lien May Be Created by Charter, Statute, Articles of Association, Etc. — (i) *In General.* The charter of the corporation, the governing statute, or the articles of association or deed of settlement under the English system, if authorized by the statute, may, in fixing the terms of the contract between the company

57. James *v.* Woodruff, 10 Paige (N. Y.) 541. *Compare In re* Onward Bldg. Soc., [1891] 2 Q. B. 463, 60 L. J. Q. B. 752, 65 L. T. Rep. N. S. 516, 40 Wkly. Rep. 26, arising under the English Companies Act, where the court refused to sanction a registration after an order for a compulsory winding-up, on the ground that the applicant represented a company engaged in speculating in the shares, which company had purchased them at a discount.

58. *Iowa.*— Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398.

Kentucky.— Dana *v.* Brown, 1 J. J. Marsh. 304; Fitzhugh *v.* Shepherdsville Bank, 3 T. B. Mon. 126, 16 Am. Dec. 90.

Maryland.— Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

Massachusetts.— Massachusetts Iron Co. *v.* Hooper, 7 Cush. 183; Sargent *v.* Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306.

Nebraska.— Williams *v.* Lowe, 4 Nebr. 382.

North Carolina.— Heart *v.* State Bank, 17 N. C. 111.

Pennsylvania.— Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532; Merchants' Bank *v.* Shouse, 102 Pa. St. 488; Steamship Dock Co. *v.* Heron, 52 Pa. St. 280.

Washington.—Dearbon *v.* Washington Sav. Bank, 18 Wash. 8, 50 Pac. 575.

England.— Murray *v.* Pinkett, 12 Cl. & F. 764, 8 Eng. Reprint 1612; s. c. *sub nom.* Pinkett *v.* Wright, 2 Hare 120, 6 Jur. 1102, 12 L. J. Ch. 119, 24 Eng. Ch. 120.

See 12 Cent. Dig. tit. "Corporations," § 605.

A similar rule prevails in Louisiana. New Orleans Nat. Banking Assoc. *v.* Wiltz, 10 Fed. 330, 4 Woods 43.

Any attempt to reserve such a lien by an indorsement upon a share certificate, to the effect that the shares therein named are subject to a lien for indebtedness due the corporation from the holder, is inoperative and void. Van Liew *v.* Barrett, etc., Beverage Co., 144 Mo. 509, 46 S. W. 202.

Where the charter of a corporation does not give it a lien on stock of the holder for indebtedness to the corporation, it has no right, by by-law or otherwise, as against the transferee of its shares for value and without notice, to deduct the transferrer's indebtedness on an assignment of his shares. Drexel *v.* Long Branch Gas Co., 3 N. J. L. J. 250.

59. Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398; Massachusetts Iron Co. *v.* Hooper, 7 Cush. (Mass.) 183. *Compare* Lindley Comp. L. (5th ed.) 456.

60. Steamship Dock Co. *v.* Heron, 52 Pa. St. 280.

Banker's lien for general indebtedness of shareholder.— The lien of a banking corporation upon the shares of its members for a general indebtedness due by them as customers of the bank rests upon a custom peculiar to banking, confirmed in many states by statute, and is therefore not considered in this article. See Banks and Banking; and the following cases: Springfield Wagon Co. *v.* Batesville Bank, 68 Ark. 234, 57 S. W. 257 (lien superior to that of execution creditor); Oakland County Sav. Bank *v.* Carson City State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463 (lien superior to right of *bona fide* purchaser); Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun (N. Y.) 90, 28 N. Y. Suppl. 1100, 60 N. Y. St. 510 [*affirmed* in 151 N. Y. 665, 46 N. E. 1149]; Stafford *v.* Produce Exch. Banking Co., 16 Ohio Cir. Ct. 50, 8 Ohio Cir. Dec. 483 (power exercised by inserting a provision in share certificate). National banks have no such lien. Bullard *v.* National Eagle Bank, 18 Wall. (U. S.) 589, 21 L. ed. 923. See to the same effect Goodbar *v.* Sulphur Spring City Nat. Bank, 78 Tex. 461, 14 S. W. 851; South Bend First Nat. Bank *v.* Lanier, 11 Wall. (U. S.) 369, 20 L. ed. 72. *Compare* Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. (N. Y.) 495. *Contra,* Young *v.* Vough, 23 N. J. Eq. 325; Knight *v.* Old Nat. Bank, 14 Fed. Cas. No. 7,885, 3 Cliff. 429.

and its shareholders, provide for such a lien.[61] A provision in the charter which goes no further than to say that the shares shall be transferable only on the books, and prohibiting such transfers by a shareholder who is indebted to the corporation, except by consent of the president and directors, has been held to have that effect.[62] The same ruling was made in regard to a similar provision in a general incorporation law, the terms of which were declared to be applicable to companies thereafter incorporated by special act, when not otherwise expressly provided.[63]

(II) *Validity of Statutes Creating Such Liens and Their Operation Upon Existing Transactions.* A statute providing that a private corporation shall have a lien on the shares of its shareholders for any debt or liability incurred to it by a shareholder, and that if necessary for the payment of such debt the corporation may sell the shares after notice, is not unconstitutional when applied to subscriptions made prior to its passage, as it merely enlarges the remedy for legal rights already existing, so far as the sale of stock for unpaid subscriptions is concerned.[64] But where the rights of a third party have intervened, as by an assignment of the certificates, a different question is presented. So where a banking association had not, before it obtained its charter, a lien on the stock of its shareholders, it was held in an early case that the lien given by the charter could not overreach a prior assignment of stock so as to preclude its transfer.[65] There is authority to the effect that the legislature may pass an act creating a lien upon the stock of a corporation already pledged by a shareholder to a third person, where the corporation has not been notified of the pledge;[66] although, as the pledgee in such a case would have an equitable interest which the law ought to protect, and as the statute confiscates that interest, the validity of such a statute may well be doubted on general principles.

(III) *Validity of By-Laws Creating Liens*—(A) *In General.* By-laws creating liens in favor of corporations, upon the shares of their members for debts due the corporation from such members, have (generally, although not always)

61. *In re* General Exch. Bank, L. R. 6 Ch. 818, 40 L. J. Ch. 429, 24 L. T. Rep. N. S. 787, 19 Wkly. Rep. 791; *In re* London, etc., Banking Co., 34 Beav. 332; New London, etc., Bank *v.* Brocklebank, 21 Ch. D. 302, 51 L. J. Ch. 711, 47 L. T. Rep. N. S. 3, 30 Wkly. Rep. 737; *In re* Stockton Malleable Iron Co., 2 Ch. D. 101, 45 L. J. Ch. 168; *Ex p.* Plant, 4 Deac. & C. 160; Hague *v.* Dandeson, 2 Exch. 740, 17 L. J. Exch. 269.

62. Kenton Ins. Co. *v.* Bowman, 84 Ky. 430, 1 S. W. 717, 8 Ky. L. Rep. 467; Farmers' Bank *v.* Iglehart, 6 Gill (Md.) 50; Rogers *v.* Huntington Bank, 12 Serg. & R. (Pa.) 77; Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039; Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; Alexandria Mechanics' Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152; Georgetown Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269; Pierson *v.* Washington Bank, 19 Fed. Cas. No. 11,155, 3 Cranch C. C. 363.

63. Mt. Holly Paper Co.'s Appeal, 99 Pa. St. 513.

Articles construed.—And where the articles of association of a bank provided that no shareholder should be permitted to transfer his shares or receive a dividend thereon, who should owe the bank any debt then due, unless by consent, etc., and authority was given whenever such a debt was past due to sell the stock and apply the proceeds to pay the same, it was held that these two provisions taken together created a lien upon the stock in favor of the bank for the holder's debts to it. Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424. *Compare* Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. (N. Y.) 495; *In re* Dunlop, 21 Ch. D. 583, 48 L. T. Rep. N. S. 89, 31 Wkly. Rep. 211 (where it was held that a clause authorizing the directors to forfeit the shares upon the failure of the shareholder to pay any demand due the company did not create a lien on the shares, since after forfeiture the debt still remained due).

64. Tutwiler *v.* Tuskaloosa Coal, etc., Co., 89 Ala. 391, 7 So. 398. But a by-law creating such a lien is void as to antecedent transfers. People *v.* Crockett, 9 Cal. 112.

65. Neale *v.* Janney, 17 Fed. Cas. No. 10,069, 2 Cranch C. C. 188.

66. Hartford First Nat. Bank *v.* Hartford L., etc., Ins. Co., 45 Conn. 22. The lien created by a statute "for any debt or liability incurred to it (the corporation) by a stockholder, before notice of transfer, or of a levy on such shares" is not confined to debts created after the enactment of the statute, but includes debts contracted before the enactment thereof. Birmingham Trust, etc., Co. *v.* East Lake Land Co., 101 Ala. 304, 13 So. 72.

been held valid, although inconsistent with the general policy of the law, which favors the free alienation of personal property.[67]

(B) *Power to "Regulate" Transfers Includes Power to Restrain.* The grant to a corporation of the power to "regulate" transfers of its shares has been generally held sufficient to authorize a by-law restraining such transfers until the payment of any indebtedness due by the shareholder to the corporation.[68]

(C) *Power Possessed but Not Regularly Exercised.* Where the corporation has such power, it must be shown, in order to establish a valid lien, that it was duly exercised. Thus if the power to enact by-laws is vested in the corporation rather than in the board of directors, it must be exercised by the shareholders; and a mere adoption by the directors of such a rule will not create the lien.[69]

c. Equitable Lien Arising From Language of Share Certificate. In still another class of cases a lien is implied from the acceptance by the shareholder of a certificate of his shares which in terms reserves such a lien to the company. Thus where the defendant company's charter provided that they might establish and put in execution such by-laws, ordinances, and regulations as should be deemed expedient for the well-ordering of the concerns of the corporation, and it was conceded that no by-law had been passed by the company giving it a lien on the shares of its shareholders for their indebtedness to it, it was nevertheless held that the acceptance by the shareholder, without objection, of a certificate which declared the stock to be transferable only at the office of the company on the surrender of the certificate, "subject nevertheless to his indebtedness and liabilities," was tantamount to an agreement on his part that his stock should be subject to such a lien.[70]

d. Protection of Purchaser of Shares Where Certificate Contains No Language Importing Lien. But, where the certificate contains no language importing a lien in favor of the corporation, then the general rule is that it is a continuing affirmation of the ownership of the special amount of stock by the person designated therein or his assignee, and that a purchaser has a right to rely thereon and claim the benefit of an estoppel in his favor as against the corporation.[71]

e. Agreements Creating Equitable Lien. On the same principle it has been held that a shareholder who takes stock with full notice and recognition of a lien reserved to the corporation for any debt of the holder is bound by such an agreement, and that his assignee is likewise bound if he had knowledge of the lien when he purchased the stock, although the reservation of the lien itself is unauthorized.[72] An agreement between a bank and its shareholders, by which the bank has an equitable lien upon the stock for any and all liabilities of the shareholder to the bank, is not void as to the creditors of the shareholder as being contrary to law or as against public policy.[73]

f. Statute Lien Does Not Enlarge Power of Company to Lend to Its Shareholders. A provision of a corporate charter giving the corporation a lien upon its shares belonging to its shareholders, by way of security from them to it, does

67. St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149. See to the same effect Spurlock *v.* Pacific R. Co., 61 Mo. 319; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388. *Compare* Tuttle *v.* Walton, 1 Ga. 43.

68. Cunningham *v.* Alabama L. Ins., etc., Co., 4 Ala. 652; McCready *v.* Rumsey, 6 Duer (N. Y.) 574; Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41; Pendergast *v.* Stockton Bank, 19 Fed. Cas. No. 10,918, 2 Sawy. 108. *Contra*, Attica Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501. *Compare* Plymouth Bank *v.* Norfolk Bank, 10 Pick. (Mass.) 454; Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 324.

69. Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249.

70. Vansands *v.* Middlesex County Bank, 26 Conn. 144. Acceptance by a shareholder of such a certificate binds him by its terms on the principle of contract or of estoppel. Jennings *v.* State Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

71. Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. (Pa.) 446, 14 Am. St. Rep. 868. See also *supra*, VI, M, 3, a.

72. Morrison-Wentworth Bank *v.* Kerdolff, 75 Mo. App. 297.

73. Farmers', etc., Bank *v.* Haney, 87 Iowa 101, 54 N. W. 61.

not operate as a special legislative permission to the shareholders to borrow or to the corporation to lend to them its capital.[74]

g. What Indebtedness Will Support Such Lien — (I) *In General.* This question depends largely upon the language of the charter, statute, by-law, or other instrument creating the lien. Thus under articles of association in pursuance of the English Companies Act,[75] providing that the directors should have discretion to refuse registration of the transfer, where the shareholder was "indebted to the company in respect of calls or otherwise," it was held that until a call had been made the shareholder was not indebted for the unpaid portion of his shares, and that no lien accrued.[76] A resolution for a call on stock which does not fix the date when it is to be paid does not constitute a call which will create an indebtedness to prevent registration of a transfer of shares; and a subsequent resolution completing the call by supplying the date will not relate back for that purpose.[77] Where the governing statute gave to the corporations at "all times" a lien on members' stock for "all" the debts due from them to the corporation,[78] the court held that the lien attached, whether the debt accrued before or after a member's acquisition of stock,[79] and a lien, in the language of the charter, "for all debts and liabilities," was held to include not only debts due for stock, but also all debts due from the shareholder prior to notice of the assignment of his stock.[80] And a by-law restraining transfers while the shareholder "is indebted to the company" was held to apply to an indebtedness not yet due,[81] and also where the obligation of the shareholder was merely that of a surety on a debt due to the company.[82]

(II) *Debts of Equitable Owners of Shares.* Such a lien has been held to extend not merely to the debts and liabilities of the nominal shareholder, but to embrace debts contracted by the equitable owners of the stock known by the company to be such owners. Thus, on the dissolution of a firm owning stock in a bank, the retiring partner sold out his interest to the others, who assumed the debts of the partnership and continued the business under a new name. No formal transfer was made on the books of the company, but the new firm, as the successor of the old, became the equitable owners of the stock. It was held that the bank's lien covered the liabilities of the new firm in its subsequent transactions with the bank, and must prevail over the claim of an equitable assignee of the retiring partner.[83]

(III) *Debt of Nominal Owner of Shares Purchased and Held as Trustee For Others.* If the articles of association give the company a final and paramount charge on the shares of any member, for all moneys owing to the company, from him alone or jointly with any other persons, and provide that when a share is held by more persons than one the company shall have a like lien and charge thereon with respect to all moneys so owing to it, or any of the holders thereof, alone or jointly with any other person, and the trustees under a marriage settlement invest a part of their trust funds in shares of the company, which shares are transferred into their joint names, and one of the trustees is partner in a firm which goes into liquidation owing a debt to the company, this private debt of the trustee is constituted a lien or charge on the shares which will prevail over the title of the *cestuis que trustent.* One reason for this conclusion is that the trustees in purchasing the shares get them subject to the

74. Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482.
75. Companies Act (1862), § 35.
76. *In re* Cawley, 42 Ch. D. 209.
77. *In re* Cawley, 42 Ch. D. 209.
78. Minn. Gen. Stat. c. 34, § 114.
79. Schmidt *v.* Hennepin County Barrel Co., 35 Minn. 511, 29 N. W. 200.
80. Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558. See also Rogers *v.* Huntington Bank, 12 Serg. & R. (Pa.) 77.
81. St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149. See also *In re* London, etc., Banking Co., 34 Beav. 332.
82. St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149.
83. Planters', etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585.

burden which the law of the corporation imposes upon them, and cannot get the benefit without taking the burden.[84]

(IV) *Invalid Demands* — (A) *In General.* A demand that is invalid, without warrant of law, will not of course support such a lien. Thus where a deceased shareholder had left stock pledged to the company for his indebtedness, and his executor, who was also president of the company, made unauthorized payments from the funds of the company to the widow, it was held that the lien on the stock would not extend to such additional indebtedness.[85]

(B) *Debts Contracted Through Abuse of Powers of Corporation.* Where a debt of a shareholder in respect of which the corporation asserts its lien is evidenced by a negotiable security, the corporation may have acquired the security under such circumstances as will operate to postpone its lien to the rights of a subsequent assignee of the shares of the debtor. Thus where an insurance company purchased a bill of exchange payable by one of its members, and the purchase was in excess of its powers, and the object of its officers in making the purchase was, by the assertion of a banker's lien, to subject the shares of such member to the payment of the bill, it was held such an abuse of corporate rights as would prevent the company from refusing its assent to an assignment of the shares previously made to a third person, although such an assignment was unknown to the officers of the company at the time of the purchase of the bill.[86]

(V) *Time of Ascertaining Fact of Indebtedness.* The time of ascertaining the fact of indebtedness is it seems the time when the transfer is sent to the proper officer for registration, and not when it subsequently comes before a meeting of the board of directors on the question of its registration.[87]

h. Effect of Such Lien — (I) *In General.* Where a valid lien exists, whether by force of statute or otherwise, so that it is good as against third persons, a purchaser, pledgee, or other transferee of the shares takes them subject to the lien,[88] in such a sense that a sale of the shares by the corporation to enforce the lien divests his title.[89] And where the lien attaches for the security of debts not yet due, the corporation may refuse to transfer until the debts are paid.[90]

(II) *Whether Liens For Calls Extend Only to Particular Shares.* Sometimes, under the terms of the law creating it, a lien for unpaid calls extends only to the particular shares as to which the shareholder is in default, and as to other shares his right to transfer is unimpaired.[91]

84. New London, etc., Bank *v.* Brocklebank, 21 Ch. D. 302, 51 L. J. Ch. 711, 47 L. T. Rep. N. S. 3, 30 Wkly. Rep. 737.

85. Reading Trust Co. *v.* Reading Iron-Works, 137 Pa. St. 282, 21 Atl. 169, 170, 27 Wkly. Notes Cas. (Pa.) 95.

86. White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601.

87. *In re* Cawley, 42 Ch. D. 209.

88. Georgetown Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269.

89. West Branch Bank *v.* Armstrong, 40 Pa. St. 278.

90. Where an assignee demands a transfer, but refuses to pay the debts then due the bank by the shareholder, and afterward makes a second demand when other notes of the shareholder had become due and payable, he cannot obtain a transfer without paying all the debts due at the time of the last demand. Reese *v.* Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536.

91. Hubbersty *v.* Manchester, etc., R. Co., L. R. 2 Q. B. 59. An agreement between a shareholder and a corporation by whose articles of association it has a lien on all his shares for his debt to it, and his right to transfer them depends on the assent of the directors, giving him additional time in consideration of his allowing certain shares to be sold on default without the delay prescribed by the articles, does not affect the lien, or the right to withhold permission to transfer as to the remaining shares. Africa Bank *v.* Salisbury Gold Min. Co., [1892] A. C. 281, 61 L. J. P. C. 34, 66 L. T. Rep. N. S. 237, 41 Wkly. Rep. 47. The lien given by a statute, which provides that no certificate of stock shall be transferred without the consent of the board of directors while the holder is indebted to the company, is not restricted to indebtedness growing out of the original subscription and subsequent assessments and calls thereon. National Bank of Republic *v.* Rochester Tumbler Co., 172 Pa. St. 614, 33 Atl. 748.

That a lien given by such statute includes all kinds of indebtedness see Winans *v.* Sanderson Oil, etc., Co., 7 Lack. Leg. N. (Pa.) 9.

(III) *Lien For Unpaid Purchase-Money Follows Shares.* There is a species of lien which follows the shares, on principles already stated,[92] unless the share certificates recite that they are paid up, or at least unless they fail to recite that they are assessable, and the transferee takes them in good faith believing that they are paid up or non-assessable; that is the lien for purchase-money due to the corporation for the shares themselves.[93] Under some schemes of incorporation this lien does not exist. Thus in California a corporation has no special seller's lien, in the absence of a contract to that effect, on shares of its capital stock for unpaid instalments of purchase-money.[94]

(IV) *Lien Upon Shares Survives, Although Debt Barred by Limitation.* Under a well-known principle the lien of a company upon the shares of a member for debts due from him to the company survives after the right of action of the company for the debt has become extinguished by the statute of limitations, so that the company can refuse to transfer the shares on its books until its demand is satisfied.[95]

(V) *Effect of Such Liens as Against Bona Fide Purchasers Without Notice.* If a lien upon the shares of a member is given by the charter of the corporation,[96] or by a general statute operating upon the corporation,[97] it is not discharged by a transfer of the shares to a person who is ignorant of the lien.[98] But if a third person has a prior claim upon shares of stock, of which claim the corporation has notice at the time when the shareholder becomes indebted to it, then such prior claim will be paramount to the statutory lien of the corporation upon the shares, although they may not have been transferred to the prior claimant on the books of the corporation as required by the statute.[99]

1. **Notice of Lien** — (I) *When Created by Special Charter.* If the corporation is operating under a special charter, and the lien is created by the charter, the assignee of the shares is bound to take notice of it.[1]

(II) *When Created by General Law.* Where by the general law a lien is given to a corporation upon its stock for the indebtedness of the shareholder, it is valid and enforceable against all the world; whoever deals with it is charged with notice of all limitations and burdens attached to it by such statute, whether the party lives in or out of the state.[2] The same rule obtains where under the general law an assignment of corporate stock is not valid as to third persons unless it is entered on the books; and an assignee of a stock certificate of a bank, from one who is in debt to the bank, which certificate provides that the transfer shall not be entered on the books until the holder has paid all he owes, is not a *bona fide* purchaser; and the equitable lien held by the bank on the stock for the amount due it from the original holder is retained as against such assignee; and it

92. See *supra*, VI, M, 3, a *et seq.*

93. One who accepted and transferred his certificate of stock in a Virginia corporation prior to an assessment made by order of the court was not discharged from liability to be further assessed under the Virginia statute (Va. Code (1873), c. 57, § 26), providing that "no stock shall be assigned on the books without the consent of the company until all the money . . . shall have been paid, and . . . the assignee and assignor shall each be liable for any installments," etc. Morris *v.* Glenn, 87 Ala. 628, 7 So. 90.

94. Lankershim Ranch Land, etc., Co. *v.* Herberger, 82 Cal. 600, 23 Pac. 134.

95. Farmers' Bank *v.* Iglehart, 6 Gill (Md.) 50; Reading Trust Co. *v.* Reading Iron-Works, 137 Pa. St. 282, 21 Atl. 169, 170, 27 Wkly. Notes Cas. (Pa.) 95; Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41.

96. German Nat. Bank *v.* Kentucky Trust Co., 40 S. W. 458, 19 Ky. L. Rep. 361.

97. Dorr *v.* Life Ins. Clearing Co., 71 Minn. 38, 73 N. W. 635, 70 Am. St. Rep. 309; Wright Lumber Co. *v.* Hixon, 105 Wis. 153, 80 N. W. 1110, 1135.

98. Jennings *v.* State Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233; Newberry *v.* Detroit, etc., Iron Mfg. Co., 17 Mich. 141; Hammond *v.* Hastings, 134 U. S. 401, 10 S. Ct. 727, 33 L. ed. 960; Bank of Commerce *v.* Newport Bank, 63 Fed. 898, 11 C. C. A. 484.

99. Prince Invest. Co. *v.* St. Paul, etc., Land Co., 68 Minn. 121, 70 N. W. 1079.

1. Georgetown Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269, opinion by Story, J.

2. Hammond *v.* Hastings, 134 U. S. 401, 10 S. Ct. 727, 33 L. ed. 960.

will extend to subsequent advances or loans made to the assignor, where the assignee gives no notice of the assignment.[3]

(III) *When Created by By-Law or Contract.* But where the corporation itself asserts a right of lien upon the shares of stock held by one of its members by virtue of a by-law merely, there is much judicial authority, based on the soundest reasoning, to the effect that it cannot make good this lien against a *bona fide* transferee of the shares who had no knowledge of it; and this although the certificates which represent the shares recite that they are transferable only on the books of the company, or at the company's office by person or by attorney.[4] And so, where a shareholder died insolvent and indebted to the corporation, and subsequently the directors, by resolution, prohibited the transfer of stock by any debtor of the company until the debt should be paid or secured, and the shareholder's administratrix sold the stock to a person who was ignorant of the indebtedness and of the resolution, it was held that the corporation had no right to refuse to transfer the stock to the purchaser.[5] But a lien created by by-law is valid as against one purchasing stock at execution sale with knowledge of the by-law, if the indebtedness to the company is older than the judgment.[6] If the share certificate has printed upon it a by-law imposing certain conditions upon any transfer of the shares, then a pledgee of it is put upon inquiry as to such conditions, and does not occupy the position of an innocent purchaser.[7]

j. Waiver of Lien — (I) *In General.* Such a lien, however created, being for the benefit of the corporation, may be waived by the corporation.[8] Such a lien may be waived and discharged by a new arrangement entered into between the corporation and the shareholder which is incompatible with its retention of the lien, or which shows an intention on the part of the corporation to waive it.[9] The corporation waives its lien where, in the absence of fraud or collusion, it permits, through its proper officers, a transfer of the shares to be made on its books with the usual formalities.[10]

(II) *Lien Waived by Giving Further Credit After Notice.* Where the company, after being charged with notice that a conflicting lien on the stock has accrued, gives further credit to the shareholder, it will be held to have waived its lien as to such subsequent credits. Thus a shareholder deposited his share certificates with a bank as security for the balance due on his current account, and the bank gave the company notice of the deposit. The certificate stated that the shares were held subject to the articles of association. It was held that the company could not, in respect of moneys which became due from the shareholder to the company after notice of the deposit with the bank, claim priority over advances by the bank made after such notice.[11]

(III) *Circumstances Under Which Lien Was Not Waived.* Where a corporation permitted a shareholder to have his stock transferred on the books, which was the only manner in which an assignment could be made, to a fictitious name,

3. Jennings *v.* State Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

4. Holly Springs Bank *v.* Pinson, 58 Miss. 421, 38 Am. Rep. 330.

5. Steamship Dock Co. *v.* Heron, 52 Pa. St. 280.

6. Tuttle *v.* Walton, 1 Ga. 43. *Compare* Leggett *v.* Sing Sing Bank, 24 N. Y. 283.

7. State Sav. Assoc. *v.* Nixon-Jones Printing Co., 25 Mo. App. 642.

8. St. Paul Nat. Bank *v.* Life Ins. Clearing Co., 71 Minn. 123, 73 N. W. 713; Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039.

9. Africa Bank *v.* Salisbury Gold Min. Co., [1892] A. C. 281, 61 L. J. P. C. 34, 66 L. T. Rep. N. S. 237, 41 Wkly. Rep. 47. For an arrangement between a corporation, its shareholder, and a bank, which was held tantamount to a waiver of the statutory lien held by the corporation on the shares of its member, see St. Paul Nat. Bank *v.* Life Ins. Clearing Co., 71 Minn. 123, 73 N. W. 713.

10. Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306; Hill *v.* Pine River Bank, 45 N. H. 300.

11. Bradford Banking Co. *v.* Briggs, 12 App. Cas. 29, 56 L. J. Ch. 364, 56 L. T. Rep. N. S. 62, 35 Wkly. Rep. 521.

Other circumstances amounting to a waiver of the lien. Dobbins *v.* Walton, 37 Ga. 614, 95 Am. Dec. 37; Africa Bank *v.* Salisbury Gold Min. Co., [1892] A. C. 281, 61 L. J. P. C. 281, 66 L. T. Rep. N. S. 237, 41 Wkly. Rep. 47.

which was known to the officers of the corporation, and he afterward caused the stock to be transferred to plaintiff, by a person represented by him to be the holder, as security for a debt due plaintiff from him, no money being paid on the transfer, it was held that the lien of the corporation upon the stock for a debt due from the shareholder was not thereby divested.[12] The mere fact that the officers of the corporation acting for it at the time the indebtedness was created failed to insist upon the production of the certificate of the stock which had been pledged for another debt, although not transferred on the books, will not operate as a waiver of the company in favor of a prior creditor to whom the certificate had been delivered as collateral for a previous debt.[13] Mere ignorance on the part of the purchaser of the fact of the existence of the lien does not destroy it, for this constitutes no waiver on the part of the corporation.[14] Nor, unless an intention to do so clearly appears, does a corporation waive its lien on stock by taking a mortgage on other property to secure the indebtedness.[15] The fact that a cashier of a bank testified that "if a party is in good standing, we don't question his right to transfer; we waive it by transferring. We do not pretend to claim the right to refuse a transfer against a shareholder in good credit," and the further fact that the shareholder was allowed a large overdraft, do not show that the loan was made on his personal credit alone, so as to waive the lien on the stock.[16] The mere assenting to an assignment, made by a shareholder for the benefit of all his creditors, "with no other preference than is or may be authorized by law," is not a waiver of the lien on the stock for debts due by the assignor to the corporation;[17] nor is the giving the shareholder additional time in consideration of his allowing certain shares to be sold on default without the delay prescribed by the articles a waiver of the lien or of the right to withhold permission to transfer as to the remaining shares.[18]

(IV) *Corporation May Waive Formal Assent of Its Directors to Transfer of Shares.* Even where the charter required the consent of the directors to the validity of a transfer, it was held that such consent need not be obtained at a formal convocation of the board, but that if it appeared that the assent of a majority of the directors had been given, and in the manner that transfers of stock were frequently made, it would be sufficient.[19] On grounds even more clear, where the restraint upon the alienation without the consent of the directors while the shareholder is indebted to the company is imposed by a by-law, the necessity of obtaining such consent may be waived by the corporation; and it has been held that it is waived by a course of conduct establishing a usage of not bringing such cases before the board; so that a transfer without such consent, but in accordance with the usage of the company, would be good as against the company.[20]

12. Stebbins *v.* Phenix F. Ins. Co., 3 Paige (N. Y.) 350.

13. Platt *v.* Birmingham Axle Co., 41 Conn. 255.

14. Hammond *v.* Hastings, 134 U. S. 401, 10 S. Ct. 727, 33 L. ed. 960.

15. Kenton Ins. Co. *v.* Bowman, 84 Ky. 430, 1 S. W. 717, 8 Ky. L. Rep. 467; Georgetown Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269.

16. Jennings *v.* State Bank, 79 Cal. 323, 330, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

17. Dobbins *v.* Walton, 37 Ga. 614, 95 Am. Dec. 37.

18. Africa Bank *v.* Salisbury Gold Min. Co., [1892] A. C. 281, 61 L. J. P. C. 34, 66 L. T. Rep. N. S. 237, 41 Wkly. Rep. 47.

Circumstances under which a banking corporation did not require a pledge from an original subscriber to its shares for a fresh advance after an assignment of the shares, of which the bank had notice. Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 324.

Settlement with depositor by mistake not a waiver of the lien. Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384. *Compare* Callanan *v.* Edwards, 32 N. Y. 483.

Circumstances under which the failure of a corporation to require its secretary to withdraw from illegal ventures as soon as it learned that he was using its money therein did not defeat its statutory lien upon his shares for the amount of his defalcations. National Bank of Republic *v.* Rochester Tumbler Co., 172 Pa. St. 614, 33 Atl. 748.

19. Ellison *v.* Schneider, 25 La. Ann. 435.

20. Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120.

k. Personal Liability of Directors For Improperly Approving Transfers. Where the directors have the power to disapprove of or to refuse the making of transfers, if they exercise their power corruptly or with gross negligence, to the injury of the corporation, they will be personally liable to it or to its representative, on principles hereafter considered in dealing with the subject of directors; but not so where they act honestly, and are guilty of a mere mistake of judgment.[21]

l. Construction of Various Statutes and Other Instruments Creating Such Liens. The articles of a company gave the company a lien on all the shares held by any shareholder indebted to the company, and gave the directors power to sell such shares in certain events. They also empowered the board to lend money, or to give credit with or without security, but no advances without security were to be made or credit given to any director. It was held that the lien given by the articles on the shares constituted a "security," and advances could be made both to shareholders and directors on such security, if the board considered the shares of adequate value.[22] A provision in the charter of a bank giving it a lien on the shares of its shareholders for debts due from them does not give the bank a lien for a debt against shares transferred to the bank by a third person as collateral security for a debt due from him to the bank, even though the shareholder is president of the bank at the time.[23]

m. When Corporation Not Guilty of Laches as Against Bona Fide Purchaser in Not Enforcing Its Lien. Where a shareholder continued to be an officer of the corporation up to within a few weeks of the time an alleged *bona fide* purchaser made advances on his stock, and nothing occurred between the time of his withdrawal from the corporation and the advancement whereby the purchaser was prejudiced, the corporation was not guilty of laches in not sooner enforcing its paramount lien on the shareholder's shares for his debt to the corporation, although the debt had existed for several years.[24]

3. Nature of Share Certificate — a. What a Share Certificate Is and Is Not — (I) *Not Property but Symbol of Property* — (A) *In General.* A share certificate is merely the paper representative of an incorporeal right, and stands on a footing similar to that of other muniments of title.[25] It is not in itself property, but is merely the symbol or paper evidence of property; hence the proprietary right may exist without a certificate.[26]

(B) *Consequences Which Flow From This Doctrine.* Numerous cases accordingly hold that a person may acquire the rights[27] and incur the liabilities[28] of a shareholder, both to the corporation and to its creditors,[29] although no certificate has in fact been issued. The same consequences may follow where a certificate

21. *In re* Faure Electric Accumulator Co., 40 Ch. D. 141, 58 L. J. Ch. 48, 59 L. T. Rep. N. S. 918, 1 Meg. 99, 37 Wkly. Rep. 116.

22. *In re* Wales Nat. Bank, [1899] 2 Ch. 629, 68 L. J. Ch. 634, 81 L. T. Rep. N. S. 363, 48 Wkly. Rep. 99.

23. Boyd *v.* Redd, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 792. Articles and statute under which the shareholder has a right to require the company, upon payment of the sum due from him to it, to assign the debt and its lien to his assignee. Everitt *v.* Automatic Weighing Mach. Co., [1892] 3 Ch. 506, 62 L. J. Ch. 241, 67 L. T. Rep. N. S. 349, 3 Reports 34. That the provisions of a charter of a corporation that the amount due by subscribers for unpaid stock shall be a fund for the payment of the corporate debts, that the transfer of stock by a subscriber shall not relieve him from payment, and that, on failure of subscriber to pay for stock when due, a right of action shall exist against him for such payment, do not create a lien in favor of the corporation on unpaid shares see Ingles Land Co. *v.* Knoxville F. Ins. Co., (Tenn. Ch. App. 1899) 53 S. W. 1111.

24. Wright Lumber Co. *v.* Hixon, 105 Wis. 153, 80 N. W. 1110, 1135.

25. Connor *v.* Hillier, 11 Rich. (S. C.) 193, 73 Am. Dec. 105.

26. See *supra*, VI, H, 7, a.

27. Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50, 17 S. W. 1043. A shareholder may accordingly assign his shares to his wife, so as to vest her with full ownership, where she is recognized as such by the corporation, although no certificate is delivered. Colton *v.* Williams, 65 Ill. App. 466.

28. Agricultural Bank *v.* Wilson, 24 Me. 273; Agricultural Bank *v.* Burr, 24 Me. 256.

29. Thayer *v.* Butler, 141 U. S. 234, 11 S. Ct. 987, 35 L. ed. 711; Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 11 S. Ct. 984, 35 L. ed. 702.

had been issued, but has been purposely left unsigned.[30] It follows that where a transfer of corporate shares is otherwise valid, no irregularity in the issue of the share certificate to the transferee will affect his interest or lessen his lawful rights to the stock transferred,[31] although it may impair the evidence by which he can assert that right. A recital upon the face of such a certificate that it shall be negotiable only upon a transfer upon the books of the company, with the assent of the company first obtained, will not prevent the vesting of a complete equitable title in an assignee by an absolute and unconditional assignment of the certificate.[32]

(C) *Is Symbol by Delivery of Which Shares May be Assigned.* A share certificate, like warehouse receipts and other documents representing personal property, is a symbol by the delivery of which the shares in a corporation which it describes may be assigned.[33]

(D) *Share Certificates Not Securities.* Share certificates are not securities in any proper sense of the word, although sometimes described as such in statutes. "They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation in which he is a member."[34]

(E) *Share Certificates Are Not Letters of Credit.* Certificates of shares of corporate stock are not letters of credit or in the nature of letters of credit.[35]

(F) *Share Certificates Are Not Negotiable Instruments* — (1) IN GENERAL. Certificates of shares of capital stock are not negotiable instruments either in form or character,[36] although they are often said to be quasi-negotiable.

(2) PURCHASER TAKES THEM SUBJECT TO EQUITIES. The general consequence of this doctrine is that whoever takes them takes them subject to the equities and burdens which attend them, as in the case of the purchase of any other non-negotiable paper, and that, although ignorant of such equities and burdens, his ignorance does not relieve the paper thereof, or enable him to hold it discharged therefrom.[37] They are non-negotiable in the sense that a complete transfer of title, good not only between the parties but also against the corporation itself, can only be made with the concurrence of the act of the corporation in pursuance of its charter, governing statute, or operative by-laws.[38]

(G) *Are Assignable When Properly Indorsed.* But they are assignable as between the vendor or purchaser, or pledger and pledgee, by mere delivery, when properly indorsed; for when indorsed in blank by the person named therein as the owner of the shares, they pass by mere delivery of the certificate, without further indorsement, and without transfer on the books of the corporation,

30. Thus where a deed of trust assigned stock standing on the corporation books in the grantor's name, and authorized the trustee to transfer it to himself or others, and the grantor delivered the certificates, the fact that they were not signed did not affect the operation of the deed, although the grantor purposely omitted to sign them, with the secret intention of retaining control of the shares. Curtis *v.* Crossley, 59 N. J. Eq. 358, 45 Atl. 905. *Compare* May *v.* Genesee County Sav. Bank, 120 Mich. 330, 79 N. W. 630.

31. O'Rourke *v.* Schultz, 23 Mont. 285, 58 Pac. 712.

32. Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520.

33. Lawler *v.* Kell, 6 Ohio S. & C. Pl. Dec. 311, 4 Ohio N. P. 218, where it is said that a share certificate so far partakes of the nature of a chose in action that an assignment in equity may be made of it.

34. Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 627 [*quoted* with approval in Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282]. See also Hawley *v.* Brumagim, 33 Cal. 394; Hardenbergh *v.* Bacon, 33 Cal. 356.

35. Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599.

36. O'Herron *v.* Gray, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599. See also *infra*, VII, E, 1, a *et seq.*

37. Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Hawes *v.* Gas Consumers' Ben. Co., 9 N. Y. Suppl. 490; Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752; Hammond *v.* Hastings, 134 U. S. 401, 10 S. Ct. 727, 33 L. ed. 960. See notes on this subject in 4 Am. St. Rep. 759; 28 Centr. L. J. 404.

38. Hall *v.* Rose Hill, etc., Road Co., 70 Ill. 673. See also *infra*, VII, D, 5, a, (I) *et seq.*

although the certificate is not a negotiable security;[39] and this equitable title is perfected into a full legal title by the transferee procuring the transfer to him to be registered on the books of the corporation, as hereafter shown.[40]

(H) *Are Continuing Affirmation by Corporation of Title and Interest of Shareholder.* It has often been said that a certificate of stock in a corporation, stating that a designated person is owner of a certain number of shares, transferable only on the books on the indorsement and surrender of the certificate, is a continuing affirmation of the ownership of the person named therein; that the corporation will not transfer the stock upon its books until a surrender of the certificate; and that the owner has the power and right to transfer and sell the stock until such power and right are lawfully terminated.[41]

(I) *Liability of Corporation in Case of Fraudulent Issues of Share Certificates.* From this it follows that a corporation may become liable to innocent third persons who have been induced to become the purchasers of its share certificates, although unauthorized and fraudulently issued by its officer, either to the extent of admitting him to the rights of a shareholder where the issue was within its powers, or of indemnifying him with respect to his loss where the issue was beyond its powers, and even where it was within its powers.[42] Privity of contract is not necessary to support such an action, because the injured party is not seeking redress upon a contract, but merely for a tortious act in the commission of which the contract was but an incident.[43]

(J) *Liability of Corporate Officers For Issuing False Share Certificates.* It has been held that officers of a corporation who sign and issue certificates of its stock in the usual form, stating upon their face that the corporation is incorporated according to the laws of a particular state, and that the stock is non-assessable, thereby represent that the stock is not spurious or invalid because of their known acts or omissions, and also that everything has been done which is necessary to make the stock rightfully exempt from further assessment; and that if such representations are false the officers will be liable in damages to one who has taken the certificates in good faith and for value, relying upon the representations.[44]

(K) *Are Subject to Limitations and Burdens Created by General and Public Laws.* Share certificates are of course subject to those limitations and burdens created by general laws governing the corporation. If therefore a public statute — as distinguished from a private statute — reserves to the corporation a lien upon its shares for debts due by the shareholders to the corporation, whoever purchases such shares takes them subject to this right of lien, although in point of fact he may be ignorant of the existence of the statute.[45] And while the lien of the corporation is capable of being waived,[46] yet the omission of the corpora-

39. Graves *v.* Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665.

40. See *infra*, VII, D, 4, d, (I), (A) *et seq.*

41. Joslyn *v.* St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337; Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. (Pa.) 446, 14 Am. St. Rep. 868.

42. New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Jarvis *v.* Manhattan Beach Co., 53 Hun (N. Y.) 362, 6 N. Y. Suppl. 703, 25 N. Y. St. 1.

43. New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30. Thus if the treasurer of a private corporation, whose duty it is to issue certificates of the stock of the corporation, fraudulently issues certificates, regular in form, but not representing any real stock, and pledges them to secure money borrowed by himself, which money he uses for his own purposes, the corporation will be liable in damages to the pledgee who took the certificates without notice of the fraud, for the amount loaned by him to the treasurer, with interest. Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540. In this case the question is considered at great length and many authorities cited. See also Titus *v.* Great Western Turnpike Road, 5 Lans. (N. Y.) 250 [*affirmed* in 61 N. Y. 237].

The measure of damages in such a case is said to be either the market value of the stock, at the date of the loan, with interest, or the amount of the loan with interest. But it cannot exceed the latter sum. Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540.

44. Windram *v.* French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750.

45. Hammond *v.* Hastings, 134 U. S. 401, 10 S. Ct. 727, 33 L. ed. 960.

46. Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039.

tion to state in the share certificate that the corporation retains a lien thereon by force of the statute is not a waiver by the corporation of this right of lien.[47]

(L) *Share Certificate Is Evidence of Vested Right*—(1) In General. The possession of a share certificate is an evidence of a right vested in the holder of the certificate which the law will protect. If therefore the corporation assumes, by a by-law or otherwise, to divide the shares of its stock, already sold and in the hands of lawful owners, into two classes, and to give to one class a preference over others in sharing in the earnings of the corporation, this act will be void, unless made good by unanimous consent. And this is so, although the equality of rights in the shares of the company was fixed by a by-law existing at the time when the purchaser acquired his shares; for such a by-law, equally with a charter provision or that of a governing statute, enters into and forms a part of his contract.[48]

(2) Illustrated in Case of Interest-Bearing Certificates. Where power exists to issue interest-bearing certificates, a certificate issued in the ordinary form of certificates of stock, but containing a promise on the part of the corporation to pay interest thereon until the happening of a specified event, constitutes the person to whom it is issued a shareholder. In such a case the corporation cannot, by a vote of the shareholders, without the individual assent of the particular holder, oblige him to receive their bond instead of money for the interest upon such certificate.[49]

b. Validity of Share Certificates. At the outset the share certificate carries with it a general presumption that the precedent steps to its valid issue were taken.[50] It has also been held that an *ultra vires* share certificate may be sustained to some extent on the theory of contract; for example, that where the certificate purports to be a certificate for one share, drawing interest at six per cent, although not operative as a certificate of stock, it may be sustained as a contract to pay annual interest during the lifetime of the corporation;[51] but this conclusion seems doubtful. A share certificate is not necessarily invalid because it is issued to one of the officers of the corporation by whom it is signed. When therefore the treasurer of a stock company whose duty it was, in connection with the president, to sign certificates of stock, issued certificates to himself, apparently regular, but in fact fraudulent, the signature of the president having been negligently affixed, and disposed of them for value to plaintiff, who took them in good faith supposing them to be genuine, it was held that the company was liable to plaintiff for the money advanced by him. The fact that the treasurer had signed certificates issued to himself did not of itself render them irregular or invalid.[52] It has been held that a share certificate, previously sold and transferred

47. Hammond *v.* Hastings, 134 U. S. 401, 10 S. Ct. 727, 33 L. ed. 960.

48. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

49. McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 100, holding that if a railway corporation have authority to issue such a certificate, they may ratify one which has been issued without authority, and that it is sufficient evidence of such ratification that the corporation, at a regular meeting of the shareholders, passed a resolution for the payment, in their bonds, of interest on such certificate. It has been held in a subordinate court, but by a judge of distinction, that where subscriptions to shares are made, to be paid in instalments, and certificates are to be issued for the several instalments, the corporation is not bound to issue the certificates before getting in the instalments, but that a readiness and willingness to issue them at the time when payment is to be made is all that can be required of it; and that, in an action to recover such an instalment, an averment of this readiness and willingness to issue the certificates is necessary. The issue of the shares and payment therefor were regarded as intended to be contemporaneous acts. James *v.* Cincinnati, etc., R. Co., 2 Disn. (Ohio) 261, opinion by Gholson, J. A contract to deliver a certain number of shares has been held, under particular circumstances, to be fulfilled, where the obligor places the obligee in a position to demand the certificate from the corporation. Field *v.* Pierce, 102 Mass. 253.

50. Smock *v.* Henderson, Wils. (Ind.) 241.

51. Bryant *v.* Ohio Dental Surgery College, 1 Cinc. Super. Ct. 307, where it was also held that no lien was created on the real estate of the corporation by such a certificate.

52. Titus *v.* Great Western Turnpike Road, 5 Lans. (N. Y.) 250 [*affirmed* in 61 N. Y. 237].

on the books of the corporation, may be signed by the treasurer, even in a case where the corporation has been dissolved by a decree of court and perpetually enjoined from transacting business and receivers thereof appointed, where there has been a failure to procure the signature of the treasurer before dissolution.[53] Certificates of shares are not necessarily invalid because issued at a place outside the state in which the corporation was organized and has its principal place of business.[54]

c. Right to Share Certificate. The right of a subscriber to the shares of a corporation to a certificate evidencing his title depends of course upon his performance of his contract of subscription, according to its terms or lawful implications; so that a payment is a condition precedent to the issuing of the certificate; then until he pays he is not entitled to it.[55]

d. Conditional Share Certificates. If the right to the share certificate depends upon a valid condition precedent, to be performed by the sharetaker, then until this condition is performed he cannot claim the certificate.[56] Conditional stock certificates which merely provide that upon payment for them the company will issue unconditional stock, and which do not entitle the holder to dividends, are said to involve the reservation of a lien on the part of the company for the amount due thereon by the holders to whom the certificates are issued. The performance of the condition by such holders, that is, the payment for the shares according to the contract of subscription, is a condition precedent which must be fulfilled before the corporation can be required to issue the unconditional certificates, or before it can rightfully do so, where it has received what are called "stock notes" in liquidation of the amount due by the subscribers to the conditional certificates, which notes it has transferred to *bona fide* takers for value.[57]

e. Issuing Share Certificates — (I) *What Constitutes an Issuing.* It has been held on a question concerning the right to a dividend that the execution of a stock certificate and placing it in the post-office addressed to the person named therein is an issue to him of the stock as of that date, entitling him to all the rights of a shareholder.[58]

(II) *Effect of Issuing Shares to Wrong Person and of Making Improper Division of Shares Among Coadventurers.* Where parties form a mining corporation to contain a certain number of shares, and convey their mining claims to trustees who are to hold the realty for corporation purposes, and issue certificates of stock, and certificates are issued to the full extent of the shares, all such certificates are valid, although some of them are issued to the wrong persons, that is, although some get more than their proportion; and the court cannot grant relief to parties who have not received their just number of certificates, by ordering the issue of new certificates to them. It seems that if in such a case the court can get the proper parties before it, it can equalize the holdings of the shareholders; but it cannot do this where the shares have passed into the hands of innocent purchasers for value. Those who have not received their proportion will, however, it seems, be entitled to indemnity from the corporation, not in the form of new shares, for that will be beyond the power of the corporation, but in the form of pecuniary compensation for their loss.[59]

53. Sewell *v.* Chamberlain, 16 Gray (Mass.) 581.

54. Courtright *v.* Deeds, 37 Iowa 503.

55. A decision in New York is to the effect that where a corporation, in a suit for the balance of a subscription for shares of the company, recovers only a portion of the sum claimed, because the other part is barred by the statute of limitations, and enforces the judgment by execution, the subscriber or his assignee, after having paid the amount recovered, is entitled to a certificate of the stock. Johnson *v.* Albany, etc., R. Co., 40 How. Pr. (N. Y.) 193.

When right to certificate not put an end to by laches.— Kobogum *v.* Jackson Iron Co., 76 Mich. 498, 43 N. W. 602.

56. See *supra*, VII, D, 3, c.

57. See for illustration Houston, etc., R. Co. *v.* Bremond, 66 Tex. 159, 18 S. W. 448.

58. Jones *v.* Terre Haute, etc., R. Co., 17 How. Pr. (N. Y.) 529.

59. Smith *v.* North American Min. Co., 1 Nev. 423.

4. Formalities in Transfer of Shares — a. Modes of Transferring Shares Governed by Law of Domicile of Corporation. The validity of the transfer of shares in a corporation is tested and governed by the law of the state under whose laws the corporation is organized and exists, and this although the transfer is made in another state.[60]

b. Transfer Must Be Made According to General Statute, the Charter, By-Laws, or Usage of Corporation, or Terms of Share Certificate. If the charter or governing statute prescribes in detail the mode in which transfers shall be made in order to be valid, that of course must be followed. If the charter is silent, contains only general provisions, or remands the subject to the by-laws, either in terms or by implication, and by-laws are passed prescribing the method, which by-laws do not infringe the charter or the law of the land, then that method must be followed. In the absence of by-laws, then, a mode of transfer may be established by the company by usage and recited on the certificate, and a transfer in that mode will be good.[61]

c. Book in Which Transfer Is to Be Registered — (i) *Constitutional Provisions and Statutes Requiring Transfer Offices to Be Kept.* Constitutional provisions and statutes exist in some of the states requiring corporations to keep offices for the registry and transfer of their shares and for making and keeping records of other matters.[62]

(ii) *Necessity of Keeping Such Offices Within State.* Statutes exist which, expressly or impliedly require the transfer-books of corporations to be kept within the state; and some of them impose penalties for a violation of this requirement.[63] A statute of Iowa which requires the books of corporations to show all transfers of shares, and to be kept subject to inspection, means to be kept within the state subject to inspection; and hence a transfer in an Iowa corporation is not valid when made on the books of the corporation kept in the state of Massachusetts.[64]

(iii) *In What Kind of Book Transfer Is to Be Registered — Stock Ledger, Stub of Subscription Book, Etc.* — (a) *In General.* Although the by-laws of a corporation require the entry of transfers of shares on a stock ledger, yet if none is kept, and a transfer by the subscriber to the capital stock to another is entered according to the custom of the company on the subscription list, an assignment is indorsed on the shares themselves, and a new certificate is issued to the purchaser by the company, the latter cannot deny the validity of the transfer.[65] So a provision in a by-law and in corporate stock certificates that they shall be transferable only on the company's transfer-books is waived where no regular transfer-books are ever furnished and the transfers are registered on the certificate book, which, with memoranda on its marginal stubs, answers the purpose of a transfer-book and a stock ledger as well as of a certificate book.[66] And even where the requirement of a general statute was that transfers, to be valid as to third persons, must be "regularly entered on the books of the company,"[67] it has

60. Masury *v.* Arkansas Nat. Bank, 87 Fed. 381. It has been held that a subscriber to the stock of a foreign corporation is deemed to be, as far as his relationship to such corporation is concerned, a resident of the domicile of such corporation. McKean *v.* New York Nat. Bldg., etc., Assoc., 10 Pa. Dist. 197, 24 Pa. Co. Ct. 458, 7 Lack. Leg. N. (Pa.) 28, 14 York Leg. Rec. (Pa.) 161.

61. It has been held that, in the absence of any by-law or other law of a corporation regulating the mode in which its stock shall be transferred, transfers must be made in the manner prescribed by the usages of the company, or set forth in the certificates of its stock. Mechanics' Banking Assoc. *v.* Mariposa Co., 3 Rob. (N. Y.) 395; State *v.* McIver, 2 S. C. 25.

62. See for example Cal. Const. (1879), art. 12, § 14; Tex. Const. (1876), art. 10, § 3.

63. Such for example is N. Y. Laws (1897), c. 384, relating to foreign corporations having offices for the transaction of business within the state. Recknagel *v.* Empire Self-Lighting Oil Lamp Co., 24 Misc. (N. Y.) 193, 52 N. Y. Suppl. 635.

64. Perkins *v.* Lyons, 111 Iowa 192, 82 N. W. 486.

65. Stewart *v.* Walla Walla Printing, etc., Co., 1 Wash. 521, 20 Pac. 605.

66. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551, 23 Atl. 795.

67. Iowa Code, § 1628.

been held that a simple entry in a stock-book that certain stock has been assigned as collateral security is sufficient to protect the assignee from the claims of the assignor's judgment creditors.[68] In short a transfer may be valid and effectual as between the parties, without any registration at the office of the company, and will be binding upon all parties, if noted by the company according to their usual method, no transfer-books being kept by them.[69]

(B) *When Lawful to Procure and Adopt New Stock-Book.* It is lawful for the directors of a corporation to adopt and procure a new seal and a new stock-book in order to effect the transfer of shares upon the books before the annual meeting of shareholders, where the prior president of the corporation withholds the old seal and stock-book of the corporation for the purpose of preventing such transfer.[70] They should make the new stock-book as far as possible a copy of the old. In such a case the inspectors of a corporate election may properly refer to the new stock-book to ascertain who are voters; but if the old book be produced, the record therein must govern in reference to transfers recorded before the new book was opened.[71]

(C) *In Case of Shares in Names of Joint Executors.* In the case of shares in the names of joint executors the title is joint in such a sense that a transfer must be executed by all of them.[72]

(IV) *Transfer-Book or Stock Ledger as Evidence.* On principle the transfer-book or stock ledger of the corporation is evidence against those who are in privity with it, and against such persons only.[73] For instance the transfer-book is admissible to show the date of a transfer when that is material.[74] It has been held that as between a corporation and a corporator the stock-book is primary, and the certificate secondary, evidence of their relation.[75] The appropriate evidence of the shareholder's right to vote at corporate elections by incorporated companies includes the stock ledger as well as the certificate book and transfer-book, but the ledger is evidence only as subordinate to, and as supported by, the other books. In case of dispute the transfer-book must control the rest.[76]

d. Mode of Effecting Transfers — (I) *By Indorsement and Delivery of Certificate With Power of Attorney in Blank* — (A) *In General.* The usual share certificate contains on its back a printed assignment or indorsement and also a power of attorney in blank, like the following: "For value received I hereby assign the within named shares to ——, and appoint —— my attorney to make the transfer on the books of the company." This is signed by the person to whom the shares are issued. In this manner, by the usages of business, of which the courts take judicial notice, the certificate may be passed from hand to hand indefinitely, by the person to whom the certificate is issued simply signing this

68. Moore *v.* Marshalltown Opera-House Co., 81 Iowa 45, 46 N. W. 750.

69. Haegele *v.* Western Stove Mfg. Co., 29 Mo. App. 486.

Under the Iowa statute it has been held that a memorandum made with a pencil on the stub of the stock-book of the corporation showing the parties, the shares transferred, and the nature of the transfer is a sufficient record of it. Perkins *v.* Lyons, 111 Iowa 192, 82 N. W. 486.

Under the statute of Kansas a sufficient record of the transfer of shares is kept by a corporation by making a memorandum of the transfer on the stub of the old certificate, with a reference to the number of the new certificate issued in its place, where the stubs contain a memorandum of the date of issue, number of certificate, number of shares, and the name of the person to whom it is issued, and a new certificate is always issued when a transfer is made. Plumb *v.* Enterprise Bank, 48 Kan. 484, 29 Pac. 699.

70. Socorro Mountain Min. Co. *v.* Preston, 17 Misc. (N. Y.) 220, 40 N. Y. Suppl. 1040.

71. *In re* Schoharie Valley Railroad Case, 12 Abb. Pr. N. S. (N. Y.) 394.

72. Barton *v.* London, etc., R. Co., 24 Q. B. D. 77, 59 L. J. Q. B. 33, 62 L. T. Rep. N. S. 164, 38 Wkly. Rep. 197.

73. See *supra*, VI, P, 5, b, (II). *Contra*, Hoagland *v.* Bell, 36 Barb. (N. Y.) 57. *Compare* Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424.

74. Kraft *v.* Coykendall, 7 N. Y. Suppl. 140, 26 N. Y. St. 79.

75. *In re* Bank of Commerce, 73 Pa. St. 59.

76. Downing *v.* Potts, 23 N. J. L. 66.

indorsement and delivering the certificate with the blanks unfilled to his assignee. When it reaches the hands of someone who desires to assume the legal rights of a shareholder, so as to be entitled to vote at corporate elections and to receive dividends, he fills up the blanks by inserting his own name as transferee, just as the holder of a promissory note indorsed in blank is entitled by the law merchant to insert any name he pleases above the indorsement as the payee. He also inserts in the second blank the name of the attorney in fact whom he wishes to make the transfer for him on the books of the corporation.[77] This person is usually the secretary or some other officer of the company, although he may insert the name of whomsoever he pleases.[78] The attorney so appointed does exactly what the original shareholder would have done had he gone to the company's office to make the transfer of the shares to his vendee. He makes an entry on the book kept by the company for that purpose, usually the stock ledger, to the effect that the shares have been transferred to the new purchaser. Then the certificate is surrendered, as hereafter indicated,[79] and a new certificate is issued to the transferee.

(B) *Assignment Need Not Be Under Seal.* An assignment of shares in a corporation need not be under seal.[80]

(II) *By Registering Transfer on Books of Company* — (A) *Registration Made by Whom — By What Officer.* In strictness the making of the transfer on the books of the company is properly made only by the attorney appointed by the transferrer to make it; but in practice it is made by the officer of the corporation having the custody of its books, usually its secretary.[81] Where the corporation had no secretary or clerk, but its president had charge of its stock-books, it was held that a demand upon him to make the necessary transfer on the books of shares to a purchaser of them was sufficient.[82]

(B) *What Is Sufficient Registration of Such Transfer.* The following methods of registration of transfers of shares on the books of the corporation have been held sufficient: A registration of the written assignment of the shares *in extenso* on the books of the company by its clerk;[83] a memorandum entered upon a stub of a stock certificate book, "Transf. to Winston Jones, assignee, for collateral, Dec. 1, '84," this importing notice to a subsequent creditor or purchaser and making the assignment good as against him;[84] for the secretary to whom the power of attorney to make the transfer had been made to enter on a book that the shares were transferred, with the words "see paper filed," which paper, being

77. Kortright *v.* Buffalo Commercial Bank, 20 Wend. (N. Y.) 91 [*affirmed* in 22 Wend. (N. Y.) 348, 34 Am. Dec. 317].

78. Dunn *v.* Buffalo Commercial Bank, 11 Barb. (N. Y.) 580.

Where the owner of shares assigned them to two persons, and gave a power of attorney to one of them to transfer them on the books of the bank, the power was held to be valid, whether the power authorized the transfer to be made to both assignees, or to the attorney alone; and the bank was held not to be liable for refusing to transfer the shares to a subsequent attaching creditor who sold them on execution. Plymouth *v.* Norfolk Bank, 10 Pick. (Mass.) 454.

79. See *infra*, VII, D, 4, e, (II), (A) *et seq.*

Interpretation of a by-law requiring an attestation "in presence of the cashier or two other witnesses." Dane *v.* Young, 61 Me. 160.

80. Atkinson *v.* Atkinson, 8 Allen (Mass.) 15. But in England if the corporation undertakes to give a certificate of the title of a shareholder, to enable him to effect a transfer of his shares to a new purchaser, this is held to be a representation of the credit and validity of the transfer within the meaning of section 6 of Lord Tenterden's Act, and if not under seal, is invalid and *ultra vires*. Bishop *v.* Balkis Consol. Co., 25 Q. B. D. 77.

81. See *supra*, VII, D, 4, d, (I), (A).

Where the charter provided that the shares should be transferable in the manner prescribed by the by-laws, and it was not shown that any by-laws governing the subject had been adopted, but the share certificates provided that the stock should be transferable only on the books of the company, on the surrender of the certificate, it was held that the officers of the company, and not the assignor of the shares, should transfer them on the books of the corporation. Green Mount, etc., Turnpike Co. *v.* Bulla, 45 Ind. 1.

82. Green Mount, etc., Turnpike Co. *v.* Bulla, 45 Ind. 1.

83. Northrop *v.* Curtis, 5 Conn. 246. *Compare* Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 231; Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487.

84. Fisher *v.* Jones, 82 Ala. 117, 3 So. 13.

the power of attorney, he wafered to the book, attesting the entry of transfer as secretary, but not signing it as attorney of the shareholder.[85]

e. Surrendering Old Certificate and Issuing New One — (I) *Surrendering Old Certificate Not Strictly Necessary* — (A) *In General.* A transfer of stock upon the books of the company to a *bona fide* holder for value carries the title to the stock, although the certificate previously issued is not surrendered at the time of the transfer.[86] The rules of the company as to the mode of making transfers of its stock, requiring a surrender of the certificate, while they may be insisted upon by the company, cannot be allowed to have the effect of impairing the rights of third persons who are ignorant of them.[87]

(B) *Corporation Must Require Surrender of Certificate at Its Peril.* The corporation must require the surrender of the old certificate at its own peril.[88] The certificate being a continuing affirmation by the corporation that the person therein named is entitled to the number of shares therein named of its capital stock, it is evident that the corporation, by allowing the transfer to be made on its books while the certificate is outstanding, may put it in the power of any one into whose hands it may fall to injure an innocent third person by transferring it to him for value. Such a taker of the certificate could not be admitted to the rights of a shareholder, but he would have an action for damages against the company.[89]

(C) *Old Certificate Must Be Properly Indorsed.* If the corporation takes up the old certificate when it is not properly indorsed and cancels it and makes the transfer on its books to the new transferee, it does so at the peril of having to answer in damages to the real owner of the shares for their conversion in case the transferee had no right to have the transfer made to him.[90]

(II) *Issue of New Certificate Unnecessary, but Usual* — (A) *In General.* The certificate being only a document constituting evidence of the title of the shareholder,[91] when the shares are formally transferred to him on the books of the company, they are his, although a new certificate of them has not been issued to him.[92] For a similar reason, if the transferrer retains the certificate in his own possession, this will not prevent the legal title from passing to the transferee by way of gift, although he may have no knowledge of the transfer.[93]

(B) *Confusion Which May Result From Failure to Issue New Certificate.* A consequence of this principle is that if a person transfers his shares to another,

85. Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120.

What is a sufficient "entry in the books of the bank" within the meaning of Me. Rev. Stat. (1840), c. 76, § 12. Skowhegan Bank *v.* Cutler, 52 Me. 509.

Entry on the stub of the old stock-book sufficient. Plumb *v.* Enterprise Bank, 48 Kan. 484, 29 Pac. 699.

86. New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534 [*affirmed* in 34 N. Y. 30]. See also Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 4 S. Ct. 345, 28 L. ed. 385. *Compare* Bond *v.* Mt. Hope Iron Co., 99 Mass. 505, 99 Am. Dec. 49.

87. New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534 [*affirmed* in 34 N. Y. 30].

88. Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586.

89. See *supra*, VI, K, 5, c, (II), (A).

90. Tafft *v.* Presidio, etc., R. Co., 84 Cal. 131, 24 Pac. 436, 18 Am. St. Rep. 166, 11 L. R. A. 125.

91. See *supra*, VII, D, 3, a, (I), (A).

92. Davenport First Nat. Bank *v.* Gifford, 47 Iowa 575; Agricultural Bank *v.* Wilson, 24 Me. 273; Agricultural Bank *v.* Burr, 24 Me. 256; Chouteau Spring Co. *v.* Harris, 20 Mo. 382; Haegele *v.* Western Stove Mfg. Co., 29 Mo. App. 486. The record of transfers of stock upon the books of a bank was held sufficient, as between the assignee and the bank, to work a change of ownership, without new certificates. Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531. *Compare* New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Thayer *v.* Butler, 141 U. S. 234, 11 S. Ct. 987, 35 L. ed. 711; Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 11 S. Ct. 984, 35 L. ed. 702.

93. Thus T transferred two thousand shares of stock to F, a niece of his wife, on the books of the corporation, but retained the certificates in his possession; and after his death they were found in an envelope with his own name and that of F indorsed thereon. F had no knowledge of the transfer; she lived in the family of T, and was in all respects treated and regarded as his daughter. It was held that the transfer on the books of the corporation vested in F the legal title. Roberts' Appeal, 85 Pa. St. 84.

and the transfer is duly registered on the books of the company, but no new certificate is issued to the transferee, and the transferrer thereafter undertakes to transfer the same shares to a third person, and the company does issue a new certificate to the latter, he thereby gets no title to the shares, the certificate not being the shares themselves, but a mere evidentiary paper.[94]

(c) *Transferee May Have Aid of Equity to Compel Delivery to Him of New Certificates.* But while the new certificate is not necessary to the title of the transferee, it is an important muniment of his title, without which his shares would become practically non-vendible. He may therefore have the aid of equity to compel the corporation to issue it to him.[95]

f. Transfer Under General Assignment For Creditors. A general assignment made by a shareholder for the benefit of his creditors does not operate to pass the legal title to his shares until the transfer has been completed on the books of the corporation, in the mode pointed out by its charter, statute, by-law, or other governing instrument. But if the assignment is valid under the laws of the state in which the assignor resides, an equitable title will pass; and if the laws of the state in which the corporation exists do not prohibit the assignment of equitable interests in corporate shares, such an assignment will bind all persons who have notice of it.[96]

5. Necessity of Registering Transfers and Effect of Unregistered Transfers[97]— a. Corporation Looks Only to Its Books — (i) *In General.* The general rule is that as between the corporation on the one hand, and its shareholders and third persons on the other, for the purpose of determining who its shareholders are, the corporation looks only to its books. This rule, we have seen, obtains for the purpose of determining who are entitled to vote at corporate elections;[98] who are entitled to receive dividends;[99] who have such a standing as shareholders as will entitle them to petition for a dissolution of the corporation for failing to pay an annual divividend;[1] and who has such a standing as a shareholder as will enable him to prosecute a suit in equity to restrain the corporation from increasing its indebtedness.[2]

(ii) *Unregistered Transfers Not Binding on Corporation.* Subject to qualifications elsewhere considered, a transfer of shares not registered on the books of the corporation, in accordance with its governing statute or its by-laws, is not binding upon it, either with or without notice *aliunde* of the transfer.[3]

(iii) *Corporation May Recognize Holders of Unregistered Certificates.* "A corporation is ordinarily justified in treating the assignee and holder

94. Houston, etc., R. Co. *v.* Van Alstyne, 56 Tex. 439.

95. Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039. See also *infra*, VII, D, 7, a.

96. Black *v.* Zacharie, 3 How. (U. S.) 483, 11 L. ed. 690.

A general assignment by a corporation for the benefit of its creditors is not rendered void by the fact that the notice of the shareholders' meeting at which it was authorized to be made was given to the transferees, and not to the transferrers, of certain shares, the transfers of which were insufficient to pass the legal title, because not formally made in the transfer-books. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551, 23 Atl. 795.

97. Sale of shares and subsequent sale of interest due thereon from the corporation passes no title to the interest which has passed with the sale of the shares. Manning *v.* Quicksilver Min. Co., 24 Hun (N. Y.) 360.

When shares of state bank of Indiana became transferable.— Coleman *v.* Spencer, 5 Blackf. (Ind.) 197.

Decisions under special transactions.— Shipman *v.* Ætna Ins. Co., 29 Conn. 245; Denny *v.* Lyon, 38 Pa. St. 98, 80 Am. Dec. 463.

98. See *supra*, IV, F, 3, a *et seq.*

99. Brisbane *v.* Delaware, etc., R. Co., 25 Hun (N. Y.) 438. To the same effect see Smith *v.* American Coal Co., 7 Lans. (N. Y.) 317. See also *supra*, VII, B, 4, a *et seq.*

1. Armstrong *v.* Herancourt Brewing Co., 11 Ohio Dec. (Reprint) 297, 26 Cinc. L. Bul. 39.

2. Becher *v.* Wells Flouring-Mill Co., 1 Fed. 276, 1 McCrary 62.

3. Stockwell *v.* St. Louis Mercantile Co., 9 Mo. App. 133 [*citing* Wagner Stat. Mo. 289, § 1; White *v.* Salisbury, 33 Mo. 150; A. Wight Co. *v.* Steinkemeyer, 6 Mo. App. 575; Fine *v.* Hornsby, 2 Mo. App. 61].

of certificates of stock as the legal and equitable owner thereof."[4] It may for example give him notice of a general meeting convened to authorize an assignment for the benefit of creditors, and this will not vitiate the proceedings had at the meeting.[5]

(iv) *When Unregistered Transferee Not Bound by Subsequent Contract Between Corporation and Other Shareholders.* It has been held that assignees of shares of corporate stock having possession of the certificates, although holding under unregistered transfers, are not bound by a subsequent contract between the corporation and the other shareholders, including the assignor in whose name the shares remain registered, to surrender a portion of such stock without a consideration, in order that new stock may be issued to pay corporate debts, on which ten per cent per annum is to be paid, or as much thereof as can be paid from the net profits.[6]

b. Unregistered Transfers Good as Between Parties to Them — (i) *In General.* Another very general statement of doctrine is that unregistered transfers of corporate shares, that is, transfers which have not been made on the books of the corporation or which have not been otherwise made in conformity with its rules or by-laws, are good, as between the parties to them, that is, that they pass to the assignee all the interest of the assignor, or at least all the interest that the parties intended should pass; although they may not be good as against the corporation itself, or more generally speaking, against third parties.[7]

(ii) *Unregistered Transfer of Share Certificate Sufficient to Execute Gift.* A shareholder may clothe another with a complete equitable title to his shares by a delivery to him of the share certificate, without a compliance with the forms required by the corporation for a transfer of the shares,[8] and

4. Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 334, 15 Pac. 691, 3 Am. St. Rep. 586 [*citing* South Bend First Nat. Bank *v.* Lanier, 11 Wall. (U. S.) 369, 20 L. ed. 172].

5. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551, 23 Atl. 795.

6. Campbell *v.* American Zylonite Co., 122 N. Y. 455, 25 N. E. 853, 34 N. Y. St. 38, 11 L. R. A. 596 [*reversing* 55 N. Y. Super. Ct. 562, 3 N. Y. Suppl. 822].

7. *Alabama.*— Duke *v.* Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472.

California.— Weston *v.* Bear River, etc., Min. Co., 5 Cal. 186, 63 Am. Dec. 117.

Georgia.— Bates-Farley Sav. Bank *v.* Dismukes, 107 Ga. 212, 33 S. E. 175.

Indiana.— Bruce *v.* Smith, 44 Ind. 1.

Maryland.— Hall *v.* U. S. Insurance Co., 5 Gill 484.

Massachusetts.— Sargent *v.* Essex Mar. R. Corp., 9 Pick. 202; Sargent *v.* Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Nesmith *v.* Washington Bank, 6 Pick. 324; Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476.

Minnesota.— Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

Missouri.— Chouteau Spring Co. *v.* Harris, 20 Mo. 382; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149; Haegele *v.* Western Stove Mfg. Co., 29 Mo. App. 486.

New Jersey.— Mt. Holly, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117; Broadway Bank *v.* McElrath, 13 N. J. Eq. 24; Rogers *v.* New Jersey Ins. Co., 8 N. J. Eq. 167.

New York.— Burrall *v.* Bushwick R. Co., 75 N. Y. 211; Johnson *v.* Underhill, 52 N. Y. 203; Leitch *v.* Wells, 48 N. Y. 585; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Leavitt *v.* Fisher, 1 Duer 1; De Comeau *v.* Guild Farm Oil Co., 3 Daly 218; Buffalo Commercial Bank *v.* Kortright, 22 Wend. 348, 34 Am. Dec. 317; Gilbert *v.* Manchester Iron Mfg. Co., 11 Wend. 627; Utica Bank *v.* Smalley, 2 Cow. 770, 14 Am. Dec. 526.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146; Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120.

Rhode Island.— Hoppin *v.* Buffum, 9 R. I. 513, 11 Am. Rep. 291.

United States.—Beardsley *v.* Beardsley, 138 U. S. 262, 11 S. Ct. 318, 34 L. ed. 928; Johnston *v.* Laflin, 103 U. S. 800, 26 L. ed. 532; Black *v.* Zacharie, 3 How. 483, 11 L. ed. 690; Georgetown Union Bank *v.* Laird, 2 Wheat. 390, 4 L. ed. 269; U. S. *v.* Cutts, 25 Fed. Cas. No. 14,912, 1 Sumn. 133.

Compare State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460.

See 12 Cent. Dig. tit. "Corporations," § 480.

Sufficient tender on rescission of sale.— Where certificates of stock are transferred by indorsement in blank, and not on the books of the company, an offer to redeliver the certificates is a sufficient tender thereof by the transferee, on a rescission of the sale. Hill *v.* Wilson, 88 Cal. 92, 25 Pac. 1105.

8. Com. *v.* Crompton, 137 Pa. St. 138, 20 Atl. 417 [*citing* Tide Water Pipe Co. *v.* Kitchenman, 108 Pa. St. 630; Finney's Appeal, 59 Pa. St. 398; German Union Bldg., etc., Assoc. *v.* Sendmeyer, 50 Pa. St. 67;

this although the securities recite that the shares are "transferable only by his or her attorney on the surrender of this certificate." [9]

(III) *THEORY THAT UNREGISTERED TRANSFER PASSES BOTH LEGAL AND EQUITABLE TITLE.* Some of the decisions assert that as between the parties to the transaction the delivery of a share certificate with an assignment and blank power of attorney indorsed, passes, as between the owner and the assignee, the entire legal and equitable title in the stock, subject only to such liens or claims as the corporation may have upon it.[10]

(IV) *THEORY THAT ONLY AN EQUITABLE TITLE PASSES* — (A) *Statement of Theory.* Other decisions are to the effect that a transfer of shares not perfected on the company's books passes only an equitable title.[11] In line with this theory an unrecorded assignment of shares is sometimes called an equitable assignment.[12] And it is often said, with reference to cases where the governing statute provides that the stock of the corporation shall be assignable only on the books of the company, that an assignment not entered on the books of the company in conformity with the statute will not pass the legal title, although it may pass an equitable title.[13]

(B) *Meaning of This Expression.* The divergencies indicated by the two preceding paragraphs seem to be mere divergencies of expression, and not of real meaning. The meaning of the expression that an unregistered transfer of shares passes only the legal title is that the legal owner of shares in a corporation is the owner in whose name the shares stand on the books of the corporation; whereas the equitable owner is the one who, being the beneficiary, that is the real owner, is not registered as such on the corporate books, and who must, if the corporation refuses so to register him, go into a court of equity to compel them to do so.[14] The real meaning is that his title is complete as against everybody but the corporation itself, and those who have a superior right to have the corporation make the transfer to them.[15]

c. Neeessity of Assignment and Delivery of Share Certificate — (I) *REGISTERED TRANSFER PASSES TITLE WITHOUT DELIVERY OF CERTIFICATE.* The general rule being that in order to pass the full legal title the assignment must be

Com. *v.* Watmough, 6 Whart. (Pa.) 117; U. S. *v.* Vaughan, 3 Binn. (Pa.) 394, 5 Am. Dec. 375].

9. Walsh *v.* Sexton, 55 Barb. (N. Y.) 251.

10. Boatmen's Ins., etc., Co. *v.* Able, 48 Mo. 136; St. Louis Stoneware Co. *v.* Partridge, 8 Mo. App. 580; Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249; Leitch *v.* Wells, 48 N. Y. 585; McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; De Comeau *v.* Guild Farm Oil Co., 3 Daly (N. Y.) 218; Hill *v.* Newichawanick Co., 48 How. Pr. (N. Y.) 427; Buffalo Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Gilbert *v.* Manchester Iron Mfg. Co., 11 Wend. (N. Y.) 627; Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526.

11. Bruce *v.* Smith, 44 Ind. 1; *In re* Bank of Commerce, 73 Pa. St. 59; Lippitt *v.* American Wood Paper Co., 15 R. I. 141, 23 Atl. 111, 2 Am. St. Rep. 886.

12. Fraser *v.* Charleston, 11 S. C. 486.

13. The following cases all sustain the statement in the text that an assignment by delivery will not pass the legal title, although it may pass an equitable title; but they vary as to the rights of an attaching creditor.

California.— Farmers' Nat. Gold Bank *v.* Wilson, 58 Cal. 600; Naglee *v.* Pacific Wharf Co., 20 Cal. 529.

Connecticut.— Shipman *v.* Ætna Ins. Co., 29 Conn. 245; Northrop *v.* Newton, etc., Turnpike Co., 3 Conn. 544; Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579.

Illinois.— Otis *v.* Gardner, 105 Ill. 436.

Massachusetts.—Blanchard *v.* Dedham Gaslight Co., 12 Gray 213; Fisher *v.* Essex Bank, 5 Gray 373.

New Jersey.—Broadway Bank *v.* McElrath, 13 N. J. Eq. 24.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146.

Rhode Island.— Lippitt *v.* American Wood Paper Co., 15 R. I. 141, 23 Atl. 111, 2 Am. St. Rep. 886.

Tennessee.— State Ins. Co. *v.* Sax, 2 Tenn. Ch. 507.

Wisconsin.— Murphy's Application, 51 Wis. 519, 8 N. W. 419.

United States.— Black *v.* Zacharie, 3 How. 483, 11 L. ed. 690; Georgetown Union Bank *v.* Laird, 2 Wheat. 390, 4 L. ed. 269; Brown *v.* Adams, 4 Fed. Cas. No. 1,986, 5 Biss. 181; Williams *v.* Mechanics' Bank, 29 Fed. Cas. No. 17,727, 5 Blatchf. 59.

14. See *infra*, VII, D, 7, a *et seq.*

15. See in illustration Parrott *v.* Byers, 40 Cal. 614; Ross *v.* Southwestern R. Co., 53 Ga. 514.

made on the books of the company, it is therefore held that a contract to sell and deliver shares of stock is satisfied by transferring the shares to the vendee upon the books of the company without delivering the certificate of stock to him, the certificate being merely additional evidence of title.[16]

(II) *Nature of Equitable Title Which Passes by Delivery of Certificate.* On the other hand it is a recognized rule in the sale of such shares that an assignment of the stock certificate will not of itself pass the title to the shares, although, like an agreement in writing to sell land, it gives an equity, so that the assignee of the certificate can compel a transfer upon the books, except as against a *bona fide* purchaser who has acquired a title by such transfer.[17] It follows that the purchaser of such shares may insist that the certificate shall be delivered up to him; and where the corporation itself is the purchaser, it may insist that the certificate shall be delivered up for cancellation. Yet where this is not insisted upon at the time of the transaction the purchaser is not at liberty to refuse payment on the ground that he has not received a transfer of title. The outstanding certificate might be evidence of an equity in the hands of a *bona fide* holder, and might give the purchaser trouble; but he should protect himself by requiring its surrender to him at the time of the sale.[18]

d. Unregistered Transfers Estop Transferrer — (I) *In General.* A party who sells corporate shares, receives a consideration therefor, and delivers the share certificate to the purchaser, with the usual assignment and power of attorney indorsed thereon in blank, and duly signed, becomes estopped as against parties who have acquired rights under the transfer, from asserting title to the shares.[19]

(II) *This Estoppel Extends to Privies of Transferrer.* This estoppel extends of course to the privies of the transferrer, for example to his assignee in bankruptcy.[20]

e. Unregistered Transfers Not Valid as Against Third Parties Without Notice — (I) *In General.* Another view which receives much support in reason and authority is that, where the governing statute requires the transfer to be made on the books of the company, a transfer of shares of corporate stock not registered on the books of the corporation is not valid as against third persons who have not actual notice of the transfer. These decisions proceed on the larger view that the object of such a statute is not merely the protection of the corporation itself, but the protection of the public; that it is in the nature of a recording act, and that the books of the corporation furnish a registry to which any person intending to deal in respect of the shares may look for information as to their real ownership.[21]

16. White *v.* Salisbury, 33 Mo. 150. See also Agricultural Bank *v.* Burr, 24 Me. 256; Ellis *v.* Essex Merrimack Bridge, 2 Pick. (Mass.) 243; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

17. Boatmen's Ins., etc., Co. *v.* Able, 48 Mo. 136. See also Sargent *v.* Essex Mar. R. Corp. Co., 9 Pick. (Mass.) 202; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Chouteau Spring Co. *v.* Harris, 20 Mo. 382; Buffalo Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

18. Boatmen's Ins., etc., Co. *v.* Able, 48 Mo. 136.

19. Chew *v.* Baltimore Bank, 14 Md. 299; Merchants' Bank *v.* Livingston, 74 N. Y. 223; Colonial Bank *v.* Hepworth, 36 Ch. D. 36, 56 L. J. Ch. 1089, 57 L. T. Rep. N. S. 148, 36 Wkly. Rep. 259.

For the reasons on which the rule rests see Prall *v.* Tilt, 28 N. J. Eq. 479; Mt. Holly, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117; McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Daniel Neg. Instr. (3d ed.) § 1708*g*. That it rests on the doctrine that when one of two innocent parties must suffer, etc., see East Birmingham Land Co. *v.* Dennis, 85 Ala. 565, 5 So. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836 [*citing* Allen *v.* Maury, 66 Ala. 10, which related to warehouse receipts].

20. Dickinson *v.* Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351. See also Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. 369, 37 Am. Rep. 353 note, learned opinion by Lowell, J.

21. This conclusion is affirmed, and this view of such statutes is expressed with more or less directness, in the following cases: Parrott *v.* Byers, 40 Cal. 614; People *v.* Elmore, 35 Cal. 653; Naglee *v.* Pacific Wharf Co., 20 Cal. 529; Strout *v.* Natoma Water, etc., Co., 9 Cal. 78; Weston *v.* Bear River, etc., Min. Co., 5 Cal. 186, 63 Am. Dec. 117, 6

(II) *Not Valid as Against Subsequent Purchaser in Good Faith Without Notice.* Another consequence of the same doctrine is that an unregistered transfer is not good as against a subsequent purchaser of the shares from the transferrer without actual notice of the transfer.[22] The rule under discussion does not, under the circumstances named, exact inquiry outside of or behind the register,[23] the principle being that *bona fide* purchasers of stock without notice are at liberty to act upon the faith of the title being where, upon the books of the bank, it appears to be.[24]

(III) *Otherwise as to Purchaser at Judicial Sale With Notice.* But if such shares are seized under an attachment against the transferrer and sold, a purchaser at the sale who has notice of the transfer will not get a good title.[25]

(IV) *Unregistered Transfers in Blank Good as to Third Persons Having Actual Notice.* The correlative doctrine is that where by the charter stock is assignable by transfer on the books of the corporation, the assignment of the certificate, with a written power to the assignee to transfer the stock to himself on the books, is a symbolical delivery, affecting those who have notice thereof as if the transfer had been made on the books.[26]

6. Priorities as Between Attaching Creditors and Unrecorded Transfers — a. Unregistered Transfers Not Good as Against Attaching Creditors of Transferrer — (I) *In General.* The general doctrine is that an unregistered assignment of corporate shares is not good as against an attaching creditor of the assignor.[27] The courts which take this view, resting their conclusion in some cases on express statutory enactments,[28] in some cases on the implications arising

Cal. 425; Murphy's Application, 51 Wis. 519, 8 N. W. 419. *Compare* Pendergast *v.* Stockton Bank, 19 Fed. Cas. No. 10,918, 2 Sawy. 108. The California cases are made to rest on the peculiar language of the statute: "No transfer . . . shall be valid for any purpose . . . except to render the 'transferee liable for corporate debts' until it shall be entered as required by the provisions of this section." This was copied from the Wisconsin statute, which in its turn came from Maine. Skowhegan Bank *v.* Cutler, 49 Me. 315. The different readings of statutes which govern this question may account for much of the conflict of judicial opinion with reference to it. Opposing views on this question with respect to creditors will be noted in the next subdivision.

Danger of failing to have transfer registered.—The dangers to the transferee of failing to have his transfer registered on the books of the corporation were pointed out by an eminent judge in New York, but his observations need not be repeated. Rapallo, J., in McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341. As to the necessity of recording transfers see a learned article by Chief Justice Corliss, in 39 Alb. L. J. 164, 184.

22. People *v.* Elmore, 35 Cal. 653; Naglee *v.* Pacific Wharf Co., 20 Cal. 529; New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534.

23. Williams *v.* Fletcher, 129 Ill. 356, 21 N. E. 783; Cady *v.* Potter, 55 Barb. (N. Y.) 463.

24. Sabin *v.* Woodstock Bank, 21 Vt. 353.

25. Weston *v.* Bear River, etc., Min. Co., 6 Cal. 425.

26. Van Cise *v.* Merchants' Nat. Bank, (Dak. 1887) 33 N. W. 897; Bank of America *v.* McNeil, 10 Bush (Ky.) 54.

27. *Alabama.*— Abels *v.* Planters', etc., Ins. Co., 92 Ala. 382, 9 So. 423; Berney Nat. Bank *v.* Pinckard, 87 Ala. 577, 6 So. 364.

California.— Naglee *v.* Pacific Wharf Co., 20 Cal. 529; Weston *v.* Bear River, etc., Min. Co., 5 Cal. 186, 63 Am. Dec. 117.

Colorado.— Conway *v.* John, 14 Colo. 30, 23 Pac. 170.

Connecticut.— Shipman *v.* Ætna Ins. Co., 29 Conn. 245; Dutton *v.* Connecticut Bank, 13 Conn. 493; Northrop *v.* Newton, etc., Turnpike Co., 3 Conn. 544.

Illinois.— People's Bank *v.* Gridley, 91 Ill. 457.

Iowa.— Commercial Nat. Bank *v.* Farmers', etc., Nat. Bank, 82 Iowa 192, 47 N. W. 1080; Ft. Madison Lumber Co. *v.* Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789.

Maine.— Skowhegan Bank *v.* Cutler, 49 Me. 315; Fisk *v.* Carr, 20 Me. 301.

Maryland.— Noble *v.* Turner, 69 Md. 519, 16 Atl. 124.

Massachusetts.— Blanchard *v.* Dedham Gas Light Co., 12 Gray 213; Fisher *v.* Essex Bank, 5 Gray 373. *Compare* Boston Music Hall Assoc. *v.* Cory, 129 Mass. 435.

New Hampshire.—Buttrick *v.* Nashua, etc., R. Co., 62 N. H. 413, 13 Am. St. Rep. 578; Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424. *Compare* Scripture *v.* Francestown Soapstone Co., 50 N. H. 571.

Wisconsin.—Murphy's Application, 51 Wis. 519, 8 N. W. 419.

United States.— Johnston *v.* Laflin, 103 U. S. 800, 26 L. ed. 532.

28. *California.*— Naglee *v.* Pacific Wharf Co., 20 Cal. 529.

from statutes requiring transfers to be recorded on the books of the corporation,[29] and in still others on legal analogies,[30] hold that the rights of the attaching creditor prevail over those of the prior unregistered transferee. One of the reasons of the rule is the consideration which avoids transfers of tangible property as against creditors, in cases where there has been no visible change of possession, such as the circumstances reasonably admit of.[31] The rule is also founded on the consideration that statutes requiring transfers of shares to be made on the books of the corporation, or only on the books of the corporation, are in the nature of recording acts, and are intended for the protection of creditors, and of the public generally, as well as for the protection of the corporation.[32]

(II) *Unless Attaching Creditor Has Actual Notice of Transfer* — (A) *In General.* But this rule does not obtain where the attaching or execution creditor has actual knowledge or notice of the prior unrecorded transfer.[33]

(B) *Statutory Exception to This Rule.* The knowledge of an attaching creditor and the officer levying the attachment on corporate stock, of a previous transfer thereof by the debtor, which has not been entered upon the books of the company, does not protect the transfer from the operation of a statute, providing that the transfer of shares of stock is not valid except as between the parties thereto until it is regularly entered upon the books of the company.[34]

b. View That Unrecorded Transfers Prevail Over Subsequent Attaching or Execution Creditors of Transferrer — (I) *In General.* Other courts take the contrary view, and hold that an unrecorded transfer of shares made to a purchaser for value will prevail over a subsequent attaching or execution creditor, or over one purchasing at a sale under a subsequent attachment or execution, provided of course the governing statute does not by express terms or by necessary implication make a transfer on the books of the corporation necessary, even as against third persons.[35] These courts proceed upon the view that an attaching creditor gets no

Colorado.— Conway *v.* John, 14 Colo. 30, 23 Pac. 170; Longmont First Nat. Bank *v.* Hastings, 7 Colo. App. 129, 42 Pac. 691.

Idaho.— Aulbach *v.* Dahler, (1896) 43 Pac. 322.

Iowa.— Ryan *v.* Campbell, 71 Iowa 760, 32 N. W. 340; Ft. Madison Lumber Co. *v.* Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789.

Massachusetts.— Newell *v.* Williston, 138 Mass. 240.

Wisconsin.—Murphy's Application, 51 Wis. 519, 8 N. W. 419.

United States.— Masury *v.* Arkansas Nat. Bank, 87 Fed. 381, holding that a writ of attachment or execution against shares of stock in a corporation takes precedence of a prior transfer of the stock which was not recorded on the books of the company or in the county clerk's office, under a statute providing that no transfer shall be valid against any creditor until the certificate of transfer shall be deposited with the county clerk for record.

Numerous statutes exist making transfers of shares void as against bona fide creditors or subsequent purchasers without notice, and these statutes have been frequently the subject of judicial interpretation, such as for instance in Berney Nat. Bank *v.* Pinckard, 87 Ala. 577, 6 So. 364; and in Jones *v.* Latham, 70 Ala. 164, opinion by Stone, C. J.

29. Central Nat. Bank *v.* Williston, 138 Mass. 244; Fisher *v.* Essex Bank, 5 Gray (Mass.) 373.

30. Ft. Madison Lumber Co. *v.* Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789.

31. Ft. Madison Lumber Co. *v.* Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789.

32. Ft. Madison Lumber Co. *v.* Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789. See also Dutton *v.* Connecticut Bank, 13 Conn. 493. *Compare* Johnston *v.* Laflin, 103 U. S. 800, 26 L. ed. 532. It will be noted that this doubtful view raises the books of private corporations to the rank and dignity of public records. 2 Thompson Corp. § 2411; Allen *v.* Stewart, 7 Del. Ch. 287, 44 Atl. 786.

33. Farmers' Nat. Gold Bank *v.* Wilson, 58 Cal. 600; Scripture *v.* Francestown Soapstone Co., 50 N. H. 571; Bridgewater Iron Co. *v.* Lissberger, 116 U. S. 8, 6 S. Ct. 241, 29 L. ed. 557.

34. Ottumwa Screen Co. *v.* Stodghill, 103 Iowa 437, 72 N. W. 669.

35. *Delaware.*— Allen *v.* Stewart, 7 Del. Ch. 287, 44 Atl. 786.

Louisiana.— Kern *v.* Day, 45 La. Ann. 71, 12 So. 6.

Minnesota.— Lund *v.* Wheaton Roller Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623.

Mississippi.— Clark *v.* German Security Bank, 61 Miss. 611.

Missouri.—Wilson *v.* St. Louis, etc., R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep.

higher rights by levying on shares standing on the books of the corporation in the name of his debtor than his debtor has in them at the time of the levy.[36] This view of course prevails in those jurisdictions where an unrecorded transfer is held to pass the legal title as between the transferrer and transferee;[37] and where a complete legal title, under this theory, has thus passed, the levy will hold nothing, unless the theory prevails in the particular jurisdiction that any equities which may remain in the assignor are leviable.[38]

(II) *This View Prevails Under Theory That Statutes Requiring Registration of Transfers Are Intended For Protection of Corporation Only.* This view prevails among those courts which adopt the theory that statutes requiring transfers of shares to be made on the books of the corporation are intended merely for the protection of the corporation and not for the protection of the outside public, and that such statutes are hence not in the nature of public recording acts.[39]

(III) *Corporation Unjustifiably Refusing to Make Transfer.* The rule has been held to be the same where the corporation unjustifiably refuses to make a transfer of the shares on its books; which wrongful act does not subject the shares to attachment to the exclusion of the rights of the real owner.[40]

(IV) *Distinction Between Case Where Transfer Is Required to Be Made on Corporate Books by Statute and by By-Law.* If the charter of a corporation, assuming that it is a public law of which all persons are bound to take notice, contains the provision that a transfer in order to be valid must be made upon the books of the corporation, then a transfer not so made will not be good as against an attaching creditor of the transferrer, although notice of the transfer may have been communicated to the corporation before the levying of the attachment.[41] But it may be different where the requirement of a registra-

624; Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 [*affirmed* in 74 Mo. 77].

New Jersey.—Broadway Bank *v.* McElrath, 13 N. J. Eq. 24.

New York.— De Comeau *v.* Guild Farm Oil Co., 3 Daly 218.

Rhode Island.— Beckwith *v.* Burrough, 13 R. I. 294.

Tennessee.— Cornick *v.* Richards, 3 Lea 1.

Texas.— Tombler *v.* Palestine Ice Co., 17 Tex. Civ. App. 596, 43 S. W. 896 [*distinguishing* Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50, 17 S. W. 1043; James *v.* James, 81 Tex. 373, 16 S. W. 1087; Seeligson *v.* Brown, 61 Tex. 114].

United States.— Hazard *v.* National Exch. Bank, 26 Fed. 94.

36. This view has been taken, even where the governing statute declared the stock of the corporation personal property and "transferable, on the books," and that "books of transfer of stock should be kept, and should be evidence of the ownership of said stock in all elections," etc., by the shareholders. Broadway Bank *v.* McElrath, 13 N. J. Eq. 24. In England the same doctrine prevails, and in that country it has been held that a judgment against a director of a corporation cannot be charged upon stock which he has sold, although it remains in his name on the company's register, and he continues to act as director, and the charter provides that a director must possess in his own right a certain number of shares. Howard *v.* Sadler, [1893] 1 Q. B. 1, 41 Wkly. Rep. 126.

37. See *supra*, VII, D, 5, b, (III).

38. As to which see 2 Thompson Corp. § 2774.

With respect to shares of national banks, it has been held that an unrecorded transfer for value and in good faith prevails over a subsequent attachment by a creditor of the assignor. Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. 369, 37 Am. Rep. 353 note. *Compare* Scott *v.* Pequonnock Nat. Bank, 15 Fed. 494, 21 Blatchf. 203.

39. Thurber *v.* Crump, 86 Ky. 408, 6 S. W. 145, 10 Ky. L. Rep. 59; Lund *v.* Wheaton Roller Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623. *Compare* Smith *v.* Crescent City Live-Stock Landing, etc., Co., 30 La. Ann. 1378; Joslyn *v.* St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337; Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

40. Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 [*affirmed* in 74 Mo. 77]. To the same effect see Telford, etc., Turnpike Co. *v.* Gerhab, (Pa. 1888) 13 Atl. 90.

Under the operation of a statute of Illinois the delivery of certificates of shares in good faith to one who has advanced money on the security of the possession of such certificates is sufficient to protect him against executions or attachments against the purchaser to the extent of the debt secured by the shares, even though there is no transfer in writing or upon the books of the corporation. Rice *v.* Gilbert, 72 Ill. App. 649 [*affirmed* in 173 Ill. 348, 50 N. E. 1087].

41. Fisher *v.* Essex Bank, 5 Gray (Mass.) 373.

tion of the transfer on the books of the corporation is established in the by-laws merely, such by-laws being regarded as merely arrangements of the corporation for its own convenience in regulating the payment of dividends, etc., and not as affecting strangers.[42]

(v) *Under This Rule Notice to Corporation Immaterial, Except Where Corporation Is the Creditor.* Notice to the corporation of such unrecorded transfer is obviously immaterial where this rule prevails,[43] except where the corporation is itself the creditor of the transferrer, since the attaching creditor would not be affected by such notice. It was so held even where the transferee wrote to the corporation requesting that the shares be transferred to him on its books, and the corporation made a minute of the transfer on the certificate stub in the book of the corporation, for the reason that it had no transfer-book, a case which seems to carry the principle very far.[44] But if the corporation is the creditor, and has notice, actual or constructive, the rule is different; and it has been held that constructive notice may come to the corporation through its president where he sells the shares and afterward ceases to act as president, and the shares are attached by the company as his property before the transfer has been made on the corporate books.[45]

c. Rights of Attaching Creditors Are Paramount to Those of Subsequent Purchasers Without Notice. The rights of an attaching creditor who levies upon shares held by his debtor will prevail over the rights of a subsequent *bona fide* purchaser of the shares for value, without notice of the attachment.[46] And this is so, even where the corporation is a foreign corporation, doing business within the domestic state, providing there is a statute, such as has been frequently enacted, subjecting foreign corporations doing business within the state to the operation of the statute governing domestic corporations.[47]

d. Reasonable Time Allowed For Transfer on Books. There is a theory of law, analogous to that which sometimes obtains with respect to the recording of mortgages, which allows a reasonable time between the execution of the instrument and the placing of it upon record, during which time an attaching creditor will not acquire a priority.[48] Statutes somewhat analogous to this principle, but which proceed in view of the fact that the corporation may unjustifiably refuse to register the transfer, require that in order that the transfer shall take precedence of an intervening attachment the transferee shall have exerted all reasonable means to have the transfer entered on the books of the corporation; and construing such a statute it has been held that he did not exert all reasonable means by going to the office of the corporation where the transfer-books were kept, and merely requesting that the transfer be made, but without staying and seeing that it was made.[49]

e. Levy of Execution or Attachment After Regular Transfer on Corporate Books Acquires No Interest. Subject to exceptions such as obtain in the case where shares have been fraudulently transferred as against creditors it is plain that under any theory, after a transfer has been made and regularly entered on the books of the corporation, one who levies upon the shares an execution or attachment sued out against the transferrer acquires no rights by virtue of the

42. Sargent *v.* Essex Mar. R. Corp., 9 Pick. (Mass.) 202.

43. Fisher *v.* Essex Bank, 5 Gray (Mass.) 373.

44. Newell *v.* Williston, 138 Mass. 240, where the case was decided under an express statutory provision that shares should be transferable only on delivery of the certificate.

45. Scripture *v.* Francestown Soapstone Co., 50 N. H. 571.

46. Shenandoah Valley R. Co. *v.* Griffith, 76 Va. 913.

47. Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

Invalidity of a transfer of more shares than are necessary to secure the debt for which they have been hypothecated, as against an attaching creditor who has previously attached and served notice on the corporation. Kyle *v.* Montgomery, 73 Ga. 337.

48. Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424.

49. Perkins *v.* Lyons, 111 Iowa 192, 82 N. W. 486.

levy merely; nor does one who derives his title by purchase at judicial sale, through the person so levying.[50]

7. Compelling Transfers in Equity — a. Equity Will Compel Transfers Under Proper Conditions. Equity will under proper circumstances compel a corporation to transfer on its books shares of stock to the owner of the equitable title and to issue to him certificates for the same.[51]

b. Circumstances Under Which Transfers Compelled. Stated generally, equity will compel a corporation to register a transfer of shares upon its books, and to admit the transferee to the rights of a shareholder, where he has become the purchaser of shares and the certificate has been regularly transferred and delivered to him by the customary indorsement in blank;[52] where the transferee has in this manner become the equitable owner of the shares, and a transfer is fraudulently withheld from him by the officers of the corporation;[53] where a subscriber to the shares of a proposed corporation received a share certificate which stated that a certain sum had been paid thereon, and that it was transferable on the books of the company only, and such subscriber assigned it to plaintiff, who requested the company to transfer it on its books, which it refused to do;[54] where a deed of gift of corporate shares was made, vesting the complete beneficial ownership in the donee, and the officers of the corporation refused to transfer the shares on the book;[55] where the total stock of the corporation consisted of four hundred shares, and plaintiff had surrendered his certificate of two hundred shares to obtain other certificates of smaller dimensions, and certificates were given him for one hundred and fifty shares, but the corporation refused to give him certificates for the remaining fifty;[56] where a shareholder has been adjudged a bankrupt and his assignee in bankruptcy tenders a sufficient bond of indemnity and demands that the shares be transferred to him on the books of the corporation;[57] where a second certificate had been erroneously issued in lieu of the first one alleged to have been lost, in which case the corporation acted at its peril, and could not set up its

50 Simmons *v.* Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476.

Effect of an assignment of shares by a writing lodged with the secretary of the corporation, after a levy by one creditor of the assignor and before a levy by another creditor. Colt *v.* Ives, 31 Conn. 25, 81 Am. Dec. 161.

51. *Alabama.*— Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632.

Kentucky.— Commonwealth Bank *v.* Winn, 61 S. W. 32, 22 Ky. L. Rep. 1629.

Maryland.— Real Estate Trust Co. *v.* Bird, 90 Md. 229, 44 Atl. 1048.

Minnesota.— Prince Invest. Co. *v.* St. Paul, etc., Land Co., 68 Minn. 121, 70 N. W. 1079.

New Hampshire.—Hill *v.* Rockingham Bank, 44 N. H. 567.

New Jersey.— Archer *v.* American Water Works Co., 50 N. J. Eq. 33, 24 Atl. 508.

New York.— Cushman *v.* Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Pollock *v.* National Bank, 7 N. Y. 274, 57 Am. Dec. 520; Bedford *v.* American Aluminum, etc., Co., 51 N. Y. App. Div. 537, 64 N. Y. Suppl. 856; Middlebrook *v.* Merchants' Bank, 41 Barb. 481, 18 Abb. Pr. 109, 27 How. Pr. 474 [*affirmed* in 3 Abb. Dec. 295, 3 Keyes 135]; Purchase *v.* New York Exch. Bank, 3 Rob. 164; Buckmaster *v.* Consumers' Ice Co., 5 Daly 313; Ernst *v.* Elmira Municipal Imp. Co., 24 Misc. 583, 54 N. Y. Suppl. 116; Williamson *v.* Continental Filter Co., 23 Misc. 755, 53 N. Y. Suppl. 1118 [*affirmed* in 34 N. Y. App. Div. 630, 53 N. Y. Suppl. 1118]; Williamson *v.* Anderson, 56 N. Y. Suppl. 833; White *v.* Schuyler, 1 Abb. Pr. 300.

Ohio.— Iron R. Co. *v.* Fink, 41 Ohio St. 321, 52 Am. Rep. 84.

Pennsylvania.— Grimes *v.* Pennsylvania R. Co., 189 Pa. St. 619, 42 Atl. 303, 69 Am. St. Rep. 830.

Wisconsin.— Tanner *v.* Gregory, 71 Wis. 490, 37 N. W. 830; Dousman *v.* Wisconsin Min., etc., Co., 40 Wis. 418.

United States.—Alexandria Mechanics Bank *v.* Seton, 1 Pet. 299, 7 L. ed. 152; Skinner *v.* Ft. Wayne, etc., R. Co., 58 Fed. 55.

See 12 Cent. Dig. tit. "Corporations," § 518.

52. See, generally, the cases cited to the preceding paragraph.

53. Archer *v.* American Waterworks Co., 50 N. J. Eq. 33, 24 Atl. 508.

54. Real Estate Trust Co. *v.* Bird, 90 Md. 229, 44 Atl. 1048.

55. Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632. To the same effect see Cushman *v.* Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315, where the assignment was formally made and witnessed by a husband to his wife.

56. Bedford *v.* American Aluminum, etc., Co., 51 N. Y. App. Div. 537, 64 N. Y. Suppl. 856.

57. Wilson *v.* Atlantic, etc., R. Co., 2 Fed. 459.

own negligence against the equity of the real owner of the shares to compel the issue of a certificate to himself;[58] and in the other cases noted in the margin.[59]

c. Circumstances Under Which Transfers Not Compelled — (i) *Not Compelled in Face of Superior Opposing Equities.* Such a decree will not be made in the face of superior opposing equities. It was refused to a person who had acquired possession of certain stock certificates, as the agent and instrument of a trust company, to enable it to commit a fraud on the rights of a shareholder.[60]

(ii) *Not Compelled Where Plaintiff Fails to Produce Sufficient Proof of Title to Shares.* This truism is well illustrated by the case described in the margin.[61]

(iii) *Not Compelled Where Plaintiff Has Been Guilty of Laches.* A court of equity will not lend its aid for the purpose of compelling the registration of a transfer of shares on the books of the corporation to one who has been guilty of unreasonable delay in asserting his rights.[62] But the execution of a deed of gift of shares, vesting the complete beneficial ownership in the donee, carries with it the authority and duty on the part of the corporation to make the proper transfer of the shares on its books, upon presentation of the certificate and the deed, and it may be compelled to perform this duty.[63]

(iv) *Not Compelled in Case of Ultra Vires Shares.* A corporation will not be compelled to transfer on its books shares which have been issued in violation of its charter, even though all the shareholders may have consented to the issue.[64]

(v) *Not Compelled in Case of Executory Contract to Sell.* An executory contract to sell shares, like other executory contracts of sale, will not in general be specifically enforced in equity.[65]

58. Brisbane *v.* Delaware, etc., R. Co., 94 N. Y. 204 [*affirming* 25 Hun (N. Y.) 438].

59. Commonwealth Bank *v.* Winn, 61 S. W. 32, 22 Ky. L. Rep. 1629 (transfer compelled of shares held by a trustee, which had been sold for reinvestment in real estate, the corporation refusing to make the transfer on the ground that it might thereby become liable to a contingent remainder-man); Sims *v.* Bonner, 60 N. Y. Super. Ct. 70, 16 N. Y. Suppl. 801, 42 N. Y. St. 14 (shares sold under a judgment collusively obtained); Grimes *v.* Pennsylvania R. Co., 189 Pa. St. 619, 42 Atl. 303, 69 Am. St. Rep. 830 (transfer of shares in an American corporation held by an executrix of an executrix of a deceased citizen of Great Britain, such transfers being authorized by the law of England, and both wills having been proved, compelled); Skinner *v.* Ft. Wayne, etc., R. Co., 58 Fed. 55 (transfers of shares assigned by contractors for the construction of a part of the railroad of the corporation, compelled).

60. Gould *v.* Head, 41 Fed. 240.

It was denied under the following circumstances: B, having sufficient funds in bank, paid by his check for certain shares of stock in a corporation, which were transferred on the books thereof to his credit, but no certificate was issued. The bank being notified of an adverse claim to his deposit, growing out of previous and independent frauds which he had committed, refused to pay the check, and he became bankrupt. It was held that the seller of the shares could not maintain a bill in equity against B and the corporation to compel a conveyance thereof. The previous frauds did not taint this transaction. Consequently the stock belonged in equity to the assignees of B, to be distributed among his creditors with his other property. Comins *v.* Coe, 117 Mass. 45.

61. A corporation issued twelve shares of its capital stock to S, as attorney of H, but before the issue was made H died. Subsequently S produced a formal transfer of the stock to himself as attorney for C, signed, "Denis A. Spellissy, as attorney for Ellen Hayden," and a purported consent to such transfer, signed by E as executor of H's estate, but did not produce any proof of E's appointment or qualification, and the corporation refused to make the transfer. It was held that an action to compel the corporation to make the transfer was properly dismissed. Spellissy *v.* Cook, etc., Co., 58 N. Y. App. Div. 283, 68 N. Y. Suppl. 995.

62. Newberry *v.* Detroit, etc., Iron Mfg. Co., 17 Mich. 141 (purchaser of shares at execution sale); York *v.* Passaic Rolling-Mill Co., 30 Fed. 471 (delay of seven years in bringing suit for specific performance of an agreement to issue shares to an employee, who had in the meantime left the company's service). *Compare* Wonson *v.* Fenno, 129 Mass. 405, where the proceeding was by one who had bought shares from a firm, but delayed to have his title perfected and registered until the shares had been sold to other persons and had risen in value.

63. Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632.

64. People *v.* Sterling Burial Case Mfg. Co., 82 Ill. 457.

65. But the denial of relief in equity proceeds upon the ground that the party claim-

(VI) *NOT COMPELLED IN CASE OF UNEXECUTED PROMISE TO MAKE GIFT OF SHARES.* It has been held that where the constating instrument provides that shares of the corporate stock shall be transferred only on the books of the corporation, if a shareholder promises even in writing — as by an instrument in the form of an assignment — to give his shares to another, the gift is not enforceable after his death, by a proceeding in equity against the corporation, any more than it could be enforced against him in his lifetime;[66] although it would be otherwise if such an inchoate transfer were made for value, or if the certificate were delivered to the donee.[67]

d. Questions of Procedure in Such Actions — (I) *WHETHER DEMAND NECESSARY TO RIGHT OF ACTION.* Where one who had purchased certain shares at a sheriff's sale on execution, the corporation having under its charter a preëmption right in respect of its stock or an option of purchasing it in preference to any one else, filed a bill in equity against the corporation to compel a transfer of the purchased stock without first demanding such transfer, this was held no reason for dismissing the bill.[68]

(II) *PARTIES TO SUITS IN EQUITY TO COMPEL TRANSFERS.* It has been held that the corporation is not a necessary party to an action against its officers to compel them to transfer stock;[69] but this is doubtful. In an action against a corporation to compel it to transfer to plaintiff certain shares of its stock, which plaintiff has acquired by purchase under a mortgage foreclosure sale, the prior owner is not a necessary party defendant.[70]

(III) *QUESTIONS OF PLEADINGS IN SUCH ACTIONS.* A complaint which alleges that plaintiff is the owner of certain shares of stock in defendant corporation, and that the corporation has recognized him as a shareholder, but refuses to deliver to him the certificates for his shares, states an equitable cause of action.[71] An execution purchaser of shares, seeking to compel registration, need not allege that when he made the purchase he had no notice that persons other than the execution debtor claimed any interest in the shares. Nor is such a petition bad because it fails to allege that the interest of defendants, who claimed to be the owners of the shares, was not registered prior to the levy. Where the complaint in such a suit alleges that the shares were registered in the name of the execution debtor at the time of the levy, it is incumbent upon the defendant corporation and the other defendants claiming an interest in the shares to traverse such allegation.[72]

(IV) *ISSUES NOT TRIABLE BY JURY.* Such an action is purely one of equi-

ing relief may have adequate compensation in an action at law for damages, and it seems that the rule itself is limited to cases where such compensation may be had. Cushman *v.* Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315 (per Miller, J.); Phillips *v.* Berger, 2 Barb. (N. Y.) 608. *Compare* Cowles *v.* Whitman, 10 Conn. 121, 25 Am. Dec. 60.

66. Baltimore Retort, etc., Brick Co. *v.* Mali, 65 Md. 93, 3 Atl. 286, 57 Am. Rep. 304; Pennington *v.* Gittings, 2 Gill & J. (Md.) 208. But see Stone *v.* Hackett, 12 Gray (Mass.) 227; Cushman *v.* Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315.

67. See *supra*, VII, D, 5, b, (II). Further as to the governing principle see Robinson *v.* Ring, 72 Me. 140, 39 Am. Rep. 308; Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368; Wilcox *v.* Matteson, 53 Wis. 23, 9 N. W. 814, 40 Am. Rep. 754.

68. Barrows *v.* National Rubber Co., 12 R. I. 173. For a case where it was held that a shareholder in an irrigation company, who did not, when he demanded a transfer of his shares, produce the share certificates, or offer any excuse for failing to do so, or demand the water, the right to which went with the possession of the shares, or tender payment therefor, had no right to take the water by force, and was a trespasser in so doing, see Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586.

69. Gould *v.* Head, 41 Fed. 240. *Compare* Sayward *v.* Houghton, 82 Cal. 628, 23 Pac. 120.

70. Tregear *v.* Etiwanda Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. Rep. 245. A similar ruling was made by the supreme court of the United States in an early case, where the prior owner, having sold the stock, was ready and entirely willing to make the transfer. Alexandria Mechanics Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152.

71. Tanner *v.* Gregory, 71 Wis. 490, 37 N. W. 830.

72. Wetumpka Bridge Co. *v.* Kidd, 124 Ala. 242, 27 So. 431.

table cognizance, and defendant cannot demand a trial by jury.[73] But of course the chancellor may as in other cases take the verdict of a jury on any issue of fact, but without being bound by it.

e. Form and Scope of Relief — (i) *In General.* The relief granted in actions of this kind is not necessarily limited to ordering a registration of the transfer of the shares on the books of the corporation. It may extend to any other relief to which plaintiff is entitled, and which is within the scope of his action. It may for example extend to the enjoining of holding corporate meetings until the transfer to which plaintiff is entitled can be compelled;[74] to having the rights of plaintiff as a shareholder established, and to having the share certificates wrongfully issued to others representing shares belonging to him canceled, and for an accounting;[75] to having void certificates issued upon a sale of the Confederate government for a sequestration, surrendered by and canceled as a cloud upon the title of plaintiff, the rightful shareholder;[76] to compel the corporation to deliver up to plaintiff as the real owner of the certificates representing shares to which he was entitled.[77]

(ii) *Decreeing Transfers and Deferred Dividends.* Plaintiff may have a decree for the transfer and also for the payment of the dividends which have accrued on the shares, with interest.[78]

(iii) *Transfers Compelled as of What Date.* Where the action is brought by a shareholder against the corporation to record new shares issued upon an increase of its capital stock, the corporation having refused to transfer on its books to plaintiff his portion of such new shares, the transfer will be ordered as of the date of the demand made by plaintiff upon the corporation for such transfer.[79]

f. Conclusiveness of Transfer Made Under Decree. The rule as to a proceeding, so far as it partakes of the nature of a proceeding *in rem*, seems to be that it is within the power of the court, having the proper parties before it, to render a decree which will operate upon the title to the shares, and which will have the effect of transferring them to a third person, notwithstanding the certificate therefor is outstanding.[80]

8. Mandamus to Compel Transfers — a. As a Rule Mandamus Will Not Lie to Compel Transfers. One who is entitled to have shares which he has purchased transferred to him on the books of the corporation cannot at common law have a mandamus to compel the transfer, for the reason that he has a right of action against the company for damages for the conversion of his stock in case a transfer is refused.[81] The inadequacy of the remedy at law and the denial of a remedy by

73. Cushman *v.* Thayer Mfg. Jewelry Co., 7 Daly (N. Y.) 330.

74. Archer *v.* American Water Works Co., 50 N. J. Eq. 33, 24 Atl. 508.

75. Sims *v.* Bonner, 16 N. Y. Suppl. 801, 42 N. Y. St. 14.

76. Perdicaris *v.* Charleston Gaslight Co., 19 Fed. Cas. No. 10,974, Chase 435.

77. Bean *v.* American L. & T. Co., 122 N. Y. 622, 26 N. E. 11, 34 N. Y. St. 620.

If the suit is by a transferee to enjoin an illegal issue of preferred shares, the court may also require the corporation to record the transfer to plaintiff of the common shares, the transfer of which he is entitled to have made on the corporate books. Ernst *v.* Elmira Municipal Imp. Co., 24 Misc. (N. Y.) 583, 54 N. Y. Suppl. 116.

78. Chew *v.* Baltimore Bank, 14 Md. 299. *Compare* Brisbane *v.* Delaware, etc., R. Co., 94 N. Y. 204; Western Union Tel. Co. *v.* Davenport, 97 U. S. 369, 24 L. ed. 1047.

79. Real Estate Trust Co. *v.* Bird, 90 Md. 229, 44 Atl. 1048.

80. Sprague *v.* Cocheco Mfg. Co., 22 Fed. Cas. No. 13,249, 10 Blatchf. 173, holding that the court is not bound to recognize the title of one who years after such a decree produces the outstanding share certificate with the signature of the former owner to a blank assignment, and proves that since such judicial proceedings he has advanced money on the faith of the certificate.

As to the conclusiveness of such decree upon third persons under the doctrine of *lis pendens* see Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616; Leitch *v.* Wells, 48 N. Y. 585. See also Dovey's Appeal, 97 Pa. St. 153.

81. *California.*— Kimball *v.* Union Water Co., 44 Cal. 173, 13 Am. Rep. 157, opinion by Niles, J.

Connecticut.— Tobey *v.* Hakes, 54 Conn. 274, 7 Atl. 551, 1 Am. St. Rep. 114; Amer-

a mandamus have given rise to the remedy in equity discussed in another subdivision.[82]

b. Exceptions to Rule — (I) *In Cases of Quasi-Public Corporations.* Exceptions to this rule have been allowed in the case of railroad[83] and turnpike companies,[84] on the ground that such corporations are created for the performance of public duties. But this reason is destitute of force; since in respect of the rights of their members these corporations are not public but private.[85]

(II) *In Case of Shares Sold at Judicial Sale.* It has been held that mandamus will lie, where the shares have been sold at judicial sale, to compel the president of the corporation to transfer them to the purchaser on the books of the company, on the ground that he has become an officer of the court *pro hac vice*.[86] But the same court holds that with this exception mandamus will not lie to compel such transfer.[87]

(III) *In Case of Breach of Duty With Respect to Incidental Rights.* Sometimes the rule which refuses relief by mandamus is admitted, but with the qualification that the remedy may exist, where there is a breach of duty in respect of incidental rights, such as the right to vote and be voted for, to draw dividends, etc.[88]

9. Action at Law Against Corporation For Refusing to Register Transfer — a. Refusal to Register Valid Transfer Is Conversion, Remediable by Action For Damages. Where a transfer of shares has been made in accordance with the charter and by-laws of the corporation, if the officers of the corporation refuse, on the application of the transferee, to enter his name as a holder of the shares upon the corporate books, this is deemed a conversion of his shares by the corporation, and his ordinary remedy is an action at law against the corporation for damages as for a conversion.[89]

ican Educational, etc., Asylum *v.* Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112.

Massachusetts.—Stackpole *v.* Seymour, 127 Mass. 104.

Minnesota.— Baker *v.* Marshal, 15 Minn. 177.

Missouri.— State *v.* Rombauer, 46 Mo. 155.

Nevada.— State *v.* Guerrero, 12 Nev. 105.

New Jersey.—Morton *v.* Timken, 48 N. J. L. 87, 2 Atl. 783; State *v.* People's Bldg., etc., Assoc., 43 N. J. L. 389.

New York.— *Ex p.* Fireman's Ins. Co., 6 Hill 243; Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 [*affirmed* in 22 Wend. 348, 34 Am. Dec. 317]; Shipley *v.* Mechanics' Bank, 10 Johns. 484.

Oregon.— Durham *v.* Monumental Silver Min. Co., 9 Oreg. 41.

Rhode Island.— Wilkinson *v.* Providence Bank, 3 R. I. 22.

England.— Rex *v.* London Assur. Co., 5 B. & Ald. 899, 1 D. & R. 510, 7 E. C. L. 489; Rex *v.* Bank of England, 2 Dougl. 506.

Cases where mandamus denied on the merits.—In several cases mandamus has been denied on the merits, on the ground that the right to relief was not clear. Townes *v.* Nichols, 73 Me. 515; State *v.* Warren Foundry, etc., Co., 32 N. J. L. 439; People *v.* Parker Vein Coal Co., 10 How. Pr. (N. Y.) 186; Law Guarantee, etc., Soc. *v.* Bank of England, 24 Q. B. D. 406, 54 J. P. 582, 62 L. T. Rep. N. S. 496, 38 Wkly. Rep. 493; Reg. *v.* Liverpool, etc., R. Co., 16 Jur. 949, 21 L. J. Q. B. 284.

Circumstances insufficient to vary rule.— It has been held that the fact that the business of the corporation is very profitable, that its shares of stock have no known market value, or that they are greatly enhanced by the good-will of a growing business, will not vary the rule, where the actual value is ascertainable in an action to recover damages. Freon *v.* Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794.

82. Cushman *v.* Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315.

83. People *v.* Crockett, 9 Cal. 112 [where no reason was given except a discussion of the merits and *overruled* in Kimball *v.* Union Water Co., 44 Cal. 173, 13 Am. Rep. 157]; State *v.* McIver, 2 S. C. 25. *Compare* Reg. *v.* Shropshire Union R., etc., Co., L. R. 8 Q. B. 420, 42 L. J. Q. B. 193, 27 L. T. Rep. N. S. 412, 21 Wkly. Rep. 953, submitted on a case stated, no question made as to form of remedy, but judgment awarding mandamus [*reversed* in L. R. 7 H. L. 496, 45 L. J. Q. B. 31, 32 L. T. Rep. N. S. 283, 23 Wkly. Rep. 709].

84. Green Mount, etc., Turnpike Co. *v.* Bulla, 45 Ind. 1.

85. See Stackpole *v.* Seymour, 127 Mass. 104, where such a mandamus was denied in case of a railroad company, the court, through Gray, C. J., saying: "No public interest or corporate right is in question."

86. Bailey *v.* Strohecker, 38 Ga. 259, 95 Am. Dec. 88.

87. State Bank *v.* Harrison, 66 Ga. 696.

88. Freon *v.* Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794. *Compare* Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. (Tenn.) 697.

89. Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Kahn *v.* St. Joseph Bank, 70 Mo. 262; St. Louis Per-

b. So of Wrongful Transfer to One Without Right — (i) *In General.* So when a company, having notice of the adverse claim of plaintiff to the stock, which is in litigation, nevertheless ignores it and transfers the shares on its books to the indorsee of the certificate, it does so at its peril, and cannot avoid liability to plaintiff simply on the ground that no preliminary injunction restraining its action has been obtained.[90]

(ii) *Not Necessary to Prove Fraud, but Proof of Negligence Sufficient.* Where plaintiff is suing for damages for the wrongful act of the corporation in permitting his shares to be transferred to someone else, it is not necessary in order to charge the corporation that its officers should have been guilty of fraud or collusion, but it is sufficient that they have failed to exercise reasonable care.[91] But where the company acts without notice of such adverse claim it cannot be held to such a liability.[92]

c. Doctrine That Trover Lies For Conversion of Shares — (i) *Statement of Doctrine.* Many courts hold that shares, considered as ideal property, and distinguished from the certificate, which as already seen [93] is the mere evidence or muniment of title, may be the subject of a conversion in such a sense as to support an action of trover at common law.[94]

(ii) *Circumstances Under Which This Right of Action Arises.* This right of action arises against an individual who, by a wrongful use of a share certificate, bearing an executed assignment and transfer power, procures the title to the shares to be vested in a person not entitled thereto,[95] and against the corporation itself when it totally denies plaintiff's rights as a shareholder therein and repudiates its obligations to him as such.[96]

petual Ins. Co. *v.* Goodfellow, 9 Mo. 149; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Kortright *v.* Buffalo Commercial Bank, 20 Wend. (N. Y.) 91. It was so held too of a refusal to issue a certificate to the assignee of one who had subscribed to the capital of a company and was entitled to the rights of a shareholder, but to whom no certificate had ever been issued. Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50, 17 S. W. 1043. *Compare* Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402.

Right of action by member of voluntary association against a subsequent corporation for refusing to issue to him certificate of shares. Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402. *Compare* Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50, 17 S. W. 1043. Not necessary in such an action for plaintiff to show his interest by a formal ascertainment. Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402.

90. Hawes *v.* Gas Consumers' Ben. Co., 9 N. Y. Suppl. 490.

91. Loring *v.* Salisbury Mills, 125 Mass. 138; Fisher *v.* Brown, 104 Mass. 259, 6 Am. Rep. 235; Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Atkinson *v.* Atkinson, 8 Allen (Mass.) 15; Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232; Duncan *v.* Jaudon, 15 Wall. (U. S.) 165, 21 L. ed. 142; Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310. See also Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306; Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407.

92. Thus a corporation which in good faith accepts the surrender of old stock certificates from one holding a power of attorney authorizing him to transfer them, and issues new certificates to the purchasers, is not liable for the stock to the owners, although such attorney surreptitiously obtained possession of the stock and converted the proceeds to his own use. Coats *v.* Louisville, etc., R. Co., 92 Ky. 263, 17 S. W. 564, 13 Ky. L. Rep. 557.

93. See *supra*, VII, D, 3, a, (I), (A).

94. *California.*— Payne *v.* Elliot, 54 Cal. 339, 35 Am. Rep. 80.

Connecticut.— Ayres *v.* French, 41 Conn. 142.

Maine.— Freeman *v.* Harwood, 49 Me. 195.

Maryland.— Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779.

Massachusetts.— Bond *v.* Mt. Hope Iron Co., 99 Mass. 505, 97 Am. Dec. 49; Jarvis *v.* Rogers, 15 Mass. 389.

Michigan.— Doctrine recognized in Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91.

Nevada.— Boylan *v.* Huguet, 8 Nev. 345.

New York.— Anderson *v.* Nicholas, 28 N. Y. 600.

South Carolina.— Connor *v.* Hillier, 11 Rich. 193, 73 Am. Dec. 105.

Utah.— Kuhn *v.* McAllister, 1 Utah 273 [*affirmed* in 96 U. S. 87, 24 L. ed. 615].

95. Baker *v.* Wasson, 53 Tex. 150; McAllister *v.* Kuhn, 96 U. S. 87, 24 L. ed. 615.

96. Bond *v.* Mt. Hope Iron Co., 99 Mass. 505, 97 Am. Dec. 49.

That trover lies by the owner of stock who has pledged it as collateral for a usurious loan see Cousland *v.* Davis, 4 Bosw. (N. Y.) 619.

It has been held that the action lies where the company has practically deprived the

(III) *View That There Is No Sensible Distinction Between Conversion of Certificate and Conversion of Shares*—(A) *In General.* The courts which so hold are unable to perceive any valid reason why trover should lie for the certificate, which is merely the paper evidence of the title of the shareholder to the shares, and yet should not lie for the shares themselves. Nor are they able to perceive any sensible distinction between an action for a certificate of stock which is unlawfully retained when demanded, for which it has always been held that trover will lie, and an action for the shares represented by the certificate, and without which the paper itself has no substantial value.[97]

(B) *Same View Under the Codes.* Under the modern codes of procedure the doctrine is recognized that an action for damages will lie for the conversion of intangible property; and it is accordingly held, in an action for the conversion of shares of stock, that it is the shares of the stock which constitute the property of the shareholder, and not merely the certificate; and that an action is maintainable for the conversion of the shares of stock which the certificate represents as well as for the conversion of the certificate.[98]

(IV) *There May Be Conversion of Certificate, Although Not of Shares*—(A) *In General.* In order to constitute a conversion it is not necessary that there should be a complete and absolute deprivation of property, but a conversion may take place where the deprivation is only partial or temporary. There may therefore be a conversion of a share certificate, although the wrong-doer does not make use of it so as to acquire possession of the shares, in other words a conversion of the certificate, for which an action will lie, without a conversion of the shares which the certificate represents.[99]

(B) *Trover Lies For Conversion of Share Certificates.* Whatever doubt may exist as to whether an action in the nature of trover will lie for the conversion of shares of stock, considered as ideal property, there is no doubt that the paper certificate of the shares is a valuable monument of title, and hence is tangible property for which trover will lie, even under the early theory of an action of trover, which rested on the fiction of a loss and a finding.[1]

d. Doctrine That Trover Does Not Lie For Conversion of Shares but Only For Conversion of Certificate. A stricter view is that trover will not lie to recover damages for the conversion of shares of corporate stock, for the reason that trover will no more lie to recover such intangible right than it will lie to recover an interest in a partnership.[2]

e. Doctrine That Assumpsit Lies Against Corporation For Refusing to Register Transfer of Shares. There is a class of cases which hold that where the corporation refuses to register upon its books a transfer of its shares, upon the demand of the transferee, and to issue to him a new certificate therefor where such new certificate is required by its charter or by-laws, he has an action of assumpsit

plaintiff of his stock by bidding it in at a pretended sale under its by-laws, although such sale is in fact illegal and void, as not having been conducted in compliance with the by-laws purporting to authorize it. Allen *v.* American Bldg., etc., Assoc., 49 Minn. 544, 52 N. W. 144, 32 Am. St. Rep. 574.

97. Ayres *v.* French, 41 Conn. 142.

That a wrongful conversion of the share certificate may operate as a conversion of the shares see McAllister *v.* Kuhn, 96 U. S. 87, 24 L. ed. 615.

98. Payne *v.* Elliot, 54 Cal. 339, 35 Am. Rep. 80. See also Fromm *v.* Sierra Nevada Silver Min. Co., 61 Cal. 629. So held in Boylan *v.* Huguet, 8 Nev. 345; and in Utah under a code similar to that of California. Kuhn *v.* McAllister, 1 Utah 273 [*affirmed* in 96 U. S. 87, 24 L. ed. 615].

99. Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91.

1. Atkinson *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282; Morton *v.* Preston, 18 Mich. 60, 100 Am. Dec. 146; Anderson *v.* Nicholas, 28 N. Y. 600.

In Louisiana a corporation is liable for the damages caused by the wrongful canceling of a certificate of its stock by its president and secretary. Factors, etc., Ins. Co. *v.* Marine Dry Dock, etc., Co., 31 La. Ann. 149.

That trover will not lie against the estate of a decedent for stock which has been pledged to the decedent and sold by a special administrator see Von Schmidt *v.* Bourn, 50 Cal. 616.

2. Neiler *v.* Kelley, 69 Pa. St. 403 [*following* Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285].

against the corporation for the breach of the implied agreement that upon such a transfer it will discharge such duty to the transferee upon his request.[3]

f. Doctrine That Form of Action For Such Injury Is Special Action on the Case. It seems that for the breach of this duty by a corporation actions of assumpsit and case have been indifferently maintained; and there are circumstances where, according to the views of the judges, the latter is the proper form of action at common law.[4]

g. Incidents of Such Actions—(I) *Plaintiff Must Have Right to Immediate Possession.* If the action is in the nature of trover to recover the share certificate, plaintiff must have a right to the immediate possession of it.[5]

(II) *Demand and Refusal.* If defendant acquired the certificate in subordination to the rights of plaintiff, for example as his bailee, then a right of action may not arise in favor of plaintiff until he has made a demand upon defendant for their possession and the demand has been refused. It has been held that a demand for a certificate of shares of corporate stock and a refusal to deliver it may not of themselves constitute a conversion, but they may be evidence of a conversion to go to the jury;[6] and that a demand, by the assignee of the shares, upon the corporation for a transfer of the shares, is not equivalent to a demand of access to the books of the corporation for the purpose of making such transfer, and does not tend to prove a conversion of the shares;[7] but this seems too great a refinement.

h. Questions of Procedure in Such Actions[8]—(I) *Parties.* Where the corporation negligently cancels the certificates of a shareholder and issues new certificates to another person, the true owner may pursue the corporation without making such other person a party to the suit,[9] or he may proceed against both.[10]

(II) *Not Necessary to Prove Fraud or Collusion—Negligence Sufficient.* Where plaintiff is suing for damages for the wrongful act of the corporation in permitting his shares to be transferred to someone else, it is not necessary, in order to charge the corporation, that its officers should have been guilty of

3. Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Kortright *v.* Buffalo Commercial Bank, 20 Wend. (N. Y.) 91 [*affirmed* in 22 Wend. (N. Y.) 348, 34 Am. Dec. 317]. *Contra,* Telford, etc., Turnpike Co. *v.* Gerhab, (Pa. 1888) 13 Atl. 90.

4. Protection L. Ins. Co. *v.* Osgood, 93 Ill. 69; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Kortright *v.* Buffalo Commercial Bank, 20 Wend. (N. Y.) 91 (per Nelson, J.); Telford, etc., Turnpike Co. *v.* Gerhab, (Pa. 1888) 13 Atl. 90; Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575. One court has reasoned that, although a shareholder who has transferred his shares in pledge has not, after making such transfer, such legal title as will enable him to maintain trover against the pledgee for an unauthorized sale, yet he may maintain a special action on the case; and a count in case may be added to the count in trover, by amendment. Nabring *v.* Mobile Bank, 58 Ala. 204. But that is on the conception that the legal title passes to the pledgee which as elsewhere seen (see *infra,* VII, F, 1, c) is not the usual view.

5. Ayres *v.* French, 41 Conn. 142.

6. *Alabama.*— Dent *v.* Chiles, 5 Stew. & P. 383, 26 Am. Dec. 360.

Connecticut.— See Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

Illinois.— Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28.

Maine.— Davis *v.* Buffum, 51 Me. 160.

Michigan.— Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91.

Missouri.— Huxley *v.* Hartzell, 44 Mo. 370.

New York.— Mechanics' Banking Assoc. *v.* Mariposa Co., 3 Rob. 395; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767.

Tennessee.— Houston *v.* Dyche, Meigs 76, 33 Am. Dec. 130.

Vermont.— Farrar *v.* Rollins, 37 Vt. 295.

Wisconsin.— Lander *v.* Bechtel, 55 Wis. 593, 13 N. W. 483.

7. Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164, per Robertson, C. J.

8. When not necessary to plead that the assessment was made for a valuable consideration see Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402.

Presumption of title in case of a transfer in blank see Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616.

Not necessary to show authority of the president of the corporation to permit transfers of shares. Buffalo Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

9. Baker *v.* Wasson, 53 Tex. 150; St. Romes *v.* Levee Steam Cotton-Press Co., 127 U. S. 614, 8 S. Ct. 1335, 32 L. ed. 289.

10. Woodhouse *v.* Crescent Mut. Ins. Co., 35 La. Ann. 238 (rule in Louisiana); Baker *v.* Wasson, 53 Tex. 150.

fraud or collusion, but it is sufficient that they have failed to exercise reasonable care.[11]

i. Measure of Damages For Refusing to Transfer — (i) *General Rule.* The general rule as to the measure of damages in an action of trover is the value of the goods at the time of the conversion, to which may be added interest up to the time of the trial, unless there were some special circumstances of outrage in the case, when the jury are at liberty to give more;[12] and this may be laid down as the general rule where the subject of the conversion is shares of stock in a corporation. The measure of damages in such actions, is (1) the value of the shares at the time of the refusal of the officers of the company to register the transfer;[13] (2) the dividends accrued thereon at that time;[14] (3) with interest to the date of the trial,[15] or in some states (and this is the better rule), to the date of the judgment.[16]

(ii) *Where Company Wrongfully Transfers Plaintiff's Shares to Third Person.* Where the company wrongfully transfers plaintiff's shares, on its books, to someone else, the conversion takes place at the date of the transfer, and the measure of damages is the value of the stock at that time.[17]

(iii) *Where Plaintiff Has Sold Shares, Company Refuses to Make Transfer, and Plaintiff Is Obliged to Buy Other Shares to Fulfil His Contract.* Where plaintiff has sold his shares and is unable to deliver them because of the refusal of the company to make the transfer on its books, so that in order to make his contract good he is obliged to buy other shares, the damages which he is entitled to recover from the company consist of the price which he was compelled to pay for the shares which he necessarily bought owing to the wrong of the company.[18]

(iv) *Full Value of Shares at Time of Conversion.* Coming now to a rule which emphasizes the importance of the distinction between trover for the conversion of the shares and trover for the conversion of share certificates merely,[19] and which hold that in trover for the conversion of a certificate of corporate stock plaintiff is entitled to recover the market value of the stock, as shown by evidence, at the time of the conversion,[20] we find a class of decisions which proceed upon the analogy of the measure of damages under the English law for the conversion of title deeds, which was the full value of the shares conveyed by the

11. Loring *v.* Salisbury Mills, 125 Mass. 138; Fisher *v.* Brown, 104 Mass. 259, 6 Am. Rep. 235; Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Atkinson *v.* Atkinson, 8 Allen (Mass.) 15; Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232; Duncan *v.* Jaudon, 15 Wall. (U. S.) 165, 21 L. ed. 142; Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310. See also Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306; Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407.

12. Weld *v.* Oliver, 21 Pick. (Mass.) 559; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; Neiler *v.* Kelley, 69 Pa. St. 403; Harger *v.* McMains, 4 Watts (Pa.) 418; Taylor *v.* Morgan, 3 Watts (Pa.) 333; Berry *v.* Vantries, 12 Serg. & R. (Pa.) 89; Dennis *v.* Barber, 6 Serg. & R. (Pa.) 420; Jacoby *v.* Laussatt, 6 Serg. & R. (Pa.) 300.

13. Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402; Parsons *v.* Martin, 11 Gray (Mass.) 111; Hussey *v.* Manufacturers', etc., Bank, 10 Pick. (Mass.) 415; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149.

14. Nutting *v.* Thomasson, 57 Ga. 418.

15. Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402.

16. Hussey *v.* Manufacturers', etc., Bank, 10 Pick. (Mass.) 415.

17. Mobile, etc., R. Co. *v.* Humphries, (Miss. 1890) 7 So. 522.

Where the company has wrongfully forfeited and sold plaintiff's shares, he may recover the amount for which the shares sold in excess of their par value. Budd *v.* Multnomah St. R. Co., 12 Oreg. 271, 7 Pac. 99, 53 Am. Rep. 355, 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

18. Tomkinson *v.* Balkis Consol. Co., [1891] 2 Q. B. 614.

19. See *supra*, VII, D, 9, c, (III), (A). See also Clowes *v.* Hawley, 12 Johns. (N. Y.) 484. Thus it is said in a work of reputation: "In trover for title deeds, the jury give the full value of the estate to which they belong by way of damages, which, however, are generally reduced to forty shillings on the deed being given up." Mayne Dam. (Woods Am. ed.) 497.

20. Connor *v.* Hillier, 11 Rich. (S. C.) 193, 73 Am. Dec. 105.

deed, and not merely the value of the paper muniments of title. In short where the possession of the certificate is necessary to the possession and enjoyment of the shares, the measure of damages is not the value of the paper on which the certificate is printed, or anything else than the value of the shares of which the paper is the muniment of title, and for the possession and enjoyment of which property the paper is necessary.[21]

(v) *For Conversion of Certificate Merely, Actual Damages, and Not Value of Shares, Recoverable.* Where the case is one of the conversion of the certificate merely, and not of the conversion of the shares represented thereby, as where the shares continue to stand in the name of plaintiff, and defendant continues wrongfully to hold possession of the scrip certificate, although unable to make use thereof to effect a transfer of the shares to himself, the measure of damages of plaintiff will be limited to the loss he actually suffers, which loss is not necessarily the value of the shares.[22]

(vi) *Corporation Not Liable For Subsequent Depreciation.* A corporation failing or refusing to transfer stock on its books, at the request of a pledgee, is not liable for subsequent depreciation of the stock.[23]

(vii) *Nominal Damages Only For Technical Conversion.* It is said that where plaintiff has suffered a technical conversion of his shares merely, without any actual pecuniary loss, he can recover nominal damages only.[24]

10. Fiduciary Relations Between Corporation and Shareholder — a. Corporation a Trustee For Its Shareholders For Protection of Their Title. A well-settled qualification of the rule that a corporation does not stand in a fiduciary relation to its shareholders, but that they may deal with each other at arm's length in the absence of fraud, is that a corporation is a trustee for its shareholders for the purpose of protecting their titles to their shares; and to this end it is bound to exercise reasonable care and diligence, and is consequently responsible to a shareholder who has lost his title to his shares through its negligence or misconduct.[25]

b. Duty of Corporation to Exercise Care and Diligence in Discharging This Trust. The duty of a corporation toward those interested in the transfer of the shares of its stock has been thus stated: It is "made the custodian of the shares of stock, and clothed with power sufficient to protect the rights of every one interested, from unauthorized transfers; it is a trust placed in the hands of the corporation for the protection of individual interests, and like every other trustee it is bound to execute the trust with proper diligence and care, and is responsible

21. Morton *v.* Preston, 18 Mich. 60, 100 Am. Dec. 146.

22. Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91. *Compare* Connor *v.* Hillier, 11 Rich. (S. C.) 193, 73 Am. Dec. 105 (where a recovery was allowed for the full value of the stock represented by the shares which had been converted, the report not showing that the conversion of the certificate did not deprive plaintiff of his legal title to the shares); Nelson *v.* King, 25 Tex. 655 (which seems to resemble the last case in its main facts). See also to the same effect Mowry *v.* Wood, 12 Wis. 413, where the subject of the conversion was a certificate of land scrip issued by the state, and where plaintiff was restricted to actual damages.

23. Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 Ohio St. 208.

24. Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

For an illustration in a case arising between a broker and customer see Gruman *v.* Smith, 81 N. Y. 25. *Compare* Nutting *v.* Thomasson, 57 Ga. 418.

25. Morawetz Corp. § 237; Perry Trusts, § 242; and the following cases:

Colorado.— Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586.

Maryland.— Stewart *v.* Firemen's Ins. Co., 53 Md. 564; Hodges *v.* Planters' Bank, 7 Gill & J. 306; Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407.

Massachusetts.— Loring *v.* Salisbury Mills, 125 Mass. 138; Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Atkinson *v.* Atkinson, 8 Allen 15.

Pennsylvania.— Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Bayard *v.* Farmers' Bank, 52 Pa. St. 232.

Tennessee.— Caulkins *v.* Memphis Gas-Light Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786; Covington *v.* Anderson, 16 Lea 310.

United States.—Duncan *v.* Jaudon, 15 Wall. 165, 21 L. ed. 142; Lowry *v.* Commercial,

for any injury sustained by its negligence or misconduct."[26] It is said that "in all such cases there may be no actual fault on the part of the corporation, yet the principle results from the justice and expediency, in such transactions, of casting the loss on those who can best provide against it.[27]

c. Liable in Damages For Failure to Discharge It, Although Not Guilty of Fraud, Collusion, or Bad Faith — (I) *In General.* It may be further stated that here as elsewhere the corporation can act only through agents, and that if a loss is sustained through the act of the proper officer of the corporation touching a transfer of the shares, the corporation, in the absence of fraud or collusion practised against it, must bear the loss, and it cannot be put upon the transferee.[28] As the corporation appoints the officers before whom the transfers of stock must be made, it is responsible for their acts, and must answer for their negligence or default, whenever the rights of a third person are concerned.[29]

(II) *Liable For Issuing New Certificate Without Surrender of Old.* To illustrate this duty and liability, it may be observed that the corporation does not act with proper care and diligence if it admits a transfer to registry, and issues a new certificate without the surrender of the old one, unless the loss or destruction of the old one is proved; and even then it seems that the corporation is entitled to a bond of indemnity.[30] If therefore its officers, through neglect, issue a new certificate to a supposed transferee without requiring the old certificate to be surrendered, the corporation becomes liable in damages to a *bona fide* transferee of such new certificate.[31]

(III) *Liable For Transferring Shares on Ancient Powers of Attorney Without Inquiring Whether They Have Been Revoked.* So where the signatures to powers of attorney for transfers were genuine, but at the time of the transfer were thirteen years old, the corporation was put upon inquiry, and was bound, before making the transfer, to ascertain whether the power had been revoked.[32]

(IV) *Liable For Permitting Wrongful Transfers.* Under the operation of this principle, a corporation which permits wrongful transfers of shares to be made upon its books becomes liable in damages to the true owner whose legal title has been thereby divested. This liability arises where the corporation permits one who is agent of another to transfer the shares of his principal to himself on its books, without proper authority from his principal, in the particular case, with no other authority than a general power of attorney authorizing him to sell and transfer stock and other securities and property, the share certificates not being indorsed by his principal;[33] and where a corporation, knowing that certain stock is held in trust, aids the trustee in converting it to his own use, by changing and reissuing stock certificates, and making transfers on its books;[34] or (in Louisiana) where the corporation, without a mandate "express and special," within article 2997 of the civil code, has permitted a transfer of a shareholder's shares.[35] And in general if a person gets possession of the certificates of shares of another, under circumstances which do not constitute him the owner or put him under the protection of the rule relating to *bona fide* purchasers for value,

etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310.

26. Cleveland, etc., R. Co. *v.* Robbins, 35 Ohio St. 483; Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310.

27. Chew *v.* Baltimore Bank, 14 Md. 299; Cleveland, etc., R. Co. *v.* Robbins, 35 Ohio St. 483, 500.

28. Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306; Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407.

29. Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310.

30. See *infra*, VII, D, 12, b, (II).

31. Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586.

32. Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232.

33. Tafft *v.* Presidio, etc., R. Co., 84 Cal. 131, 24 Pac. 436, 18 Am. St. Rep. 166, 11 L. R. A. 125, decided under Cal. Civ. Code, § 324.

34. Caulkins *v.* Memphis Gas-Light Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786. See also *infra*, VII, D, 13, b *et seq.*

35. Woodhouse *v.* Crescent Mut. Ins. Co., 35 La. Ann. 238.

the corporation will be liable to the real owner, in an action for damages for the conversion of his shares, if its officers transfer the shares on the corporate books to the supposed owner. The governing principle is that the owner of property cannot be deprived of it without his consent, except by due process of law.[36]

(v) *Liable For Restricting Rightful Transfers.* In like manner it is a breach of this trust for a corporation to refuse to make upon its books a rightful transfer of the shares of a member, for which it is liable to him in damages.[37] A mere notice to the officers of the company, from parties having a beneficial interest in the stock sought to be transferred, that the right of the party having the legal title to make the transfer is questioned and will be contested, will not justify the officers in a persistent refusal to make the transfer, after a reasonable and sufficient time has elapsed to enable the parties giving the notice to institute legal proceedings to contest the right to make the transfer.[38]

11. Liability of Corporation For Making or Permitting Wrongful Transfers on Its Books — a. Liability For Transferring on Power of Attorney Executed by Shareholder Who Is Non Sui Juris. We shall see[39] that the rule is that where a corporation recognizes a power of attorney to transfer shares on its books, it takes the risk of its validity, just as a banker takes the risk of the validity of the signature of the check which it pays. Under this view the corporation is therefore liable in case it permits a transfer under a power of attorney which is either forged,[40] or executed by an infant, a married woman, or a lunatic.[41]

b. Corporation Cannot Refuse Transfer Because It Dissents From Motive of Parties to Transfer — (1) *In General.* As elsewhere seen, when treating of the right of shareholders to alien their shares,[42] the conclusion is that where the parties to the transfer of corporate shares comply with the conditions which give them the legal right to have the transfer made on the books of the company, the officers of the corporation are under no duty to inquire into the motives of the transfer, nor can they refuse to make the transfer on the books of the corporation because they may think that the motives of the parties are improper, or that the transfer may injuriously affect the interests of that or of some other company. Their duties are merely ministerial and clerical, and they have no judicial

36. Western Union Tel. Co. *v.* Davenport, 97 U. S. 369, 24 L. ed. 1047. It has been held that, for a banking corporation to take up a share certificate from one to whom a life-estate therein had been bequeathed, upon her presentation of the same, with an indorsement thereon by the executors, that they had sold, assigned, and transferred to her such shares, without inquiring as to whether there was an actual sale or transfer to her for value, is such negligence as will render the bank and its officers liable to the remainderman, where such officer had actual knowledge of the contents of the will. Cox *v.* Wilson First Nat. Bank, 119 N. C. 302, 26 S. E. 22.

37. Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249, no evidence that the shareholder was indebted to the corporation.

38. State *v.* McIver, 2 S. C. 25. It has been held that the fact that certificates of stock purporting to be fully paid have been inadvertently issued to subscribers who have paid but two thirds of their subscriptions, and that the secretary of the corporation has been ordered by the directors to call in and cancel such certificates, does not justify him in refusing to transfer on the books of the corporation shares purchased from one of such subscribers. Nor is it material whether the sale of the stock was *bona fide* or not, since the purchaser in such a case becomes responsible for whatever remains unpaid in respect of the shares. Herdegen *v.* Cotzhausen, 70 Wis. 589, 36 N. W. 385. To this statement of doctrine it ought to be added by way of caution, that other courts have held that where a corporation issues unpaid stock as fully paid up it thereby estops itself, as against an innocent purchaser for value, from claiming that anything remains unpaid in respect of them. See *supra*, VI, M, 3, a.

39. See *infra*, VII, D, 14, a, (1).

40. See *infra*, VII, D, 14, a, (1) *et seq.*

41. Chew *v.* Baltimore Bank, 14 Md. 299, where a corporation was held liable to a lunatic for permitting a transfer on its books of shares belonging to the lunatic on the faith of a power of attorney executed by the lunatic. But it has been held that a sale of corporate stock by a minor, if not on its face manifestly injurious to her, is merely voidable at her election; and the corporation, being bound to make transfer to the purchaser if the sale has not been avoided at the time it is demanded, is not liable for any loss resulting from the sale and transfer. Smith *v.* Nashville, etc., R. Co., 91 Tenn. 221, 18 S. W. 546.

42. See *supra*, VII, D, 1, d.

power to pass upon the validity of the reasons which induce the parties to demand the transfer.[43]

(II) *Exception in Case of Conspiracy to Wreck Corporation and Merge It in a "Trust."* An exception to this principle has been admitted, to the effect that where a person demanding the transfer of the shares on the books of the company has conspired with others and entered into an arrangement whereby the shares were to be indorsed and delivered to him, apparently and professedly for value, but really without any consideration, so as to enable him to acquire the ownership and control of the corporation to the exclusion of all other persons interested therein, the person demanding the transfer being an agent of one of that species of combination known as a "trust" for the control of corporations, the officers of the corporation will be justified in resisting the transfer.[44]

(III) *Corporation Cannot Restrain Transfers Made to Effect Collateral Purposes Not Unlawful.* Under the operation of the foregoing principle this will be the rule in the case of an out-and-out transfer made for the purpose of enabling the transferee to vote at a corporate election.[45] It has been so held where the object of the transfer was to enable the transferee to become a party to an action.[46] But such an effect will not be ascribed to a transfer where it appears that it was a sham, and that there was no real change in ownership.[47]

e. Whether Blank Transferee Must Satisfy Corporation That He Is Genuine Purchaser. It has been held that the corporation is under no obligation to permit a transfer to be made to a person claiming to be the assignee of a certificate, on the mere presentation of such a certificate, with an assignment and power of attorney executed by the original holder in blank, no person being named or specified as the assignee or attorney; and moreover, that an action of assumpsit cannot be maintained against the bank, for refusing to permit such transfer, without proof by plaintiff that he had purchased the certificate and was the owner thereof.[48] But the true view seems to be that the holder of a certificate of shares of stock, with an irrevocable power of attorney from the owner to transfer them, is the presumptive equitable owner, and if shown to be a holder for value without notice his title cannot be impeached, although the attorney's name is in blank; that such a power of attorney may be filled up and executed, by any one of several successive *bona fide* holders, whenever his interests may require it; and that the power is neither exhausted by its first use, revoked by the maker's death, nor affected by passing through any number of hands, until its execution by an

43. State *v.* McIver, 2 S. C. 25; *In re* Klaus, 67 Wis. 401, 29 N. W. 582.

44. Gould *v.* Head, 41 Fed. 240. *Compare* 38 Fed. 886.

It has been held that a pooling arrangement by which shareholders transfer their shares to trustees, to be voted as directed by holders of the majority thereof for the period of five years, unless the holders of two thirds of such stock vote to put an end to the trust sooner, is contrary to public policy and void, as against the right of an assignee of some of the trustees' certificates to have the shares, thereby represented, issued to him in his own name and under his own control. Harvey *v.* Linville Imp. Co., 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L. R. A. 265.

45. See *supra*, VII, D, 1, d. It has been held that if a party purchases of a bank a large amount of stock to increase the number of votes he is entitled to throw, makes use of them for that purpose, and immediately thereafter the directors return the purchase-money and resume the stock, a court of equity will not compel the purchaser to refund the money and take back the stock where the proof shows that no injury has resulted from the transaction. Taylor *v.* Miami Exporting Co., 6 Ohio 176.

46. Stock was transferred to A on the day of the commencement of an action to set aside sales made by the corporation, in order that A might join in the action. The money with which the purchase was made was placed to A's credit by the person who wanted him to join, and the shares were not transferred on the books of the corporation. It was held (Davis, P. J., dissenting) that the transfer carried title to A, and that he was properly a party to the action. Ervin *v.* Oregon R., etc., Co., 35 Hun (N. Y.) 544.

47. A transfer of bank-stock to citizens of the state, by a non-resident holder, for the purpose of enabling them to vote, under the statute, without any real change in the ownership, does not according to one holding make the transferees legal voters. State *v.* Hunton, 28 Vt. 594.

48. Dunn *v.* Buffalo Commercial Bank, 11 Barb. (N. Y.) 580.

actual transfer.[49] As he is presumptively the equitable owner, the corporation cannot, before permitting a transfer to him of the shares on its books, put him to further proof of his title, without first producing evidence impeaching it.[50]

d. Corporation Not a Guarantor of Shareholder's Title — (i) *In General.* As already indicated[51] it is sometimes held that the measure of duty of the corporation is good faith and reasonable care and diligence; and that, in the absence of fraud or collusion on the part of its officers charged with the duty of protecting the title of the shareholder, the mere transfer of stock on the books thereof, by direction of the vendor to his vendee, does not make the company liable as a guarantor of the vendor's title to the stock.[52]

(ii) *Does Not Become Such Guarantor by "Certification" of Shares Under English Custom.* A "certification" of shares, under a custom which has sprung up on the English Stock Exchange, has been held to amount to no more than a representation that the transferrer has produced to the person certifying such documents as are apparently in order, and as show on the face of them a *prima facie* title in the transferrer to transfer the shares mentioned in the transfer. It does not warrant the title of the transferrer, or the validity of the various documents which establish his title. It does not therefore estop the company from afterward denying title to one who purchases shares on the faith of such a certification, or give him an action against it for a careless misrepresentation.[53]

e. Right of Corporation to Refuse Substitution of Assignee Until Subscription Paid. No general rule upon this question can be stated with confidence, but its solution depends in most cases upon the terms of the charter, governing statute, or valid by-law. One view is that the fact that an assessment against the shares has been made and is delinquent does not defeat the right of a shareholder to have the shares transferred to a purchaser, since the identity of the shares, or the lien thereon for the assessment, is not affected by the transfer.[54] The principle, however, remains that the mere assignment by a subscriber of his shares will not relieve him from liability to the corporation in respect of any unpaid balance due thereon until the assignee is regularly substituted in his place on the books of the corporation.[55]

f. Corporation Should Refuse Transfer Unless Old Certificate Surrendered. (i) *In General.* Where certificates are outstanding representing shares of stock, it is the duty of the corporation to resist any transfer of such shares on its books, without the production and surrender of the certificates; and any act done or suffered by the corporation which invests a new party with the ownership of

49. Mt. Holly, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117; Leavitt *v.* Fisher, 4 Duer (N. Y.) 1; Tatman *v.* Lobach, 1 Duer (N. Y.) 354.

50. Thus it has been held that a corporation whose duty to its shareholders is to protect persons interested from unauthorized transfers of stock upon its books is not bound to examine whether a transferrer with power to transfer is attempting a fraud. Hughes *v.* Drovers', etc., Nat. Bank, 86 Md. 418, 38 Atl. 936. On the same grounds it has been held that a corporation which in good faith accepts the surrender of old stock certificates from one holding a power of attorney authorizing him to transfer them and issue new certificates to the purchaser is not liable for the stock to the owners, although such attorney surreptitiously obtained possession of the stock and converted the proceeds to his own use. Couts *v.* Louisville, etc., R. Co, 92 Ky. 263, 17 S. W. 564, 13 Ky. L. Rep. 557.

51. See *supra*, VII, D, 10, b.

52. Central R., etc., Co. *v.* Ward, 37 Ga. 515.

53. Bishop *v.* Balkis Consol. Co., 25 Q. B. D. 512, 59 L. J. Q. B. 565, 63 L. T. Rep. N. S. 601, 2 Meg. 292, 39 Wkly. Rep. 99 [*affirming* 25 Q. B. D. 77].

54. Craig *v.* Hesperia Land, etc., Co., 113 Cal. 7, 45 Pac. 10, 54 Am. St. Rep. 316, 35 L. R. A. 306.

The fact that a shareholder does not know of an assessment upon his stock at the time he demands a transfer on the books of the company to a purchaser from him, or when he brings action to enforce his rights, does not defeat his right to the transfer. Craig *v.* Hesperia Land, etc., Co., 113 Cal. 7, 45 Pac. 10, 54 Am. St. Rep. 316, 35 L. R. A. 306.

55. Putnam *v.* New Albany, etc., R. Co., 16 Wall. (U. S.) 390, 21 L. ed. 361, opinion by Strong, J.

the shares, without the due production and surrender of the certificate, renders the corporation liable to the real owner of the shares for their conversion.[56] And it is so liable to a *bona fide* holder for value of the old certificate.[57]

(II) *New Certificates Issued Without Taking Up Original Ones Invalid.* If the secretary of a corporation issues new share certificates without taking up and canceling the original certificates, the new certificates will be invalid,[58] except as the foundation of a claim for indemnity against the corporation under the principles elsewhere stated.[59]

(III) *Validity of By-Law Restraining Transfers Except Upon Surrender of Certificate, Etc.* It follows from what has preceded that a by-law of a corporation, providing that no shares of its stock shall be transferred on its books until the certificate has been surrendered to its president or shown to be lost, is valid and binding on all its shareholders and their heirs.[60]

(IV) *Corporation Not Liable to Holder of Certificate in Case of Transfer by Order of Court.* When a judicial tribunal of last resort, after a *bona fide* contest by the corporation, has ordered stock to be transferred to a purchaser at a sheriff's sale, the corporation is not liable to the holder of the certificate of the stock, who took no steps to protect himself.[61]

(V) *Previous Transfer to Purchaser at Execution Sale.* One who purchases shares of bank-stock, expressed to be "transferable at the bank," has no action against the bank for refusing to transfer to him on its books, where, previous to any notice by him to the bank, it had transferred them in good faith to one who had purchased them at a sale on execution against the person in whose name they stood on the corporate books.[62]

12. Duties and Responsibilities of Corporation Where Certificates Have Been Lost or Stolen — a. Rights of Owner Superior to Those of Bona Fide Purchasers of Lost or Stolen Share Certificates. Share certificates not being negotiable instruments, if such a certificate is lost or stolen from the owner, without fault on his part, his right to it is superior to that of any person who may acquire it by purchase for value from any other holder;[63] and he may maintain, against the corporation and the person who holds the stolen scrip, an action to establish his right to it.[64]

56. *Illinois.*— Hall *v.* Rose Hill, etc., Road Co., 70 Ill. 673.

Maryland.— Cohen *v.* Gwynn, 4 Md. Ch. 357.

Massachusetts.— Sewall *v.* Boston Water Power Co., 4 Allen 277, 81 Am. Dec. 701.

New York.— Cushman *v.* Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315 (per Miller, J.); New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Pollock *v.* National Bank, 7 N. Y. 274, 57 Am. Dec. 520; Smith *v.* American Coal Co., 7 Lans. 317.

Texas.— Strange *v.* Houston, etc., R. Co., 53 Tex. 162.

United States.— South Bend First Nat. Bank *v.* Lanier, 11 Wall. 369, 20 L. ed. 172.

England.— Donaldson *v.* Gillot, L. R. 3 Eq. 274, 12 Jur. N. S. 959, 15 L. T. Rep. N. S. 382, 15 Wkly. Rep. 166; Matter of Bahia, etc., R. Co., L. R. 3 Q. B. 584, 9 B. & S. 844, 37 L. J. Q. B. 176, 18 L. T. Rep. N. S. 467, 16 Wkly. Rep. 862; Davis *v.* Bank of England, 2 Bing. 393, 3 L. J. C. P. O. S. 4, 9 Moore C. P. 747, 9 E. C. L. 629.

57. Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586; South Bend First Nat. Bank *v.* Lanier, 11 Wall. (U. S.) 369, 20 L. ed. 172.

Equitable owner, not producing certificate, cannot maintain action against the corporation for refusing to register a transfer of the shares to him. New London Nat. Bank *v.* Lake Shore, etc., R. Co., 21 Ohio St. 221.

Circumstances under which a corporation was held liable in damages to the real owner of shares for transferring them on its books to another and issuing a new certificate without the production of the old one. Strange *v.* Houston, etc., R. Co., 53 Tex. 162.

58. Hall *v.* Rose Hill, etc., Road Co., 70 Ill. 673; Cincinnati, etc., R. Co. *v.* Citizens' Nat. Bank, 11 Ohio Dec. (Reprint) 50, 24 Cinc. L. Bul. 198.

59. See *infra*, VII, D, 14, d, (I).

60. State *v.* Iberville Parish Judge, 30 La. Ann. 307.

61. Friedlander *v.* Slaughter House Co., 31 La. Ann. 523.

62. Williams *v.* Mechanics' Bank, 29 Fed. Cas. No. 17,727, 5 Blatchf. 59.

63. East Birmingham Land Co. *v.* Dennis, 85 Ala. 565, 5 So. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836; Barstow *v.* Savage Min. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705.

64. Wells *v.* Smith, 7 Abb. Pr. (N. Y.) 261. For the same principle as to bills of lading indorsed in blank see Gurney *v.* Beh-

b. Corporation Issues New Certificate Where Old One Not Produced at Its Peril — (I) *In General.* If the share certificate of a shareholder has been lost, and he or his alleged vendee claims of the corporation the issue of a new certificate, the corporation will issue it at its peril, and is therefore as elsewhere stated [65] entitled to demand indemnity before making such new issue.[66]

(II) *May Require Bond of Indemnity Before Issuing New Certificate.* A bond of indemnity may be required by a corporation as a condition of issuing new certificates of stock for those that have been lost, where the owner is an assignee and has never had possession of the old certificates, and the lapse of time is not so great as to preclude danger of their reappearance.[67]

c. Corporation Refuses to Register Transfer to Rightful Owner at Its Peril — (I) *In General.* So where, on a false allegation made to the corporation by a shareholder that his share certificate has been lost, if the corporation refuses to admit a *bona fide* purchaser of such certificate to registration on its books, as a shareholder in respect of it, it equally proceeds at its peril.[68]

(II) *In Such Case Vendor of Bona Fide Shareholder May Be Liable Together With Corporation.* If a shareholder sells his shares to a purchaser for value and in good faith, and afterward, by means of a false affidavit of their loss and a bond of indemnity, procures the corporation to issue new shares to him, and to refuse to admit to registration and to the rights of a shareholder his vendee, the latter may have an action against both him and the corporation.[69] The right of action against the vendor of the shares is supported on the principle which gives a right of action not only against the principal tortfeasor, but also against all who aid and abet him in the doing of the wrong, all being regarded as principals.[70]

13. Transfers of Shares Held in Trust — a. Issuing Shares to Third Persons "In Trust." The propriety of a corporation issuing its shares to a third person who is not a regular subscriber thereto, to be held in trust for the corporation, or to be held upon some other trust, depends of course upon the governing statute, or where the governing statute permits such an issuing, in some cases upon the governing by-laws. It seems that a corporation cannot, by an arrangement of this kind, whereby it issues a part of its shares in trust, disable itself from issuing the remaining shares to *bona fide* takers at their par value, that is, from filling

rend, 3 E. & B. 622, 18 Jur. 856, 23 L. J. Q. B. 265, 2 Wkly. Rep. 425, 77 E. C. L. 622.

That the purchaser from one who has no title must prove negligence of the true owner and show that it is the proximate cause of the deceit see Barstow *v.* Savage Min. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705 [*quoted* with approval in East Birmingham Land Co. *v.* Dennis, 85 Ala. 565, 5 So. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836].

65. See *infra*, VII, D, 12, b, (II).

66. For a case proceeding upon this principle and deciding a number of incidental questions see Cleveland, etc., R. Co. *v.* Robbins, 35 Ohio St. 483.

67. Guilford *v.* Western Union Tel. Co., 43 Minn. 434, 46 N. W. 70. For an untenable holding to the effect that the company may be compelled by mandamus to issue a new share certificate in place of one advertised under a by-law as lost see State *v.* New Orleans Gaslight Co., 25 La. Ann. 398.

Protecting the company by requiring the claimant of the lost share certificate to furnish a bond of indemnity, and also by allowing the case to stand on the docket and be kept open for any further proceedings which justice might require. Galveston City Co. *v.* Sibley, 56 Tex. 269. The decree, which is a long one, is set out in the report, 56 Tex. 279–281.

Statute of New York giving a remedy for procuring a duplicate certificate in case of a loss of the original. N. Y. Laws (1873), c. 151, § 1. For comments on this statute with the view that its constitutionality is doubtful see 2 Thompson Corp. § 2524. Consideration of this statute explained and petition upon which it was held that the court had no jurisdiction to order the issuing of a new certificate see Biglin *v.* Friendship Assoc., 46 Hun (N. Y.) 223, 11 N. Y. St. 566.

68. Greenleaf *v.* Ludington, 15 Wis. 558, 82 Am. Dec. 698.

69. Greenleaf *v.* Ludington, 15 Wis. 558, 82 Am. Dec. 698.

70. Among the cases illustrating this principle are: Dreyer *v.* Ming, 23 Mo. 434; Coats *v.* Darby, 2 N. Y. 517; Judson *v.* Cook, 11 Barb. (N. Y.) 642; Herring *v.* Hoppock, 3 Duer (N. Y.) 20 [*affirmed* in 15 N. Y. 409]; Beardsley, C. J., in Davis *v.* Newkirk, 5 Den. (N. Y.) 92, 94; Wall *v.* Osborn, 12 Wend. (N. Y.) 39; Root *v.* Chandler, 10 Wend. (N. Y.) 110. 25 Am. Dec. 546; Phillips *v.*

up its capital stock in the regular way.[71] A resolution to deliver the stock of a corporation to trustees of a certain association or combination, which is carried unanimously by the votes of all who are present, including every member of the trustees of the corporation and all the shareholders except two, who own but a small part of the stock, and who in fact have consented to the delivery of the stock, has been held sufficient to make the corporation a party to the combination.[72]

b. Effect of Notice on Books of Corporation That They Are Held in Trust For Third Persons. Although there has been some wavering of judicial opinion on this question,[73] yet most of the cases unite in holding that where the shares are so registered on the books of the company as to convey to the officers of the company notice that they are held in trust for a third person, the corporation is bound to see, before it permits a conveyance on its books by the trustee, that he has the consent of the *cestui que trust* where that is necessary, or that he is otherwise acting within the authority conferred upon him by the instrument creating the trust or by the decree of a court of competent jurisdiction; otherwise the corporation will be obliged to make good any loss accruing to the trust estate from the unauthorized transfer. In short if the corporation, having notice of the trust, permits the trustee to transfer without authority, it is liable if he misappropriates the fund.[74] Therefore one who holds corporate shares on the books of the corporation as trustee of another cannot insist upon their transfer by the corporation without exhibiting his authority in full.[75]

c. Notice in Case of Fiduciary Having Power to Sell Personal Property of Estate, Such as Administrators, Guardians, Assignees in Insolvency, Etc.— (i) *In General.* How far the company or transfer agent is chargeable with notice of the terms under which stock is held in a fiduciary capacity depends largely upon the nature of the trust. In the case of administrators, guardians, and assignees of the estates of insolvents, it would seem that the company acting in good faith is discharged of any participation in the wrong, when it assures itself of the official character of the person seeking to make the transfer. For the law casts the legal title of the personal property of the estate upon such trustees. Their primary duty is administration, and involves the power to sell personalty, when necessary for the payment of debts or the proper management of the estate.[76] So where the transfer is signed simply as administrator and is made to the "heirs and distributees" of the decedent, the company is not charged with notice of the existence and contents of a will, although in fact the transfer is made by an administrator *cum testamento annexo*, and passes the title to the stock to the legatees in accordance with the terms of the will; and consequently is not liable for permitting a subsequent transfer in violation of the terms of the trust.[77]

(ii) *In Case of Judicial Sale Duty of Corporation Before Transferring Shares to See That Terms of Order Are Complied With.* Where an order of court authorized an administrator to sell shares belonging to the estate

Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108.

71. Poor *v.* European, etc., R. Co., 59 Me. 270.

72. People *v.* North River Sugar Refining Co., 54 Hun (N. Y.) 354, 3 N. Y. Suppl. 401, 7 N. Y. Suppl. 406, 27 N. Y. St. 282, 2 L. R. A. 33, 5 L. R. A. 386 [*affirmed* in 121 N. Y. 582, 24 N. E. 834, 31 N. Y. St. 781, 18 Am. St. Rep. 843, 9 L. R. A. 33].

73. See Albert *v.* Baltimore, 2 Md. 159; Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407.

74. *California.*— Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237.

Maryland.— Marbury *v.* Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. Rep. 467; Stewart *v.* Firemen's Ins. Co., 53 Md. 564; Farmers', etc., Bank *v.* Wayman, 5 Gill 336.

Pennsylvania.— Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232.

South Carolina.— Magwood *v.* Southwestern Railroad Bank, 5 S. C. 379.

United States.— Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310, opinion by Taney, J.

See note on this subject in 19 Am. & Eng. Corp. Cas. 412.

75. Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232.

76. Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232; Wallace *v.* Holmes, 29 Fed. Cas. No. 17,100, 9 Blatchf. 65. *Compare* Atkinson *v.* Atkinson, 8 Allen (Mass.) 15.

77. Smith *v.* Nashville, etc., R. Co., 91 Tenn. 221, 18 S. W. 546.

at private sale, on good security, and authorized a credit of only one year, and the administrator sold upon a credit of ten years, and accepted the individual note of the purchaser without security, the company was liable for the loss sustained by the estate in consequence of its registering the transfer and issuing new certificates.[78]

d. Executors Under a Will — (i) *In General.* An executor under a will holds the legal title to the personalty and presumably has the power to sell shares belonging to the estate for the purpose of the trust created by the will or imposed upon him by the will. His letters testamentary show an apparent right to dispose of the stocks of the testator even though bequeathed specifically; and on principle the company is bound to respect his title and transfer them according to his desire. Nor, in the absence of notice of an intended breach of trust, is the corporation bound to concern itself with the disposition which the trustee makes of the proceeds of the sale; or to see whether, in making distribution, he proceeds in conformity with the terms of the will.[79]

(ii) *When Company Liable For Issuing New Certificates After Removal of Executor From Office.* Where a company upon reorganization issued two negotiable certificates to an executor, redeemable in new stock, in place of stock belonging to the estate which he surrendered, it was held liable for a loss occasioned to the estate by his negotiation of the certificates after his removal from office, and the issue of the new stock to the holders thereof.[80]

(iii) *Where Executor Is Also Trustee Under Will, Company Put on Inquiry With Respect to His Powers.* There are cases, however, which are difficult to reconcile with this view, in which it is said that the transfer being made by an executor, his character of executor is notice of itself that there is a will open to inspection on the public records, and that the company is charged with a notice of its contents and of the trust which it creates as if it had actually read it.[81]

e. In Case of Shares Held by a Guardian. If shares are transferred on the books of the corporation to a person, with the addition of the word "guardian,"

78. Citizens' St. R. Co. *v.* Robbins, 128 Ind. 449, 26 N. E. 116, 25 Am. St. Rep. 445, 12 L. R. A. 498. *Compare* Marbury *v.* Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467; Webb *v.* Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479.

79. Hutchins *v.* State Bank, 12 Metc. (Mass.) 421. The English courts have adopted this view in cases growing out of the duties of the Bank of England as transfer agent of shares in the public funds. Franklin *v.* Bank of England, 9 B. & C. 156, 7 L. J. K. B. O. S. 183, 4 M. & R. 11, 1 Russ. 575, 46 Eng. Ch. 511, 17 E. C. L. 78; Fowler *v.* Churchill, 2 Dowl. N. S. 562, 7 Jur. 156, 12 L. J. Exch. 230, 11 M. & W. 323; Bank of England *v.* Lunn, 15 Ves. Jr. 569; Bank of England *v.* Parsons, 5 Ves. Jr. 665; Hartga *v.* Bank of England, 3 Ves. Jr. 55. *Compare* Keane *v.* Roberts, 4 Madd. 332, 20 Rev. Rep. 306; McLeod *v.* Drummond, 17 Ves. Jr. 152, 11 Rev. Rep. 41. These cases all turn upon the legal title of the executor to the fund. The facts were not such as to charge him as trustee in addition to, or independently of, his office as executor. The principle has been recognized in those American cases in which the executor has acted solely in his capacity as executor, and the case is unembarrassed by any additional trust relation growing out of the provisions of the will, and with a knowledge of which it is sought to charge the company. Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232.

80. Mobile, etc., R. Co. *v.* Humphries, (Miss. 1890) 7 So. 522.

81. Stewart *v.* Firemen's Ins. Co., 53 Md. 564; Caulkins *v.* Memphis Gas-Light Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786; Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310. For a case proceeding on this principle, charging the company with notice of the powers of the executor under the terms of the will and with knowledge that he was dealing with the shares as his own property, so as to make the company liable for the loss sustained by the *cestui que trust*, in consequence of transferring the shares on its books, see Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310. *Compare* Albert *v.* Baltimore, 2 Md. 159 [*reversing* 1 Md. Ch. 407], a case growing out of the same estate and the transactions of the same executor. It was there held that the mere facts that the stock in question stood on the books in the names of the executors as such, and was subsequently transferred to them as "trustees" in connection with the privilege of a certain married woman to draw the dividends, were insufficient to charge the corporation with notice of the trust, and render it liable for a loss resulting from allowing the trustees to transfer the stock.

this will charge the corporation with notice of the fact that the shares are held in trust; and if they are thereafter hypothecated without an order of court, and the corporation recognizes the transfer and completes it on its books, it will be liable for a conversion.[82] So where the certificate gives notice on its face that shares are the property of the minors, the transfer will be void both as to the company and the transferee.[83]

f. In Case of Ordinary Trustees — (I) *In General.* The principle is that ordinary trustees, excluding those already considered, have no powers *ex officio*, or as matter of law, but that one dealing with them must ascertain the extent of their powers at his peril. When therefore a share certificate shows on its face that the stock is held in trust, one lending money on a pledge of it by the trustee will be charged with notice of the fact that the latter is abusing his trust, when apparently the loan is for a private purpose, and an inquiry would reveal the fact.[84] And since the company is a custodian of the rights of the shareholders, such a notice to it of the fiduciary nature of the transferrer's title will charge it with the obligation to ascertain the extent of his power to transfer it. If it permit a transfer without doing so, it will render itself liable to the *cestui que trust*, who is thereby injured.[85] To protect itself against such liability, it has a right to refuse a transfer of stock held in trust until the terms of the trust are submitted to its legal adviser.[86]

(II) *Lapse of Time Will Not Affect Liability After Notice of Trust.* When the company is once charged with a notice of the fact that the stock is held in trust and of the limited powers of the trustee, the mere lapse of time before the transfer in fraud of the *cestui que trust* will not affect its liability.[87]

(III) *Not Necessary That Beneficiary Should Be Named on Books.* An examination of the foregoing cases will show that it is not necessary that the name of the beneficiary should be disclosed on the books, to charge the corporation with knowledge of the trust. The addition of the word "executor," "guardian," or "trustee" is sufficient to put it upon inquiry, and that is enough.[88]

(IV) *In Case Shares Are Registered as Held "In Trust."* It has been said that the fact that shares are entered in the books of a company and in a transfer as held "in trust" is sufficient of itself to put a purchaser on inquiry as to the right to sell them.[89]

82. Webb *v.* Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479, where the shares had been indorsed in blank and placed by the guardian in the hands of his attorney for purposes connected with the administration, and were by the attorney hypothecated to secure his own debt.

83. Atkinson *v.* Atkinson, 8 Allen (Mass.) 15.

84. Duncan *v.* Jaudon, 15 Wall. (U. S.) 165, 21 L. ed. 142. To the same effect see Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

85. *Maryland.*— Marbury *v.* Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467; Stewart *v.* Firemen's Ins. Co., 53 Md. 564.

Massachusetts.— Loring *v.* Salisbury Mills, 125 Mass. 138.

Pennsylvania.— Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232.

South Carolina.—Magwood *v.* Southwestern Railroad Bank, 5 S. C. 379.

Tennessee.— Caulkins *v.* Memphis Gas-Light Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786.

86. Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232.

87. Marbury *v.* Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467.

88. Webb *v.* Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479. For two early and seemingly untenable decisions opposed to this principle see Albert *v.* Baltimore, 2 Md. 159; Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407.

A good illustration of the text will be found in a case where a corporation had issued share certificates showing on their face that they were to be taken by the holder as devisee under and subject to the provisions of a certain will. Here it was held that the corporation was chargeable with notice of the contents of the will and of the trusts imposed thereby, in all its subsequent dealings with such shares of stock. Caulkins *v.* Memphis Gas-Light Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786.

89. Raphael *v.* McFarlane, 18 Can. Supreme Ct. 183. *Contra*, where shares are registered in a name with the addition of

(v) *Liability of Corporation For Issuing New Certificate Where Trustee Transfers in Breach of His Trust.* A corporation which has issued a certificate of stock to a person as trustee, and has notice of the name of the *cestui que trust*, but on the trustee's wrongful transfer of the certificate issues a new one, without making inquiry, is liable to the rightful owner thereby injured, without proof of collusion between the trustee and itself.[90]

(vi) *In Case Shares Are Vested in Trustee Who Has Discretionary Power to Sell.* Where the trustee is vested, under the terms of the instrument creating the trust, with a discretion to sell or otherwise dispose of the shares in question, it would seem that the company, in the absence of evidence to the contrary, has the right to assume that a proposed transfer is lawful and within the power conferred. It is not charged with a duty to investigate the grounds and purpose with which the discretion is exercised.[91]

(vii) *Corporation Not Liable Unless Registration Is Proximate Cause of Loss Sustained by Cestui Que Trust.* The negligence of the corporation in permitting the transfer must be the efficient and proximate cause of the loss sustained by the *cestui que trust.* If the purchaser's title was complete without the transfer, then it cannot be the efficient, proximate cause of the loss. Such a purchaser could compel a transfer to himself, and it would be the grossest injustice to hold the corporation responsible when its refusal would subject it to liability to the purchaser, and in no way improve the case of the *cestui que trust.*[92]

g. Bona Fide Purchasers of Shares Sold by Trustees Protected — (i) *In General.* The rule does not extend so far as to endanger the rights of *bona fide* purchasers of the shares; neither the shares nor their value can be recovered by or on behalf of the *cestui que trust* from such purchaser. While the successor in the trust for instance can maintain a bill in equity to recover them from the purchaser who took them from the original trustee with knowledge of the facts, yet he cannot maintain such a bill to recover shares which the former trustee assigned to one having no knowledge, from the shares or otherwise, of the trust.[93] Even where the *cestui que trust* is an infant at the time of the conversion, a subsequent *bona fide* purchaser is protected.[94]

(ii) *Who So Protected as Bona Fide Purchaser* — (a) *In General.* The *bona fide* purchaser who is protected in such cases must be one who either has (1) no notice of the trust;[95] or (2) no notice that the transfer is being made in violation of the trust;[96] or (3) no notice or knowledge of facts which ought to put an honest and prudent man upon inquiry as to either of the two preceding facts.

(b) *Purchaser Without Notice of Trust.* Within the first of these conditions, it is held that a *bona fide* purchaser of stock in a bank or other corporation stand-

the word "trustee." Brewster *v.* Sime, 42 Cal. 139.

Meaning of the words "in trust," where there have been a series of transfers of the shares, with the conclusion that the transferees were trustees for the institutions of which they were respectively the officers or servants, and not for the original owner. Duggan *v.* London, etc., Loan Co., 18 Ont. App. 305.

Other circumstances where corporation chargeable with notice of the terms under which the shares are held and liable accordingly. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237. Such notice not imputed to a custodian of shares transferred to a national bank, merely because the bank had no power to purchase such shares. Peck *v.* Providence Gas Co., 17 R. I. 275, 21 Atl. 543, 23 Atl. 967, 15 L. R. A. 643.

Circumstances under which corporation liable for assisting in an unauthorized sale of shares, although it acted in good faith and on advice of counsel. Caulkins *v.* Memphis Gas-Light Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786.

90. Loring *v.* Salisbury Mills, 125 Mass. 138.

91. Peck *v.* Providence Gas Co., 17 R. I. 275, 21 Atl. 543, 23 Atl. 967, 15 L. R. A. 643. To this general principle see the full discussion in Mason *v.* Bank of Commerce, 16 Mo. App. 275.

92. Smith *v.* Nashville, etc., R. Co., 91 Tenn. 221, 18 S. W. 546.

93. Atkinson *v.* Atkinson, 8 Allen (Mass.) 15. See also Citizens' St. R. Co. *v.* Robbins, 128 Ind. 449, 26 N. E. 116, 25 Am. St. Rep. 445, 12 L. R. A. 498.

94. Keeney *v.* Globe Mill Co., 39 Conn. 145, holding that the remedy of the infant was on administrator's bond.

95. See *infra*, VII, D, 13, g, (II), (B).

96. See *infra*, VII, D, 13, g, (II), (C).

ing in the name of trustees, without notice of the trust, will be protected, whether the trustees have the legal authority to make the transfer or not.[97]

(c) *Purchaser Without Notice That Transfer Is Being Made in Violation of Trust.* Within the second, it has been held that the mere addition of the word "trustee" to the name of the person who appears on the books of the corporation as the shareholder, with nothing to indicate the character of the trust or the party beneficially interested, will not deprive him of the legal capacity to transfer the stock, although by so doing he may commit a breach of trust.[98] This is in conformity with the general principle which, in the absence of fraud, protects persons who purchase from trustees, which is, that where the power exists in the trustee to sell, or as it is sometimes called, to vary the securities, the purchaser is not concerned with the disposition which he makes of the purchase-money.[99]

(d) *Assignee in Insolvency Not Bona Fide Purchaser.* An assignee under a statute, of the estate of an insolvent, has been held not to be a *bona fide* purchaser of shares, in such a sense that he can reclaim from the corporation shares which stand in the name of the insolvent without notice of a secret trust attaching to them. On the contrary the *cestui que trust* is entitled to have the shares transferred to him.[1]

h. Corporation Not Liable in Case of Irregular Transfer From Trustee to Cestui Que Trust. The foregoing principle has been justly held not to apply so as to make the corporation liable where a transfer which, although irregular, but such as a court of equity would order on a proper application, is made by the trustee to the beneficiary in the trust.[2]

i. In Case of Several Trustees All Must Join in Transfer. Where the shares are held in trust by several trustees, in order to a valid transfer all must join.[3]

j. Right of Cestui Que Trust to Demand That Shares Be Transferred to Himself. The corporation has of course the right to a reasonable opportunity to examine the grounds upon which the alleged *cestui que trust* claims that the shares be transferred to him on the books of the company. But where the company refused in such a case to examine the evidence offered and to permit a transfer, it was held proper, on a bill in equity against it to compel a transfer, where it appeared that it could easily have satisfied itself of the truth of the facts, to enter a decree against it for costs as well as to compel the transfer.[4]

14. Liability For Transferring Shares on Forged Power of Attorney — a. Corporation Liable For Transferring Shares on Forged Indorsement of Certificate — (i) *In General.* A corporation, as trustee for its shareholder of the title to his shares, is bound at its peril to know his signature. If therefore the power of attorney on the old certificate has been forged, and the company issues a new certificate to the holder, it will be liable to the true owner for the conversion of the shares.[5]

97. Winter *v.* Montgomery Gas-Light Co., 89 Ala. 544, 7 So. 773; Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407; Smith *v.* Nashville, etc., R. Co., 91 Tenn. 221, 18 S. W. 546.

98. Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407.

99. Mason *v.* Bank of Commerce, 16 Mo. App. 275.

1. Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515.

2. Butler *v.* Merchants' Ins. Co., 14 Ala. 777.

3. When therefore under the English Companies Clauses Act of 1845, § 18, the names of the executors of a deceased shareholder in a company were placed on the register of shareholders in respect of shares which belonged to their testator, they become joint shareholders in the individual capacity, although they might be described as executors in the register; and consequently the shares could be transferred only by means of a transfer executed by all of them. Barton *v.* London, etc., R. Co., 24 Q. B. D. 77, 59 L. J. Q. B. 33, 62 L. T. Rep. N. S. 164, 38 Wkly. Rep. 197.

4. Iasigi *v.* Chicago, etc., R. Co., 129 Mass. 46.

When a trustee of shares is not a purchaser and consequently not liable to the corporation for unpaid balances. Powell *v.* Willamette Valley R. Co., 15 Oreg. 393, 15 Pac. 633.

Effect of sale by a cestui que trust under Massachusetts statute rendering void contracts for the sale of shares, except, etc. Duchemin *v.* Kendall, 149 Mass. 171, 21 N. E. 242, 3 L. R. A. 784.

5. Pratt *v.* Boston, etc., R. Co., 126 Mass. 443; Pratt *v.* Taunton Copper Mfg. Co., 123

(II) *Qualification That Owner of Shares Has Not Been Negligent* — (A) *In General.* The owner of the shares must exercise ordinary care, adapted to the circumstances of the case, and so must the corporation.[6] So far as the negligence of plaintiff is concerned, the governing principle is that parties guilty of negligence which alters the rights of others are concluded by such negligence.[7]

(B) *Such Negligence May Consist in Receiving Dividends on Number of Shares Reduced by the Forgery.* According to a more or less doubtful decision of Lord Denman, the negligence of the shareholder who has been defrauded by the forgery may consist in receiving dividends from the corporation on the reduced number of his shares, although he receives such dividends without knowledge of the fraud which has been practised upon him; since he is under the duty of inquiry, to the end that the corporation shall not be induced by his acceptance of the dividends to believe that the transfers are genuine.[8] But it is not easy to see how a negligent act or omission of the true owner, done after the commission of the forgery, and after the accomplishment of the purpose of the forgery, could be deemed the proximate cause of the owner's loss. The conclusion is therefore preferably put on the ground of ratification.[9]

(C) *Doctrine That Shareholder's Right of Action Against Corporation Is Not Concluded by His Allowing Escape of Forger.* The English court of common pleas in 1824, in a very elaborate opinion written by Best, C. J., decided that a shareholder might recover from the Bank of England the dividends arising from his stock in the funds, although at the time the dividends were payable he knew that the stock had some months previously been placed, under a forged power of attorney, in the name of another person, and had omitted to notify the bank of the circumstance, and had not demanded payment of the dividends until after the escape of the offender.[10]

(D) *Theory of Liability Where Certificates Are Fraudulently Transferred by Holder's Agent.* The principle which protects the corporation in such a case is that where one of two innocent parties must suffer for the fraud of a third, the loss shall rather fall on the one who enabled the third person to commit the fraud. Where the owner of shares intrusted the certificates, with blank powers of attorney, to his own agent for safekeeping, and the agent fraudulently transferred them to a third party, who in turn without knowledge of the fraud had

Mass. 110, 25 Am. Rep. 37; Sewall *v.* Boston Water Power Co., 4 Allen (Mass.) 277, 81 Am. Dec. 701; Pollock *v.* National Bank, 7 N. Y. 274, 57 Am. Dec. 520; Western Union Tel. Co. *v.* Davenport, 97 U. S. 369, 24 L. ed. 1047; Matter of Bahia, etc., R. Co., L. R. 3 Q. B. 584, 9 B. & S. 844, 37 L. J. Q. B. 176, 18 L. T. Rep. N. S. 467, 16 Wkly. Rep. 862.

6. Coles *v.* Bank of England, 10 A. & E. 437, 451, 2 P. & D. 521, 37 E. C. L. 242. Lord Denman cited Hume *v.* Bolland, 1 C. & M. 130, R. & M. 371, 2 Tyrw. 575, 21 E. C. L. 770, and Davis *v.* Bank of England, 2 Bing. 393, 409, 3 L. J. C. P. O. S. 4, 9 Moore C. P. 747, 9 E. C. L. 629, as recognizing this doctrine.

7. Sewall *v.* Boston Water Power Co., 4 Allen (Mass.) 277, 81 Am. Dec. 701.

8. Coles *v.* Bank of England, 10 A. & E. 437, 2 P. & D. 521, 37 E. C. L. 242.

9. In Bank of Ireland *v.* Evans, 5 H. L. Cas. 389, 3 Wkly. Rep. 573, this case received an interpretation, not only in the unanimous opinion of the judges of England, delivered to the house of lords by Mr. Baron Parke, but also in the separate opinions of the lords themselves, to the effect that what Lord Denman really held was that the negligent conduct of plaintiff in receiving the dividends on the sum to which the stock was reduced by the forged transfers was a ratification of those transfers, by which the stock was reduced to that amount. But this seems to be an unfaithful, or at least an inaccurate, interpretation of that decision, and it seems to be better to regard it as Lord Brougham did, as "a somewhat doubtful case." In Swan *v.* North British Australasian Co., 2 H. & C. 175, 181, 10 Jur. N. S. 102, 32 L. J. Exch. 273, 11 Wkly. Rep. 862, decided in the court of exchequer chamber in 1863, Blackburn, J., in giving his opinion, said that he did not consider Coles *v.* Bank of England to be binding in a court of error.

10. Davis *v.* Bank of England, 2 Bing. 393, 3 L. J. C. P. O. S. 4, 9 Moore C. P. 747 [*reversed* on error on two points in 5 B. & C. 185, 11 E. C. L. 422]. See the comments of Lord Denman on this case in Coles *v.* Bank of England, 10 A. & E. 437, 449, 2 P. & D. 521, 37 E. C. L. 242, and for a detailed explanation of Davis *v.* Bank of England, 2 Bing. 393, 3 L. J. C. P. O. S. 4, 9 Moore C. P. 747, 9 E. C. L. 629, see 2 Thompson Corp. §§ 2559, 2560, where the reasoning of Best, C. J., is quoted at length.

them transferred to himself, it was held that the owner could not recover from the corporation for the loss.[11]

(E) *Not Negligence For Shareholder by Reposing Confidence in Another to Afford Opportunity For Forgery.* The present law of England is that the mere fact that the shareholder reposes confidence in another, in such a manner as to make it possible for him to commit a fraud upon third persons and upon the corporation, by means of executing a forged transfer of the shares, does not make the loss thereby entailed the natural or probable result of the confidence thus reposed; because the forgery, not being the natural and probable consequence of the negligence, but an unusual and extraordinary act, is not the proximate, but is the remote, consequence of such negligence;[12] and this doctrine seems to have been substantially adopted in Massachusetts.[13]

b. Remedy in Equity of Original Shareholder Against Corporation — (I) *In General.* If a power of attorney to make a transfer of shares is forged, and a transfer is made by the corporation, the rightful shareholder may maintain a bill in equity to compel the corporation to issue to him a new certificate for his shares and to pay dividends thereon; in other words he may maintain a bill to compel the corporation specifically to perform what it has undertaken in his favor.[14]

(II) *Form of Relief in Such Cases.* The ordinary form of equitable relief is a decree compelling the corporation to reinstate him on its books, to issue a proper certificate of stock to him, and to pay him the dividends declared on the stock after its unauthorized transfer, or an alternative decree for the value of the stock and dividends.[15]

11. Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80.

12. England *v.* Bank of England, 21 Q. B. D. 160; Swan *v.* North British Australasian Co., 2 H. & C. 175, 10 Jur. N. S. 102, 32 L. J. Exch. 273, 11 Wkly. Rep. 862; Bank of Ireland *v.* Evans, 5 H. L. Cas. 389, 3 Wkly. Rep. 573. See also Vagliano *v.* Bank of England, 22 Q. B. D. 103 [*affirmed* in 23 Q. B. D. 243, 53 J. P. 564, 58 L. J. Q. B. 357, 61 L. T. Rep. N. S. 419, 37 Wkly. Rep. 640 (*reversed* in [1891] 1 A. C. 107)].

13. Hill *v.* C. F. Jewett Pub. Co., 154 Mass. 172, 28 N. E. 142, 26 Am. St. Rep. 230, 13 L. R. A. 193.

The doctrine of a leading English case on this subject is that negligence that will visit the shareholder with the loss of his shares must be something more than confiding in another whose honesty he had no reason to suspect, but must be something that amounts to an estoppel or to a ratification. Bank of Ireland *v.* Evans, 5 H. L. Cas. 389, 3 Wkly. Rep. 573. To the same effect see England *v.* Bank of England, 21 Q. B. D. 160.

Alteration assisted by the gross negligence of a clerk of the corporation, of an assignment of part of the shares named in the certificate, so as to make it an assignment of all, broker committing the fraud becoming insolvent, corporation liable to the owner as for a conversion. Sewall *v.* Boston Water Power Co., 4 Allen (Mass.) 277, 81 Am. Dec. 701.

Circumstances insufficient to discharge corporation.— It has been held that a corporation which transfers shares of stock on the surrender of the original certificates and the supposed authority of powers of attorney from executors whose signatures were forged is not relieved from liability to the estate by reason of the fact that the forgery was committed by a son of one of the executors, who had been intrusted with a key to the box in which the shares were kept, when there was nothing to show that the father had reason to suppose him untrustworthy. Pennsylvania Ins. Co. *v.* Franklin F. Ins. Co., 181 Pa. St. 40, 37 Atl. 191, 40 Wkly. Notes Cas. 145, 37 L. R. A. 780.

14. Pratt *v.* Taunton Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37; Sewall *v.* Boston Water Power Co., 4 Allen (Mass.) 277, 81 Am. Dec. 701; Pollock *v.* National Bank, 7 N. Y. 274, 57 Am. Dec. 520; Western Union Tel. Co. *v.* Davenport, 97 U. S. 369, 24 L. ed. 1047; Ashby *v.* Blackwell, Ambl. 503, 27 Eng. Reprint 326, 2 Eden. 299, 28 Eng. Reprint 913; Midland R. Co. *v.* Taylor, 8 H. L. Cas. 751, 8 Jur. N. S. 419, 31 L. J. Ch. 336, 6 L. T. Rep. N. S. 73, 10 Wkly. Rep. 382; Sloman *v.* Bank of England, 9 Jur. 243, 14 L. J. Ch. 226, 14 Sim. 475, 37 Eng. Ch. 475; Hildyard *v.* South Sea Co., 2 P. Wms. 76, 24 Eng. Reprint 647. See also *supra*, VII, D, 7, a.

15. Western Union Tel. Co. *v.* Davenport, 97 U. S. 369, 24 L. ed. 1047.

A form of a decree will be found in Brown *v.* Howard F. Ins. Co., 42 Md. 384, 20 Am. Rep. 90. *Compare* Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310; Swan *v.* North British Australasian Co., 7 H. & N. 603.

English rule where blank transfers are lodged with a broker who has fraudulently filled them up. Transfer void; original owner entitled to have certificates delivered up and their registration in the name of the

c. Liability of Corporation to Bona Fide Subpurchaser—(I) *In General.* On the ordinary principle of equitable estoppel *in pais*,[16] applied to the doctrine that a share certificate is a continuing affirmation by the corporation to the public, intending that the public shall act upon the faith of it in dealing with the shares, that the person named therein is the rightful owner of the number of shares described therein,[17] if the certificate has been issued in pursuance of a forged indorsement of the certificate held by the previous owner, the corporation is bound to make good the loss sustained by a *bona fide* purchaser of the new certificate.[18]

(II) *American Doctrine Applicable to Certificates Originally Issued and to Those Reissued in Effecting Transfer.* The American doctrine, applicable alike to forged or fraudulent share certificates originally issued, or to those reissued in effecting a transfer, is that forged or fraudulent stock certificates are not certificates in legal contemplation and give no rights of their own force. Still the act of the corporation in issuing them, they having been accepted and acted upon in good faith by another, estops the corporation from denying their validity, in so far as they are made the foundation of a claim for indemnity against the corporation.[19]

d. Liability of Corporation For Fraudulent Issues or Overissues of Its Shares—(I) *In General.* Restating what has been gone over in former sections[20] and leaving out of view the question whether the new certificate is issued in consequence of the company having been misled by a forgery of the old one, the broader doctrine is that if the officer of the corporation charged with the duty of issuing share certificates to its members and of transferring their shares on its books, with power to countersign, seal, and issue certificates, upon surrender and cancellation of prior certificates, etc., makes a fraudulent issue the company will be bound to make it good in the form of damages.[21]

purchaser restrained. Tayler *v.* Great Indian Peninsula R. Co., 4 De G. & J. 559, 61 Eng. Ch. 442.

Equitable action by original owner in the case of a forged indorsement followed by a transfer to an innocent purchaser, and still another transfer and a refusal of the corporation to issue a certificate to the last transferee. Brown *v.* Howard F. Ins. Co., 42 Md. 384, 20 Am. Rep. 90. *Compare* Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310; Swan *v.* North British Australasian Co., 7 H. & N. 603.

Notice by corporation to a shareholder of an application to register a transfer of his shares and a neglect by the shareholder of such notice held not to estop him from setting up that his signature to the transfer was a forgery. Barton *v.* London, etc., R. Co., 24 Q. B. D. 77, 59 L. J. Q. B. 33, 62 L. T. Rep. N. S. 164, 38 Wkly. Rep. 197.

That the original shareholder has no remedy in equity against a subsequent bona fide purchaser in the case of a transfer of his shares on a forged certificate see Pratt *v.* Taunton Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37.

Circumstances under which the corporation was exonerated where forged certificates of its shares were issued by its president, who was not its proper officer to issue such certificates. Hill *v.* C. F. Jewett Pub. Co., 154 Mass. 172, 28 N. E. 142, 26 Am. St. Rep. 230, 13 L. R. A. 193.

If one of two executors forges signature of the other to a blank transfer, it will not pass title to the shares, since there must be a valid transfer by both. Barton *v.* London, etc., R. Co., 24 Q. B. D. 77, 59 L. J. Q. B. 33, 62 L. T. Rep. N. S. 164, 38 Wkly. Rep. 197.

16. As to which see Matter of Bahia, etc., R. Co., L. R. 3 Q. B. 584, 9 B. & S. 844, 37 L. J. Q. B. 176, 16 Wkly. Rep. 862, 18 L. T. Rep. N. S. 467; Gregg *v.* Wells, 10 A. & E. 90, 2 P. & D. 296, 37 E. C. L. 71; Pickard *v.* Sears, 6 A. & E. 469, 2 N. & P. 488, 33 E. C. L. 257; Freeman *v.* Cooke, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114.

17. See *supra*, VII, D, 3, a, (II).

18. Shaw *v.* Port Philip, etc., Gold Min. Co., 13 Q. B. D. 103, 53 L. J. Q. B. 369, 50 L. T. Rep. N. S. 685, 32 Wkly. Rep. 771; Matter of Bahia, etc., R. Co., L. R. 3 Q. B. 584, 9 B. & S. 844, 37 L. J. Q. B. 176, 18 L. T. Rep. N. S. 467, 16 Wkly. Rep. 862; Davis *v.* Bank of England, 2 Bing. 393, 3 L. J. C. P. O. S. 4, 9 Moore C. P. 747, 9 E. C. L. 629.

19. Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. (Pa.) 446, 14 Am. St. Rep. 868.

20. See *supra*, VI, K, 5, a, (I) *et seq.*

21. Allen *v.* South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716; Boston, etc., R. Co. *v.* Richardson, 135 Mass. 473; Machinists' Nat. Bank *v.* Field, 126 Mass. 345; Pratt *v.* Taunton Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37; Batavia Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Titus *v.* Great Western Turnpike Road, 61 N. Y. 237; Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Fifth Ave. Bank *v.* Forty-Second St., etc., R. Co., 17 N. Y. Suppl.

(II) *First Taker of Original Certificates Has No Such Right of Action Against Company.* The right of action against the company, on the principles already explained,[22] is a right of action in *bona fide* subtransferees of the new certificates which have been issued in consequence of the forgery. The first person deceived by the forgery has on principle no right of action against the company for recognizing the forgery and issuing a new certificate to him, since it is his duty to discover the forgery as much as it is the duty of the company.[23] It was distinctly held by the English court of appeal in 1880 that the issue of the company's stock certificate under a forged transfer is not a representation by the company that the immediate transfer to the person procuring it is valid, so as to give him a right of action against the company if it proves invalid.[24]

(III) *But Company Has Right of Action Against Him.* On the contrary, if the purchaser exhibits to the corporation a forged assignment of some of its shares, or a forged power of attorney to assign it, and thus obtains a new certificate which he sells, he is liable to the corporation, not because it is his duty to attend to the transfer of the shares, but because he has impliedly represented to the corporation that the forged signature is the genuine signature of the shareholder, whereby he has deceived the corporation.[25]

e. When Corporation Not Bound by Forged Indorsement Made By Its Transfer Agent. A corporation is not bound by the act of its treasurer and transfer agent in forging the name of a holder of shares to an assignment thereof, as his act is not within the scope of his employment as in case of an issue of the stock certificate itself.[26]

E. Bona Fide Purchasers of Shares — 1. In General — a. Certificates of Shares Are Not Negotiable Instruments — (I) *In General.* Certificates of corporate shares are not negotiable paper in the full sense of the term.[27] The most that can be said is that such instruments possess a quasi-negotiability dependent upon the customs of merchants and the convenience of trade. They are not in the matter of transferability protected strictly as negotiable paper.[28]

(II) *Custom or Usage of Regarding Them as Negotiable Not Good.* It being an established principle of law that certificates of stock are not to be

826, 44 N. Y. St. 379; Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 4 S. Ct. 345, 28 L. ed. 385; Shaw *v.* Port Philip, etc., Gold Min. Co., 13 Q. B. D. 103, 53 L. J. Q. B. 369, 50 L. T. Rep. N. S. 685, 32 Wkly. Rep. 771.

22. See *supra*, VII, D, 14, c, (I).

23. This is clearly brought out in Hildyard *v.* South Sea Co., 2 P. Wms. 76, 24 Eng. Reprint 647, where the transferee of the shares under the forged letter of attorney was by reason of his negligence held to pay the cost of the suit in equity to restore the title to the real owner.

24. Simm *v.* Anglo-American Tel. Co., 5 Q. B. D. 188, 44 J. P. 280, 49 L. J. Q. B. 392, 42 L. T. Rep. N. S. 37, 28 Wkly. Rep. 290. *Compare* Hart *v.* Frontino, etc., Gold Min. Co., L. R. 5 Exch. 111, 39 L. J. Exch. 93, 22 L. T. Rep. N. S. 30.

25. Boston, etc., R. Co. *v.* Richardson, 135 Mass. 473.

That it is the duty of the first transferee to examine the genuineness of the transfer and that the loss is primarily upon him see Hambleton *v.* Central Ohio R. Co., 44 Md. 551; Brown *v.* Howard F. Ins. Co., 42 Md. 384, 20 Am. Rep. 90.

Rule as to forged commercial paper is illustrated in Vagliano *v.* Bank of England, 22 Q. B. D. 103 [*affirmed* in 23 Q. B. D. 243, 53 J. P. 564, 58 L. J. Q. B. 357, 61 L. T. Rep. N. S. 419, 37 Wkly. Rep. 640 (*reversed* in [1891] 1 A. C. 107)].

26. New York City Second Nat. Bank *v.* Curtiss, 2 N. Y. App. Div. 508, 37 N. Y. Suppl. 1028, 74 N. Y. St. 323 [*affirmed* in 153 N. Y. 681, 48 N. E. 1107].

27. Winter *v.* Belmont Min. Co., 53 Cal. 428; Sherwood *v.* Meadow Valley Min. Co., 50 Cal. 412 [*followed* in Barstow *v.* Savage Min. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705]; Hall *v.* Rose Hill, etc., Road Co., 70 Ill. 673; Weaver *v.* Barden, 49 N. Y. 286; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599. *Compare* the following cases in New York: Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173 [*overruling* McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Bush *v.* Lathrop, 22 N. Y. 535].

28. East Birmingham Land Co. *v.* Dennis, 85 Ala. 565, 567, 5 So. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836 (opinion by Somerville, J.); Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. See also Sewall *v.* Boston Water Power Co., 4 Allen (Mass.) 277, 81 Am. Dec. 701.

regarded as negotiable paper, it is not permissible to prove a custom or usage among stock-brokers to the contrary, the reason being that no usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract.[29]

(III) *Are Said to Be Quasi-Negotiable.* Most business men, in conformity with a settled general usage, have come to regard such certificates as partaking very nearly of the character of negotiable notes or bonds, which by mere delivery pass from hand to hand the debts which they evidence. It was proved in one case that it was the custom in the city of New York that share certificates so indorsed in blank should pass from hand to hand by delivery,[30] and courts, which take judicial notice of the usages of trade[31] will no doubt take notice that such is the custom of trade throughout the whole country. The conclusion then is, as said by Mr. Justice Davis, that certificates of stock, "although neither in form or character negotiable paper . . . approximate to it as nearly as practicable."[32]

b. View That Bona Fide Purchaser of Shares Takes Only Title of His Vendor — (I) *Statement of View.* From the premise that certificates of stock are not negotiable paper, the conclusion would naturally follow that a *bona fide* assignee of such certificates takes them subject to the equities which exist against the assignor.[33] Under this theory an unregistered assignment will not pass title as against creditors of the assignor,[34] as against subsequent purchasers from him without notice,[35] or as against the lien of the corporation on the shares for the indebtedness of the shareholder.[36] A qualified statement of this rule is that an innocent purchaser for value of a certificate of corporate shares of stock, although indorsed in blank by the owner, obtains no better title to the stock than this vendor had, in the absence of negligence on the part of the owner.[37] Under this rule the transfer of shares stands on the same footing as an assignment of a merchant's account, a non-negotiable note, or any other species of personal property. With this premise in mind, it is sometimes laid down by judges in general terms that the purchaser in good faith of corporate shares gets no higher title than his vendor had to convey.[38] This is the general rule with regard to sales of personal property[39] other than negotiable securities, at least in America, where there is no market overt; and it is the English rule with regard to sales of shares, in the absence of special circumstances raising an estoppel, something more than the mere act of signing a blank transfer and delivering the certificate to another person.[40]

29. East Birmingham Land Co. *v.* Dennis, 85 Ala. 565, 5 So. 577, 7 Am. St. Rep. 73, 2 L. R. A. 836; Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. To the same effect see East Tennessee, etc., R. Co. *v.* Johnston, 75 Ala. 596, 51 Am. Rep. 489; Lehman *v.* Marshall, 47 Ala. 362.

30. Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454.

31. Davis *v.* Hanly, 12 Ark. 645; Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390; Greenleaf Ev. (15th ed.) § 5.

32. For a discussion of the grounds on which the courts uphold the seminegotiability of corporate shares see the language of Davis, J., in Lanier *v.* South Bend First Nat. Bank, 11 Wall. (U. S.) 369, 377, 20 L. ed. 172 [*quoted* with approval in Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586, and in many other cases].

33. Perhaps the ablest presentation of this view is found in the powerful opinion of Comstock, J., in Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 623, which is understood not to express the present law of New York on this subject. See *infra*, VII, E, 1, c, (I).

34. See *supra*, VII, D, 6, a, (I); Blanchard *v.* Dedham Gaslight Co., 12 Gray (Mass.) 213.

35. Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424.

36. Georgetown Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269.

37. East Birmingham Land Co. *v.* Dennis, 85 Ala. 565, 5 So. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836.

38. Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

39. Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599.

40. London, etc., Banking Co. *v.* London, etc., Plate Bank, 20 Q. B. D. 232; Williams *v.* Colonial Bank, 38 Ch. D. 388, 57 L. J. Ch. 826, 59 L. T. Rep. N. S. 643, 36 Wkly. Rep. 625; Colonial Bank *v.* Hepworth, 36 Ch. D. 36, 56 L. J. Ch. 1089, 57 L. T. Rep. N. S. 148, 36 Wkly. Rep. 259; France *v.* Clark, 26

(II) *Rule Applicable Where Share Certificate Is Purchased From Thief.* The general rule is that one who purchases personal property from a thief (except in England, in market overt) gets no title. This principle applies to all kinds of personal property, except to money and negotiable securities. A certificate of corporate stock does not form an exception to this rule.[41] It has been held to apply in a case where one having no title to shares of corporate stock purloins the certificate, duly indorsed in blank, and for a valuable consideration transfers it to an innocent third party.[42]

e. **Contrary View, Where Certificate Is Delivered With Power of Attorney Indorsed in Blank, That Bona Fide Purchaser Gets Good Title**—(I) *Statement of View.* A contrary rule, and one generally recognized and applied in America, is that a person in possession of a certificate of shares having indorsed thereon a written transfer and power of attorney in blank, signed by the person named therein as owner, may transfer to a third person, who has no notice or knowledge of any equities existing between the original owner and such holder, or any informality in the title of such holder, a greater interest in the certificate, and consequently in the shares represented by it, than the original owner had.[43]

(II) *Reasons of This Rule.* "Certificates of stock," it has been said, "are

Ch. D. 257, 53 L. J. Ch. 585, 50 L. T. Rep. N. S. 1, 32 Wkly. Rep. 466 [*affirming* 22 Ch. D. 830, 52 L. J. Ch. 362, 48 L. T. Rep. N. S. 185, 31 Wkly. Rep. 374, and *distinguishing In re* Tahiti Cotton Co., L. R. 17 Eq. 273].

An excellent illustration of the English rule is furnished by a case where the English executors of a deceased English holder of shares in an American railroad signed blank transfers, with powers of attorney indorsed on the certificates, and gave them to their brokers in London to enable them to receive the dividends, and if it should become necessary to sell the shares, and the brokers fraudulently deposited them with a London bank as security for advances made to themselves, and afterward became bankrupt, in which case it was held that as between the bank and the executors the right to the shares stood in the executors and that they were entitled to be restored as holders of them. Williams *v.* Colonial Bank, 38 Ch. D. 388, 57 L. J. Ch. 826, 59 L. T. Rep. N. S. 643, 36 Wkly. Rep. 625. *Compare* Duggan *v.* London, etc., Loan, etc., Co., 18 Ont. App. 305 [*overruling* 19 Ont. 272]. See also *supra*, VII, D, 14, a, (II), (A) *et seq.* Thus it has been held in that country that the conduct of executors in delivering to a broker transfers of stock without filling out blank powers of attorney was consistent either with an intention to sell or pledge the shares, or to have themselves registered as the owners, and therefore did not estop them from setting up their title as against a bank to which he had fraudulently transferred them, for the bank ought to have inquired into the broker's authority. Colonial Bank *v.* Cady, 15 App. Cas. 267, 60 L. J. Ch. 131, 63 L. T. Rep. N. S. 27, 39 Wkly. Rep. 17.

41. Barstow *v.* Savage Min. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705 [*distinguishing* or *denying* Winter *v.* Belmont Min. Co., 53 Cal. 428, and *following* Sherwood *v.* Meadow Valley Min. Co., 50 Cal. 412]. See also East Birmingham Land Co. *v.* Dennis, 85 Ala. 565, 5 So. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836.

42. Anderson *v.* Nicholas, 28 N. Y. 600. See to the same effect Knox *v.* Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 51 Am. St. Rep. 700, 31 L. R. A. 779 [*reversing* 74 Hun (N. Y.) 483, 26 N. Y. Suppl. 482, 57 N. Y. St. 48]; Bangor Electric Light, etc., Co. *v.* Robinson, 52 Fed. 520 (although there is nothing on the certificate to show that it is irregularly transferred, and although there is no person within reach from whom inquiry can be made).

43. National Safe Deposit, etc., Co. *v.* Gray, 12 App. Cas. (D. C.) 276.

A somewhat different statement of the same rule has been to say that where, on the face of certificates of stock, absolute ownership appears in him who is in possession thereof, and there is no evidence outside showing actual or constructive notice that the ownership is in another, the person taking such certificates for value gets title, good against the actual owner, who put it in the power of the one in possession to deal therewith as his own.

Alabama.— Winter *v.* Montgomery Gas Light Co., 89 Ala. 544, 7 So. 773.

California.— Brewster *v.* Sime, 42 Cal. 139.

Georgia.—Stinson *v.* Thornton, 56 Ga. 377; Nutting *v.* Thomason, 46 Ga. 34.

Illinois.— Williams *v.* Fletcher, 129 Ill. 356, 21 N. E. 783.

Maryland.— Farmers', etc., Bank *v.* Wayman, 5 Gill 336.

Michigan.— Walker *v.* Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187.

New Jersey.—Mt. Holly, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117.

New York.— Weaver *v.* Barden, 49 N. Y. 286 (collecting the authorities); McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

Pennsylvania.— Westinghouse *v.* German Nat. Bank, 196 Pa. St. 249, 46 Atl. 380; Burton *v.* Peterson, 12 Phila. 397, 35 Leg. Int. 144.

assignable, and pass from hand to hand by indorsement, as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be *bona fide* owners thereof, and an innocent purchaser thereof for value will hold them against the true owner, where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee."[44] If therefore the corporation is thus induced to issue new certificates of shares in the place of the old ones, to facilitate a division and sale, a purchaser of one of the new certificates in good faith, for value without notice of any infirmity connected with it, will get a good title.[45] The theory of the courts which uphold this line of doctrine is that statutory or other provisions that the shares shall be transferable on the books of the company are for the benefit of the company merely, and do not extend to the protection of the general public, of third parties,[46] or even of the shareholders.[47] If the corporation assent to such transfer otherwise than on the books, and by such transfer the persons to whom it is transferred become shareholders, no objection can be made by the corporation or by the shareholder as long as he is in fact a shareholder.[48]

d. When Unregistered Transfers Are Subject to Equity of Corporation — (i) *In General.* Where there is a power, either in the corporation at large or in its directors, to regulate the transfer of its stock, they may require by by-law the transfer to be made on the books of the company; and in that case the title of a purchaser before the transfer is entered on the books, although good between him and the vendor, is not a legal but an equitable title merely, and being no more than an equity, it will be subject to the prior equity, if any, of the corporation. In other words the assignee merely steps into the shoes of the assignor and takes no greater title or right than he has.[49] Under this theory he takes the risk that the equitable title is such as will enable him to compel a legal transfer.[50]

(ii) *When Not Subject to Such Equity.* Opposed to this are holdings to the effect that a transfer of shares by one to a *bona fide* purchaser for value vests the title in the purchaser free from equities between the seller and the corporation of which the purchaser was ignorant at the time of the transfer, although provided for by a by-law of the corporation. The fact of the existence of such a by-law is not enough to charge him with notice. The power of corporations to make by-laws governing the transfer of their stock does not include the power to create liens thereon affecting purchasers for value without notice.[51]

United States.— Johnston *v.* Laflin, 103 U. S. 800, 26 L. ed. 532; Cowdrey *v.* Vandenburgh, 101 U. S. 572, 25 L. ed. 923.

England.— Dodds *v.* Hills, 2 Hem. & M. 424, 12 L. T. Rep. N. S. 139.

So enacted by statute in New Hampshire by N. H. Laws (1887), c. 16, p. 417.

44. Supply Ditch Co. *v.* Elliott, 10 Colo. 327, 333, 15 Pac. 691, 3 Am. St. Rep. 586. See also Lanier *v.* South Bend First Nat. Bank, 11 Wall. (U. S.) 369, 20 L. ed. 172.

45. Caulkins *v.* Memphis Gas-Light Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786 [*citing* Cherry *v.* Frost, 7 Lea (Tenn.) 1; Cornick *v.* Richards, 3 Lea (Tenn.) 1]. See also *supra*, VII, D, 14, c, (i) *et seq.*

46. Chouteau Springs Co. *v.* Harris, 20 Mo. 382; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149; Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526; U. S. *v.* Cutts, 25 Fed. Cas. No. 14,912, 1 Sumn. 133.

47. Joslyn *v.* St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337.

48. Smock *v.* Henderson, 4 Wils. (Ind.) 241.

49. Vansands *v.* Middlesex County Bank, 26 Conn. 144; Stebbins *v.* Phenix F. Ins. Co., 3 Paige (N. Y.) 350; Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253; Georgetown Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269.

50. Wood *v.* Maitland, 10 Phila. (Pa.) 84, 30 Leg. Int. (Pa.) 352.

Under the civil code of California, section 324, providing that a transfer of stock by indorsement and delivery of the certificate "is not valid, except between the parties, until the same is entered upon the books," an assignee of the certificate, according to a later holding in that state, takes subject to the bank's equity, and as the condition is sufficient to put him on inquiry he is not a *bona fide* purchaser. Jennings *v.* State Bank, 79 Cal. 323, 331, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233. *Compare* Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359.

51. Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359; Driscoll *v.* West Bradley, etc., Mfg. Co., 59 N. Y. 96; Bullard *v.* National Eagle Bank, 18 Wall. (U. S.) 589, 21 L. ed. 923.

When a "charter" in Louisiana does not

(III) *Doctrine That Corporation Is Estopped to Deny Validity of Certificates Formally Issued* — (A) *In General.* A corporation is estopped to deny the validity of stock certificates issued in proper form and under its seal, and duly signed by its officers authorized to issue certificates, as against holders of such certificates who have taken them for value without knowledge that they had been fraudulently issued, or without being in possession of such facts as should have put a careful and fair-minded man upon such an inquiry as would have led to the discovery of such facts.[52]

(B) *Bona Fide Purchasers of Such New Certificates Protected.* Hence a purchaser of corporate shares, receiving new certificates therefor, signed by the proper officers, although issued through their fraud, is, if he acts in good faith, entitled to be protected as a *bona fide* purchaser. He owes no duty to the corporation to see to it that the seller surrenders the old certificates and transfers them on the books of the corporation.[53] The reason is that stock certificates constitute a continuing affirmation by the corporation of the ownership of the stated amount of stock by the person designated therein or his assignee, and the purchaser has a right to rely thereon and claim the benefit of an estoppel against the corporation.[54] After there has been a surrender of the old certificate to the corporation to effect a transfer,[55] and an issue by the corporation of a new certificate to the holder of the old, and the new certificate has passed into the hands of a *bona fide* purchaser, there has been in law a change of title to the shares; the new purchaser will hold the certificate as against the world;[56] although as already stated[57] the corporation may be liable to the original owner for a conversion.[58]

(C) *Corporations Liable For Issuing Such Fraudulent Certificates Creating Overissues.* As already stated[59] a corporation is liable in damages where a certificate of its capital stock is issued to a *bona fide* purchaser by its treasurer, with

create a lien in favor of the corporation.— The "charter" of a corporation organized under a general law in Louisiana seems to be the same as the articles of association where the corporation is organized under a general statute in other states. Such a "charter," it has been held, cannot create a lien in favor of the corporation upon the shares of its members for debts due by them to the corporation, unless the creation of such a lien is authorized by the general law, which it is not. New Orleans Nat. Banking Assoc. *v.* Wiltz, 10 Fed. 330, 4 Woods 203. So held in regard to a by-law. Bryon *v.* Carter, 22 La. Ann. 98.

52. *Massachusetts.*— Allen *v.* South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716; Boston, etc., R. Co. *v.* Richardson, 135 Mass. 473; Machinists' Nat. Bank *v.* Field, 126 Mass. 345; Pratt *v.* Taunton Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37.

Missouri.— Mechanics' Sav. Inst. *v.* Potthoff, 9 Mo. App. 574.

New York.— Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30.

Ohio.— Lee *v.* Citizens' Nat. Bank, 2 Cinc. Super. Ct. 298.

Pennsylvania.— Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. 446, 14 Am. St. Rep. 868.

England.— Shaw *v.* Port Philip, etc., Gold Min. Co., 13 Q. B. D. 103, 53 L. J. Q. B. 369, 50 L. T. Rep. N. S. 685, 32 Wkly. Rep. 771.

53. Allen *v* South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716; Knox *v.* Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 51 Am. St. Rep. 700, 31 L. R. A. 779 [*reversing* 74 Hun (N. Y.) 483, 26 N. Y. Suppl. 482, 57 N. Y. St. 48 (*affirming* 25 N. Y. Suppl. 164)].

54. Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616; Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. (Pa.) 446, 14 Am. St. Rep. 868; State Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180; Matter of Bahia, etc., R. Co., L. R. 3 Q. B. 584, 9 B. & S. 844, 37 L. J. Q. B. 176, 18 L. T. Rep. N. S. 467, 16 Wkly. Rep. 862. See also Jefferson *v.* Burford, 17 S. W. 855, 13 Ky. L. Rep. 650. When therefore stock was issued on the vote of directors, and used by them as a pledge to obtain a loan, the corporation was held estopped from setting up that the issue of unpaid stock is prohibited by the constitution, and the holder was entitled to the same to the extent of the loan. Gasquct *v.* Crescent City Brewing Co., 49 Fed. 496.

55. See *supra*, VII, D, 4, e, (I), (A) *et seq.*; VII, D, 11, f, (I) *et seq.*

56. Machinists' Nat. Bank *v.* Field, 126 Mass. 345; Pratt *v.* Taunton Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37; Mandlehaum *v.* North American Min. Co., 4 Mich. 465.

57. See *supra*, VII, D, 10, c, (IV).

58. Winter *v.* Montgomery Gaslight Co., 89 Ala. 544, 7 So. 773.

59. See *supra*, VI, K, 5, c, (I).

whom blank certificates, signed by its president, have been left, although all of the stock which the corporation is entitled to issue has been previously issued, and although the treasurer fraudulently issued the certificate in question to effect some purpose of his own. Nor does the fact that the certificate thus issued was transferable on the books of the company only on the surrender of the old certificate, and that no old certificate was ever surrendered, relieve the corporation from liability, if the purchaser of the stock paid full value for it and otherwise acted in good faith.[60] Such a certificate is not indeed a genuine certificate, and does not give to the holder the rights of a shareholder; it merely gives to him the right to be indemnified by the corporation to the extent of his expenditure on the faith of it.[61]

(D) *Effect of Pledge of Such Fraudulent Certificate.* If such a certificate is given in pledge to an innocent taker, the thing pledged is not shares of stock, but merely a right to call upon the corporation for indemnity against any loss suffered in consequence of relying upon its representations, contained in the share certificate, that the person named therein is entitled to the shares of stock therein named.[62]

(E) *Corporation Estopped by Its Books.* A *bona fide* transferee of shares, which the books of the corporation show to be paid up, is not liable for any alleged deficiency in the consideration received by the corporation for it, of which he had no notice.[63]

(F) *Rights of Bona Fide Purchasers to Unpaid Shares.* It follows that *bona fide* purchasers of stock in a corporation, which was paid for by the subscriber in land, while the charter of the company allowed it to take real estate for stock, cannot be held liable for any difference between the actual value of the land and the price at which it was taken, especially where it is impossible to restore the parties to the original condition, because coal in the mine had been largely mined out of it.[64]

e. Purchaser Not Bound to Look Beyond Face of Share Certificate — (I) *Statement of Rule.* Where the shares of a corporation are offered for sale by the person named in the certificate, an intending purchaser is not required to look beyond the recitals of the certificate in regard to his title or the equities of the corporation, or to suspect fraud in the issuing of the shares, where all seems fair and honest. He is not bound to examine the books of the corporation to ascertain the validity of a transfer.[65] The reason arises from the nature of a share certificate, which as already stated is a continuing affirmation of the ownership of the specified amount of stock by the person designated therein or his assignee, until it is withdrawn in some manner recognized by law; and a purchaser in good faith has a right to rely thereon and to claim the benefit of an estoppel in his favor

60. Allen *v.* South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716.

61. Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. (Pa.) 446, 14 Am. St. Rep. 868. See also Jeanes' Appeal, 116 Pa. St. 573, 11 Atl. 862, 2 Am. St. Rep. 624; Wright's Appeal, 99 Pa. St. 425.

62. Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 34 Wkly. Notes Cas. (Pa.) 446, 14 Am. St. Rep. 868.

Fraudulent pledger not entitled to recover from fraudulent pledgee any part of what the latter may have received from the corporation on the claim of the pledgee for indemnity, although such claim may have been paid in genuine shares which afterward increased in value to an amount exceeding the debt of the pledger to the pledgee. Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 24 Wkly. Notes Cas. (Pa.) 446, 14 Am. Rep. 868.

Circumstances under which a corporation does not estop itself from disputing the validity of spurious share certificates which the holder has pledged for a loan and afterward repurchased. Cincinnati, etc., R. Co. *v.* Citizens' Nat. Bank, 11 Ohio Dec. (Reprint) 50, 24 Cinc. L. Bul. 198, opinion by Taft, J.

63. Mallinckrodt Chemical Works *v.* Belleville Glass Co., 34 Ill. App. 404. See also *supra*, VI, M, 3, a *et seq.*

64. Brant *v.* Ehlen, 59 Md. 1; Keystone Bridge Co. *v.* McCluney, 8 Mo. App. 496; Du Pont *v.* Tilden, 42 Fed. 87.

65. Salisbury Mills *v.* Townsend, 109 Mass. 115; Bayard *v.* Farmers' Bank, 52 Pa. St. 232; Foreman *v.* Bigelow, 9 Fed. Cas. No. 4,934, 4 Cliff. 508; Lowry *v.* Commercial,

as against the corporation.[66] Accordingly it has been held that a corporation whose certificate of stock is outstanding cannot defeat the title of a purchaser in good faith without actual notice, by proof of the pendency of an action in a competent court of New York, to determine the title of the original holder of the stock. Its own positive statements in the certificate cannot be overcome by such a constructive theoretical notice.[67] For the same reason a purchaser of corporate stock receiving new certificates therefor, signed by the proper officers, although issued through their fraud, is, if he acts in good faith, entitled to be protected as a *bona fide* purchaser. He owes no duty to the corporation to see to it that the seller surrenders any old certificates and transfers them on the books of the corporation.[68]

(11) *Rule Limited to Cases Where Certificate Has Been Issued by Corporate Officer Empowered to Issue Such Certificates.* By parallel reasoning the corporation should be held liable where through its negligence it suffers its share certificates, formally filled out, signed and sealed, to get out upon the market where they may operate to deceive innocent purchasers; and this is probably the American rule. But where the certificates have fraudulently and without negligence of the corporation gotten into the possession of an officer of the corporation having no power to issue share certificates, and he issues them and negotiates with innocent persons, then it seems that the corporation is not liable to such innocent takers.[69]

f. Other Holdings With Respect to Rights of Bona Fide Purchasers. No discrimination can be made by the corporation between *bona fide* purchasers of the stock of a corporation or company which is on sale in open market, as to the right to perfect their title to the stock, when no discretionary power is reserved to that effect.[70] An innocent purchaser of corporate shares for value from the apparent owner obtains an indefeasible title and is unaffected by a secret defect in his seller's title, although the seller was a trustee and guilty of a breach of trust in making the sale.[71] A transfer of shares on the books of the corporation, made by *de facto* officers of the corporation, to an innocent party is valid,[72] under principles elsewhere explained.

etc., Bank, 15 Fed. Cas. No. 8,581, Taney 310.

66. Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616. This principle is recognized in Hall *v.* Rose Hill, etc., Road Co., 70 Ill. 673.

67. Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616.

68. Allen *v.* South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716.

69. Thus where the certificates were not issued by the corporate officer empowered to issue them, but were issued by its president, who had no such power, but who made use of the facilities afforded by his office to get possession of some blank certificates which had been signed, and also of the corporate seal which he had affixed to them, and then fraudulently issued them for his own purposes, it was held that the certificates so issued stood on the footing of forged certificates, and that they did not estop the corporation; and further that the corporation had not been negligent in permitting its president to continue in office and have access to its certificate book and seal in such a sense as to make it liable for his act in issuing the certificates, although it knew of his former misconduct in pledging his own shares to another person in violation of an agreement to pledge them to an associate, and that he was insolvent. Hill *v.* C. F. Jewett Pub. Co., 154 Mass. 172, 28 N. E. 142, 26 Am. St. Rep. 230, 13 L. R. A. 193. Similarly it has been held that it is not within the apparent scope of the authority of the secretary of a corporation to issue stock certificates directly as belonging to himself; and his representations that they represent real transactions, implied from the fact of their issuance, will not estop the company to deny their validity. Cincinnati, etc., R. Co. *v.* Citizens' Nat. Bank, 11 Ohio Dec. (Reprint) 50, 24 Cinc. L. Bul. 198, opinion by Taft, J.

70. Rice *v.* Rockefeller, 134 N. Y. 174, 31 N. E. 907, 47 N. Y. St. 542, 29 Abb. N. Cas. (N. Y.) 120, 30 Am. St. Rep. 658, 17 L. R. A. 237.

71. Smith *v.* Nashville, etc., R. Co., 91 Tenn. 221, 18 S. W. 546. That equity will not require a purchaser in good faith of corporate shares at more than their full value from a solvent corporation, which had purchased them from the holder, to surrender them on the ground that the corporation had no power to purchase its own shares without express legislative authority see Jefferson *v.* Burford, 17 S. W. 855, 13 Ky. L. Rep. 650.

72. Morris *v.* Stevens, 17 Pa. Co. Ct. 209.

2. Who Are and Who Are Not Bona Fide Purchasers — a. Must Have Paid Purchase-Money Before Notice of Prior Right or Equity — (I) *In General.* To entitle a party to the character of a *bona fide* purchaser, without notice of a prior right or equity, he must not only have obtained the legal right to the property, but he must have paid the purchase-money or some part thereof, or have parted with value on the faith of the purchase, before notice of such prior right or equity. The mere giving of security to pay the purchase-money is not sufficient to entitle the purchaser to the protection of the court.[73]

(II) *Pendency of Action in Another State Not Such Notice.* The pendency of an action in another state to determine the title to corporate stock is not constructive notice to the purchaser in New York of a defect in the title of his assignor, and does not affect the title acquired by him.[74]

b. Circumstances Sufficient to Put Purchaser on Inquiry and Prevent Him From Being Regarded as Innocent Purchaser — (I) *In General.* Where a certificate of shares is regular on its face, imports ownership in its holder, and contains no intimation of any equities impairing such ownership or full title, whether in the corporation or in third persons, an intending purchaser is not bound to suspect fraud or infirmity of title, or to go back and search the register, but may rely upon the disclosures of the certificate.[75] But one who knows that the person purporting to sell or pledge is acting in fraud of the rights of the real owner, or who has information sufficient to put a reasonable and just man upon such inquiry as would discover that such is the fact, is not an innocent purchaser within the meaning of this rule. Thus, when the purchaser knew that the holder held the certificate in a fiduciary character, he was not protected when he took it to secure a debt growing out of another transaction.[76] So where the vendor was a boy of only sixteen years of age, it was held that the vendee was not a *bona fide* purchaser.[77] So where one buys a certificate of corporate stock not under seal of the corporation and not signed by the person whom he knows is its president under a representation that it is all the stock of the company, but with the knowledge that certain persons are officers and directors of the company, and that the articles of incorporation require directors to be shareholders, these facts are sufficient to put him on inquiry, and he cannot be said to be an innocent purchaser.[78]

(II) *When Purchaser From Corporate Officer Bound to Investigate His Authority.* One who accepts newly-issued certificates of stock from an

73. Weaver *v.* Barden, 49 N. Y. 286.

74. Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616.

That a lis pendens can have no extraterritorial effect see Carr *v.* Lewis Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328 [*affirming* 15 Mo. App. 551]; Shelton *v.* Johnson, 4 Sneed (Tenn.) 672, 70 Am. Dec. 265, 269 note.

75. See as supporting the principle of the text Scarlett *v.* Ward, 52 N. J. Eq. 197, 27 Atl. 820; Duggan *v.* London, etc., Loan, etc., Co., 18 Ont. App. 305.

76. Prall *v.* Tilt, 28 N. J. Eq. 479.

77. Anderson *v.* Nicholas, 28 N. Y. 600.

78. Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894.

Other circumstances insufficient to put purchaser on inquiry.— A purchaser of a certificate of stock indorsed in blank by the shareholder named therein, from an officer of the corporation who has no part to perform in the execution of the certificate, is not charged with the duty of inquiring as to its validity. Knox *v.* Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 51 Am. St. Rep. 700, 31 L. R. A. 779 [*reversing* 74 Hun (N. Y.) 483, 26 N. Y. Suppl. 482, 57 N. Y. St. 48 (*affirming* 25 N. Y. Suppl. 164)]. It has been held that an owner of railway stock who loans it and transfers the certificate to his son, who takes out a new certificate and delivers it to his father, with a power of attorney authorizing the transfer on the corporate books, with full power of substitution, is a "*bona fide* purchaser for value," within the meaning of Mass. Stat. (1884), c. 229, providing that the delivery of a stock certificate to such a purchaser, with a written power of attorney to sell, assign, or transfer the same, shall be a sufficient delivery to transfer the title. Andrews *v.* Worcester, etc., R. Co., 159 Mass. 64, 33 N. E. 1109.

Other circumstances sufficient to put intending purchaser upon inquiry were disclosed in the following cases: Sabin *v.* Woodstock Bank, 21 Vt. 353; Colonial Bank *v.* Cady, 15 App. Cas. 267, 60 L. J. Ch. 131, 63 L. T. Rep. N. S. 27, 39 Wkly. Rep. 17 [*affirming* 38 Ch. D. 388, and *reversing* 36 Ch. D. 659, 57 L. T. Rep. N. S. 188].

officer of a corporation, who has authority from the corporation to sign, seal, and issue for the corporation certificates of its stock, as collateral security for a personal loan made to the officer, is bound to inquire whether the officer has authority to issue the certificates for the purpose intended; and if he does not make such inquiry, and the officer in fact issued them in fraud of the rights of the corporation, he takes them subject to those rights.[79]

(III) *Notice to Purchaser From Corporate Officer Acting as Purchaser's Agent.* The mere fact that the officer of the corporation who makes fraudulent issue of its shares to a purchaser is acting as broker for the purchaser at the time does not impute to the purchaser constructive notice of the fraudulent character of his act, the principle being that notice to an agent is not imputed to his principal when the agent is engaged in committing an independent fraudulent act on his own account, and when the facts to be imputed relate to this fraudulent act.[80]

(IV) *Notice of Broker's Want of Authority Implied From His Failure to Execute Blank Power of Attorney.* If the principal delivers certificates to the broker without executing the usual power of attorney indorsed thereon, this fact will put any one with whom the broker seeks to negotiate the shares upon inquiry as to the extent of his authority.[81]

c. Who Not Purchasers For Value — (I) *In General.* On principle, supported by some authority, in order to make a purchaser of corporate shares at the time of the transfer a purchaser for value, he must have parted with new value before other conflicting superequities supervened. Thus it has been held that, although there has been a negotiation for a sale, yet if the creditor of the intending vendor attaches before the purchase-price is paid and the certificates delivered, the rights of the attaching creditor are superior to those of the vendee.[82] And more broadly and in analogy to the rule in respect of land, and it may be added on the soundest grounds, it has been held that one is a holder for value within the meaning of the rule only in so far as he parts with value at the time of the transaction; he is not a purchaser for value to the extent of an overdue check surrendered and an antecedent debt receipted for.[83]

(II) *Purchaser of Shares at Execution Sale* A purchaser of corporate stock at execution sale against the registered owner is not a *bona fide* purchaser as against a prior transferee thereof by a transfer of the certificate, where, although at the time of the levy he was ignorant of the transfer, he was notified of it at the sale, and there is no constitutional or statutory prohibition of transfer of stock by means of transfer of the certificate.[84]

F. Pledges and Mortgages of Shares — 1. Nature and Incidents of Contract — a. Delivery of Share Certificate Essential. Delivery of the thing pledged being ordinarily essential to a contract of pledge,[85] and, in cases where the subject of the pledge is intangible delivery of its symbol being essential, it follows that shares of stock cannot be pledged, unless they are evidenced by certificates, which

79. Farrington *v.* South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 15 Am. St. Rep. 222, 5 L. R. A. 849. *Compare* Allen *v.* South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716, where the preceding case is distinguished.

80. Allen *v.* South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716.

81. Colonial Bank *v.* Cady, 15 App. Cas. 267, 60 L. J. Ch. 131, 63 L. T. Rep. N. S. 27, 39 Wkly. Rep. 17 [*affirming* 38 Ch. D. 388, 57 L. J. Ch. 826, 59 L. T. Rep. N. S. 643, 36 Wkly. Rep. 625].

82. Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

83. Moodie *v.* Seventh Nat. Bank, 11 Phila. (Pa.) 366, 33 Leg. Int. (Pa.) 400. *Compare* Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147, where this subject is discussed with respect to ordinary personal property.

84. Wilson *v.* St. Louis, etc., R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624.

85. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Atkinson *v.* Foster, 134 Ill. 472, 25 N. E. 528; Vanstone *v.* Goodwin, 42 Mo. App. 39; Casey *v.* Schneider, 96 U. S. 496, 24 L. ed. 790; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779; New Orleans Banking Assoc. *v.* Wiltz, 10 Fed. 330. See also Caffin *v.* Kirwan, 7 La. Ann. 221.

must be transferred and delivered to the pledgee. If therefore there are no certificates there can be no pledge.[86] On the other hand the doctrine is constantly recognized that shares of corporate stock may be pledged by a contract accompanied with the simple delivery of the share certificates.[87]

b. Distinction Between Pledge and Mortgage of Shares — (I) *In General.* The substantial distinction between a pledge and a mortgage seems to be that in the case of a pledge the thing itself must pass by a delivery, either actual or symbolical, while at the same time the legal title does not pass; whereas in the case of a mortgage the legal title does pass, while the thing mortgaged may remain in the possession of the mortgagor.[88] Moreover if the debt, to secure the payment of which the pledge is made, be not discharged when due, the pledgee does not for that reason obtain an absolute title to the pledge; but he then acquires the right to sell it and to pay himself out of the proceeds of the sale. If such proceeds are not sufficient to discharge the debt entire, the pledger remains liable for the deficiency; if they are more than sufficient, the pledgee is responsible for the surplus.[89]

(II) *Mortgage of Shares With Possession Retained by Mortgagor.* In the case of a mortgage, the question of delivery, as between the parties, saving always the rights of creditors and subsequent purchasers, is immaterial. If the mortgage is foreclosed and the stock sold, the purchaser may maintain an action against the corporation to compel the issue of the certificate to himself; and to such action the mortgagor is not a necessary party.[90] On the other hand a pledge by an instrument in writing (or, in Louisiana, by a notarial act), not accompanied by a delivery of the certificate, is no pledge as against third persons, and, notwithstanding such an attempted pledge, is not good as against a judgment creditor of the pledger.[91]

c. Title How Vested After Pledge. It is often said that as between the pledger and pledgee of corporate stock the general property remains in the pledger, and the pledgee has a special property in the pledge during the continuance of the

86. Lallande *v.* Ingram, 19 La. Ann. 364; Bidstrup *v.* Thompson, 45 Fed. 452.

87. Dewey *v.* Bowman, 8 Cal. 145; Factors', etc., Ins. Co. *v.* Marine Dry Dock, etc., Co., 31 La. Ann. 149; Blouin *v.* Hart, 30 La. Ann. 714; Vanstone *v.* Goodwin, 42 Mo. App. 39; Doak *v.* State Bank, 28 N. C. 309.

The modern theory of a pledge was understood in the time of Coggs *v.* Bernard, 2 Ld. Raym. 909, where it is said that the fourth sort of bailment is where goods or chattels are delivered to another as a pawn to be a security to him for money borrowed of him by the bailor. Of course where the legal title passes it cannot be called a bailment. On the other hand where the legal title does not pass the instrument will not be allowed to operate as a mortgage. Vanstone *v.* Goodwin, 42 Mo. App. 39. And it is reasoned in one case that a delivery of incorporeal property in pledge, such as corporate shares, must necessarily be effectuated by a writing; but this means nothing more than that the symbol representing the shares, namely, the share certificate, must be in writing or printing and that the indorsement thereon must of course be so. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237. See also Dewey *v.* Bowman, 8 Cal. 145; Bowman *v.* Wood, 15 Mass. 534; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307.

The nature of pledges of certificates of corporate stock is treated in the following cases:

California.— Thompson *v.* Toland, 48 Cal. 99.

Illinois.— Rozet *v.* McClellan, 48 Ill. 345, 95 Am. Dec. 551.

Maryland.— Worthington *v.* Tormey, 84 Md. 182.

Massachusetts.— Fisher *v.* Brown, 104 Mass. 259, 6 Am. Rep. 235.

New York.— Van Blarcom *v.* Broadway Bank, 9 Bosw. 532; Hasbrouck *v.* Vanderveort, 4 Sandf. 74.

Pennsylvania.— Conyngham's Appeal, 57 Pa. St. 474.

West Virginia.— Whitteker *v.* Charleston Gas Co., 16 W. Va. 717.

Wisconsin.— Heath *v.* Silverthorn Lead Min. Co., 39 Wis. 146.

88. See Dewey *v.* Bowman, 8 Cal. 145; Vanstone *v.* Goodwin, 42 Mo. App. 39; Doak *v.* State Bank, 28 N. C. 309. See also Newton *v.* Fay, 10 Allen (Mass.) 505, 506, where the distinction is explained by Chapman, J.

89. Dewey *v.* Bowman, 8 Cal. 145.

For an instrument which was held to be neither a pledge nor a mortgage see Vanstone *v.* Goodwin, 42 Mo. App. 39.

90. Tregear *v.* Etiwanda Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. Rep. 245.

91. Bidstrup *v.* Thompson, 45 Fed. 452.

contract of pledge.[92] Until the debt matures the pledgee has merely a possessory lien upon the shares; and when the debt to secure which they are pledged to him is extinguished the lien is also extinguished.[93] The general property which the pledger is said usually to retain is nothing more than the legal right to the restoration of the thing pledged on payment of the debt.[94]

d. Neither Notice to Corporation Nor Transfer to Corporate Books Necessary to Valid Pledge as Between Parties. Neither a notice to the corporation nor a transfer on its books is essential to the creation of a pledge of corporate stock, valid as between the pledger and pledgee.[95] The transfer of shares on the books of the corporation is not essential to the liability of the corporation to the pledgee of stock as collateral security, for dividends accruing during the continuance of the pledge, if the corporation had actual notice of the pledge.[96] A pledger of corporate shares has a right to cause a proper entry of the transaction between himself and his pledger to be entered upon the books of the corporation for his protection, although the contract is silent on the subject.[97] A court of equity will not decree a transfer of corporate stock on the corporate books in favor of a pledgee, unless he shows a present interest in the stock.[98] A pledgee of share certificates in place of which new stock has been issued, and which have been treated as canceled, although not surrendered, has no right to have the stock transferred to him upon the books of the company, where he did not pay or advance any valuable consideration on account of it.[99]

e. Absolute Transfer May Be Shown by Parol to Have Been Intended as Pledge. Although the transfer is absolute and there is no written contract of pledge, the pledger may show, on a bill in equity to redeem, that the delivery

92. Cross *v.* Eureka Lake, etc., Canal Co., 73 Cal. 302, 14 Pac. 885, 2 Am. St. Rep. 808; Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Dewey *v.* Bowman, 8 Cal. 145; Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307; Garlick *v.* James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294 (case of pledge of a note).

93. Cross *v.* Eureka Lake, etc., Canal Co., 73 Cal. 302, 14 Pac. 885, 2 Am. St. Rep. 808. See also Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237. That it is not invariably true that the legal title always remains in the pledger see the intelligent discussion of the subject by Ruggles, J., in Wilson *v.* Little, 2 N. Y. 443, 444, 447, 51 Am. Dec. 307.

94. Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307.

That the special property in the pledge passes to the pledgee see Doak *v.* State Bank, 28 N. C. 309.

Sense in which an equitable title merely passes to the pledgee see Noble *v.* Turner, 69 Md. 519, 524, 16 Atl. 124.

Sense in which an innocent subpledgee of the shares without notice of the rights of the original holder may be regarded as acquiring a title which will be negatively protected by a court of equity by withholding the usual remedy see Otis *v.* Gardner, 105 Ill. 436. In such cases it is reasoned that, corporate shares being similar to choses in action, an equitable title passes without observing the requirements of the charter or by-laws that there shall be a registration of the transfer on the books. Laing *v.* Burley, 101 Ill. 591; Kellogg *v.* Stockwell, 75 Ill. 68. But it must remain true that in a strict sense, in the case of a mere pledge of corporate shares, no title passes to the pledgee either legal or equitable.

95. Pitot *v.* Johnson, 33 La. Ann. 1286; Friedlander *v.* Slaughter House Co., 31 La. Ann. 523; Factors', etc., Ins. Co. *v.* Marine Dry Dock, etc., Co., 31 La. Ann. 149; Smith *v.* Crescent City Live-Stock Landing, etc., Co., 30 La. Ann. 1378; May *v.* Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163; Meredith Village Sav. Bank *v.* Marshall, 68 N. H. 417, 44 Atl. 526; Masury *v.* Arkansas Nat. Bank, 93 Fed. 603, 35 C. C. A. 476.

96. Guarantee Co. of North America *v.* East Rome Town Co., 96 Ga. 511, 23 S. E. 503, 51 Am. St. Rep. 150.

97. Spreckels *v.* Nevada Bank, 113 Cal. 272, 45 Pac. 329, 54 Am. St. Rep. 348, 33 L. R. A. 459.

98. Grand Forks Second Nat. Bank *v.* St. Thomas First Nat. Bank, 8 N. D. 50, 76 N. W. 504.

99. Miller *v.* Houston City St. R. Co., 69 Fed. 63, 16 C. C. A. 128.

What is transfer on books.— A note made by the secretary of a corporation on the margin of the stubs of certain certificates of stock transferred as collateral security by the owner that the transferee holds them as security for a loan does not constitute a transfer of the stock on the books of the corporation, as against creditors of the transferrer, where such transfer has not been authorized by either party. McFall *v.* Buckeye Grangers' Warehouse Assoc., 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47.

Registration with county clerk.— That a pledge of shares as collateral security for a debt is not within the terms of a statute providing for the registration of stock transfers with the county clerk, etc., see Masury *v.* Arkansas Nat. Bank, 93 Fed. 603, 35 C. C. A. 476 [*reversing* 87 Fed. 381].

was intended as a pledge to secure a debt and not as an absolute transfer of title to the shares.[1]

f. Effect of Pledge of Shares Upon Lien of Corporation Thereon. If the corporation has a valid lien upon its shares and if a person to whom they are offered in pledge has notice of such lien, as where the lien is created by a general law of which all persons are charged with knowledge,[2] or where notice of it is conveyed upon the share certificate, then it is not necessary to say that this lien cannot be displaced by the mere act of the shareholder concurring with the act of a third party. And while no doubt the corporation may waive or divest itself of such lien by overt corporation action,[3] yet clearly the act of a subordinate ministerial officer, not a member of the board of directors, such as the assistant secretary, in certifying that the corporation has no such lien, will not have this effect.[4] It is also a sound view that where the corporation issues certificates, stating that the shares are paid up, and without reserving a lien for any unpaid balance on the face of the certificates, it ought to be estopped from asserting a lien against an innocent purchaser or pledgee without notice. But where the certificate itself contains a recital that no transfer shall take place on the books of the corporation until after payment of all indebtedness due to the corporation by the persons in whose name the shares stand on the books of the corporation, then one who takes such a certificate, in pledge or otherwise, holds the shares subject to any lien of the corporation for any indebtedness of the pledger to the corporation, and this is so, although no lien is given to the corporation, either by its charter, by statute, or by its by-laws. It is simply the case where two parties create a lien by a compact between themselves, and where third persons having notice of it take subject to it.[5] If the case is one of a banking corporation, the acceptance of such a certificate by the shareholder and a subsequent loan to him by the bank effects a contract which creates an equitable lien on his shares for the amount of the indebtedness.[6] Hence if there is a delivery of the certificates in pledge, and the pledgee gives no notice to the bank of his rights, and the pledger afterward becomes indebted to it, its lien will be superior to the equities of the pledgee.[7] A citizen of the United States holding shares in a corporation existing under the laws of a foreign country holds them subject to the laws and policy of that country, and where, by an amendment of its laws, the corporation acquires a lien which under such laws becomes paramount to a previous pledge, the priority of such lien will be recognized by the courts of the United States.[8] A corporation having knowledge of a prior pledge of stock cannot extend credit to the shareholder and rely upon its lien as against him, although the statute provides that transfers or liens affecting the stock, if not made or registered upon the books, are invalid as to *bona fide* creditors or subsequent purchasers without notice.[9]

g. Whether Pledgee Becomes Shareholder — (i) *In General.* This question must generally be answered by the terms of the governing statute and the contract of pledge. In the absence of anything in the statute or in the contract varying the rule, it is and must be, that a pledgee of shares, no matter what form

1. Newton *v.* Fay, 10 Allen (Mass.) 505.
2. Birmingham Trust, etc., Co. *v.* East Lake Land Co., 101 Ala. 304, 13 So. 72.
3. See *supra*, VII, D, 2, j, (I) *et seq.*
4. Kenton Ins. Co. *v.* Bowman, 84 Ky. 430, 1 S. W. 717, 8 Ky. L. Rep. 467.
5. Jennings *v.* State Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233; Vansands *v.* Middlesex County Bank, 26 Conn. 144.
6. Vansands *v.* Middlesex County Bank, 26 Conn. 144.

As to the lien of a banking corporation upon the shares of its shareholders see Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575.

7. Jennings *v.* State Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

In Louisiana a pledge of shares of stock in a corporation is valid by the delivery of the certificate, and will not be defeated by the fact that the pledger afterward becomes indebted to the corporation, the character of which prohibits transfers in case of the shareholder being indebted to the company. Shares of stock are not "credits" within the meaning of La. Civ. Code, art. 3158. Pitot *v.* Johnson, 33 La. Ann. 1286.

8. Hudson River Pulp, etc., Co. *v.* Warner, 99 Fed. 187, 39 C. C. A. 452.
9. Birmingham Trust, etc., Co. *v.* Louisiana Nat. Bank, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600.

the transaction takes other than that of an absolute transfer, does not become a shareholder so as to make him liable for an assessment laid against the shares, in the absence of any conduct on his part estopping him from asserting his true character.[10] If there is a statute permitting persons holding shares as trustees to vote at corporate meetings, this principle prevents the principle from being extended so as to include pledgees who hold the shares as collateral security, and such persons are not entitled to vote.[11]

(II) *No Right to Inspect Corporate Books.* A mere pledgee has therefore no right to inspect the books of the corporation.[12]

(III) *Right of Pledgee to Vote at Corporate Elections — When Give Proxy to Pledger.* If the shares have been transferred to the pledgee on the books of the corporation he becomes the legal owner as between the corporation and himself, and has *prima facie* the right to vote in respect of the shares for directors, which right the pledger has not. But it is held that equity will in a proper case compel him to give the pledger a proxy.[13] A statute provided that a certificate of stock issued as a pledge shall so state, and also give the name of the pledger, who alone shall be responsible as a shareholder. A certificate stated that it was held as collateral for the note of a person named, but did not state that he was the pledger. It was held that the statute was not complied with, and hence the pledgee, who held the certificate, was entitled to vote the stock rather than the pledger.[14]

h. Pledges of Shares Held in Trust. If one to whom shares are offered in pledge has notice, actual or constructive, that they are held in trust for another, then if they are transferred to him in violation of the conditions of the trust he acquires no rights with respect to them.[15] On the other hand, where the intending pledgee has no such notice, and the share certificate does not convey such notice to him, then the principle obtains that he is not bound to suspect fraud or to institute inquiry, where all seems fair and honest and conformable to correct business dealings.[16] For example a bank taking a pledge of shares, the certificate of which shows that the pledger is entitled as executor, is not chargeable with notice of the settlement under which such stock is held, where its manager inquires of the borrower whether he is absolutely entitled to the stock, and is informed that he is, and examines the will, which contains no reference to any trust, and endeavors to obtain a new certificate in the pledger's name, but is informed that such is not the practice of the company where the holder is entitled as executor.[17]

i. Rights of Innocent Holders of Shares. Where a share certificate with a transfer indorsed in blank and signed by the person named therein as owner has been intrusted to a broker or other third person, and has been by such custodian fraudulently pledged to raise money for his own purposes, the pledgee being without knowledge that the broker is not the real owner, then whether the pledgee will get a better title than the real owner depends upon which of two divergent theories, already considered,[18] prevails in the particular jurisdiction. In

10. Beal *v.* Essex Sav. Bank, 67 Fed. 816, 15 C. C. A. 128.

The question of the liability of a pledgee of shares to the creditors of the corporation is most fully considered *infra*, VIII, M, 1, b *et seq.*

11. National Bank of Commerce *v.* Allen, 90 Fed. 545, 33 C. C. A. 169 [*citing* People *v.* Hill, 16 Cal. 113; Miller *v.* Murray, 17 Colo. 408, 30 Pac. 46; Com. *v.* Dalzell, 152 Pa. St. 217, 25 Atl. 535, 34 Am. St. Rep. 640; Hoppin *v.* Buffum, 9 R. I. 513, 11 Am. Rep. 291].

12. Matter of Brooklyn First Nat. Bank, 44 N. Y. App. Div. 635, 60 N. Y. Suppl. 1138 [*affirming* 28 Misc. (N. Y.) 662, 59 N. Y. Suppl. 1042].

13. *In re* Argus Printing Co., 1 N. D. 434, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L. R. A. 781. See also *In re* Barker, 6 Wend. (N. Y.) 509; *Ex p.* Wilcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

14. Wentworth Co. *v.* French, 176 Mass. 442, 57 N. E. 789.

15. Paterson First Nat. Bank *v.* National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139 [*modifying* 22 N. Y. App. Div. 24, 47 N. Y. Suppl. 880].

16. See *supra*, VII, E, 2, b, (I).

17. Powell *v.* London, etc., Bank [1893] 1 Ch. 610.

18. See *supra*, VII, E, 1, b, (I) *et seq.*

England the pledgee acquires no inchoate title as against the real owner, which can ripen into a real title by a registration of the transfer on the books of the company, the blank space in the certificate being filled up by the name of such pledgee.[19] In some jurisdictions in America the real owner, by intrusting the broker or other person with the means of deceiving third persons as to his title to the shares, may lose his own title by the misconduct of the broker with reference to them.[20]

j. Incidental Rights of Pledgee. A pledgee of shares cannot maintain actions at law against the directors for losses sustained by reason of their negligence or mismanagement rendering the shares valueless,[21] since even the shareholders cannot.[22]

k. Status of Pledgee Where Debt Has Been Paid. Where the debt for which the shares had been pledged has been paid, and the legal title is still allowed to stand in the name of the pledgee, his trust relation is not determined, but he holds the shares in trust for the pledger, subject to the obligation of returning the same upon the demand of the latter. When therefore shares of stock of an incorporated company had been conveyed by plaintiff to defendant as collateral security for a debt, and the debt was afterward paid, but nevertheless the shares continued to stand in defendant's name, and while so standing were assessed under an act of the legislature, were sold for the non-payment of the assessment, and defendant became the purchaser, it was held that the sale was invalid, and that defendant was liable in trover for the value of the shares at the time of the alleged sale, and for the dividends he had received thereon, together with interest, after deducting the amount of the assessment and expenses of the sale.[23] Holders of conditional scrip in a corporation, who are equitable holders of pledged stock subject to the pledge, have the right to redeem it by paying the debt at any time after it is due.[24]

l. When Pledgee Not Entitled to New Certificate. It has been held that a pledgee of stock is not entitled to have the certificate surrendered and a new one issued in his name when the contract is silent on the subject; since the statute requiring an entry of a transfer upon the books of the corporation to protect the transferee is satisfied by entering the names of the pledger and pledgee, the number or designation of the shares, and the date of the transfer, without the cancellation of the certificates and the issue of new ones.[25]

m. Protection of One Who Takes Pledge of Shares From Married Woman. In a state where married women have the capacity to acquire and transfer personal property as if sole, if shares stand in the name of a married woman, the certificate is evidence of an absolute ownership by her, and if nothing indicates a trust in favor of another person, one from whom a loan is solicited upon a pledge of the shares as security is warranted in making the loan upon an assumption of ownership and power to transfer, and is not bound to institute inquiries for the purpose of ascertaining how she obtained them.[26]

2. Validity of Pledges of Shares as Against Third Parties — a. Assignment of Shares in Pledge Without Delivery Not Good as Against Creditors Without Notice. An assignment of shares in pledge, without a delivery of the share cer-

19. Fox *v.* Martin, 64 L. J. Ch. 473.

20. See *supra*, VII, E, 1, c, (I). It has been held that a transfer of shares in a corporation by the trustees of the corporation to whom the entire stock has been issued, to be held as collateral security for money loaned the corporation, made to a subscriber to the capital stock of such corporation on the payment of his subscription, and at the request of the corporation, conveys a perfect title, even though the pledge of stock to the trustee was invalid. Northwood Union Shoe Co. *v.* Pray, 67 N. H. 435, 32 Atl. 770.

21. Barnes *v.* Swift, 11 Ohio Dec. (Reprint) 321, 26 Cinc. L. Bul. 110.

22. Smith *v.* Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Howe *v.* Barney, 45 Fed. 668.

23. Freeman *v.* Harwood, 49 Me. 195, opinion by Tenney, C. J.

24. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

25. Spreckels *v.* Nevada Bank, 113 Cal. 272, 45 Pac. 329, 54 Am. St. Rep. 348, 33 L. R. A. 459.

26. Leitch *v.* Wells, 48 N. Y. 585.

tificates, is not good as to creditors who are without actua. notice of such assignment, but creates merely a secret lien; so that such a creditor or his representative may seize them to the exclusion of the interest in them which has passed to the assignee.[27]

b. Doctrine That Attachment of Creditor Prevails Over Unregistered Pledge. If therefore the shares are not regularly transferred to the pledgee on the books of the corporation, the pledge will not, according to the prevailing opinion,[28] be valid as against subsequent attaching or execution creditors of the pledger;[29] but such an unrecorded transfer in pledge vests such a title in the pledgee as equity will protect against one attaching the stock in a suit against the pledger with knowledge of facts sufficient to put him on inquiry regarding the so-called equitable ownership.[30]

c. Doctrine That Unregistered Pledge Prevails Over Attachments and Executions. Contrary to the foregoing, other courts hold that where the pledge has been perfected by the delivery of the share certificates the right of the pledgee, although the shares have not been transferred to him, or the fact of the pledge noted on the corporate books, will prevail over the rights of attachment and execution creditors or purchasers at execution sales claiming through them.[31] According to one of these decisions the right of the pledgee is superior to that of the purchaser on execution against the pledging shareholder, although the execution is on a judgment in favor of the corporation against the shareholder for the amount of an assessment on the stock.[32] It has been held that the right of a pledgee to corporate stock is superior to that of the purchaser of the stock at a subsequent sale under execution, although the corporation was not notified of the transfer of the stock, and no transfer was made on the books of the corporation, where the purchaser at the sale had notice of the pledgee's rights before his purchase.[33]

d. Power of Pledgee Holding Certificate Indorsed in Blank to Pass Title to Innocent Purchaser. So also a pledgee to whom shares of corporate stock are delivered, with an assignment indorsed in blank and an irrevocable power of transfer signed and sealed by the transferrer, may pass a good title thereto to an innocent purchaser, or may pass such an interest therein to an innocent pledgee that the latter may hold them as security for his advances after other securities are exhausted, the reason being that the pledger delivers something more than the mere possession of a chattel; he delivers a written evidence of a transfer of

27. Atkinson *v.* Foster, 134 Ill. 472, 25 N. E. 528 (the shares were seized by a receiver); Bidstrup *v.* Thompson, 45 Fed. 452.

28. See *supra*, VII, D, 6, a, (I) *et seq.*

29. Ft. Madison Lumber Co. *v.* Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789, 77 Iowa 393, 42 N. W. 331; Noble *v.* Turner, 69 Md. 519, 16 Atl. 124; State Ins. Co. *v.* Sax, 2 Tenn. Ch. 507.

30. Weston *v.* Bear River, etc., Min. Co., 6 Cal. 425; Cheever *v.* Meyer, 52 Vt. 66. An entry in a stock-book of a corporation that certain stock has been assigned as collateral security is sufficient to protect the assignee against the claims of judgment creditors of the assignor, under Iowa Code, § 1078, providing that a transfer of corporate stock is not valid as to third persons until regularly entered in the company's books. Moore *v.* Marshalltown Opera-House Co., 81 Iowa 45, 46 N. W. 750. B and S were indebted to A by their joint note. A calling on them for security, they agreed that they would each transfer to him fifteen shares of certain insurance stock, and that the stock of S, after securing the note, should be held by A as security to B for certain liabilities assumed by him for S. B transferred his fifteen shares to A, and S went to the insurance office to transfer his, when it was found that all his stock had been attached by a creditor. The creditors of S soon after instituted proceedings in insolvency against him. The attachment being vacated thereby, it was held that B acquired no lien whatever on the fifteen shares of the stock of S. Shipman *v.* Ætna Ins. Co., 29 Conn. 245.

31. Masury *v.* Arkansas Nat. Bank, 93 Fed. 603, 35 C. C. A. 476 [*reversing* 87 Fed. 381].

32. Dearborn *v.* Washington Sav. Bank, 18 Wash. 8, 50 Pac. 575.

33. May *v.* Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163. *Compare* Buffalo German Ins. Co. *v.* Buffalo Third Nat. Bank, 162 N. Y. 163, 56 N. E. 521, 48 L. R. A. 107 [*reversing* 29 N. Y. App. Div. 137, 51 N. Y. Suppl. 667 (*affirming* 19 Misc. (N. Y.) 564, 43 N. Y. Suppl. 550)].

full title, without expressing on its face the conditions upon which the title is absolutely transferred.[34]

e. Purchasers With Notice Take Subject to Rights of Pledger — (I) *Rule Stated.* It is scarcely necessary to say that one who purchases shares of corporate stock, whether at a private or judicial sale,[35] with actual notice,[36] or with a knowledge of such facts as upon reasonable inquiry would enable him to know[37] that the certificates have been pledged, takes subject to the rights of the pledgee and gets only such title as the pledgee had.

(II) *What Imports Notice* — (A) *Certificate Issued "In Trust" to Person Who Attempts to Pledge It.* By analogy to the rule elsewhere pointed out,[38] if the certificate shows on its face that it is issued "in trust" to the person who attempts to pledge it, this is sufficient to put the pledgee upon inquiry and to charge him with notice of the trust, and of all that he might have ascertained by inquiry; and if he pledges it in breach of his trust, the pledgee must account to the *cestui que trust* or to the substituted trustee for the amount misappropriated by the pledger.[39]

(B) *Owner's Name in Certificate Not Notice of His Rights.* Where the owner of stock delivers the certificate to his pledgee with a power to transfer it, the fact that his name is in the certificate is not notice of his rights, as against third persons who take it for value from the pledgee.[40]

(C) *Lis Pendens Not Notice.* Stocks are articles of commerce passed from hand to hand, like commercial paper; and it has been said that the doctrine of a constructive notice by *lis pendens* is not applicable to them.[41]

34. Thompson *v.* Toland, 48 Cal. 99; McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341. To the same effect see Brewster *v.* Sime, 42 Cal. 139; Cherry *v.* Frost, 7 Lea (Tenn.) 1. In Thompson *v.* Toland, 48 Cal. 99, this principle was applied on very doubtful grounds in a case where the pledgee pledged the shares to secure an antecedent debt, and his pledgee parted with no new value. Such a person ought not to be held a purchaser for value as against the real owner, unless he makes it appear that he lost other means securing his debt by taking the pledge. Burton *v.* Peterson, 12 Phila. (Pa.) 397, 35 Leg. Int. (Pa.) 397. See further Jarvis *v.* Rogers, 13 Mass. 105, 15 Mass. 369; Fatman *v.* Lobach, 1 Duer (N. Y.) 364 [with which *compare* McCready *v.* Rumsey, 6 Duer (N. Y.) 574]; Buffalo Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317. *Compare* Bush *v.* Lathrop, 22 N. Y. 535; Covell *v.* Tradesman's Bank, 1 Paige (N. Y.) 131; Matter of North British Australasian Co., 7 C. B. N. S. 400, 30 L. J. C. P. 113, 97 E. C. L. 400; Swan *v.* North British Australasian Co., 2 H. & C. 175, 10 Jur. N. S. 102, 32 L. J. Exch. 273, 11 Wkly. Rep. 862; Swan *v.* North British Australasian Co., 7 H. & N. 603. It has therefore been held that pledgees of corporate shares, in good faith and without notice that their pledger is not the absolute owner, are entitled to hold them as security for their entire loan, although it is much greater than the debt of the real owner who pledged the shares to their pledger, where, although they might have discovered by investigation that he was a stock-broker, besides being engaged in other business, there was nothing in the original or various intermediate transfers before they reached the pledgees to show that he held the shares by way of security in connection with stock speculations. Duggan *v.* London, etc., Loan, etc., Co., 18 Ont. App. 305. That the rule is different under the English law, the purchaser getting no more than his vendor had and conveyed, see *supra*, VII, E, 1, b, (I); Williams *v.* Colonial Bank, 38 Ch. D. 388, 57 L. J. Ch. 826, 59 L. T. Rep. N. S. 648, 36 Wkly. Rep. 625. That such is the English law in regard to personal property generally see Cole *v.* North Western Bank, L. R. 10 C. P. 354, 44 L. J. C. P. 233, 32 L. T. Rep. N. S. 733.

35. For example at a sheriff's sale. Weston *v.* Bear River, etc., Min. Co., 6 Cal. 425; May *v.* Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163.

36. Weston *v.* Bear River, etc., Min. Co., 6 Cal. 425.

37. Cheever *v.* Meyer, 52 Vt. 66.

38. See *supra*, VII, D, 13, f, (IV).

39. Gaston *v.* American Exch. Nat. Bank, 29 N. J. Eq. 98; Budd *v.* Monroe, 18 Hun (N. Y.) 316; Duncan *v.* Jaudon, 15 Wall. (U. S.) 165, 21 L. ed. 142; Duggan *v.* London, etc., Loan, etc., Co., 19 Ont. 272.

40. Felt *v.* Heye, 23 How. Pr. (N. Y.) 359.

41. Leitch *v.* Wells, 48 N. Y. 585, 609, per Earl, C.

Other holdings relating to pledges of shares. — The fact that a shareholder who has pledged certain shares of his stock to secure an indebtedness of the corporation is the owner and holder of the rest of the corporate stock will not authorize him to transfer the property of the corporation to secure his own individual indebtedness to the prejudice of

3. Returning Identical Certificate — a. Right to Shares Is Not Right to Certificates of Particular Number in Series. A certificate for shares not being the shares themselves, but being merely a muniment or evidence of title to them,[42] it follows that where the shares in a corporation are equal in denomination and none of them in any respect preferred before the others, the right of a subscriber to have a given number of shares may broadly be said to be not a right to have certificates of any particular number in the series. His rights are satisfied if there be allotted to him the number of shares of stock for which he has subscribed; for when he is the holder of certificates numbered from one to ten he holds precisely the same proprietary interest in the company as when he holds certificates numbered from ninety-one to one hundred. Therefore, where a bailee holds corporate stock in his own name, or in the name of a third person in trust for his bailor, he is not bound to ear-mark or identify the particular certificates and have them forthcoming under the terms of the trust agreement, but it is sufficient if he keep at all times on hand a sufficient number of shares of the company of the same series and kind to return to his bailor when lawfully called upon so to do.[43]

b. Pledgee or Trustee Not Bound to Hold Identical Certificates — (i) *In General.* If shares of stock have been pledged as collateral to secure the payment of a promissory note, it will be sufficient if the pledgee have on hand the same number of the same series of the shares of the same company, at the time the note falls due; and if he sell these in pursuance of the contract of pledge, he will discharge the contract on his part, and will not be liable to account to his bailor for the highest price at which similar shares were sold by him, the bailee, at any time during the period.[44]

(ii) *Failing to Return Identical Certificates Liable For No More Than Nominal Damages.* Under this theory the pledgee may, by delivering to the pledger other certificates of shares in the same company, being in all respects of the same series and equal in value to those which were the subject of the pledge, exonerate himself from more than nominal damages for the conversion of the certificates actually received in pledge.[45]

(iii) *Rule Where Shares Not Specially Marked.* Where the certificates of the shares which are the subject of the pledge are not specially marked so as to identify them and distinguish them from other shares of the like denominations of the same corporation, the broker is not bound to keep on hand the identical certificates and redeliver them, but it will be sufficient if, at the expiration of the term of pledge, he redelivers an equivalent number of the like shares.[46] Nor is the identity of the pledge changed by the act of the pledgee in

creditors of the corporation and of the pledgee of such stock. Stewart *v.* Gould, 8 Wash. 367, 36 Pac. 277. A statute providing for a public registration of transfers of shares in the office of the county clerk was held not applicable to transfers by way of pledge, but only to absolute sales. Batesville Telephone Co. *v.* Myer-Schmidt Grocer Co., 68 Ark. 115, 56 S. W. 784.

42. Hawley *v.* Brumagim, 33 Cal. 394, 399, opinion by Sanderson, J.

43. Hawley *v.* Brumagim, 33 Cal. 394; Horton *v.* Morgan, 6 Duer (N. Y.) 56 [*affirmed* in 19 N. Y. 170, 75 Am. Dec. 311]; Allen *v.* Dykers, 3 Hill (N. Y.) 593; Nourse *v.* Prime, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606, 7 Johns. Ch. (N. Y.) 69, 87, 11 Am. Dec. 403; Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720; Le Croy *v.* Eastman, 10 Mod. 499.

44. Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282; Berlin *v.* Eddy, 33 Mo. 426; Nourse *v.* Prime, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606, 7 Johns. Ch. 69, 11 Am. Dec. 403.

As to the extent to which this rule is applicable where shares are held by a trustee see Pinkett *v.* Wright, 2 Hare 120, 6 Jur. 1102, 12 L. J. Ch. 119, 24 Eng. Ch. 120.

For illustrations of the foregoing rule see Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282; Ketchum *v.* Bank of Commerce, 19 N. Y. 499; Frost *v.* Clarkson, 7 Cow. (N. Y.) 24; Raymond *v.* Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317; Noyes *v.* Spaulding, 27 Vt. 420; Hogan *v.* Shee, 2 Esp. 522; Shales *v.* Seignoret, 1 Ld. Raym. 440; Giles *v.* Edwards, 7 T. R. 181, 4 Rev. Rep. 414.

45. The reason of the rule was aptly stated by Crockett, J., in Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282.

46. Nourse *v.* Prime, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606; Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720.

surrendering the certificates which have been delivered and taking out new ones in his own name.[47]

(IV) *Rule Not Applicable to Case of Shares of Different Values or Kinds.* The rule which permits the pledgee to return shares evidenced by certificates different from those which were delivered to him has of course no application where the corporation has two kinds of stock of different values in the market, and where the bailee converts the more valuable stock and offers to return an equal number of shares of the less valuable kind. In such a case it has been well said that the bailee is bound to restore the identical stock pledged.[48]

c. Pledgee Liable if He Does Not Keep on Hand Same Number of Shares of Same Denomination — (I) *In General.* Dismissing from consideration the mere certificates, which are not the shares themselves, where a broker to whom shares are pledged by his customer sells the shares contrary to the terms of the pledge, and does not keep on hand the same number of the same kind of shares, it will be a breach of trust and a conversion, and in an action for damages therefor it will be no defense that he afterward tendered to plaintiff the proper amount of the same kind of shares.[49] Nor will it be any defense to a claim arising from such an unlawful conversion that defendant was at all times afterward either actually possessed of, or had the means of immediately obtaining, other shares of stock in the same company, of equal value with those disposed of, which he was ready and intended, whenever called upon, to substitute for those belonging to plaintiff of which he had disposed.[50]

(II) *Distinction Between Pledge of Shares and Doctrine of Fungibles in Scotch Law.* The distinction has been pointed out between a pledge of shares and the doctrine of fungibles in the Scotch law, which consists of a loan of something, such as corn, wine, money, etc., to be used by the borrower and to be returned, not in the shape of the article itself, but in the same quantity of an article of the like kind. Here there is no breach of trust in consuming the article which is the subject of the loan because that is the contract of the parties. But in the case of a pledge of shares, if the pledgee sells them without authority, it is a violation of his trust, although he afterward purchases other articles of the same kind and value, to be returned to the pledger, unless there is some agreement, either expressed or implied, between the parties that he shall be permitted so to do.[51]

(III) *Custom to Rehypothecate or Otherwise Use Pledge.* In an action by a pledger against his pledgee, a broker, for the conversion of certain shares delivered to the latter in pledge, it has been held that evidence was inadmissible by defendant, of a custom or usage by which a broker was authorized to hypothecate or otherwise to use securities received by him as margins on transactions like the one in question, and that plaintiff had knowledge of the custom.[52]

d. Doctrine That Pledgee Is Bound to Return Identical Certificates. Contrary to the foregoing, there is a limited view that the pledgee is bound, at the election of the pledger, to return the identical certificates pledged.[53] According to this view one who has pledged a certificate of stock as collateral security may treat a transfer thereof by the pledgee to a creditor of the pledgee as a conversion, although the pledgee has a greater number of shares standing to his credit on the books of the corporation.[54]

47. Ketchum *v.* Bank of Commerce, 19 N. Y. 499.

48. Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307.

49. Allen *v.* Dykers, 3 Hill (N. Y.) 593 [*affirmed* in 7 Hill (N. Y.) 497, 42 Am. Dec. 87]. *Compare* Duggan *v.* London, etc., Loan, etc., Co., 19 Ont. 272.

50. Parsons *v.* Martin, 11 Gray (Mass.) 111.

51. Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

52. Lawrence *v.* Maxwell, 53 N. Y. 19. To the same effect see Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

53. Langton *v.* Waite, L. R. 6 Eq. 165, 37 L. J. Ch. 345, 18 L. T. Rep. N. S. 80, 16 Wkly. Rep. 508.

54. Fay *v.* Gray, 124 Mass. 500, opinion by Soule, J.

e. Doctrine That Pledgee Has No Right to Sell Shares Before Maturity of Loan. According to this last view the pledgee has no right to sell before maturity, whether he keeps on hand a like number and kind or not; and if he does so he is chargeable with the price produced by the sale, whatever may be the subsequent reduction in its value.[55] But according to the former view if the pledgee before maturity of the debt and without authority in the terms of the contract of pledge sells the shares, and does not keep in hand the same number and kind of shares, this will render him liable to the pledger for a breach of trust, and he cannot discharge this liability by afterward purchasing other shares of the same denominations and value with which to replace those which he has sold.[56]

4. Enforcing Contract of Pledge[57] — a. Ordinary Remedies of Pledgee. The ordinary remedies of a pledgee are: (1) To proceed personally against the pledger for his debt, without first selling the collateral security.[58] (2) To file a bill in chancery, and have a judicial sale under a regular decree of forfeiture.[59] (3) To

55. Langton *v.* Waite, L. R. 6 Eq. 165, 37 L. J. Ch. 345, 18 L. T. Rep. N. S. 80, 16 Wkly. Rep. 508; *Ex p.* Dennison, 3 Ves. Jr. 552.

56. Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87 [*affirming* 3 Hill (N. Y.) 593].

57. Preliminary statement.— With respect to the remedies available to the pledgee for the enforcement of the contract of pledge there is on most points no difference between pledges of corporate shares and pledges of other personal property, for which see, generally, Pledges.

58. Sonoma Valley Bank *v.* Hill, 59 Cal. 107; Jones *v.* Scott, 10 Kan. 33; Stover *v.* Flack, 41 Barb. (N. Y.) 162. And see Hendrix *v.* Harman, 19 S. C. 483. By pursuing this course he does not destroy or impair his lien upon the property pledged. Ehrlich *v.* Ewald, 66 Cal. 97, 4 Pac. 1062; Darst *v.* Bates, 95 Ill. 493; Archibald *v.* Argall, 53 Ill. 307; Smith *v.* Strout, 63 Me. 205; Butterworth *v.* Kennedy, 5 Bosw. (N. Y.) 143.

It follows from this that he is not required to return the pledge before bringing such an action, unless there is a stipulation in the contract of pledge to that effect.

Arkansas.— West *v.* Carolina L. Ins. Co., 31 Ark. 476.

Illinois.— Darst *v.* Bates, 95 Ill. 493.

Massachusetts.— Taylor *v.* Cheever, 6 Gray 146.

Missouri.— American Nat. Bank *v.* Harrison Wire Co., 11 Mo. App. 446.

Nebraska.— Lormer *v.* Bain, 14 Nebr. 178, 15 N. W. 323.

Vermont.— Rutland Bank *v.* Woodruff, 34 Vt. 89.

United States.— Lewis *v.* U. S., 92 U. S. 618, 23 L. ed. 513.

Value of pledge as set-off.— Nor can the pledgee or those sued set up the value of the pledge by way of set-off or recoupment (Winthrop Sav. Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56), although in some jurisdictions damages for the conversion of the pledge will avail as a defense if the conversion is established (Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189). So loss to pledger by negligence of pledgee may be set up by way of counter-claim. Scott *v.* Crews, 2 S. C. 522. See also Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Douglass *v.* Mundine, 57 Tex. 344. Where this rule prevails the pledgee must in such action either produce the collateral security or account for its non-production. Ocean Nat. Bank *v.* Fant, 50 N. Y. 474; Stuart *v.* Bigler, 98 Pa. St. 80.

Effect on pledgee's lien.— An attachment by the pledgee of the thing pledged is in general a waiver of his lien. Evans *v.* Warren, 122 Mass. 303; Buck *v.* Ingersoll, 11 Metc. (Mass.) 226. And see Sickles *v.* Richardson, 14 Hun (N. Y.) 110. But of course in a jurisdiction where an action against the pledger is not a waiver of the pledgee's lien, he will not waive it by attaching other property of the pledger in such an action. Taylor *v.* Cheever, 6 Gray (Mass.) 146. As to the effect of an attachment where corporate shares have been pledged see Norton *v.* Norton, 43 Ohio St. 509, 3 N. E. 348. The writer is indebted for the matter of this note to 79 Am. Dec. 500, where the reader will find a learned note on the general subject of pledge.

59. At common law the pledgee, in the absence of a special contract to the contrary, could obtain a sale of the pledge only under a judicial decree. Ogden *v.* Lathrop, 1 Sweeny (N. Y.) 643; Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200. Such it seems is the rule of the civil law (Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62), and under the civil code of Louisiana (Brother *v.* Saul, 11 La. Ann. 223). The right to come into equity to obtain a decree of sale still exists, in the absence of a special provision to the contrary, in the contract of pledge. Briggs *v.* Oliver, 68 N. Y. 336; Ogden *v.* Lathrop, 1 Sweeny (N. Y.) 643; Sitgreaves *v.* Farmers', etc., Bank, 49 Pa. St. 359; Smith *v.* Coale, 12 Phila. (Pa.) 177, 34 Leg. Int. (Pa.) 58. *Compare* Durant *v.* Einstein, 5 Rob. (N. Y.) 423, 35 How. Pr. (N. Y.) 223, where the jurisdiction of equity is denied except under special circumstances. This course may be safer and more advantageous in many cases for obvious reasons than to make a non-judicial sale of the pledge. Boynton *v.* Payrow, 67 Me. 587; Conyngham's Appeal, 57 Pa. St. 474. It may be even necessary in

sell without judicial process, upon giving reasonable notice to the debtor to redeem.[60]

b. His Right of Action. A pledgee of stock may sue in his own name to protect his interest as such in the property of the corporation, and is not required to act through the corporation.[61]

c. Statute of Limitations Does Not Run. The pledgee of corporate stock has a right to retain it until the debt for which it was pledged is fully satisfied. But during the time that he so holds it, he cannot assert that he holds it adversely, and thereby acquire it under the statute of limitations.[62]

d. Obligation of Corporation to Transfer to Purchaser at Pledgee's Sale. Where the sale has regularly taken place, in pursuance of the contract of pledge, or in pursuance of law, in the absence of express provisions in the contract, the corporation must transfer the shares to the purchaser on its books and issue to him a new certificate in the appropriate mode. But the corporation cannot be put in the wrong for refusing such a transfer where the pledgee has not sold at public auction after due notice to the pledger, and has not resorted to a suit in equity as he may do.[63]

5. Action by Pledger For Conversion of Shares[64] — a. Tender of Amount Due Not Necessary Before Such Action — (I) *In General.* Where shares of stock have been converted by a pledgee who holds them as collateral security for an amount due him by the pledger, it is not necessary, in order to enable the pledger to maintain an action for damages for the conversion, that he should first tender to the pledgee the amount due by him to the latter.[65]

(II) *But Pledgee May Recoup Such Indebtedness.* But in such a case the pledgee is entitled to recoup the damages by the amount of the debt that is due him by the pledger.[66]

b. Pledgee May Show That Transfers Were Fictitious. It has been held that the pledgee may show, as a defense to an action for the conversion of the shares, that the transfers of them made by him were fictitious, designed to conceal his transactions, and to prevent the injury to his credit which might follow from a publication of the fact of his having so many shares of the particular kind in

some cases, as where the pledger has not waived his right to notice and cannot be found, to be personally served with notice to redeem. Indiana, etc., Co. *v.* McKernan, 24 Ind. 62; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248. In such a suit the pledger will not be allowed to set up as a defense that he gave the pledge with intention to defraud his creditors, for a conveyance void as to creditors is nevertheless good as between the parties to it. Chafee *v.* A. W. Sprague Mfg. Co., 14 R. I. 168.

60. 2 Kent Comm. 582.

California.— Wilson *v.* Brannan, 27 Cal. 258.

Connecticut.— Stevens *v.* Hurlbut Bank, 31 Conn. 146.

Iowa.— Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497.

Massachusetts.— Merchants' Nat. Bank *v.* Thompson, 133 Mass. 482.

Texas.— King *v.* Texas Banking, etc., Co., 58 Tex. 669; Brightman *v.* Reeves, 21 Tex. 70.

England.— Pigot *v.* Cubley, 15 C. B. N. S. 701, 10 Jur. N. S. 318, 33 L. J. C. P. 134, 12 Wkly. Rep. 467, 109 E. C. L. 701; Tucker *v.* Wilson, 1 P. Wms. 261, 24 Eng. Reprint 379.

This power of sale is ordinarily an incident of the pledge in such a sense that it follows the debt into the hands of an assignee, the same as the power of sale in a mortgage deed of trust follows an assignment of the notes secured by the mortgage. Alexandria, etc., R. Co. *v.* Burke, 22 Gratt. (Va.) 254. But the pledgee is not bound on default to sell the thing pledged, even after notice from the pledger so to do. Napier *v.* Central Georgia Bank, 68 Ga. 637; Field *v.* Leavitt, 37 N. Y. Super. Ct. 215.

The equitable right of redemption does not exist in respect of a mortgage of stocks; that right extends only to mortgages of land. Lockwood *v.* Ewer, 2 Atk. 303, 9 Mod. 275, 26 Eng. Reprint 585.

61. Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

62. Cross *v.* Eureka Lake, etc., Canal Co., 73 Cal. 302, 14 Pac. 885, 2 Am. St. Rep. 808.

63. Indiana, etc., R. Co. *v.* McKernan, 24 Ind. 62.

As to the obligation of the corporation to issue new certificates to the pledgee see Haldeman *v.* Hillsborough, etc., R. Co., 2 Handy (Ohio) 101, 12 Ohio Dec. (Reprint) 351.

64. For form of good count in trover for conversion of corporate shares see Ayres *v.* French, 41 Conn. 142.

65. Neiler *v.* Kelley, 69 Pa. St. 403.

66. Neiler *v.* Kelley, 69 Pa. St. 403.

his possession; and that all the stocks remained in his control and ready for delivery to the owner on the payment of the amount for which they were pledged.[67]

c. Measure of Damages. Where a broker had sold shares of his principal it was held that the principal was entitled to recover from him the amount of profit which he had realized in dealing with them.[68] In another case the measure of damages which the pledger was entitled to recover from the pledgee for a conversion of corporate shares which were the subject of the pledge, in a common-law action of trover therefor, was held to be the value of the shares at the time of the alleged sale, and the dividends which the pledgee had received thereon, together with interest, after deducting the amount of the assessments and expenses of the sale.[69]

VIII. LIABILITY OF SHAREHOLDERS TO CREDITORS OF CORPORATION.

A. Non-Liability at Common Law — 1. General Rule. As already seen[70] the corporation and its shareholders are distinct persons in law. The general rule of law therefore is that the shareholders of a joint-stock corporation are not liable for its debts[71] or for its torts,[72] except to make good the amount due to the corporation for their shares,[73] unless made so by constitutional or statutory enactment,[74] or unless they have assumed a larger liability by contract or by conduct.

67. Day *v.* Holmes, 103 Mass. 306.

68. Langton *v.* Waite, L. R. 6 Eq. 165, 37 L. J. Ch. 345, 18 L. T. Rep. N. S. 80, 16 Wkly. Rep. 508.

69. Freeman *v.* Harwood, 49 Me. 195.

70. See *supra*, VI, F, 1, a *et seq.*

71. *Alabama.*—Smith *v.* Huckabee, 53 Ala. 191, 193, per Brickell, J.

California.— Green *v.* Beckman, 59 Cal. 545; French *v.* Teschemaker, 24 Cal. 518.

Connecticut.— Middletown Bank *v.* Magill, 5 Conn. 28, 51, per Hosmer, C. J.

Indiana.— Shaw *v.* Boylan, 16 Ind. 384.

Iowa.— Spense *v.* Iowa Valley Constr. Co., 36 Iowa 407.

Maine.— Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559.

Massachusetts.— Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531, 539 (per Hoar, J.) [*affirmed* in 10 Wall. (U. S.) 566, 575, 19 L. ed. 1029 (per Miller, J.)]; Norton *v.* Hodges, 100 Mass. 241; Gray *v.* Coffin, 9 Cush. 192; Andover Free Schools *v.* Flint, 13 Metc. 539.

New Jersey.— Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52.

New York.— Seymour *v.* Sturgess, 26 N. Y. 134; Harger *v.* McCullough, 2 Den. 119; Freeland *v.* McCullough, 1 Den. 414, 423, 43 Am. Dec. 685; Thomas *v.* Dakin, 22 Wend. 9, 95 (per Cowen, J.); Slee *v.* Bloom, 19 Johns. 456, 473, 10 Am. Dec. 273 (per Spencer, C. J.).

Pennsylvania.— Myers *v.* Irwin, 2 Serg. & R. 368, 371, per Tilghman, C. J.

Rhode Island.— New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 188, 75 Am. Dec. 688, per Ames, C. J.

United States.— Terry *v.* Little, 101 U. S. 216, 25 L. ed. 864.

England.— Van Sandau *v.* Moore, 4 L. J. Ch. O. S. 177, 1 Russ. 441, 46 Eng. Ch. 441.

72. Peck *v.* Cooper, 8 Ill. App. 403.

73. Toner *v.* Fulkerson, 125 Ind. 224, 25 N. E. 218; Walker *v.* Lewis, 49 Tex. 123 (holding that they are bound to make good their subscriptions in favor of creditors in some form of proceeding).

Liability of the shareholder to creditors of the corporation is therefore exhausted by his making the full payment for his shares, except where constitutional provisions or statutes make the shares assessable, although the purchase-price has been fully paid. Green *v.* Abietine Medical Co., 96 Cal. 322, 31 Pac. 100 (under constitution of California); Santa Cruz R. Co. *v.* Spreckles, 65 Cal. 193, 3 Pac. 666, 802; Gainey *v.* Gilson, 149 Ind. 58, 48 N. E. 633.

74. *Indiana.*— Toner *v.* Fulkerson, 125 Ind. 224, 25 N. E. 218.

Iowa.— Spense *v.* Iowa, etc., Constr. Co., 36 Iowa 407.

Louisiana.—Monaghan *v.* Hall, 18 La. Ann. 310.

Ohio.— Wood *v.* Pearce, 2 Disn. 411.

Tennessee.— Jackson *v.* Meek, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620.

United States.— Bank of North America *v.* Rindge, 57 Fed. 279.

Statutes and constitutional provisions.— The rule that shareholders are bound in favor of creditors of the corporation to make good their subscriptions is affirmed by various statutes and constitutional provisions too numerous to set forth in detail. See the following cases:

Colorado.— Smith *v.* Londoner, 5 Colo. 365.

Indiana.— Wheeler *v.* Thayer, 121 Ind. 64, 22 N. E. 972.

Iowa.— Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263.

Maine.— Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904.

Missouri.— Schricker *v.* Ridings, 65 Mo. 208; Miley *v.* Parker, 7 Mo. App. 561.

2. Cannot Enlarge Liability by By-Law, Etc., Except by Unanimous Consent. The members of a corporation cannot enlarge their liability by by-law, resolution, etc., except by unanimous consent; because to do so would be to alter the charter or other fundamental agreement by which all, upon becoming incorporate, have agreed to be bound;[75] although, if credit has been sought and obtained upon the faith of such a by-law, it may possibly, on the principle of estoppel, give a right of action against the signers of it.[76]

3. May Enlarge Liability by Contract — a. In General. But there is no rule of law or principle of public policy which will prevent the shareholders of a corporation from enlarging their liability to the corporation or to its creditors by contract unanimously concurred in.[77]

b. Such Engagements Within Statute of Frauds. But as the shareholder is in law a different person from the corporation, his promise to become personally liable for the debts of the latter beyond the extent to which he stands liable under the law is a promise to answer for the debt, default, or miscarriage of another person, and is hence within the statute of frauds, and not enforceable unless in writing.[78]

c. Feme Covert Shareholder Cannot Bind Her Estate. So where, under the law of the state, a married woman can pledge her personal responsibility only to effect some purpose of her own, or for the benefit of her own estate, she cannot bind herself by indorsing a promissory note to secure the debt of a corporation of which she is a shareholder, because the estate of the corporation is not her estate, and such an indorsement is therefore not for the benefit of her estate.[79]

d. Effect of Representation to Public That Shareholders Are Liable For Corporate Debts. The fact that individual members of a corporation may have represented to the public that they were so liable will not bind them as shareholders; nor will equity entertain a bill against them as shareholders under such by-law, or on account of such representations. If they have incurred liabilities as individuals, disconnected from their corporate capacity, they should be proceeded against as individuals.[80]

e. Not Necessary That Creditors Should Know of Guaranty Made by Shareholders. It has been held that where shareholders, in order to obtain credit for the corporation and a discount for its benefit, execute a guaranty to a banking company and its assigns to secure payment of the general indebtedness of the corporation to a specified amount, they become liable on such guaranty to the holders of notes of the corporation discounted by the banking company, although when the notes were transferred the purchaser did not know of the existence of the guaranty.[81]

75. Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691; Andover Free Schools *v.* Flint, 13 Metc. (Mass.) 539.

76. Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691.

Validity of the by-law of a corporation not professing to have any fixed capital whereby its members agree to contribute equally and ratably to all expenses incurred. Hume *v.* Winyaw, etc., Co., 1 Carolina L. J. 217. *Compare* Savage *v.* Putnam, 32 Barb. (N. Y.) 420.

77. London, etc., Bank *v.* Parrott, 125 Cal. 472, 58 Pac. 164 (liable both as shareholders and as guarantors); Lillard *v.* Decatur Cotton Seed Oil Co., 14 Tex. Civ. App. 67, 36 S. W. 792; Tidioute Sav. Bank *v.* Libbey, 101 Wis. 193, 77 N. W. 182, 70 Am. St. Rep. 907.

78. Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691.

79. Russel *v.* People's Sav. Bank, 39 Mich. 671, 33 Am. Rep. 444; West *v.* Laraway, 28 Mich. 464; De Vries *v.* Conklin, 22 Mich. 255.

80. Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Dec. 563. Invalidity, as against shareholders, of indorsement on circulating notes of bank of the words "individual property of stockholders liable." Lowry *v.* Inman, 46 N. Y. 119. That the obligation of certain shareholders of a bank to "pay and discharge all the debts owing by the company" did not oblige them to pay its circulating notes see Pollard *v.* Kentucky Exporting Co., 4 J. J. Marsh. (Ky.) 52. That a bond, with security given by the corporators of a savings bank to secure depositors therein, is not capital stock see Huntington *v.* District of Columbia Nat. Sav. Bank, 96 U. S. 388, 24 L. ed. 777.

81. Tidioute Sav. Bank *v.* Libbey, 101 Wis. 193, 77 N. W. 182, 70 Am. St. Rep. 907.

f. When Shareholder Entitled to Advantages of Sureties. As the promise of a shareholder to pay a debt of the corporation is a promise to pay the debt of another, it entitles the promisor to all the rights and remedies of a surety as to extensions and renewals of credits not authorized by him.[82] A statute providing that the release of any debtor under the insolvent law shall not operate to discharge any other party liable as security, guarantor, or otherwise for the same debt, applies to shareholders who have become liable for the debt of the corporation, where the corporation is discharged in insolvency.[83] Shareholders do not occupy the position of sureties as to a debt of the corporation, where the benefit arising from such debt is a direct and intended benefit to the members of the corporation;[84] or in consequence of an agreement and compromise of debts of the corporation made by the shareholders acting separately, in which they provide for the issue of certain debentures and bonds.[85]

g. Stipulation For Payment Only on Call. A stipulation in the contract of subscription that it shall be payable only on the call of the company is valid as between shareholders, but will not be allowed to defeat the rights of creditors.[86]

h. Charter Provision For Payment Only on Call. In like manner a provision in the charter that "the balance due on each share shall be subject to the call of the directors" does not give a shareholder the right, as between himself and the company's creditors, to withhold payment of the balance due from him until the necessities of the company require payment in full for the shares subscribed.[87]

i. When Shareholders Liable to Indemnify Directors For Illegal Distribution of Assets. The directors of a company who have been required by its liquidator in winding-up proceedings to replace a portion of the capital distributed by them among the shareholders upon the ground that the reduction of the capital was *ultra vires* because not sanctioned by the court are entitled to indemnity from the shareholders, where the latter knew at the time that they were receiving a part of the capital.[88]

4. Not Liable to Creditors When Not Liable to Corporation. Except where a different rule of liability is prescribed by constitutional or statutory provision, and except where elements of estoppel supervene, the general rule is that the shareholder is not liable to creditors after the insolvency of the corporation, unless the circumstances are such that he would have been liable to the corporation itself.[89]

5. Power of Corporation to Reinstate Liability of Shareholders. Where two corporations make a valid agreement by which the debt of one is assumed by the other it is competent for them to rescind such agreement, reinstate the liability

82. Home Nat. Bank *v.* Waterman, 134 Ill. 461, 29 N. E. 503.

83. Willis *v.* Mabon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281.

84. Mobile, etc., R. Co. *v.* Nicholas, 98 Ala. 92, 12 So. 723.

85. Mobile, etc., R. Co. *v.* Nicholas, 98 Ala. 92, 12 So. 723. That a shareholder in a corporation who purchases stock of another shareholder cannot require the latter to pay a part of a note made by both shareholders for a corporate debt, where sufficient property of the corporation to secure its payment was set apart for the purpose, see Meguiar *v.* Walsh, 36 S. W. 1124, 18 Ky. L. Rep. 433.

86. Curry *v.* Woodward, 53 Ala. 371.

87. Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515, 526, 10 S. Ct. 589, 33 L. ed. 994 [*affirming* 86 Mo. 466 (*affirming* 12 Mo. App. 148)].

88. Moxham *v.* Grant, [1899] 1 Q. B. 480, 68 L. J. Q. B. 283.

89. Deadwood First Nat. Bank *v.* Gustin Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676; Robertson *v.* Sibley, 10 Minn. 323; Union Sav. Assoc. *v.* Seligman, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776 [*overruling* Griswold *v.* Seligman, 72 Mo. 110]; Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359.

Illustrations.— If a subscription has been made upon a valid condition, so that without complying with the condition the corporation could not enforce it, a creditor cannot. Hahn's Appeal, (Pa. 1886) 7 Atl. 482. So where a subscriber to stock tendered the amount of his subscription to the corporation while it was solvent and demanded a certificate, which was refused, it was held that he was not liable to the assignee in insolvency of the corporation. Potts *v.* Wallace, 32 Fed. 272. So in case of a valid forfeiture by the directors of the shares of the shareholder. Mills *v.* Stewart, 62 Barb. (N. Y.) 444.

of the corporation so discharged, and place the parties *in statu quo*; and the shareholders of the debtor corporation will become, under a constitutional provision, personally liable for their respective proportionate shares of the liability so created or reinstated. The corporation has the same power to bind its shareholders by reinstating the old debt that it would have to create a new one.[90]

6. Liability of Shareholders Where Corporation Embarks in Other Business Than That Authorized by Its Charter. There is judicial authority for the proposition that if a corporation embarks in other business than that authorized by its charter, and incurs indebtedness in that business, its shareholders will, with respect to such indebtedness, be liable as partners;[91] and the contrary has been held.[92] So where a constitutional provision imposes a double liability upon the shareholders of corporations, except those organized for manufacturing purposes, and a corporation organized for such purposes enters upon general merchandising, with respect to indebtedness incurred while so merchandising, its members will incur the liability imposed by the constitutional provision.[93]

7. Where Corporation Is Formed For Illegal Purpose or Enters Upon Illegal Business. It seems that where the formation of the corporation is prohibited by law or public policy,[94] or where a corporation engages in a business which is prohibited by law or public policy,[95] its members become liable as partners;[96] but not so where its shares are void for non-compliance with the provision of its charter.[97]

8. Liability of Sole Shareholder or of Shareholder in "One-Man Corporation." In theory of law, although all the shares pass into the hands of one person, yet so long as the corporate existence is maintained, the liability of this one person as a shareholder and his immunity from such liability are the same as where there are many shareholders.[98] It has been held in conformity with this principle that the sole shareholder of a bank who has received its assets is bound for its debts to the extent of such assets.[99] But this does not exclude the conclusion that a sole shareholder who wrongfully causes the transfer of all the property of the corporation to be made to himself, so as to deprive a creditor of the corporation of the payment of his debt, may be held responsible, not as a shareholder, but as a fraudulent conveyee, for that payment.[1]

9. Shareholders Personally Liable For Their Fraud Committed in Dealing With Corporate Assets. It is not necessary to enlarge upon, or to illustrate the principle that immunity from personal liability does not extend to cases where shareholders use the corporation as a mere cloak for their own fraudulent schemes, and commit frauds in dealing with corporate assets or otherwise, on pretense of acting on behalf of the corporation.[2]

90. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

91. Ridenour *v.* Mayo, 40 Ohio St. 9, 29 Ohio St. 138.

92. Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; Whitwell *v.* Warner, 20 Vt. 425.

93. Mohr *v.* Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074. *Compare* State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

Further as to ultra vires debts see *infra*, VIII, J, 2, b.

94. Empire Mills *v.* Alston Grocery Co., (Tex. App. 1891) 15 S. W. 505, 12 L. R. A. 366 [*affirming* (Tex. App. 1891) 15 S. W. 209].

95. McGrew *v.* City Produce Exch., 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771, stock gambling.

96. But see American Mirror, etc., Co. *v.* Bulkley, 107 Mich. 447, 65 N. W. 291.

97. Tschumi *v.* Hills, 6 Kan. App. 549, 51 Pac. 619. See also Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Andrews *v.* National Foundry, etc., Works, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139; *In re* London, etc., Ins. Corp., L. R. 4 Ch. 682, 21 L. T. Rep. N. S. 182, 17 Wkly. Rep. 751. That the holder of stock in a corporation, part of which is valid and part invalid, cannot require that payments made by him on the latter shall be applied to his valid stock see Kampmann *v.* Traver, (Tex. Civ. App. 1895) 29 S. W. 1144.

98. Louisville Banking Co. *v.* Eisenman, 21 S. W. 531, 14 Ky. L. Rep. 705, 19 L. R. A. 684 [*rehearing denied* in 21 S. W. 1049, 14 Ky. L. Rep. 710]; Salomon *v.* Salomon, [1897] A. C. 22, 66 L. J. Ch. 35, 75 L. T. Rep. N. S. 426, 4 Manson 89, 45 Wkly. Rep. 193.

99. Robertson *v.* Conrey, 5 La. Ann. 297.

1. Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55.

2. Colquitt *v.* Howard, 11 Ga. 556 (persons exercising powers of corporations held to ac-

B. Liability in Equity on Ground That Capital Stock of Corporation Is Trust Fund For Its Creditors — 1. General Doctrine Stated. It is a favorite doctrine of the American courts[3] that the capital stock and other property of a corporation are to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien upon, or right of priority of payment out of, it, in preference to any of the shareholders of the corporation.[4]

2. This Trust Fund Includes Unpaid Subscriptions For Shares — a. In General. This capital stock, it has been said, consists of the money paid in, or authorized or required to be paid in, as the basis of the business of the corporation and the means of conducting its operations.[5] It is an essential part of the doctrine of the preceding section that money agreed to be paid into the corporate treasury by the shareholders for their respective shares is a part of this trust fund.[6] When the liquidation of these unpaid subscriptions becomes necessary to pay the debts of the company, the shareholders cannot be allowed to refuse the payment of

count as trustees); Medill *v.* Collier, 16 Ohio St. 599; Whitwell *v.* Warner, 20 Vt. 425. *Compare* Sisson *v.* Matthews, 20 Ga. 848; Matthews *v.* Stanford, 17 Ga. 543; Tinkham *v.* Borst, 31 Barb. (N. Y.) 407.

Not personally liable for securing to themselves fraudulent preferences.— Whitwell *v.* Warner, 20 Vt. 425, questionable holding.

3. The writer has not found a similar statement of doctrine in any English book of reports. The idea appears to have been invented by Story, J., in Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308, decided in 1824.

4. *Alabama.*— Curry *v.* Woodward, 53 Ala. 371; Smith *v.* Huckabee, 53 Ala. 191; St. Mary's Bank *v.* St. John, 25 Ala. 566; Paschall *v.* Whitsett, 11 Ala. 472; Allen *v.* Montgomery R. Co., 11 Ala. 437.

Connecticut.—Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560.

Georgia.— Beck *v.* Henderson, 76 Ga. 360; Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Robison *v.* Carey, 8 Ga. 527; Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Illinois.— Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129; Tarbell *v.* Page, 24 Ill. 46.

Massachusetts.— Baker *v.* Atlas Bank, 9 Metc. 182; Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505.

Mississippi.— Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74.

Nebraska.— State *v.* Commercial State Bank, 28 Nebr. 677, 44 N. W. 998.

New Jersey.— New York City Nat. Trust Co. *v.* Miller, 33 N. J. Eq. 155.

New York.— Mann *v.* Pentz, 3 N. Y. 415; Hurd *v.* Tallman, 60 Barb. 272; Briggs *v.* Penniman, 8 Cow. 387, 18 Am. Dec. 454; Slee *v.* Bloom, 19 Johns. 456, 10 Am. Dec. 273. In Tinkham *v.* Borst, 31 Barb. 407, the court proceeded on the idea that creditors have an equitable lien upon the assets of a dissolved corporation in the hands of one of its members.

North Carolina.— Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 80, 6 Am. St. Rep. 539.

Ohio.— Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187; Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273, 13 Ohio 197.

Vermont.— Bassett *v.* St. Albans Hotel Co., 47 Vt. 313.

Wisconsin.— Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

United States.— Morgan County *v.* Allen, 103 U. S. 498, 26 L. ed. 498; Sawyer *v.* Hoag, 17 Wall. 610, 21 L. ed. 731; Putnam *v.* New Albany, etc., R. Co., 16 Wall. 390, 21 L. ed. 361; New Albany *v.* Burke, 11 Wall. 96, 20 L. ed. 155; Ogilvie *v.* Knox Ins. Co., 22 How. 380, 16 L. ed. 349; Curran *v.* Arkansas, 15 How. 304, 14 L. ed. 705; Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. ed. 945; Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 743; Main *v.* Mills, 16 Fed. Cas. No. 8,976, 6 Biss. 98; Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,112, 1 Woods 463; Payson *v.* Stoever, 19 Fed. Cas. No. 10,863, 2 Dill. 427; Union Nat. Bank *v.* Douglass, 24 Fed. Cas. No. 14,375, 1 McCrary 86; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308.

5. Farrington *v.* Tennessee, 95 U. S. 679, 24 L. ed. 558.

6. So held in nearly all the cases cited in the preceding section. Also in the following cases:

Alabama.— Allen *v.* Montgomery R. Co., 11 Ala. 437.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Missouri.— Shickle *v.* Watts, 94 Mo. 410.

North Carolina.— Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539.

Wisconsin.— Gogebic Invest. Co. *v.* Iron Chief Min. Co., 78 Wis. 427, 47 N. W. 726, 23 Am. St. Rep. 417; Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

United States.— Washburn *v.* Green, 133 U. S. 30, 10 S. Ct. 280, 33 L. ed. 516; Morgan County *v.* Allen, 103 U. S. 498, 26 L. ed. 498; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220; Sawyer *v.* Hoag, 17 Wall. 610, 21 L. ed. 731; Ogilvie *v.* Knox Ins. Co., 22 How. 380, 16 L. ed. 349; Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,112, 1 Woods 463; Winans *v.* McKean R., etc., Co., 30 Fed. Cas. No. 17,862, 6 Blatchf. 215. But a bond with security, given by the corporators of a savings bank

them, unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash.[7]

b. Former Extent of This Trust-Fund Doctrine. It was also a part of this doctrine that any device by which its members seek to avoid the liability imposed upon them by law is void as to creditors.[8]

c. Recent Qualifications of This Doctrine. But this doctrine, as already seen,[9] has been recently modified by the supreme court of the United States to the extent of holding that, in the absence of circumstances creating an equitable estoppel in favor of the creditor of the corporation and against the shareholder, the latter cannot be compelled to pay, even for the purpose of liquidating the debts of the corporation after its insolvency, anything beyond what the corporation agreed with him to accept as full payment.[10]

d. No Longer a Trust Fund For All of Its Creditors Ratably. It is a necessary part of a doctrine which makes the assets of a corporation a trust fund in equity for its creditors, that such assets are a trust fund for all the creditors of the corporation, to be distributed ratably to those standing in equal equity. This necessarily includes the conclusion that the directors or managers of a corporation cannot, in contemplation of insolvency, so dispose of its assets as to prefer particular creditors and defer others. But a modern inroad upon the doctrine made by several American courts leaves it in the power of a corporation to prefer its creditors, thus placing it, even in contemplation of insolvency, precisely in the same position with respect to its power of disposition of its property as that occupied by a natural person.[11]

3. Shareholders Withdrawing This Trust Fund Bound to Restore It For Benefit of Creditors — a. In General. If a shareholder withdraws this trust fund created by his share subscription, or any part of it, without restoring to the corporation a full and fair consideration for it, he will be held bound to make it good whenever it is necessary to do so for the satisfaction of the creditors of the corporation.[12] Nor have the directors as trustees of this fund any power, except in the way of *bona fide* compromises, to release a subscriber to the fund, either as against creditors or as against other shareholders,[13] or to accept payment of part for the whole.[14]

b. But Not Bona Fide Dividends of Profits. This principle does not extend so far as to require shareholders to surrender, for the benefit of creditors, *bona fide* dividends of profits declared and distributed at a time when the company was solvent and prosperous.[15]

c. Grounds of Equitable Relief Where Capital Stock Is Divided Leaving Debts Unpaid — (i) *In General.* If the capital stock should be divided, leaving any debts unpaid, every shareholder receiving his share of the capital stock would in equity be held liable *pro rata* to contribute to the discharge of such debts out of the fund in his own hands.[16]

to secure depositors therein, is in no sense capital stock of the company. Huntington *v.* District of Columbia Nat. Sav. Bank, 96 U. S. 388, 24 L. ed. 777.

7. Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349.

According to one judicial expression with respect to national banks it also includes the superadded statutory liability of the holders of paid-up shares under U. S. Rev. Stat. § 5151. Stuart *v.* Hayden, 72 Fed. 402, 18 C. C. A. 618.

8. Howe *v.* Illinois Agricultural Works, 46 Ill. App. 85; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203. See also *supra*, VI, M, 1, b, (v), (B) *et seq.*

9. See *supra*, VI, M, 1, i.

10. Hospes *v.* Northwestern Mfg., etc., Co., 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470, where the new doctrine was applied.

11. Hospes *v.* Northwestern Mfg., etc., Co., 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470.

12. St. Marys' Bank *v.* St. John, 25 Ala. 566 (division of assets among shareholders in contemplation of insolvency); Lewis *v.* Robertson, 13 Sm. & M. (Miss.) 558.

13. Rider *v.* Morrison, 54 Md. 429.

14. Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257. See also McAvity *v.* Lincoln Pulp, etc., Co., 82 Me. 504, 20 Atl. 82; Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74.

15. Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308.

16. St. Marys' Bank *v.* St. John, 25 Ala. 566; Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2

(II) *Remedy of Judgment Creditor in Such Case.* Accordingly, when the property has been divided among the shareholders, a judgment creditor, after the return of an execution against the corporation unsatisfied, may maintain a creditor's bill against a single shareholder,[17] or against as many shareholders as he can find within the jurisdiction,[18] to charge him or them to the extent of the assets thus diverted; and it is immaterial whether he got them by fair agreement with his associates or by an act wrongful as against them.

4. This Trust Fund Pursued Only in Equity — a. In General. In the absence of special statutory provisions this trust fund can in general be reached only by appropriate proceedings in equity.[19]

b. Grounds on Which Courts of Equity Proceed. In affording relief to creditors of corporations on this ground, courts of equity proceed on the familiar principle that whoever is found in possession of a trust fund, under circumstances which charge him with knowledge of the trust, is bound to account as trustee to those beneficially interested in such fund.[20] Whenever shareholders have in their possession any of this trust fund they hold it *cum onere*, subject to all the equities which attach to it;[21] and they stand in such a relation of privity with the corporation that their dealings with it will be subjected to close scrutiny where the rights of its creditors are involved.[22]

c. Grounds of Equitable Relief Where Stock Is Not Paid in — (I) *In General.* If the shareholders are indebted to the corporation on account of subscriptions made by them to the capital stock, and the board of directors fail or refuse to raise the money to pay such debts, by making and enforcing against the members the necessary assessments, a court of equity will interfere, and either

Am. Rep. 563; Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505; Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308; Story Eq. Jur. § 1252. See also Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121; Tinkham *v.* Borst, 31 Barb. (N. Y.) 407.

17. Hastings *v.* Drew, 76 N. Y. 9; Bartlett *v.* Drew, 57 N. Y. 587 [*affirming* 4 Lans. (N. Y.) 444, 60 Barb. (N. Y.) 648].

18. Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308.

That a receiver of the assets of the corporation has an equitable lien on assets so improperly distributed among the shareholders see Heman *v.* Britton, 88 Mo. 549 [*reversing* 14 Mo. App. 121]. See also *In re* National Funds Assur. Co., 10 Ch. D. 118, 48 L. J. Ch. 163, 39 L. T. Rep. N. S. 420, 27 Wkly. Rep. 302.

That this remedy to compel restoration of capital improperly divided is available only in equity see Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505. *Compare* Gifford *v.* Thompson, 115 Mass. 478.

Construction of a statute making shareholders liable where corporate funds have been improperly diverted to the payment of dividends, with the conclusion that the word "funds" means resources. Miller *v.* Bradish, 69 Iowa 278, 28 N. W. 594.

That this rule is not varied by a public registration of the shares see Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593.

19. See Practical Knowledge Soc. *v.* Abbott, 2 Beav. 559, 4 Jur. 453, 9 L. J. Ch. 307, 17 Eng. Ch. 559; Wallworth *v.* Holt, 4 Myl. & C. 619, 18 Eng. Ch. 619. Therefore there was no remedy in Massachusetts until the system of equity was adopted by statute. Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505.

20. St. Marys' Bank *v.* St. John, 25 Ala. 566; Calhoun *v.* King, 5 Ala. 523; Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308; Adair *v.* Shaw, 1 Sch. & Lef. 266; Hill *v.* Simpson, 7 Ves. Jr. 152, 6 Rev. Rep. 105.

21. Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 313.

22. See the observations of Miller, J., upon this subject in Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731 [*citing* Lawrence *v.* Nelson, 21 N. Y. 158].

For an illustration of proceeding in equity to compel shareholders to account for diversions of this fund see Hancock *v.* Holbrook, 40 La. Ann. 53, 3 So. 351; McKusick *v.* Seymour, 48 Minn. 172, 50 N. W. 1116. See also Horner *v.* Carter, 11 Fed. 362, 3 McCrary 595.

For decisions illustrating the scope of equitable relief where there has been a fraudulent conversion of corporate property see the following cases:

Alabama.— Allen *v.* Montgomery R. Co., 11 Ala. 437.

Georgia.— Hightower *v.* Mustian, 8 Ga. 506.

Mississippi.— Wright *v.* Petrie, Sm. & M. Ch. 282.

New York.— Nathan *v.* Whitlock, 9 Paige 152.

United States.— Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276, 10 S. Ct. 550, 33 L. ed. 900.

compel the directors to perform this duty, or, according to the modern practice, perform it by its own proper officers.[23]

(II) *Equity Will Compel Directors to Make Assessments.* The power of the directors to make assessments upon shares, when necessary to discharge the debts of the corporation, is not discretionary in the sense of being beyond the control of a court of justice.[24] But courts of equity will compel the exercise of the power or exercise it themselves.[25]

(III) *Or Make Assessments by Its Own Methods.* Or what is now the more frequent practice the court will make an assessment by its own methods, ordering the shareholders to pay the amount assessable against them severally to the receiver,[26] the assignee for creditors,[27] or even to the complainant.[28]

d. Reference to Master — (I) *In General.* According to the usual practice of a court of equity a reference will be made to a master to ascertain and report the amount of the debt, and the proportion of it with which each of the shareholders should be charged.[29]

(II) *Where Corporation Is in Hands of Receiver.* This will be done where the corporation is in the hands of a receiver; and the proper course is said to be for the receiver to procure an order on the shareholders to show cause why a call should not be made, and for the court, on the return-day of the order, after hearing the parties, to grant or refuse the order of assessment.[30]

(III) *In Case of Assignment For Benefit of Creditors.* Where an assignment has been made by an insolvent corporation for the benefit of its creditors, it is competent for the superintending court to make an order requiring the payment of unpaid share subscriptions.[31]

23. Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593; Henry *v.* Vermilion, etc., R. Co., 17 Ohio 187; Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57, 62; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 330, 16 L. ed. 349; Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,112, 1 Woods 463.

24. See Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,112, 1 Woods 463 (per Bradley, J.); Reg. *v.* Victoria Park Co., 1 Q. B. 287, 292, 41 E. C. L. 544 (per Lord Denman, C. J.).

25. *Alabama.*— Allen *v.* Montgomery R. Co., 11 Ala. 437, 449, per Goldthwaite, J.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412, leading case where the doctrine takes root.

Minnesota.—*In re* Minnehaha Driving Park Assoc., 53 Minn. 423, 55 N. W. 598 (under a statute); Marson *v.* Deither, 49 Minn. 423, 52 N. W. 38.

New Jersey.— Falk *v.* Whitman Cigar Co., 55 N. J. Eq. 396, 36 Atl. 1094.

New York.— Briggs *v.* Penniman, 8 Cow. 387, 18 Am. Dec. 454; Slee *v.* Bloom, 19 Johns. 456, 10 Am. Dec. 273.

Ohio.— Henry *v.* Vermilion, etc., R. Co., 17 Ohio 187.

Washington.—McKay *v.* Elwood, 12 Wash. 579, 41 Pac. 919.

United States.— Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380, 387, 16 L. ed. 349 (in which Grier, J., said that a bill filed for this purpose was in the nature of an attachment, in which the shareholders are called on to answer as garnishees of the principal debtor); Furnald *v.* Glenn, 56 Fed. 372.

England.— Salmon *v.* Hamborough Co., 1 Ch. Cas. 204, 1 Kyd Corp. 273.

26. See *infra*, VIII, B, 4, d, (II).

27. See *infra*, VIII, B, 4, d, (III).

28. Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 484, 10 Am. Dec. 273.

29. Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454.

30. Falk *v.* Whitman Cigar Co., 55 N. J. Eq. 396, 36 Atl. 1094.

31. *In re* Minnehaha Driving Park Assoc., 53 Minn. 423, 55 N. W. 598 (statutory assignment for benefit of creditors); Marson *v.* Deither, 49 Minn. 423, 52 N. W. 38; McKay *v.* Elwood, 12 Wash. 579, 41 Pac. 919 (by direction of the court, after the execution of a common-law assignment for creditors by the corporation makes the subscribers liable as for a debt presently due).

The authority of the court to order the assessment depends upon the question whether it is necessary to assess the shareholders in order to raise money to liquidate the debts of the corporation. *In re* Minnehaha Driving Park Assoc., 53 Minn. 423, 55 N. W. 598.

Such an assessment does not determine the liability of any particular shareholder, but merely has the effect of making due and payable whatever he may be liable for under the call, so that suit may be brought therefor by the assignee. *In re* Minnehaha Driving Park Assoc., 53 Minn. 423, 55 N. W. 598.

If the court makes an excessive assessment upon the unpaid shares, this does not violate the substantial rights of the shareholders, since the excess will be repaid to them upon distribution, although no more should be called than is necessary to pay the debts of the corporation and the costs of the winding-up proceedings. Furnald *v.* Glenn, 56 Fed. 372.

(iv) *Conclusiveness of Call When Ordered by Court.* The propriety of the assessment ordered by the court appointing a receiver of an insolvent corporation cannot be questioned, in an action by the receiver to collect the assessment.[32]

(v) *Power of Directors to Make Calls Ceases With Commencement of Winding-Up Proceedings.* The power of the directors to make assessments on the shares comes to an end *ipso facto* with the making of a judicial order to wind up the corporation.[33]

(vi) *Whether Call or Assessment Necessary After Commencement of Winding-Up Proceedings.* No call or assessment by the directors is necessary before the institution of suits to collect unpaid balances on subscriptions to capital stock of a corporation, where the corporation has become insolvent and proceedings have been instituted by creditors to wind up and distribute its assets.[34]

5. Creditors Entitled to Share Ratably. The mere statement that the capital stock of a corporation is a trust fund in equity for its creditors carries with it the conclusion that all the beneficiaries of the trust — all the creditors — are entitled to share ratably in its distribution, according to the principles upon which courts of equity proceed in the distribution of equitable assets;[35] and such is the rule, with confusing exceptions[36] growing out of theories of the right of a corporation to prefer its creditors, which will be hereafter discussed.[37]

C. Liability For Debts Incurred Before Organization — 1. General Doctrine That Members Are in Such Cases Liable as Partners — a. Statement of Doctrine. It is a general principle that until a corporation is legally organized the coadventurers will be liable as partners for all debts contracted on behalf of the aggregate body, with their consent, either express or implied.[38]

b. When Partners Liable by Estoppel After Incorporation. Where partners have dealt as such with a third person who has sold goods to them, and after

32. Rand *v.* Mutual F. Ins. Co., 58 Ill. App. 528.

33. Fowler *v.* Broad's Patent Night Light Co., [1893] 1 Ch. 724, 62 L. J. Ch. 373, 68 L. T. Rep. N. S. 576, 3 Reports 295, 41 Wkly. Rep. 247.

34. Ross-Meehan Brake-Shoe Foundry Co. *v.* Southern Malleable Iron Co., 72 Fed. 957.

35. Rieper *v.* Rieper, 79 Mo. 352; Heiman *v.* Fisher, 11 Mo. App. 275; Purdy *v.* Doyle, 1 Paige (N. Y.) 558; Morrice *v.* Bank of England, Cas. t. Talb. 218; Story Eq. Jur. § 544. See further as to the general rule Atlas Bank *v.* Nahant Bank, 3 Metc. (Mass.) 581; Codwise *v.* Gelston, 10 Johns. (N. Y.) 507; McDermutt *v.* Strong, 4 Johns. Ch. (N. Y.) 687.

36. Wetherbee *v.* Baker, 35 N. J. Eq. 501.

37. See *infra*, XX, B, 1, a *et seq.*

That the directors may become personally liable for a breach of this trust and duty of distributing ratably see Graham *v.* Hoy, 38 N. Y. Super. Ct. 506.

38. *Florida.*— Taylor *v.* Branham, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362.

Illinois.— McDowell *v.* Joice, 149 Ill. 124, 36 N. E. 1012.

Iowa.— Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85.

Kentucky.— Cincinnati Cooperage Co. *v.* Bate, 96 Ky. 356, 26 S. W. 538, 16 Ky. L. Rep. 626, 49 Am. St. Rep. 306, where the directors changed the corporate name without complying with the statute, and the shareholders were held liable on the ground of disincorporation.

Mississippi.— Perkins *v.* Rouss, 78 Miss. 343, 29 So. 92.

Missouri.— Martin *v.* Fewell, 79 Mo. 401; Kimball *v.* Davis, 52 Mo. App. 194 (failure to file statutory notice of the amount of capital stock, and holding that a substantial mistake in stating the amount of capital stock leaves the shareholders liable, whether a typographical error or not).

New York.— Fuller *v.* Rowe, 57 N. Y. 23.

Pennsylvania.— Guckert *v.* Hacke, 159 Pa. St. 303, 28 Atl. 249, 34 Wkly. Notes Cas. 41 (those who transact business upon the strength of a corporate organization which is materially defective are liable as partners); McFall *v.* McKeesport, etc., Ice Co., 123 Pa. St. 259, 16 Atl. 478, 23 Wkly. Notes Cas. 146.

Wisconsin.— Bergeron *v.* Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85, omission to file papers required by statute as a condition precedent — corporation not such *de facto*.

That it is necessary to show that the shareholder was acting as a partner at the time the contract was made or that upon some consideration he consented to be liable with the other shareholders see Fuller *v.* Rowe, 57 N. Y. 23.

For an agreement by which the members of an expired corporation created an agent to renew and carry on the business, and thereby became liable as partners for his

becoming incorporated they continue to deal with him as before, having their bills made in the same way, without apprising him of their altered condition, they will continue to be liable to him as partners under the principle of estoppel, unless he have actual knowledge, derived from some other source, of the fact of their having become incorporated.[39] Somewhat opposed to the foregoing, it has been held that the failure of an association organized under a statute to record its articles of incorporation before the commencement of negotiations for the purchase of goods, which culminated in a contract with the association after the articles were recorded, does not render its members liable as individuals or general partners for the goods so purchased and delivered.[40]

c. Liability of Members of Joint-Stock Company Afterward Incorporated. If an unincorporated joint-stock company contracts liabilities, and afterward becomes incorporated and assigns its property to the corporation, the members of the unincorporated association remain primarily and jointly and severally liable for the debts so contracted. The responsibility of the corporation for debts so contracted by the voluntary association does not become substituted, without the consent of the creditors, so as to exempt the members from individual liability.[41] But the corporation which thus steps into the shoes of the joint-stock company and accepts an assignment of its property becomes also primarily liable for the existing indebtedness of the company. The creditors thus retain the same security which they had before, namely, the property of the joint-stock company, now that of the corporation, and the individual liability of the members of the joint-stock company, who now become corporators.[42] But existing creditors of the joint-stock company may, by acts which indicate a clear understanding that the credit of the corporation is substituted for that of the partners, discharge the latter from personal liability for the partnership debts, as by continuing with the corporation their previous course of dealing with the partnership and transferring on their books their account against the partnership to their account against the corporation.[43]

2. Distinction Between Prerequisite Steps Necessary to Incorporation and Directory Provisions — a. In General. This distinction relates to cases where attempts are made to create corporations in pursuance of general enabling statutes, and cases where there has been an incorporation by a special act of the legislature. In the former case the enabling statute prescribes the taking of certain steps which are either by the express terms of the statute or by its reasonable construction a condition precedent to the coming into existence of the corporation; so that until those steps are taken the coadventurers do not acquire an exemption from individual liability for debts incurred with their sanction, in behalf of the supposed corporation.[44]

b. Failure to File Articles of Incorporation — (i) *In General.* The requirement of most of these general enabling acts that articles of incorporation shall be

undertakings, see National Union Bank *v.* Landon, 45 N. Y. 410.

For an example of a promissory note drawn by the master and indorsed by the treasurer of a masonic lodge, on which the members of the lodge were held liable, see Ferris *v.* Thaw, 72 Mo. 446 [*affirming* 5 Mo. App. 279], the members of the lodge being charged on the theory of being undisclosed principals.

39. Goddard *v.* Pratt, 16 Pick. (Mass.) 412, 28 Am. Dec. 259; Martin *v.* Fewell, 79 Mo. 401; Whitwell *v.* Warner, 20 Vt. 425.

40. Durham Fertilizer Co. *v.* Clute, 112 N. C. 440, 17 S. E. 419; Hinds *v.* Battin, 163 Pa. St. 487, 30 Atl. 164, 35 Wkly. Notes Cas. (Pa.) 350.

41. Goddard *v.* Pratt, 16 Pick. (Mass.) 412, 28 Am. Dec. 259; Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209; Broyles *v.* McCoy, 5 Sneed (Tenn.) 602.

42. Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209.

43. Whitwell *v.* Warner, 20 Vt. 425, opinion by Redfield, J.

44. Bigelow *v.* Gregory, 73 Ill. 197; Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85. See further Harris *v.* McGregor, 29 Cal. 124; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Granby Mining, etc., Co. *v.* Richards, 95 Mo. 106, 8 S. W. 246; Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416. But *compare* Krutz *v.* Paola Town Co., 20 Kan. 397; Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Eaton *v.* Aspinwall, 19 N. Y. 119.

filed in a certain public office,[45] or with the secretary of state,[46] falls within the class of mandatory provisions without compliance with which there is no incorporation, and the coadventurers remain liable as partners;[47] but this is not true where the frame of language employed by the statute does not necessarily imply that the filing of articles shall be a prerequisite to the assumption of corporate powers.[48]

(II) *Debts Contracted After Articles Filed, but Before Payment For Shares.* After the articles of incorporation have been filed in compliance with the governing statute, individual liability for the debts contracted by or on behalf of the corporation ceases, even in respect to members who have not paid up their share subscriptions,[49] unless the statute in terms makes them liable until such payment.[50]

e. Failure to Publish Articles or Notice of Incorporation. This is not a prerequisite to the coming into existence of the corporation, such as leaves shareholders liable for its debts as partners.[51] Even if the rule were otherwise no debt is created, within the meaning of such a statute, by the mere making of an executory contract for the purchase of goods, until the contract has been broken, so as to make the shareholders liable for the debt thereby created, under a statute, by reason of not having given notice of their corporate character by the filing of a certificate.[52]

d. Failure to Keep Corporate Books. A failure to keep corporate books as required by a statute does not render the shareholders liable for the debts of the corporation.[53]

e. Failure to Post By-Laws. A failure to post by-laws as required by a statute does not render the shareholders liable for the debts of the corporation.[54]

f. Failure to File Certificate With County Clerk. A failure to file the certificate of incorporation with the clerk of the county where the principal business of the corporation is to be carried on, as required by a statute, does not leave the corporators liable for debts of the corporation.[55]

3. Increasing Capital Stock Under General Law — a. In General. Where a corporation has been organized under a special charter granted by the legislature, and proceeds to increase its capital stock under the provisions of a general law, this is tantamount to a reincorporation under the general law; so that if there is a failure to pay in the full amount of the increased capital, and to file a certificate thereof as required by the general law, the subscribers to the increase of stock will become individually liable for the subsequent debts of the company to the full extent of the amount subscribed by them respectively.[56] If the liability under the general law is a superadded individual liability, the subscribers to the invalid increase of shares will become individually liable.[57]

45. Bigelow *v.* Gregory, 73 Ill. 197.

46. Hurt *v.* Salisbury, 55 Mo. 310. See also Harris *v.* McGregor, 29 Cal. 124; Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416.

47. The same has been held of a statute prescribing that in case of a banking corporation certain securities shall be deposited in a public depository. Medill *v.* Collier, 16 Ohio St. 599.

48. McClain Anno. Code Iowa, § 1611; Iowa Code (1873), § 1061.

49. Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101.

50. Such was the statute of Massachusetts construed and applied in Barre First Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563.

51. Clark *v.* Richardson, 31 S. W. 878, 17 Ky. L. Rep. 514.

52. Wing *v.* Slater, 19 R. I. 597, 35 Atl. 302, 33 L. R. A. 566.

53. Langan *v.* Iowa, etc., Constr. Co., 49 Iowa 317.

54. Langan *v.* Iowa, etc., Constr. Co., 49 Iowa 317; McKellar *v.* Stout, 14 Iowa 359.

55. Jones *v.* Butler, 146 N. Y. 55, 40 N. E. 633 [*reversing* 83 Hun (N. Y.) 91, 41 N. Y. Suppl. 401, 63 N. Y. St. 814].

Where the corporation does business in two counties, evidence that the certificate required by statute to be filed by the corporation has not been filed in one of the counties is *prima facie* evidence that no certificate has been filed. Maher *v.* Carman, 38 N. Y. 25.

56. Tibballs *v.* Libby, 87 Ill. 142.

57. Butler *v.* Walker, 80 Ill. 345. *Compare* Sayles *v.* Brown, 40 Fed. 8. That no liability with respect to an increase of shares, because of a failure to file a certificate of the increase, can attach to a member of the company until it is proved that he is

b. Liability in Case of Increase of Shares Until Whole Amount Has Been Paid in. A statute requiring in the case of an increase of capital the payment of the full amount, and the filing and recording of a certificate to that effect, means that until the certificate has been filed and recorded a shareholder remains liable for debts contracted after the increase, although in point of fact he may have paid in full his subscription to the increased shares;[58] and until all the shares as increased are paid for the members are severally liable for the corporate debts.[59]

4. Statutory Liability Until Capital Paid and Certificate Thereof Filed — a. In General. Another statutory provision existing in several of the states is to the effect that until the capital stock of a corporation shall have been paid in, and a certificate thereof filed in some office of public registration, the shareholders shall be individually liable for its debts.[60] Under some of these statutes the liability attaches to the shareholders, although for other purposes the corporation may have acquired a valid organization,[61] and although the contract may not be *ultra vires*, but may be enforceable by the corporation on its part.[62] As in the case of some other like statutes, the effect of the omission is not to invalidate contracts made by the corporation until the condition is complied with, but is to leave the members liable to answer for them.[63] On the other hand such a statute[64] has been held to mean that the several shareholders of a corporation are individually liable until the whole amount of its capital stock shall have been paid in for any debts of the corporation contracted before that time, and that the subsequent paying in of all the stock terminates the liability. If therefore the whole capital stock of a company was paid in before the trial of a suit brought by a creditor against a shareholder under this statute, the antecedent liability of defendant having thus terminated, plaintiff could not proceed to judgment.[65] And where the statute[66] provides that the shareholders shall be liable until the whole amount of the capital stock shall be paid in, and further provides that it shall be paid in within two years, the creditor is not bound to wait until the expiration of that time before proceeding against a shareholder.[67]

b. Statute Must Be Complied With Both as to Payment and Recording, Etc. The fact that the capital may have been paid in will not exonerate the shareholders, unless the statutory certificate is made and recorded within the pre-

a holder of a part of the increased shares see Griffeth *v.* Green, 129 N. Y. 517, 29 N. E. 838, 42 N. Y. St. 101 [*affirming* 13 N. Y. Suppl. 470, 37 N. Y. St. 705].

58. Butler *v.* Walker, 80 Ill. 345.

59. Booth *v.* Campbell, 37 Md. 522.

60. Salem First Nat. Bank *v.* Almy, 117 Mass. 476; Hawes *v.* Anglo-Saxon Petroleum Co., 111 Mass. 200.

61. Baker *v.* Backus, 32 Ill. 79.

62. Chase's Patent Elevator Co. *v.* Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. 300.

63. Chase's Patent Elevator Co. *v.* Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. 300, 9 L. R. A. 339.

64. Md. Code (Suppl. 1868), art. 26.

65. Booth *v.* Campbell, 37 Md. 522.

66. N. Y. Laws (1848), c. 40, § 10.

67. King *v.* Duncan, 38 Hun (N. Y.) 461.

Construction of New York Insurance Law making corporators jointly and severally liable until the whole amount of the "capital raised" has been paid in, etc. Chase *v.* Lord, 77 N. Y. 1 [*reversing* 16 Hun (N. Y.) 369, Earl, Folger, and Miller, JJ., dissenting].

Where the coadventurers embark upon the corporate business without paying in anything, they render themselves liable to creditors to make good the minimum capital prescribed by the governing statute. Burns *v.* Beck, 83 Ga. 471, 10 S. E. 121.

Payment by a single subscriber of the amount subscribed by him does not exonerate him from personal liability where the statute requires the whole amount of the capital to be paid in, and a certificate thereof recorded; and this extends to a superadded personal liability. Butler *v.* Walker, 80 Ill. 345 [*reaffirmed* in Tibbals *v.* Libby, 87 Ill. 412].

Constitutionality of statute.— That a general statute making directors and shareholders liable for the debts of the corporation, where it was organized under a special charter before the passage of the general statute, because of the capital stock not having been wholly paid in, is not unconstitutional in this application of it see Black *v.* Womer, 100 Ill. 328; Gulliver *v.* Roelle, 100 Ill. 141.

Prima facie evidence and burden of proof in order to charge a shareholder under such a statute — burden on plaintiff, although necessary to prove a negative. Chase *v.* Lord, 77 N. Y. 1, 6 Abb. N. Cas. (N. Y.) 258; Bruce *v.* Driggs, 25 How. Pr. (N. Y.) 71. See also Taylor *v.* New England, etc.,

scribed time;[68] nor will the recording of a certificate which is merely acknowledged but not sworn to, as required by the statute, exonerate them.[69]

c. Effect of Issuing Shares as Fully Paid Which Have Not Been Fully Paid. It is further held that proof that shares of stock of the company have been issued as fully paid, when they have not been fully paid, establishes fraud in law, and it is not necessary to supplement this by proving an actual fraudulent intent. So also if it be shown that the shares were issued in exchange for property, with a knowledge on the part of the trustees of the corporation that the value of the property was much less than the par value of the shares, no other fraudulent intent need be shown to authorize a recovery against a shareholder, under the statute, than such as is evidenced by such action.[70]

d. Payment in Worthless Inventions. The payment of the stock exacted by this statute may be either a payment in money or in property honestly regarded as a fair equivalent of money; and where payment had been made, not in cash, but in the transfer to a corporation of certain worthless inventions, a verdict of a jury against a shareholder was sustained, the evidence being, in the view of the court, "sufficient, if not overwhelming."[71]

e. Extraterritorial Effect of Statutes of This Kind. Statutes of the kind under consideration, making the shareholders liable for all debts and contracts made by the company before the capital stock has been paid in and a certificate thereof made and recorded, etc., fall within the class of statutes which are construed as remedial, and not as penal,[72] and are consequently enforced by the courts of other states than those enacting them.[73]

f. Rule Where There Is No Such Statute. If there is no statute such as we are considering the fact that the corporation commences business after a part only of its authorized or potential stock has been subscribed for does not make or leave its members liable as partners for its debts.[74]

5. Rule in Case of De Facto Corporations. In the absence of explicit statutory requirements varying this conclusion, the rule is that although there may have been irregularities in the steps taken to create the corporation, yet where there has been an imperfect organization the members will not be liable to creditors as partners.[75]

6. Liability of Corporators For Debts Contracted Before Shares Distributed. Where an association of persons have complied with the provisions of the law necessary to constitute them a corporation, and have fixed the amount of their capital stock, but have not divided it, and in this situation contract debts, the individual members are jointly and severally liable for such debts.[76]

7. Conclusiveness of Certificate of Incorporation. Upon principles already considered[77] the certificate of incorporation, usually issued by the secretary of

Co., 4 Allen (Mass.) 577. For an instruction to a jury to this effect which met with judicial approval see Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416.

68. Plass *v.* Housman, 2 N. Y. Suppl. 235, 17 N. Y. St. 671.

69. Hardman *v.* Sage, 124 N. Y. 25, 26 N. E. 354, 35 N. Y. St. 54.

70. National Tube-Works Co. *v.* Gilfillan, 124 N. Y. 302, 26 N. E. 538, 35 N. Y. St. 357.

71. National Tube-Works Co. *v.* Gilfillan, 124 N. Y. 302, 26 N. E. 538, 35 N. Y. St. 357.

Entering upon business with a less capital than that prescribed in special act of incorporation — liable as partners to the extent of making good the deficiency. Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209. But see South Carolina Mfg. Co. *v.* State Bank, 6 Rich. Eq. (S. C.) 227, where the same court holds that in such a case the solvent shareholders are not bound to make up the deficiencies of the insolvent ones.

72. See *infra*, VIII, E, 2; VIII, E, 3.

73. Flash *v.* Conn, 16 Fla. 428, 26 Am. Rep. 721. *Compare* Sayles *v.* Brown, 40 Fed. 8.

74. Thornton *v.* Balcom, 85 Iowa 198, 52 N. W. 190; Sweney *v.* Talcott, 85 Iowa 103, 52 N. W. 106.

75. Bendall *v.* Jackson, 11 Pa. Co. Ct. 183 (mistake occurring in the office of the secretary of state); Seymour Opera-House Co. *v.* Wooldridge, (Tex. Civ. App. 1895) 31 S. W. 234; Stokes *v.* Findlay, 23 Fed. Cas. No. 13,478, 4 McCrary 205.

76. Salem First Nat. Bank *v.* Almy, 117 Mass. 476; Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385, 111 Mass. 200.

77. See *supra*, I, M, 7.

state, is a quasi-adjudication of the fact that the corporation has been formed; so that one who afterward gives credit to it as a corporate body cannot support an action against its members by proving that notwithstanding its certificate of incorporation certain prerequisites of the law authorizing its incorporation had not been complied with.[78] In such a case the validity of the existence of the corporation can only be contested by the state.[79]

8. ESTOPPELS AGAINST RAISING QUESTION OF VALIDITY OF CORPORATE EXISTENCE — a. When Shareholders Estopped. Under many circumstances the shareholders will be estopped from setting up the want of such a compliance with the law as is necessary to call the corporation into existence for the purpose of escaping their liability as shareholders, thereby taking advantage of their own wrong.[80]

b. When Creditor Estopped by Reason of Having Contracted With Corporation as Such — (I) *IN GENERAL.* If the corporation is such *de facto*, in other words, is a body which might exist under the laws of the jurisdiction, and is in the exercise of corporate franchises, the general rule is that one who contracts with it, and who extends credit to it as an artificial body, becomes thereby estopped from questioning its corporate existence, and consequently from attempting to enforce the contract against its members as partners or original undertakers.[81]

(II) *THIS RULE VARIED BY STATUTES.* But it is to be carefully kept in mind that this rule is here and there varied by statutes, such as have the effect of making the members of defective corporations, such as but for the statute would be regarded as corporations *de facto*, personally liable for their debts.[82]

(III) *DOCTRINE OF SOME COURTS THAT MEMBERS OF ABORTIVE CORPORATIONS ARE NOT LIABLE AS PARTNERS GENERALLY OR SPECIALLY.* Contrary to the foregoing we find that some courts proceed upon the ground that in

78. Laflin, etc., Powder Co. *v.* Sinsheimer, 46 Md. 315, 24 Am. Rep. 522. See also on a similar case American Salt Co. *v.* Heidenheimer, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. Rep. 743.

79. Laflin, etc., Powder Co. *v.* Sinsheimer, 46 Ind. 315, 25 Am. Rep. 522. To the proposition that where a corporation has acquired a formal or colorable existence, its right to exist cannot be challenged in a collateral proceeding so long as the state acquiesces, see also the following cases:

Alabama.— Duke *v.* Cahawba Nav. Co., 16 Ala. 372; Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Massachusetts.— Charles River Bridge *v.* Warren Bridge, 7 Pick. 344.

New Hampshire.— State *v.* Carr, 5 N. H. 367.

New York.— Jones *v.* Dana, 24 Barb. 395.

North Carolina.— Tar River Nav. Co. *v.* Neal, 10 N. C. 520.

Pennsylvania.— Centre, etc., Turnpike Road Co. *v.* McConaby, 16 Serg. & R. 140.

80. For pertinent illustrations see McDougald *v.* Lane, 18 Ga. 444; McDougald *v.* Bellamy, 18 Ga. 411; Hammond *v.* Straus, 53 Md. 1 (where, however, the statutory requirements were construed as conditions subsequent).

81. *Alabama.*— Cory *v.* Lee, 93 Ala. 468, 8 So. 694; Snider's Sons' Co. *v.* Troy, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515.

Georgia.— Planters', etc., Bank *v.* Padgett, 69 Ga. 159.

Michigan.— Merchants', etc., Bank *v.* Stone, 38 Mich. 779.

New Jersey.— Stout *v.* Zulick, 48 N. J. L. 599, 7 Atl. 362.

Texas.— American Salt Co. *v.* Heidenheimer, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. Rep. 743.

United States.— Whitney *v.* Wyman, 101 U. S. 392, 25 L. ed. 1050; Gartside Coal *v.* Maxwell, 22 Fed. 197.

See also Fox *v.* McComb, 17 N. Y. Suppl. 783, 44 N. Y. St. 178.

The reasons in support of this doctrine are that the corporate character of a corporation which has had a *de facto* existence for a considerable time cannot be collaterally assailed by persons who contracted with it in its corporate capacity, relying upon the corporate credit, in order to hold a shareholder thereof individually liable on account of the failure to observe the statutory requirements essential to constitute a *de jure* corporation. Hogue *v.* Capital Nat. Bank, 47 Nebr. 929, 66 N. W. 1036, well set forth by Clopton, J., in Snider's Sons' Co. *v.* Troy, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515.

82. See and *compare* the following cases:

Arkansas.—Garnett *v.* Richardson, 35 Ark. 144.

Illinois.— Bigelow *v.* Gregory, 73 Ill. 197.

Indiana.— Coleman *v.* Coleman, 78 Ind. 344.

Iowa.— Thornton *v.* Balcom, 85 Iowa 198, 52 N. W. 190; Heuer *v.* Carmichael, 82 Iowa 288, 47 N. W. 1034.

the case of a defectively organized corporation the members do not become liable for debts contracted in its behalf, as partners, generally or specially,[83] because they have not agreed to become such and have not held themselves out as such to the other contracting party, and for the further reason that a partnership is not formed by an abortive attempt to form a corporation.[84]

D. Constitutional Provisions Creating and Abolishing Individual Liability — 1. Description of These Provisions — a. Nature and Extent of Liability Created Thereby. Constitutional provisions have been established in many states designed to secure the creditors of corporations by providing for a superadded individual liability. The following may be taken as a model: "Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."[85]

b. Meaning of Word "Dues" in Such Provision. The word "dues" in such a provision makes the shareholders liable for all contracted liabilities of the corporation, but not for unauthorized or *ultra vires* engagements made by its officers,[86] even though the corporation itself may be estopped from repudiating the contract by reason of having received the benefit of it.[87]

2. Constitutional Provisions Restricting Liability to Unpaid Subscriptions. Other constitutional provisions designed to attract incorporated capital into the state declare a liability to the amount of shares subscribed for or held, and no more, thus: "Dues from private corporations shall be secured by such means as may be prescribed by law; but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."[88]

3. Constitutional Provisions Securing Debts Due For Labor. Constitutional provisions also exist securing debts due by corporations and joint-stock associations for labor, by an individual liability of their shareholders.[89]

4. Constitutional Provisions For Proportional Individual Liability. A provision of this nature is found in the constitution of California.[90]

5. Constitutional Provisions Securing Creditors of Banking Companies. Numerous constitutional provisions have been established especially relating to banking

Nebraska.— Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416.

83. Blanchard *v.* Kaull, 44 Cal. 440; Stafford Nat. Bank *v.* Palmer, 47 Conn. 443; Salem First Nat. Bank *v.* Almy, 117 Mass. 476; Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; Fay *v.* Noble, 7 Cush. (Mass.) 188; Central City Sav. Bank *v.* Walker, 66 N. Y. 424.

84. Blanchard *v.* Kaull, 44 Cal. 440. See also *supra*, I, Q, 7, c, (VI).

85. *California.*— Const. (1849), art. 4, § 32; Const. (1879), art. 12, § 2.

Indiana.— Const. (1851), art. 11, § 14.

Kansas.— Const. (1859), art. 12, § 2. Hence a provision in a Kansas charter that the shareholders shall not be individually liable for the corporate debts is unconstitutional; but it may be rejected and does not invalidate the organization. Aultman *v.* Waddle, 40 Kan. 195, 19 Pac. 730.

Montana.— Const. (1889), art. 15, § 19.

North Carolina.—Const. Amendm. (1876), art. 8, § 2.

South Carolina.— Const. (1868), art. 12, § 4.

In Missouri the following cases apply to the Missouri constitution of 1865: State Sav. Assoc. *v.* Kellogg, 63 Mo. 540; Blakeman *v.* Benton, 9 Mo. App. 107; Pickering *v.* Templeton, 2 Mo. App. 424.

The abolition of this double liability by constitutional amendment leaves shareholders liable as at common law to the extent of their unpaid shares and no more. Gausen *v.* Buck, 68 Mo. 545; Schricker *v.* Ridings, 65 Mo. 208.

86. Ward *v.* Joslin, 100 Fed. 676 [*affirmed* in 105 Fed. 224, 44 C. C. A. 456].

87. Ward *v.* Joslin, 105 Fed. 224, 44 C. C. A. 456.

88. *Alabama.*— Const. (1875), art. 14, § 8.

Idaho.— Const. (1889), art. 11, § 17.

Minnesota.— Const. (1857), art. 10, § 3.

Missouri.— Const. (1875), art. 12, § 9.

Nebraska.— Const. (1875), art. 11, § 4 (in special and particular language); Gorder *v.* Connor, 56 Nebr. 781, 77 N. W. 383.

Nevada.— Const. (1864), art. 8, § 3.

Oregon.— Const. (1857), art. 11, § 3.

South Carolina.— Const. (1868), art. 12, §§ 4, 5; Flenniken *v.* Marshall, 43 S. C. 80, 20 S. E. 788, 28 L. R. A. 402.

Washington.— Const. (1889), art. 12, § 4, "except banking and insurance companies."

West Virginia.— Const. (1872), art. 11, § 2.

89. Mich. Const. (1850), art. 15, § 7.

As to liability for "labor debts" see *infra*, VIII, K, 1, a *et seq.*

90. See Larrabee *v.* Baldwin, 35 Cal. 155; Borland *v.* Haven, 37 Fed. 394, 13 Sawy.

companies, securing the creditors of such companies and especially the holders of their circulating notes[91] by a superadded liability of their shareholders.[92]

6. WHETHER THESE CONSTITUTIONAL PROVISIONS ARE SELF-ENFORCING. Following the doctrine of the supreme court of the United States in what is perhaps the leading case on the question whether constitutional provisions are self-executing,[93] a majority, but not all, of the courts have held that constitutional provisions of this kind are not self-enforcing, but that they are merely directory to the legislature.[94] Other courts, proceeding perhaps on clearer and better grounds, hold that such provisions are self-enforcing, unless their language merely imports a command to the legislature.[95]

7. EFFECT OF CONSTITUTIONAL PROVISION CREATING DOUBLE LIABILITY. The necessary effect of a constitutional provision creating what is called a double liability on the part of a shareholder for the debts of the corporation is to prevent the legislature from authorizing a subscription to the shares of a corporation, even by a municipal body, on the condition of a single liability only;[96] or to prevent the legislature from enacting a statute creating a proportionate liability, where the constitution has created a simple superadded liability which may be sued for by any creditor;[97] although such a provision would not necessarily invalidate other portions of the act.[98]

8. EFFECT OF CONSTITUTIONAL AMENDMENT ABOLISHING DOUBLE LIABILITY. A constitutional amendment abolishing this double liability would not be operative as against creditors of a corporation who become such while the constitutional provision creating the double liability was in force, because this would operate to impair the obligation of their contract within the meaning of the contract clause of the federal constitution;[99] but this would not be the case with respect to bonds

551. Under this provision shares are assessable although full paid. Green *v.* Abietine Medical Co., 96 Cal. 322, 31 Pac. 100; Santa Cruz R. Co. *v.* Spreckles, 65 Cal. 193, 3 Pac. 661, 802.

91. Allen *v.* Clayton, 63 Iowa 11, 18 N. W. 663, 50 Am. Rep. 716.

92. Ill. Const. (1870), art. 11, § 6. Similar are Ind. Const. (1851), art. 11, § 6; Iowa Const. (1857), art. 8, § 9; Mich. Const. (1850), art. 15, § 3, Amendm. 1860. That the provision of this nature in the constitution of New York of 1846 applied to special chartered banks as well as to those organized under a general law was held in *In re* Reciprocity Bank, 22 N. Y. 9.

93. Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800, a decision by a court sitting without a full bench and some of the judges, including Story, J., dissenting.

94. *Illinois.*— Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804.

Massachusetts.— New Haven Horse Nail Co. *v.* Linden Springs Co., 142 Mass. 349, 7 N. E. 773.

Missouri.— Blakeman *v.* Benton, 9 Mo. App. 107. So in effect ruled in Jerman *v.* Benton, 79 Mo. 148.

New Hampshire.— Crippen *v.* Leighton, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467 (relating to a constitution of Kansas); Rice *v.* Merrimack Hosiery Co., 56 N. H. 127.

New York.— Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757, relating to the constitution of Kansas.

Rhode Island.— Hancock Nat. Bank *v.* Farnum, 20 R. I. 466, 40 Atl. 341.

See also Morley *v.* Thayer, 3 Fed. 737. Upon the analogous question whether a constitutional provision imposing a personal liability upon directors is self-enforcing see Larrabee *v.* Baldwin, 35 Cal. 155; French *v.* Teschemaker, 24 Cal. 518; State *v.* Kelsey, 89 Mo. 623, 1 S. W. 838; Cummings *v.* Winn, 89 Mo. 51, 14 S. W. 512; Householder *v.* Kansas, 83 Mo. 488; Fusz *v.* Spaunhorst, 67 Mo. 256 [*reversing* 5 Mo. App. 583].

95. Schertz *v.* Chester First Nat. Bank, 47 Ill. App. 124; McKusick *v.* Seymour, 48 Minn. 158, 50 N. W. 1114; Willis *v.* Mabon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281; Densmore *v.* Shepard, 46 Minn. 54, 48 N. W. 528, 681; Arthur *v.* Willius, 44 Minn. 409, 46 N. W. 851; Mohr *v.* Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074; State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Allen *v.* Walsh, 25 Minn. 543; Dodge *v.* Minnesota Plastic Slate Roofing Co., 16 Minn. 368; Whitman *v.* Oxford Nat. Bank, 83 Fed. 288, 28 C. C. A. 404 [*affirmed* in 176 U. S. 559, 20 S. Ct. 477, 44 L. ed. 587].

96. Dupee *v.* Swigert, 127 Ill. 494, 21 N. E. 622.

97. French *v.* Teschemaker, 24 Cal. 518.

98. Robinson *v.* Bidwell, 22 Cal. 379; Dupee *v.* Swigert, 127 Ill. 494, 21 N. E. 622; Aultman *v.* Waddle, 40 Kan. 195, 19 Pac. 730.

99. St. Louis R. Supplies Mfg. Co. *v.* Harbine, 2 Mo. App. 134 [*following* Hathorn *v.* Calef, 2 Wall. (U. S.) 10, 17 L. ed. 776].

of a corporation issued between the establishment of the original constitutional ordinance and the act of the legislature carrying it into effect, it not being self-executing.[1] And where a corporation has issued its negotiable bonds when the double liability clause of the constitution was in effect, the security afforded by this liability inhered in the bonds so as to be available to one who purchased them after the constitutional provision had been abolished.[2]

9. Creditor May Waive His Constitutional or Statutory Right to Proceed Against Shareholders. There is no doubt that a creditor may, by express contract with the corporation, waive his constitutional or statutory right to proceed against its shareholders in case of its failure to pay the debts;[3] and it is equally clear that the creditor may waive this right by contract even at the time of making the contract,[4] or subsequently, assuming in the latter case that there is a consideration accruing to the creditor for such a release of his rights. But on the question whether an implied waiver arises from the fact that the shareholders have agreed among themselves not to be answerable to creditors and that a creditor has notice of this agreement there is more doubt.

10. Exemption From Individual Liability in Case of Corporations Engaging in Particular Business. It remains to consider the condition of the constitutional law of Minnesota under which shareholders of corporations generally rest under an individual liability for the debts of the corporation, but exempting from such liability shareholders in corporations organized for manufacturing and mechanical purposes.[5] The construction of the provision is that in order to acquire the benefit of the exemption the corporation must have been created exclusively for manufacturing or mechanical purposes.[6]

E. Construction of Statutes Making Shareholders Personally Liable For Corporate Debts — 1. Doctrine That Such Statutes Are to Be Strictly Construed — a. Statement of Doctrine. The courts of several of the states have adopted the rule that statutes creating an individual liability on the part of shareholders to pay the debts of the corporation are in derogation of the common law and hence to be strictly construed.[7]

1. Jerman *v.* Benton, 79 Mo. 148.

2. Blakeman *v.* Benton, 9 Mo. App. 107.

3. French *v.* Teschemaker, 24 Cal. 518, 539; Robinson *v.* Bidwell, 22 Cal. 379, 388 (per Crocker, J.); Basshor *v.* Forbes, 36 Md. 154.

4. Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. (Tenn.) 1, 53 Am. Dec. 742.

That there is such a waiver in the case of a partnership see Story Partn. § 164; also the opinion of Crocker, J., in Robinson *v.* Bidwell, 22 Cal. 379, 389. But note the opinion of Sir Nathaniel Lindley that all engagements of this kind among shareholders are valueless. Lindley Partn. (1st ed.) 301.

5. Minn. Const. (1857), art. 10, § 3.

6. Arthur *v.* Willius, 44 Minn. 409, 46 N. W. 851.

What corporations are within this exemption.— Senour Mfg. Co. *v.* Church Paint, etc., Co., 81 Minn. 294, 84 N. W. 109 (what language in articles of incorporation sufficiently describe the business — manufacturing of painters' materials and supplies, etc., within the statute); Cuyler *v.* City Power Co., 74 Minn. 22, 76 N. W. 948 (water and steam power company); Nicollet Nat. Bank *v.* Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334 (manufacturing clothing and then selling it).

What corporations are not within this exemption.— Gould *v.* Fuller, 79 Minn. 414, 82 N. W. 673 (general laundry business); Minnesota Title Ins., etc., Co. *v.* Regan, 72 Minn. 431, 75 N. W. 722 (manufacturing and leasing manufactured articles and buying, owning, selling, leasing, and otherwise disposing of real estate, patents, inventions, and other personal property).

Evading this constitutional provision by incorporating ostensibly for manufacturing or mechanical purposes and then engaging in other business. Mohr *v.* Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074. *Compare* Senour Mfg. Co. *v.* Church Paint, etc., Co., 81 Minn. 294, 84 N. W. 109 (shareholders not liable, although corporation organized within the statute did engage in other business than manufacturing or mechanical purposes); State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

7. Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904; Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; Dane *v.* Dane Mfg. Co., 14 Gray (Mass.) 488; Gray *v.* Coffin, 9 Cush. (Mass.) 192; Chase *v.* Lord, 77 N. Y. 1, 6 Abb. N. Cas. (N. Y.) 258 [*reversing* 16 Hun (N. Y.) 369]; Means' Appeal, 85 Pa. St. 75; Moyer *v.* Pennsylvania Slate Co., 71 Pa. St. 293.

b. Comments on Doctrine. It may be doubted whether, under proper conceptions of the line of demarcation between the province of the legislature and that of the judiciary, there is properly any canon of statutory construction, as strict construction, liberal construction, or any other construction than a construction which gives so far as possible full and fair effect to the intention of the legislature.[8] But however this may be, the reason given by the judges for applying a rule of strict construction in the relation under consideration, that statutes which subject members of corporations to liability for the debts are in derogation of the common law,[9] is believed to be gross misconception. Instead of such statutes being in derogation of the common law, the true view is that statutes conferring upon members of corporations an exemption from liability to pay the debts of the corporation, that is to say, to pay their own debts, contracted by their own agents in their own behalf and for their own profit, thus exempting them from the burden of paying their own debts which rest upon the inhabitants of the state in common, are in derogation of the common law.

c. Illustration of Strict Construction, With Conclusion That in Case of Death of Shareholder His Statutory Liability Cannot Be Revived Against His Executor. Applying this rule of construction, under a statute providing that the person or property of a shareholder was not thereafter to be taken upon an execution issued against the corporation, "unless a summons in the action was left with said stockholder," it was held that if, pending the determination of the question of the liability of a shareholder who has been summoned, he should die, the proceeding could not be revived against his executor;[10] a holding which affords a gross illustration of the doctrine of strict construction.

2. Decisions Which Import Remedial Construction. Decisions are not wanting which support the theory that such statutes are to be construed remedially so as to suppress the mischief and advance the remedy.[11]

3. Such Statutes When Penal to Be Strictly Construed. Statutes imposing a liability upon shareholders for the payment of debts of the corporation are to be strictly construed when penal in their nature, such as a statute making them so liable because of the failure to perform some specific act,[12] such as the failure to publish an annual notice of the indebtedness of the corporation.[13] But it is to be observed that statutes imposing individual liability on shareholders are generally held to be not penal.[14]

4. What Statutes of Individual Liability Are Penal and What Not — a. In General. It has been held that a statute making shareholders individually liable for certain contracts which it expressly forbids the corporation to make is not to be regarded as making them liable as on contract, but creates a liability in the nature of a penalty.[15] So a statute making the shareholders liable to pay the debts of the corporation contracted while it is in default in publishing a notice of the state of its affairs therein provided for has been held to be penal in its character.[16] The courts are, however, substantially agreed in one thing: That an ordi-

8. In vindication of this principle read the language of Lumpkin, J., in Lane *v.* Morris, 8 Ga. 468, 475, 478; of Kent, J., in Ingalls *v.* Cole, 47 Me. 530, 540; of Graves, J., in Bohn *v.* Brown, 33 Mich. 257; and also judicial expressions in the following cases: Davidson *v.* Rankin, 34 Cal. 503, 505; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 265; Coffin *v.* Rich, 45 Me. 507, 511, 71 Am. Dec. 559, per Davis, J. [*affirming* the language of 4 Bacon Abr. 652].

9. Gray *v.* Coffin, 9 Cush. (Mass.) 192.

10. Dane *v.* Dane Mfg. Co., 14 Gray (Mass.) 488. See also Ripley *v.* Sampson, 10 Pick. (Mass.) 371.

11. Lane *v.* Morris, 8 Ga. 468; Van Hook *v.* Whitlock, 2 Edw. (N. Y.) 304; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432.

12. Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214; Garrison *v.* Howe, 17 N. Y. 458.

13. Globe Pub. Co. *v.* State Bank, 41 Nebr. 175, 59 N. W. 683, 27 L. R. A. 854. *Compare* Kritzer *v.* Woodson, 19 Mo. 327.

14. See *infra*, VIII, E, 4, a *et seq.*

15. Lawler *v.* Burt, 7 Ohio St. 340. To similar effect see Bird *v.* Hayden, 1 Rob. (N. Y.) 383, 2 Abb. Pr. N. S. (N. Y.) 61; Struges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

16. Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214. See also Sayles *v.* Brown, 40 Fed. 8.

nary double or individual liability imposed upon a shareholder for the debts of the corporation is not in the nature of a penalty, but springs out of contract.[17]

b. Statute Supplanting One More Onerous. These it seems should be remedially construed.[18]

5. Statutory Remedy Against Shareholders to Be Followed — a. In General. Laying theories out of view, the general conclusion of the courts is that in any proceeding to enforce a statutory individual liability against a shareholder or shareholders the remedy prescribed by the statute must be followed.[19]

b. Rule Where Statute Points Out No Remedy. This is consistent with the conclusion that if the constitutional ordinance or statute creating the personal liability points out no remedy, then the proper remedy must be sought for in the principles of the common law or of equity.[20]

6. Such Statutes Not Construed as Retroactive — a. In General. Upon a familiar rule of statutory construction,[21] statutes imposing an individual liability on shareholders for the debts of the corporation are not construed so as to make them retroactive in their operation, unless their terms clearly import an intention on the part of the legislature that they shall be so construed.[22]

b. But May Operate Upon Existing Corporations. But it has been held that such a statute may well be held to operate upon existing corporations, although not as to past transactions.[23]

c. Liability Governed by Statute in Force When Debt Created. It follows that the statutory liability of a shareholder for the debts of the corporation is to be

17. Norris *v.* Wrenschall, 34 Md. 492; Bagley *v.* Tyler, 43 Mo. App. 195; Manville *v.* Edgar, 8 Mo. App. 324; Hodgson *v.* Cheever, 8 Mo. App. 318; Aultman's Appeal, 98 Pa. St. 505. See as showing that the liability is contractual Hawkins *v.* Iron Valley Furnace Co., 40 Ohio St. 507; Brown *v.* Hitchcock, 36 Ohio St. 667; Wright *v.* McCormack, 17 Ohio St. 86; Hathorn *v.* Calef, 2 Wall. (U. S.) 10, 17 L. ed. 776. But see Rice *v.* Merrimack Hosiery Co., 56 N. H. 114, 128, where the court, in refusing to enforce the liability of shareholders in an Ohio corporation for all debts due to laborers, declared it to be a "mere creature of the statute, having none of the elements of a contract, whether express or implied."

18. Gay *v.* Keys, 30 Ill. 413; Holyoke Bank *v.* Goodman Paper Mfg. Co., 9 Cush. (Mass.) 576.

19. *Illinois.*— Peck *v.* Coalfield Coal Co., 3 Ill. App. 619.

Maine.— Grose *v.* Hilt, 36 Me. 22.

Massachusetts.— Chamberlin *v.* Huguenot Co., 118 Mass. 532; Priest *v.* Essex Hat Mfg. Co., 115 Mass. 380; Erickson *v.* Nesmith, 15 Gray 221; Knowlton *v.* Ackley, 8 Cush. 93, 97; Stone *v.* Wiggin, 5 Metc. 316; Kelton *v.* Phillips, 3 Metc. 61; Andrews *v.* Callender, 13 Pick. 484; Ripley *v.* Sampson, 10 Pick. 371; Child *v.* Coffin, 17 Mass. 64; Leland *v.* Marsh, 16 Mass. 389.

Minnesota.— Johnson *v.* Fischer, 30 Minn. 173, 14 N. W. 799; Allen *v.* Walsh, 25 Minn. 543.

New York.— Lowry *v.* Inman, 46 N. Y. 119; Diven *v.* Lee, 36 N. Y. 302, 34 How. Pr. 197; St. Louis Sav. Assoc. *v.* O'Brien, 51 Hun 45, 3 N. Y. Suppl. 764, 20 N. Y. St. 826.

Pennsylvania.— Youghiogheny Shaft Co. *v.* Evans, 72 Pa. St. 331; Hoard *v.* Wilcox, 47 Pa. St. 51; Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43.

Rhode Island.— Moies *v.* Sprague, 9 R. I. 541.

Vermont.— Bassett *v.* St. Albans Hotel Co., 47 Vt. 313; Windham Provident Inst. *v.* Sprague, 43 Vt. 502; Dauchy *v.* Brown, 24 Vt. 197.

United States.— New York Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 7 S. Ct. 757, 30 L. ed. 825. *Compare* Terry *v.* Little, 101 U. S. 216, 25 L. ed. 864; Pollard *v.* Bailey, 20 Wall. 520, 22 L. ed. 376.

20. Cummings *v.* Winn, 89 Mo. 51, 14 S. W. 512; Householder *v.* Kansas City, 83 Mo. 488; Windham Provident Inst. *v.* Sprague, 43 Vt. 502.

21. *Connecticut.*— Whedon *v.* Gorham, 38 Conn. 408.

New York.— Palmer *v.* Conly, 4 Den. 374.

Vermont.— Perrin *v.* Sargeant, 33 Vt. 84; Simonds *v.* Powers, 28 Vt. 354.

Wisconsin.— Seamans *v.* Carter, 15 Wis. 548, 82 Am. Dec. 696.

England.— Hitchcock *v.* Way, 6 A. & E. 943, 6 L. J. K. B. 215, 2 N. & P. 72, W. W. & D. 491, 33 E. C. L. 490; Paddon *v.* Bartlett, 3 A. & E. 884, 1 H. & W. 286, 5 N. & M. 384, 30 E. C. L. 399; London *v.* Harrison, 9 B. & C. 524, 17 E. C. L. 238, 7 L. J. K. B. O. S. 249, M. & M. 191, 22 E. C. L. 504, 4 M. & R. 404.

22. Hathorn *v.* Towle, 46 Me. 302; Carroll *v.* Hinkley, 46 Me. 81; Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; Grose *v.* Hilt, 36 Me. 22.

23. Arenz *v.* Weir, 89 Ill. 25 (where such a statute was construed as applying to corporations organized before its passage); Gray *v.* Coffin, 9 Cush. (Mass.) 192. *Com-*

determined according to the law in force when the debt was contracted, and not by a subsequent statute, although the latter statute was enacted before the particular shareholder became such, and although it lessens the liability of shareholders to creditors, the reason being that this individual liability enters into the contract of subscription of each shareholder and forms a part of the security of the creditor.[24]

7. STATUTORY DESCRIPTIONS OF PERSONS CHARGEABLE AS SHAREHOLDERS. It is not necessary to say that the person sought to be charged with liability as a shareholder must come within the statutory description, a rule which has been applied so as to exonerate from liability the estate of a deceased shareholder;[25] so as to make the word "subscribers" in an amendatory statute include all shareholders, not only those who were original subscribers to the shares but those who became owners of them by transfer, the amendatory act reinstating the ordinary liability to the amount of stock subscribed for;[26] and so as to make the phrase "all the members" in a statute of individual liability include all who are members at the time when the liability is sought to be enforced.[27]

8. INDIVIDUAL LIABILITY SURVIVES IN PERSONAL REPRESENTATIVE OF DECEASED SHAREHOLDER. Statutes which merely impose upon shareholders an individual liability for the debts of the corporation, not being penal in their nature,[28] the liability thus created does not die with the shareholder, but survives, and may be enforced against his estate in the hands of his personal representative.[29]

F. Constitutional Questions Arising Under Such Statutes — 1. GENERAL DOCTRINE THAT LEGISLATIVE ALTERATION OF CHARTER IS VOID — a. Statement of Doctrine. The charter of a corporation, when accepted, is a contract between the corporation and the state; and unless the right of legislative supervision is reserved therein any subsequent act of the legislature which impairs any of the substantial privileges conferred by it impairs the obligation of a contract, and is hence in conflict with the constitution of the United States and void.[30]

b. Invalidity of Statutes Substituting Liability of Corporation For That of Shareholders. Therefore it is not within the power of the state legislature, under the constitution of the United States, by granting a charter to the members of a joint-stock company, who are personally liable for its debts, to substitute the responsibility of the joint fund for that of the individual members and the fund, without the consent of the creditors.[31]

2. STATUTES IMPOSING INDIVIDUAL LIABILITY UNCONSTITUTIONAL AS TO EXISTING CHARTERS. Statutes and state constitutional ordinances imposing, without their consent, an individual liability upon shareholders for the debts of the corporation

pare Megargee *v.* Wakefield Mfg. Co., 48 Pa. St. 442.

24. National Commercial Bank *v.* McDonnell, 92 Ala. 387, 9 So. 149; Gibbs *v.* Davis, 27 Fla. 531, 8 So. 633.

25. Diven *v.* Lee, 36 N. Y. 302, 34 How. Pr. (N. Y.) 197.

26. Gay *v.* Keys, 30 Ill. 413.

27. Curtis *v.* Harlow, 12 Metc. (Mass.) 3. See also Longley *v.* Little, 26 Me. 162.

28. See *infra*, VIII, O, 1 *et seq.*

29. Cochran *v.* Wiechers, 119 N. Y. 399, 23 N. E. 803, 29 N. Y. St. 388, 7 L. R. A. 553; Chase *v.* Lord, 77 N. Y. 1; Bailey *v.* Hollister, 26 N. Y. 112; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 862; Flash *v.* Conn, 109 U. S. 371, 3 S. Ct. 263, 27 L. ed. 966; Allen *v.* Fairbanks, 40 Fed. 188. To the contrary see Dane *v.* Dane Mfg. Co., 14 Gray (Mass.) 488. *Compare* Gray *v.* Coffin, 9 Cush. (Mass.) 192.

Words importing a superadded individual liability to the amount of the stock held.— The words "to the extent of their stock" were so construed. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

Whether a release of a corporation under an insolvent act releases its shareholders.— See and *compare* Willis *v.* Mabon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281; Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400, 43 N. W. 60.

Construction of the words "business and property" in an English winding-up act. China Bank *v.* Morse, 44 N. Y. App. Div. 435, 61 N. Y. Suppl. 268.

30. U. S. Const. art. 1, § 10; Nichols *v.* Somerset, etc., R. Co., 43 Me. 356; Nichols *v.* Bertram, 3 Pick. (Mass.) 342; Wales *v.* Stetson, 2 Mass. 143, 3 Am. Dec. 39; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

31. Witmer *v.* Schlatter, 2 Rawle (Pa.) 359.

are therefore unconstitutional, in so far as they operate upon existing charters under which there is no such liability,[32] unless in the original charter or in some statute or constitutional provision existing and operative at the time of its passage, a power on the part of the legislature to alter the charter is reserved;[33] and this rule applies under the same conditions to corporations which have been organized under general laws.[34]

3. STATUTES IMPOSING LIABILITY AS TO FUTURE DEBTS NOT UNCONSTITUTIONAL. A statute which makes the shareholders of an existing corporation liable for the future debts of the corporation or which discharges them from such liability[35] does not infringe the chartered franchises of the corporation, but merely regulates the future relations of debtor and creditor, and is hence a valid exercise of legislative power.[36] But such a statute would be unconstitutional, in so far as it should attempt to create an individual liability for debts of the corporation already contracted.[37]

4. LEGISLATIVE POWER OVER LIABILITY OF SHAREHOLDERS WHERE RIGHT OF REPEAL IS RESERVED. Where the legislature passes a general statute authorizing the organization of corporations, and provides for an exemption from individual liability on the part of their members, and in the statute reserves the right to alter or repeal it, this is a reservation of the power to alter or repeal all or any of the terms, conditions, and rules of liability prescribed in the act; and it is competent for the legislature thereafter to pass an act imposing individual liability upon the members of such corporations, although they were such at the time of the latter act.[38]

5. EFFECT OF CONSTITUTIONAL MANDATE UPON CHARTERS WITH RESPECT TO WHICH NO RIGHT OF REPEAL OR AMENDMENT HAS BEEN RESERVED. The provision which we have found in so many constitutions,[39] that "dues from corporations . . . shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law,"[40] has been held to authorize the passage of a law imposing an individual liability on shareholders of corporations which had been previously chartered, and in whose charter no right of amendment thereof was reserved. The view being that the language was designed to express a reservation of power in the general assemby to provide from time to time by legislation, as experience should suggest or wisdom dictate, for securing dues from corporations by individual liability of the corporators or by other means.[41]

6. STATUTES AFFECTING REMEDY MERELY, NOT INVALID — a. Rule Stated. Statutes which do not attempt to impose a new or an increased liability upon shareholders, but which merely change or otherwise affect the remedy of the creditor against them are not unconstitutional.[42]

b. What Statutes Taking Away Remedies Against Shareholders Have Been Held Valid — (I) *IN GENERAL.* Of this nature is a statute repealing a previous

32. Com. *v.* Cochituate Bank, 3 Allen (Mass.) 42; Fairchild *v.* Masonic Hall Assoc., 71 Mo. 526; Ireland *v.* Palestine, etc., Turnpike Co., 19 Ohio St. 369 [*qualifying* Palestine, etc., Turnpike Co. *v.* Wooden, 13 Ohio St. 395]; Steacy *v.* Little Rock, etc., R. Co., 22 Fed. Cas. No. 13,329, 5 Dill. 348 (state constitutional ordinance). *Compare* State *v.* Sullivan County Ct., 51 Mo. 522.

33. *In re* Oliver Lee, etc., Bank, 21 N. Y. 9. See also *supra*, I, K, 3, a *et seq.*

34. Ireland *v.* Palestine, etc., Turnpike Co., 19 Ohio St. 369.

35. Sparks *v.* Lower Payette Ditch Co., 2 Ida. 1030, 29 Pac. 134; Hathorn *v.* Towle, 46 Me. 302; Carroll *v.* Hinkley, 46 Me. 81.

36. Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; Stanley *v.* Stanley, 26 Me. 191; Gray *v.* Coffin, 9 Cush. (Mass.) 192. *Compare* Longley *v.* Little, 26 Me. 162; Wheeler *v.* Frontier Bank, 23 Me. 308; Com. *v.* Cochituate Bank, 3 Allen (Mass.) 42.

37. Com. *v.* Cochituate Bank, 3 Allen (Mass.) 42.

38. Sherman *v.* Smith, 1 Black (U. S.) 587, 17 L. ed. 163 [*affirming In re* Oliver Lee, etc., Bank, 21 N. Y. 9, and *followed* in *Re* Reciprocity Bank, 22 N. Y. 9]. *Compare* Wiliams *v.* Nall, 108 Ky. 21, 55 S. W. 706, 21 Ky. L. Rep. 1526.

39. See *supra*, VIII, D, 1, a *et seq.*

40. Ill. Const. art. 10, § 2.

41. Weidenger *v.* Spruance, 101 Ill. 278.

42. Com. *v.* Cochituate Bank, 3 Allen (Mass.) 42; Steam Stone-Cutter Co. *v.* Scott, 157 Mo. 520, 57 S. W. 1076.

statute making shareholders liable to arrest under execution issued upon judgment recovered against the corporation[43] and a statute changing the remedy of the creditors of certain insolvent corporations to a bill in equity brought by trustees as their representatives.[44]

(II) *Statutes Giving New or Additional Remedies to Creditors.* The same principle upholds the validity of statutes which give a new or additional remedy to creditors of the corporation against its shareholders without increasing the measure of their liability.[45]

(III) *Statutes Giving Summary Remedies.* Statutes which permit an execution on a judgment against a corporation to be levied upon the body[46] and goods of a shareholder are not unconstitutional.[47]

7. Waiver by Shareholder of Constitutional Immunity. While an individual liability for corporate debts cannot be imposed upon a shareholder by a statute passed subsequently to the time when he became such, yet he may waive this constitutional immunity and become liable by his own consent.[48]

8. Statutes Repealing Individual Liability Laws, if Retroactive, Void — a. In General. It is the settled law of this country that a statute[49] or ordinance of a state constitution[50] which repeals a former statute which made the shareholders of a corporation individually liable to pay the debts of the corporation is, as respects creditors whose debts were contracted prior to its passage, in derogation of the constitution of the United States[51] and void.[52]

b. Otherwise in Case of Shareholders Subsequently Joining. But such a repeal is valid as to shareholders subsequently joining the company.[53]

9. No Power in Legislature to Vary Liability Fixed by State Constitution. If the state constitution prescribes the extent of the liability of shareholders to corporate creditors in such language as excludes the power of the legislature, any act passed by that body extending such liability[54] will be void as to the shareholders, and any act restricting it will be void as to creditors.

G. Extraterritorial Force of Statutes Imposing Individual Liability Upon Shareholders — 1. Liability of Resident Shareholders in Foreign Corporations Determined By Law of Domicile — a. In General. The charter of a corporation, or the statute under which it is organized, furnishes the guide in determining the liability of its shareholders to its creditors;[55] and this is so where

43. *Ex p.* Penniman, 11 R. I. 333.

44. Com. *v.* Cochituate Bank, 2 Allen (Mass.) 42; Story *v.* Furman, 25 N. Y. 214.

45. Sparks *v.* Lower Payette Ditch Co., 2 Ida. 1030, 29 Pac. 134; Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515, 10 S. Ct. 589, 33 L. ed. 994.

46. Before the abolition of imprisonment for debt.

47. Stanley *v.* Stanley, 26 Me. 191; Marcy *v.* Clark, 17 Mass. 330 (opinion by Parker, C. J.).

48. Ireland *v.* Palestine, etc., Turnpike Co., 19 Ohio St. 369.

49. Norris *v.* Wrenschall, 34 Md. 492; Story *v.* Furman, 25 N. Y. 214; Rochester *v.* Barnes, 26 Barb. (N. Y.) 657; Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87; Hathorn *v.* Calef, 2 Wall. (U. S.) 10, 17 L. ed. 776.

50. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120; Ochiltree *v.* Iowa R. Contracting Co., 54 Mo. 113 [*affirmed* in 21 Wall. (U. S.) 249, 22 L. ed. 546]; Provident Sav. Inst. *v.* Jackson Place Skating, etc., Rink, 52 Mo. 552; Blakeman *v.* Benton, 9 Mo. App. 107; St. Louis R. Supplies Mfg. Co. *v.* Harbine, 2 Mo. App. 134.

51. U. S. Const. art. 10, § 1.

52. Hathorn *v.* Calef, 2 Wall. (U. S.) 10, 17 L. ed. 776. That this is an additional security extended to the creditor is the doctrine of nearly all the cases. Hawkins *v.* Iron Valley Furnace Co., 40 Ohio St. 507; Brown *v.* Hitchcock, 36 Ohio St. 667; Wright *v.* McCormack, 17 Ohio St. 86; Aultman's Appeal, 98 Pa. St. 505. Cases proceeding upon the principle of the text, where the state was a shareholder, are: Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Woodruff *v.* Trapnall, 10 How. (U. S.) 190, 13 L. ed. 383.

53. Ochiltree *v.* Iowa R. Contracting Co., 21 Wall. (U. S.) 249, 22 L. ed. 546 [*affirming* 54 Mo. 113].

54. Van Pelt *v.* Gardner, 54 Nebr. 701, 74 N. W. 1083, 75 N. W. 874.

55. *Alabama.*—Smith *v.* Huckabee, 53 Ala. 191; St. Mary's Bank *v.* St. John, 25 Ala. 566; Bingham *v.* Rushing, 5 Ala. 403.

Connecticut.— Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161.

Georgia.— Lane *v.* Morris, 8 Ga. 468, opinion by Lumpkin, J.

Indiana.— Shaw *v.* Boylan, 16 Ind. 384.

the proceeding is by a creditor of a foreign corporation against a resident shareholder; if the shareholder is liable at all he is in general liable only according to the law of the domicile of the corporation.[56] Nor can he plead ignorance of such law any more than he can plead ignorance of the law of another state, when he makes a contract to be executed therein.[57] Subject to exceptions hereafter stated, those laws are administered in the courts, state or federal, in which the action to charge the shareholder is brought as rules of property, obligatory not only in the state enacting them but everywhere else.[58] This of course supposes that there is no valid and operative legislation in the state of the shareholder's domicile imposing upon him a distinct liability as a shareholder in a foreign corporation, in view of which he has elected to assume that liability.[59] It also supposes that the statute imposing the liability is not penal in its nature; for if it is it will not be allowed to have any extraterritorial operation.[60]

b. So in Case of Shareholders in Migrating Companies. The court of appeals of New York has clothed the shareholders of a Connecticut corporation doing business in the state of New York with the immunities attaching to their situation under the laws of Connecticut;[61] has enabled citizens of New York to organize themselves into a corporation under the laws of another state for the purpose of doing business in New York, and to enjoy the immunity of corporators in their own state;[62] and has even allowed a foreign corporation domiciled in New York to make an assignment, preferring particular creditors, which a domestic corporation could not do.[63]

c. Interpretation of Foreign Statute in Foreign Forum Followed. In all such cases, where the question of the liability of the resident shareholder depends upon the interpretation of the charter or statute of the foreign state by which the corporation was created, or by which it is governed, the court will follow the interpretation which the courts of that state have put upon it, in pursuance of the well-known rule that a foreign tribunal is followed in the interpretation of its own statutes.[64]

Maine.— Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559.

Massachusetts.— Andover Free Schools *v.* Flint, 13 Metc. 539.

Ohio.— Judson *v.* Stewart, 7 Ohio S. & C. Pl. Dec. 532, 7 Ohio N. P. 160.

United States.— Sumner *v.* Marcy, 23 Fed. Cas. No. 13,609, 3 Woodb. & M. 105.

56. *Massachusetts.*— New Haven Horse Nail Co. *v.* Linden Springs Co., 142 Mass. 349, 7 N. E. 773; Halsey *v.* McLean, 12 Allen 438, 90 Am. Dec. 157; Hutchins *v.* New England Coal Min. Co., 4 Allen 580; Blackstone Mfg. Co. *v.* Blackstone, 13 Gray 488; Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray 244, 71 Am. Dec. 753; Jones *v.* Sisson, 6 Gray 288.

Minnesota.— Deadwood First Nat. Bank *v.* Gustin Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676.

New York.— Merrick *v.* Van Santvoord, 34 N. Y. 208; Seymour *v.* Sturgess, 26 N. Y. 134; St. Louis Sav. Assoc. *v.* O'Brien, 51 Hun 45, 3 N. Y. Suppl. 764, 20 N. Y. St. 826; McDonough *v.* Phelps, 15 How. Pr. 372; *Ex p.* Van Riper, 20 Wend. 614.

West Virginia.— Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184.

United States.— Glenn *v.* Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262; Allen *v.* Fairbanks, 45 Fed. 445; Payson *v.* Withers, 19 Fed. Cas. No. 10,864, 5 Biss. 269.

The liability of a shareholder in a corporation created by the provincial parliament of Quebec to its creditors is to be determined, in a court of New York, by the law of that province. Molson's Bank *v.* Boardman, 47 Hun (N. Y.) 135, 14 N. Y. St. 658.

A shareholder of a national bank subjects himself to the provisions of the National Bank Act, as part of the contract in the bank's charter. Young *v.* Wempe, 46 Fed. 354.

57. Payson *v.* Withers, 19 Fed. Cas. No. 10,864, 5 Biss. 269, 278.

58. Chase *v.* Curtis, 113 U. S. 452, 5 S. Ct. 554, 28 L. ed. 1038; Allen *v.* Fairbanks, 45 Fed. 445.

59. See Drinkwater *v.* Portland Mar. R. Co., 18 Me. 35.

60. See *infra*, VIII, G, 5, b, (III).

61. Merrick *v.* Van Santvoord, 34 N. Y. 208.

62. Demarest *v.* Flack, 128 N. Y. 205, 28 N. E. 645, 40 N. Y. St. 383, 13 L. R. A. 854.

63. Vanderpoel *v.* Gorman, 140 N. Y. 563, 35 N. E. 932, 56 N. Y. St. 503, 37 Am. St. Rep. 601, 24 L. R. A. 548. See also 28 Am. L. Rev. 307, 461.

64. St. Louis Sav. Assoc. *v.* O'Brien, 51 Hun (N. Y.) 45, 3 N. Y. Suppl. 764, 20 N. Y. St. 826; Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697; Johnston *v.* South Western R. Bank, 3 Strobh. Eq. (S. C.) 263. See also Franks Oil Co. *v.* McCleary, 63 Pa. St. 317, where the second case is referred to.

d. Remedy According to Law of Forum — (I) *In General.* Subject to the exceptions already noted, upon a well-understood principle, the matters pertaining to the remedy are governed by the law of the forum.[65]

(II) *Statutes Creating Common-Law Liabilities.* A statute creating, in favor of the creditor of the corporation and against the shareholder, a common-law liability, may be enforced in another state by an ordinary action at law.[66]

(III) *Where Statute Creates Liability but Prescribes No Remedy.* And the general rule no doubt is that where the statute law of the state creating the corporation makes the shareholders liable to its creditors, but without prescribing the mode of making this liability available to them, the course of proceeding in another state must be regulated by the law of that state.[67]

(IV) *Where Foreign Statute Creates Right to Which Domestic Statute May Appropriately Apply Remedy.* It is believed to be a sound view that where a foreign statute creates a right but prescribes no remedy, any remedy available under a domestic statute may be applied.[68]

e. What Rule in Federal Courts. Courts of the United States in dealing with this question are not bound by the decisions of state courts, especially where the right of plaintiff is founded upon a judgment of the foreign state to which the courts of the domestic state are bound, under the constitution of the United States, to give full faith and credit. A court of the United States accordingly is not bound by a decision of a court of the state in which it is sitting which refuses to enforce the statute of another state rendering holders of shares in an insolvent corporation situated in that state individually liable for its debts.[69]

2. Where Liability Is in Respect of Unpaid Shares. Where the liability is in respect of unpaid shares merely, then it rests in contract, and will be enforceable everywhere under the rule of comity,[70] subject to a few possibly ill-founded exceptions.

3. Action by Foreign Receiver to Enforce This Contractual Liability. To enforce this contractual liability, one suing in a representative capacity, such as the receiver, trustee,[71] or assignee in bankruptcy[72] of a foreign corporation, may maintain his action against the resident shareholder, if the corporation itself could have maintained it had the shareholder been a citizen of the state in which it was domiciled.[73]

4. Doctrine That Shareholder Is Bound by Decree in Foreign Insolvency Proceedings Without Notice. It is no defense by a resident shareholder of a foreign corporation, when thus sued by its representative, that he had no notice of the

This doctrine is either stated in terms or conceded in all the decisions. Chase *v.* Curtis, 113 U. S. 452, 5 S. Ct. 554, 28 L. ed. 1038; Allen *v.* Fairbanks, 45 Fed. 445.

65. Deadwood First Nat. Bank *v.* Gustin Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676.

66. St. Louis Sav. Assoc. *v.* O'Brien, 51 Hun (N. Y.) 45, 3 N. Y. Suppl. 764, 20 N. Y. St. 826.

67. Drinkwater *v.* Portland Mar. R. Co., 18 Me. 35. *Compare* Kersall *v.* Marshall, 1 C. B. N. S. 241, 87 E. C. L. 241. See also Rice *v.* Merrimack Hosiery Co., 56 N. H. 114; Globe Rolling-Mill Co. *v.* Ballou, 42 Fed. 749, decisions of doubtful propriety.

68. Persch *v.* Simmons, 3 N. Y. Suppl. 783.

69. Dexter *v.* Edmands, 89 Fed. 467, holding that a state statute giving a creditor of an insolvent corporation a right to sue individual shareholders for his debt wherever they may be found cannot be said to offend the public policy of the United States, or to be repugnant to justice or good morals, or calculated to injure the United States or its citizens so as to prevent a court of United States from enforcing it.

70. Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161 (enforceable by an action brought by the foreign receiver); Mann *v.* Cooke, 20 Conn. 178; Seymour *v.* Sturgess, 26 N. Y. 134.

Requisites of "garnishment bill." — What a "garnishment bill" in Tennessee to enforce the liability of resident shareholders in a foreign corporation must show. Doak *v.* Stahlman, (Tenn. Ch. App. 1899) 58 S. W. 741.

71. Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

72. Payson *v.* Withers, 19 Fed. Cas. No. 10,864, 5 Biss. 269; Payson *v.* Stoever, 19 Fed. Cas. No. 10,863, 2 Dill. 427.

73. Seymour *v.* Sturgess, 26 N. Y. 134; McDonough *v.* Phelps, 15 How. Pr. (N. Y.) 372. That a shareholder of a dissolved foreign corporation in the possession of its as-

action in which such representative was appointed. The reason is that when a corporation is sued at the instance of creditors, and duly served, a subscriber to the capital stock, although a non-resident and not served with notice, is so far represented by the corporation as to be bound as a corporator by the proceedings and the decree rendered therein.[74] In the absence of fraud such decree is not open to collateral attack by the shareholder when sued by the representative of the corporation to collect the assessment thereby ordered.[75] It cannot be impeached except for actual fraud.[76]

5. Statutes of Individual Liability Enforced or Not Ex Comitate Unless Penal — a. In General. If the liability of the domestic shareholder in a foreign corporation exists wholly by virtue of a statute of the foreign state in which such corporation is domiciled it will be enforced or not, according to the laws enacted by the legislature, or the views of policy and comity entertained by the courts of the state of the shareholder's domicile. It is a case for the application of the well-understood principle of law that the legislation of one state has no operation in another state *ex proprio vigore*, but only *ex comitate*.[77]

b. When Enforced — (i) *In General.* The courts of the state where the laws of such foreign state are sought to be enforced will use a sound discretion as to the extent and mode of that comity. They will not permit their tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the state that enacted the law, and which tend to operate with hardship on their own citizens.[78] But on the other hand the view has been taken that the statutory right to proceed against a shareholder for a debt of the corporation, in addition to the amount invested in his shares, is a substantial right of the creditor, and is enforceable against a resident of the state of the forum, who is a shareholder in the insolvent corporation created and undergoing administration in another state.[79]

(ii) *When Liability Is Contractual.* If the liability sought to be enforced is in the nature of contract, and is not opposed to the legislation or public policy of the state in which it is sought to be enforced the courts of such state will give effect to it.[80]

(iii) *When Liability Is Penal.* If the statute creating such liability is penal in its nature it will not be enforced outside of the sovereignty enacting it.[81]

sets in the domestic state may be proceeded against for the same see Tinkham *v.* Borst, 31 Barb. (N. Y.) 407.

74. Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156, and cases cited below. *Contra*, Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486; Wigton *v.* Bosler, 102 Fed. 70.

75. Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184.

76. Glenn *v.* Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262.

77. Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204; Smith *v.* Mutual L. Ins. Co., 14 Allen (Mass.) 336; Halsey *v.* McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Erickson *v.* Nesmith, 4 Allen (Mass.) 233; Erickson *v.* Nesmith, 15 Gray (Mass.) 221; Gale *v.* Eastman, 7 Metc. (Mass.) 14; Healy *v.* Root, 11 Pick. (Mass.) 389; Bagley *v.* Tyler, 43 Mo. App. 195; Erickson *v.* Nesmith, 46 N. H. 371.

78. Rice *v.* Merrimack Hosiery Co., 56 N. H. 114.

79. Tabler *v.* Anglo-American Assoc., 32 S. W. 602, 17 Ky. L. Rep. 815; Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Dexter *v.* Edmands, 89 Fed. 467. And this although he may be subjected to the inconvenience of not being able to recoup himself from the other shareholders. Schertz *v.* Chester First Nat. Bank, 47 Ill. App. 124.

80. Broadway Nat. Bank *v.* Baker, 176 Mass. 294, 57 N. E. 603 (failure to recover judgment and have an execution returned *nulla bona* in the state of the forum does not preclude a recovery); Hodgson *v.* Cheever, 8 Mo. App. 318; Western Nat. Bank *v.* Reckless, 96 Fed. 70 (absence of a statute in the state of the forum enacting proceeding for the enforcement of the individual liability of shareholders, not evidence of a settled public policy which should prevent the enforcement of such liability against a shareholder of a foreign corporation resident in the state); Kisseberth *v.* Prescott, 91 Fed. 611 (immaterial that the court is without power to enforce a contribution among the shareholders).

81. *Maryland.*—Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204.

Massachusetts.— Halsey *v.* McLean, 12 Allen 438, 90 Am. Dec. 157; Gale *v.* Eastman, 7 Metc. 14.

New Jersey.— Derrickson *v.* Smith, 27 N. J. L. 166.

(IV) *STATUTE OF INDIVIDUAL LIABILITY NOT PENAL, BUT REMEDIAL.* Statutes which merely create an individual liability on the part of shareholders to pay the debts of the corporation upon the default of the artificial body are generally regarded as remedial and not penal.[82] The courts of several of the states have enforced against their own citizens, shareholders in foreign corporations, a limited statute liability to creditors, in excess of any amount which might remain unpaid of their stock subscription.[83]

(V) *WHAT STATUTES OF INDIVIDUAL LIABILITY ARE PENAL.* Statutes making directors liable to pay the debts of the corporation for failing to make and file certain described annual reports;[84] or making them liable for contracting or assenting to the contracting of corporate debts beyond the amount of capital paid in;[85] or making shareholders liable to pay the debts of the company in case of a failure to give a certain notice therein specified;[86] or liable for certain contracts of the corporation which it is forbidden by statute to make[87] have been held penal in their nature[88] and not to be enforced outside of the state enacting them.[89] But this doctrine does not apply to judgments recovered in one state against the directors of corporations for such defaults as those above described; and these are suable in the courts of another state, under that clause of the constitution of the United States which requires each state to give full faith and credit to the public acts, records, and judicial proceedings of every other state.[90]

c. When Not Enforced. Other courts, proceeding upon this pretext or that, hold that a statute of another state rendering shareholders in a corporation created under the laws of such other state liable to contribute to the payment of its debts, in addition to the amount of their share subscriptions, will not be enforced against shareholders residing in the state of the forum, although not penal,[91] it being consonant with the public policy of such state to exonerate its own citizens from paying debts which they have agreed to pay, and which have been contracted by their own agents and for their own profit, for no other reason than the reason that such debts were contracted in another state.

New York.— Scoville *v.* Canfield, 14 Johns. 338, 7 Am. Dec. 467.

Ohio.— Indiana *v.* John, 5 Ohio 217.

England.— Folliott *v.* Ogden, 4 Bro. P. C. 111, 1 H. Bl. 123, 3 T. R. 726, 2 Eng. Reprint 75.

82. Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Dexter *v.* Edmands, 89 Fed. 467.

83. Sackett's Harbor Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225. See also the following cases:

Connecticut.— Paine *v.* Stewart, 33 Conn. 516.

Massachusetts.— Bond *v.* Appleton, 8 Mass. 472, 5 Am. Dec. 111.

Missouri.— Bagley *v.* Tyler, 43 Mo. App. 195; Hodgson *v.* Cheever, 8 Mo. App. 318.

New York.— St. Louis Sav. Assoc. *v.* O'Brien, 51 Hun 45, 3 N. Y. Suppl. 764, 20 N. Y. St. 826; McDonough *v.* Phelps, 15 How. Pr. 372.

Pennsylvania.— Aultman's Appeal, 98 Pa. St. 505.

The salutary decision of the supreme court of the United States in Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123, goes beyond many of the state decisions and places the doctrine on its true ground.

84. Halsey *v.* McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Derrickson *v.* Smith, 27 N. J. L. 166. See also *infra*, IX, P, 5, a *et seq.*

85. Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204. See also *infra*, IX, P, 7, a *et seq.*

86. Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214.

87. Lawler *v.* Burt, 7 Ohio St. 340; Sayles *v.* Brown, 40 Fed. 8.

88. *Compare* on this point Kritzer *v.* Woodson, 19 Mo. 327; Boughton *v.* Otis, 21 N. Y. 261; Shaler, etc., Quarry Co. *v.* Bliss, 34 Barb. (N. Y.) 309; Andrews *v.* Murray, 33 Barb. (N. Y.) 354; Bird *v.* Hayden, 1 Rob. (N. Y.) 383, 2 Abb. Pr. N. S. (N. Y.) 61; Squires *v.* Brown, 22 How. Pr. (N. Y.) 35; Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582; Harrisburg Bank *v.* Com., 26 Pa. St. 451; Hill *v.* Frazier, 22 Pa. St. 320.

89. Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204; Halsey *v.* McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Derrickson *v.* Smith, 27 N. J. L. 166; Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184.

90. Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123 [*reversing* 70 Md. 191, 16 Atl. 651, 14 Am. St. Rep. 344, 2 L. R. A. 779].

91. Crippen *v.* Laighton, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467 (notwithstanding a decision of a court in the state of the foreign corporation that the statutory liability is contractual and not penal); Brookman *v.* Merchants' Sav. Bank, 31 Misc.

6. ACTIONS BY FOREIGN RECEIVERS TO ENFORCE STATUTES OF INDIVIDUAL LIABILITY — a. Conditions Under Which Such Action Upheld. Proceeding on the ground that the statutory superadded individual liability of shareholders to pay the debts of the corporation in the event of the default of the artificial body is contractual, it has frequently been held that where a proceeding in insolvency has taken place in the state which is the domicile of the corporation, in which proceeding the amount which ought to be paid by each shareholder, under the governing statute, to liquidate the debts of the corporation, has been ascertained, the receiver or other liquidating officer duly appointed in the foreign jurisdiction may maintain an action against a domestic shareholder in such foreign corporation to recover his share of the amount necessary to a liquidation so ascertained.[92]

b. Conditions Under Which Such Action Not Upheld. Such an action has not been upheld to recover the amount of an assessment made upon the shares by the court of another state, it being the domicile of the corporation, in a proceeding to which the shareholder was not a party, to which he did not appear, and to which he could not have been required to appear because of his being beyond the jurisdiction of the court.[93]

7. WHERE GOVERNING STATUTE OF FOREIGN CORPORATION IMPOSES INDIVIDUAL LIABILITY AND PRESCRIBES REMEDY. Where the governing statute of the foreign corporation imposes the individual liability and prescribes the remedy, then under a well-settled rule of statutory construction[94] such remedy is exclusive; and this rule is applied in courts of the United States as well as in state courts.[95]

8. WHETHER FOREIGN SHAREHOLDERS ENTITLED TO CONTRIBUTION FROM RESIDENT SHAREHOLDERS — a. In General. Where the foreign statute which creates the liability is penal in its nature, no action for contribution by the non-resident shareholder can be maintained according to one holding.[96]

b. Where Foreign Statute Requires Suit in Equity, Relief Denied. Some courts have adopted the conclusion that where the foreign statute requires a suit in equity, any remedy to charge the creditors where the statute governing the corporation creates an individual liability on the part of its shareholders for its debts, and prescribes a remedy to enforce the same by a suit in equity brought on behalf of all the creditors, in which the corporation itself and all the shareholders within reach of the process of the court are made parties, no separate action of any sort, whether at law or in equity, can be maintained in a state other than that of the

(N. Y.) 191, 65 N. Y. Suppl. 54; Wyatt *v.* Moorehead, 7 Ohio S. & C. Pl. Dec. 380; Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486.

92. Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161 (holding that the right of action depends not on the right of a foreign receiver to sue on demands in favor of the party he represents, but on the right of a substituted promisee to sue a promisor whose contract provided for such substitution, since the shareholder's relations depend on the laws of the state in which the corporation is created); Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301 (holding that the general right of action is thereby created against each and every shareholder and that it is immaterial that he is a non-resident of the state of the administration); Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 30 N. Y. Civ. Proc. 307, 47 L. R. A. 725 [*affirming* 39 N. Y. App. Div. 151, 57 N. Y. Suppl. 187, no domestic creditors claiming part of the fund, and the remedy in the domestic forum being the same as in the foreign state]. *Compare* Hansou *v.* Davison, 73 Minn. 454, 76 N. W. 254.

For a good complaint in an action by a foreign receiver under this rule see Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161.

93. Wigton *v.* Bosler, 102 Fed. 70. See also Stoddard *v.* Lum, 32 N. Y. App. Div. 565, 53 N. Y. Suppl. 607; Mercantile Trust, etc., Co. *v.* Mellon, 20 Pa. Co. Ct. 25 (action by foreign receiver to recover the shareholders' proportion of a tax).

94. Stafford *v.* Ingersol, 3 Hill (N. Y.) 38; Almy *v.* Harris, 5 Johns. (N. Y.) 175; Lynch *v.* Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520; Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196.

95. Patterson *v.* Lynde, 106 U. S. 519, 1 S. Ct. 432, 27 L. ed. 265.

96. Sayles *v.* Brown, 40 Fed. 8. But see Allen *v.* Fairbanks, 45 Fed. 445.

Reviving a judgment against a corporation to reach property of non-resident members situated within the state. De Wolf *v.* Mallett, 3 Dana (Ky.) 214.

domicile of the corporation against any of its shareholders, however numerous, to charge them with such individual liability.[97]

c. **Contrary Holdings on This Question.** Other courts have taken the view that an action by a single shareholder can be maintained under a statute of the state wherein the corporation has been created and is undergoing administration, against a single shareholder residing within the state of the forum, notwithstanding the objection that all the shareholders were not joined, and that plaintiff had no right to a decree against defendant for anything more than contribution after the accounts necessary for the purpose have been stated.[98]

d. **Maintaining Creditor's Bill Founded on Foreign Judgment.** In the case cited to the preceding paragraph, the doctrine (for what it is worth) seems to have been overlooked that a creditor's bill cannot be founded on a foreign judgment.[99]

H. Statutes Creating Joint and Several Liability as Partners — 1. Not Liable as Partners, Except by Statute, Where Corporation Is Lawfully Formed. Where a corporation has been lawfully formed, its shareholders are not partners, even as amongst themselves, unless the governing statute makes or leaves them so.[1]

2. Liability as Partners Before Organization. The liability already considered which attaches to the members of inchoate corporations on obligations incurred before the corporation has been formed is not a statutory liability, but is a common-law liability, arising by the act of the parties, on the ground that there is no corporation which is answerable for the obligation which they have created.[2] Statutes[3] and charters exist affirming this species of liability, but they cannot be regarded as creating a special or statutory liability, since they merely affirm the liability which exists at common law.[4]

3. Liability as Partners After Abandonment of Franchise. Where the shareholders in a corporation completely abandon their corporate franchise and subsequently incur debts, they become liable as partners to pay the same.[5]

4. Liability as Partners For Embarking in Business Not Authorized by Statute. It seems that if a corporation embarks in a business, with respect to which the statute law affords no immunity from the general liability of partners, the shareholders may become liable as such, although as to matters within the powers of the corporation and the protection of the statute law they will be protected from personal liability.[6]

97. Post *v.* Toledo, etc., R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86 [*quoted* in Bank of North America *v.* Rindge, 154 Mass. 203, 27 N. E. 1015, 26 Am. St. Rep. 240, 13 L. R. A. 56]; Erickson *v.* Nesmith, 4 Allen (Mass.) 233 (holding that the New Hampshire statute meant a bill in equity in New Hampshire, and repelling a suit in equity in Massachusetts on that ground); Erickson *v.* Nesmith, 15 Gray (Mass.) 221; Nimick *v.* Mingo Iron Works, 25 W. Va. 184 (remedy denied on the ground that the foreign assignee could not be compelled to account in West Virginia so as to do justice to all the parties). See also New Haven Horse Nail Co. *v.* Linden Springs Co., 142 Mass. 349, 7 N. E. 773, and cases cited, several of which bear upon this question by analogy.

98. Sackett's Harbor Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225, where, however, the company was insolvent and all other shareholders had responded to its debts to the extent of their statutory liability. See also Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274.

99. See as to this doctrine Davis *v.* Bruns, 23 Hun (N. Y.) 648; Tarbell *v.* Griggs, 3 Paige (N. Y.) 207, 23 Am. Dec. 790; Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522. See, however, Hatch *v.* Dorr, 11 Fed. Cas. No. 6,206, 4 McLean 112, and Wilkinson *v.* Yale, 29 Fed. Cas. No. 17,678, 6 McLean 16.

Action for discovery.— Action by a nonresident judgment creditor of a foreign corporation for a discovery of the names of its shareholders upheld. Post *v.* Toledo, etc., R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86.

Resident members of resident corporations liable on foreign contracts the same as on domestic contracts. Hutchins *v.* New England Coal Min. Co., 4 Allen (Mass.) 580.

1. Baker *v.* Backus, 32 Ill. 79; Cincinnati Second Nat. Bank *v.* Hall, 35 Ohio St. 158.

2. Broyles *v.* McCoy, 5 Sneed (Tenn.) 602.

3. Salem First Nat. Bank *v.* Almy, 117 Mass. 476; Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385, 111 Mass. 200.

4. Perkins *v.* Sanders, 56 Miss. 733.

5. It was so held where shareholders proceeded to change the name of their corporation without complying with the law. Perkins *v.* Sanders, 56 Miss. 733.

6. Lehman *v.* Knapp, 48 La. Ann. 1148, 20 So. 674. But see to the contrary Tennessee

5. Statutes and Charters Under Which Liability Is That of Partners. The shareholders of incorporated companies have been held liable as partners, precisely as though they had not been incorporated, under a charter provision declaring them liable individually "in the same manner as carriers at common law, for the transportation of all goods," etc.;[7] under a charter making them personally liable, "at all times, for all debts due by said corporation,"[8] although this liability attached only to those who were members of the corporation when the suit was brought;[9] under a charter making them personally liable, "provided said corporation shall become insolvent," etc., their liability as joint debtors or copartners attaching whenever the corporate responsibility fails;[10] and under various other charter and statute provisions exhibited by the cases cited in the margin.[11]

6. "Double Liability" Regarded as That of Partners Except as to Limitation of Amount. The statutory liability of shareholders to pay, in liquidation of the debts of the corporation, an amount equal to the par value of the stock held by them — often called a "double liability" — is in some jurisdictions regarded as that of partners, except as to the limitation of amount.[12]

7. Liability as Partners Attaches to Members Who Were Such When Debt Contracted. This liability, when it arises under statutes and charters, attaches to those who were members at the time the debt was contracted, and not to those who had ceased at that time to be members, or who became such subsequently,[13] unless retiring members had suffered themselves to be held out as members after so retiring, and credit had been obtained by the company on the faith of their being members.[14]

8. Liability of Principal Debtors or Undertakers, and Not That of Guarantors or Sureties — a. In General. This liability is that of principal debtors — original undertakers — and not that of guarantors or sureties.[15]

b. Does Not Depend Upon Corporate Assets Being Exhausted. It does not depend upon the predicate that the assets of the corporation have been exhausted, but the shareholders may be proceeded against, although an assignee of the corporation has assets in his hands sufficient to pay the debts.[16]

c. Extension of Time Does Not Discharge Liability. Therefore an extension of time given to a corporation by a creditor will not discharge the shareholder from liability to pay the debt.[17]

Automatic Lighting Co. *v.* Massey, (Tenn. Ch. App. 1899) 56 S. W. 35.

7. Allen *v.* Sewall, 2 Wend. (N. Y.) 327 [*reversed* on other grounds in 6 Wend. (N. Y.) 335].

8. Southmayd *v.* Russ, 3 Conn. 52.

9. Middletown Band *v.* Magill, 5 Conn. 28, this holding probably untenable.

10. Deming *v.* Bull, 10 Conn. 409.

11. Young *v.* Rosenbaum, 39 Cal. 646; Davidson *v.* Rankin, 34 Cal. 503; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 265; Moss *v.* Averell, 10 N. Y. 449; Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87; Hager *v.* McCullough, 2 Den. (N. Y.) 119; Moss *v.* Oakley, 2 Hill (N. Y.) 265; New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688. See also McAuley *v.* York Min. Co., 6 Cal. 80; Planters' Bank *v.* Bivingsville Cotton Mfg. Co., 10 Rich. (S. C.) 95.

12. Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Thompson *v.* Meisser, 108 Ill. 359; Fuller *v.* Ledden, 87 Ill. 310; Conklin *v.* Furman, 67 Barb. (N. Y.) 484, 8 Abb. Pr. N. S. (N. Y.) 161; Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797.

13. Middletown Bank *v.* Magill, 5 Conn. 28 (per Hosmer, C. J., and Brainard, J.); Moss *v.* Oakley, 2 Hill (N. Y.) 265.

14. See *infra*, VIII, L, 3, b. But see Middletown Bank *v.* Magill, 5 Conn. 28 (per curiam, Chapman, Peters, and Bristol, JJ.; *contra*, Hosmer, C. J., and Brainard, J.); Marcy *v.* Clark, 17 Mass. 330; Bond *v.* Appleton, 8 Mass. 472, 5 Am. Dec. 111.

15. Young *v.* Rosenbaum, 39 Cal. 646; Davidson *v.* Rankin, 34 Cal. 503; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 265; Southmayd *v.* Russ, 3 Conn. 52; Marcy *v.* Clark, 17 Mass. 330; Moss *v.* Averell, 10 N. Y. 449; Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Harger *v.* McCullough, 2 Den. (N. Y.) 119 [*overruling* Moss *v.* McCullough, 5 Hill (N. Y.) 131]; Simonson *v.* Spencer, 15 Wend. (N. Y.) 548.

16. Hatch *v.* Burroughs, 11 Fed. Cas. No. 6,203, 1 Woods 439. But under many charters and statutes the liability of the corporation must be first exhausted. See *infra*, VIII, P, 2, a.

17. Harger *v.* McCullough, 2 Den. (N. Y.) 119. *Contra*, Sonoma Valley Bank *v.* Hill, 59 Cal. 107 (under Cal. Civ. Code, § 322); Hanson *v.* Donkersley, 37 Mich. 184.

d. Direct Action Lies Against Shareholders as Partners. This liability, being original and not collateral, an action at law lies directly against the shareholders, as against partners, on their joint contract,[18] and need not be predicated on a judgment obtained against the corporation;[19] nor is the remedy against the shareholders merged in the judgment against the company.[20]

e. Limitation Runs From Time of Contracting Debt. For the same reason the statute of limitations begins to run in favor of the shareholder from the time when the debt was contracted.[21]

f. Assets of Deceased Shareholder Liable. Where the liability is that of a partner, if a shareholder dies, a creditor may maintain a suit in equity to have satisfaction of his debt out of the decedeut's estate.[22]

g. Liability of Shareholder Not Merged by Judgment Against Corporation. Where the liability is that of partners it is not merged in a judgment recovered against the corporation, unless the shareholders were parties to the suit; but an action may be subsequently brought against the shareholders.[23]

h. Actions Against Shareholders and Corporation Jointly. There are statutes which allow actions to be prosecuted against the corporation and the shareholders jointly.[24]

I. Statutes Imposing Individual Liability Upon Shareholders — 1. Such Statutes Are Merely in Affirmation of Common Law — a. In General. Some of the statutes under consideration are merely in affirmation of the common law, such as those which declare shareholders liable to creditors of the corporation, to the extent of the capital subscribed for by them and not paid in.[25]

b. Statutes Declaring Liability For Stock Subscribed but Not Paid in, and For Capital Improperly Withdrawn. Some of the statutes declare a liability to creditors for capital subscribed for but not paid in, and also for capital subscribed for and paid in, but improperly withdrawn.[26] These also are obviously in affirmation of the common law.

2. Statutes Declaring Superadded or Double Liability — a. In General. The most numerous class of statutes impose a liability upon shareholders to the extent of the stock subscribed for by them, in addition to the common-law liability thus incurred. This liability has been created by such expressions as "liable to double the amount of his stock and no more"; this meaning that the shareholder is liable to pay for his stock and as much more, but not twice as much more;[27] "liable to the amount of stock held or owned by him," this meaning the same thing as the

18. Southmayd *v.* Russ, 3 Conn. 52; Freeland *v.* McCullough, 1 Den. (N. Y.) 414, 43 Am. Dec. 685; Simonson *v.* Spencer, 15 Wend. (N. Y.) 548; Planters' Bank *v.* Bivingsville Cotton Mfg. Co., 10 Rich. (S. C.) 95.

19. Young *v.* Rosenbaum, 39 Cal. 646; Davidson *v.* Rankin, 34 Cal. 503; Witherhead *v.* Allen, 4 Abb. Dec. (N. Y.) 628, 3 Keyes (N. Y.) 562, 8 Abb. Pr. N. S. (N. Y.) 164, 33 How. Pr. (N. Y.) 620.

20. Young *v.* Rosenbaum, 39 Cal. 646; Witherhead *v.* Allen, 4 Abb. Dec. (N. Y.) 628, 3 Keyes (N. Y.) 562, 8 Abb. Pr. N. S. (N. Y.) 164, 33 How. Pr. (N. Y.) 620; Conklin *v.* Furman, 57 Barb. (N. Y.) 484. See also *infra*, VIII, H, 8, g.

21. Davidson *v.* Rankin, 34 Cal. 503. The rule is the same where the officers of a corporation are made personally liable for its debts during the period of omission on their part to perform a statutory duty. Bassett *v.* St. Albans Hotel Co., 47 Vt. 313.

22. New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

23. Dodge *v.* Minnesota Plastic Slate Roofing Co., 16 Minn. 368. See also *supra*, VIII, H, 8, d.

24. See Conklin *v.* Furman, 48 N. Y. 527 [*affirming* 57 Barb. (N. Y.) 484].

25. Such is the liability under Oreg. Const. art. 12, § 2 (Ladd *v.* Cartwright, 7 Oreg. 329; Patterson *v.* Lynde, 106 U. S. 519, 1 S. Ct. 432, 27 L. ed. 265); and under the New York statutes (Beals *v.* Buffalo Expanded Metal Constr. Co., 49 N. Y. App. Div. 589, 63 N. Y. Suppl. 635). See also Colorado Fuel, etc., Co. *v.* Sedalia Smelting Co., 13 Colo. App. 474, 59 Pac. 222 (action may be maintained against a corporation and a shareholder, and an original judgment recovered against a shareholder for his unpaid stock); Wilson Cotton Mills *v.* C. C. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770 [*rehearing denied* in 116 N. C. 647, 21 S. E. 431].

26. For an example of such a statute examine Poor *v.* Willoughby, 64 Me. 379.

27. Schricker *v.* Ridings, 65 Mo. 208. See also Gibbs *v.* Davis, 27 Fla. 531, 8 So. 633.

preceding.[28] And generally such expressions as liable "to the amount of his stock," or "to the amount of his stock and no more," import a superadded liability to the full amount of the par value of the shares held by each shareholder, which is not satisfied by his merely paying up what is due under his contract of subscription.[29]

b. This Liability Is Several, Unequal, and Limited — (I) *In General.* This liability is not joint, but is several, unequal, and limited, as to which each member stands alone, except that if he pays more than his proportion of the debts of the company, he may as in other cases have contribution from his co-shareholders.[30] A judgment at law cannot therefore be rendered against the shareholders jointly to enforce this liability, or against each *in solido*.[31] Nor does a judgment against some of the shareholders have the effect of releasing the others.[32]

(II) *But This Presents No Obstacles to Proceedings in Equity.* But this as we shall see presents no obstacle to the joining of all the members as defendants in a suit in equity; for these courts have the power, in a proceeding in which all the members are before it, to mold their decree according to the several rights and liabilities of each member.[33] The rule in equity is therefore the reverse of that at law; here all members must be made parties, unless the joinder of some is shown to be impracticable.[34]

c. When This Liability That of Original and Principal Debtors. It has been held that the liability created by an act relating to state banking corporations, providing that such shareholders shall be individually responsible to the amount of their respective share or shares for all the indebtedness and liability of the bank, is that of original and principal debtors; and, subject to the limitation as to the amount of the liability of each shareholder, more nearly resembles that of copartners than any other with which it can be compared.[35]

d. Statute Held to Create Liability of Guarantors. A statute providing that the shareholders of electric light companies shall be jointly and severally liable for the payment of all debts contracted during the time of their holding their

28. Willis *v.* Mabon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281 (under constitution of Minnesota). See also Lauraglenn Mills *v.* Ruff, 52 S. C. 448, 50 S. E. 587 (under S. C. Const. (1895), § 18, jointly and severally liable to its creditors in an amount equal to the par value of their stock, together with five per cent of its par value).

29. *Alabama.*—McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120, opinion by Somerville, J.

Illinois.— Root *v.* Sinnock, 120 Ill. 350, 11 N. E. 339, 60 Am. Rep. 558; Queenan *v.* Palmer, 117 Ill. 62, 619, 7 N. E. 470, 613; Thompson *v.* Meisser, 108 Ill. 359; Eames *v.* Doris, 102 Ill. 350; Harper *v.* Union Mfg. Co., 100 Ill. 225; Wincock *v.* Turpin, 96 Ill. 135; Bromley *v.* Goodwin, 95 Ill. 118; Tibballs *v.* Libby, 87 Ill. 142; Culver *v.* Chicago Third Nat. Bank, 64 Ill. 528.

Michigan.— Pettibone *v.* McGraw, 6 Mich. 441.

Missouri.— Gausen *v.* Buck, 68 Mo. 545 [*overruling* Lewis *v.* St. Charles County, 5 Mo. App. 225]; Schricker *v.* Ridings, 65 Mo. 208; Lewis *v.* St. Charles County, 13 Mo. App. 48.

New York.— U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199; Walker *v.* Crain, 17 Barb. 119; Woodruff, etc., Iron Works *v.* Chittenden, 4 Bosw. 406; Poughkeepsie Bank *v.* Ibbotson, 24 Wend. 473; Briggs *v.* Penniman, 8 Cow. 387, 18 Am. Dec. 454; Slee *v.* Bloom, 20 Johns. 669.

Pennsylvania.— Lane's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166.

Tennessee.— Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. 1, 53 Am. Dec. 742.

See also Norris *v.* Johnson, 34 Md. 485.

30. 3 Thompson Corp. § 3816.

31. Reynolds *v.* Feliciana Steam Boat Co., 17 La. 397.

32. Hanson *v.* Davison, 73 Minn. 454, 76 N. W. 254.

Liability under an agreement that each shareholder shall be liable for the repayment of money borrowed by the corporation, etc., is several and not joint. Dorman *v.* Swift, 1 Pennew. (Del.) 457, 41 Atl. 1105.

33. Perry *v.* Turner, 55 Mo. 418, 426 (per Napton, J.); Umsted *v.* Buskirk, 17 Ohio St. 113.

34. Crease *v.* Babcock, 10 Metc. (Mass.) 525; Umsted *v.* Buskirk, 17 Ohio St. 113; Pierce *v.* Milwaukee Constr. Co., 38 Wis. 253; Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797. *Compare* Castleman *v.* Holmes, 4 J. J. Marsh. (Ky.) 1 (not error to decree against some and continue the cause as to the others); Reynolds *v.* Feliciana Steam Boat Co., 17 La. 397 (to the contrary where the liability was for unpaid shares).

35. Booth *v.* Dear, 96 Wis. 516, 71 N. W. 816.

shares to the extent of twenty-five per cent of the amount of stock held by them, if a judgment is obtained against the company, an execution returned thereon unsatisfied, and a suit brought against any such shareholder while continuing to hold his stock, or within two years thereafter, has been held to make the shareholders liable to the creditors of the company as guarantors.[36]

3. LIABILITY THUS CREATED IS CONTRACTUAL IN ITS NATURE — a. In General. The liability created by these ordinary statutes of superadded individual liability is not penal or statutory, but is contractual in its nature, the theory being that the statute enters into and forms a part of the engagement of the shareholders when they become members of the corporation, and that each shareholder impliedly contracts with the creditors of the corporation that he will assume the liability declared by the statute in their favor.[37]

b. May Be Enforced Everywhere. It follows that the liability thus created may be enforced everywhere, and that a court of the United States, sitting in another state, is not deprived of jurisdiction to enforce it in a state other than that creating the corporation.[38]

4. WHAT STATUTES OF INDIVIDUAL LIABILITY ARE PENAL. Some statutes of individual liability are penal in their nature, such as statutes imposing upon shareholders liability to pay the corporate debts, because of certain defaults of the directors or managing officers with respect to certain prescribed acts, such as filing certain reports, publishing certain statements, etc.[39] These statutes have no extra-territorial force; and consequently if the resident shareholders have been made liable for the corporate debts under them they cannot, it has been held, have contribution from the non-resident shareholders.[40] While these statutes are penal in their nature, a substantial compliance with their terms is necessary to exonerate the shareholders, as where the statute requires the filing of an annual certificate stating the liabilities of the corporation, and a certificate is filed which is false.[41]

5. LIABILITY IN PROPORTION WHICH SHARES OF SHAREHOLDER BEAR TO CORPORATE INDEBTEDNESS — a. In General. Some of the state constitutions and statutes have adopted the policy of making each shareholder liable in the proportion which his portion of the whole share capital bears to the whole amount of the corporate debts.[42]

b. Liability Reduced by Corporate Indebtedness Taken Up by Shareholder. The liability thus declared has been held subject to be reduced by the amount of the indebtedness of the corporation which the shareholder may have taken up

36. Ball Electric Light Co. *v.* Child, 68 Conn. 522, 37 Atl. 391.

37. *Maryland.*— Hager *v.* Cleveland, 36 Md. 476; Norris *v.* Wrenschall, 34 Md. 492.

Minnesota.— Hanson *v.* Davison, 73 Minn. 454, 76 N. W. 254; Deadwood First Nat. Bank *v.* Gustin Minerva Consol. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676.

Ohio.— Cleveland Gas Co. *v.* Collins, 19 Ohio Cir. Ct. 247, 10 Ohio Cir. Dec. 475; Judson *v.* Stewart, 7 Ohio S. & C. Pl. Dec. 532.

Pennsylvania.— Aultman's Appeal, 98 Pa. St. 505.

West Virginia.— Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184.

United States.— Whitman *v.* Oxford Nat. Bank, 176 U. S. 559, 20 S. Ct. 477, 44 L. ed. 587 [*affirming* 83 Fed. 288, 28 C. C. A. 404]; Flash *v.* Conn, 109 U. S. 371, 3 S. Ct. 263, 27 L. ed. 966; Hathorn *v.* Calef, 2 Wall. 10, 17 L. ed. 776.

38. Whitman *v.* Oxford Nat. Bank, 83 Fed. 288, 28 C. C. A. 404 [*affirmed* in 176 U. S. 559, 20 S. Ct. 477, 44 L. ed. 587].

39. McKellar *v.* Stout, 14 Iowa 359.

40. Sayles *v.* Brown, 40 Fed. 8.

41. Congdon *v.* Winsor, 17 R. I. 236, 21 Atl. 540. See also Hite Natural Gas Co.'s Appeal, 118 Pa. St. 436, 12 Atl. 267, which related to a limited partnership.

Liability for frauds under Iowa statute. Hoffman *v.* Dickey, 54 Iowa 135, 6 N. W. 174.

42. For expositions and illustrations of this liability see the following cases:

California.— Larrabee *v.* Baldwin, 35 Cal. 155.

Georgia.— Branch *v.* Baker, 53 Ga. 502; Belcher *v.* Willcox, 40 Ga. 391; Adkins *v.* Thornton, 19 Ga. 325; Robinson *v.* Darien Bank, 18 Ga. 65; Lane *v.* Harris, 16 Ga. 217.

Kentucky.— Castleman *v.* Holmes, 4 J. J. Marsh. 1.

Maine.— Dane *v.* Young, 61 Me. 160; Wiswell *v.* Starr, 48 Me. 401.

before the commencement of the suit against him, although the statute does not say so in terms; so that if he has redeemed bills of the bank to the amount of his personal liability this discharges him.[43]

6. Whether Solvent Shareholders Liable to Make Up Deficiency Caused by Defaults of Insolvent Ones. Statutory schemes have existed (but they are few) under which, in case the assets of a corporation are not sufficient to satisfy all its creditors, the corporators are individually liable to make good the deficiency, including that which may arise from the insolvency of any of the corporators to the extent of the capital professed to be paid in as set forth in the charter.[44]

7. Statutes Creating Liability "For All Losses," Etc. A bank charter declaring that "the stockholders of said Bank shall be personally and individually liable for all losses, deficiencies and failures of the capital stock of said Bank," has been held to make the shareholders personally liable to the creditors of the bank for its indebtedness in proportion to their respective shares in the stock of the same,[45] and not merely bound to keep the capital good by assessments. A bank charter making the shareholders individually liable "to make good losses to depositors and others" renders the shareholders liable to all creditors suffering from the failure of the bank to pay its debts.[46] But no personal liability is imposed on the shareholders of an insolvent corporation in process of liquidation, by a clause in the charter that "if at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment."[47]

8. Individual Liability Is Not Liability to Corporation. The statutory superadded individual liability under discussion is in no sense a liability to the corporation itself, and such statutes do not give the corporation the right to assess the shareholders; but it is a liability to the creditors only, or a liability to be worked out in their behalf in a proper judicial proceeding.[48]

9. This Superadded Individual Liability Exists Only by Force of Statute. The superadded individual liability dealt with above, being an exception to the rule of non-liability of the common law,[49] must as a general rule be imposed by a constitutional ordinance or a statute, or it does not exist at all.[50] It cannot, we have seen,[51] be imposed by a mere by-law; although of course it may be assumed by the shareholders by a contract with the creditors, provided the contract is supported by a consideration,[52] and is in writing.[53]

10. Individual Liability Does Not Depend Upon Stock Being Paid For. This superadded individual statutory liability does not depend in any sense upon the question whether the shares have been paid for.[54] Neither does it depend in

Massachusetts.— Crease *v.* Babcock, 10 Metc. 525.

43. Branch *v.* Baker, 53 Ga. 502; Belcher *v.* Willcox, 40 Ga. 391; Robinson *v.* Darien Bank, 18 Ga. 65; Lane *v.* Harris, 16 Ga. 217. *Compare* Tallmadge *v.* Fishkill Iron Co., 4 Barb. (N. Y.) 382.

This rule is frequently declared in the statutes creating this species of proportionate liability. See for instance Cal. Laws (1863), p. 736.

44. Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209.

That this is not the liability of shareholders of national banks see U. S. *v.* Knox, 102 U. S. 422, 26 L. ed. 216. Nor under a state statute rendering each shareholder liable to contribute "equally and ratably" to the amount of his shares see *In re* Hollister Bank, 27 N. Y. 393, 84 Am. Dec. 292.

45. Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

46. Queenan *v.* Palmer, 117 Ill. 62, 619, 7 N. E. 470, 613.

47. Dewey *v.* St. Albans Trust Co., 57 Vt. 332.

Construction of charter provision that stock shall not be assessed more than fifty per cent. Wilbur *v.* Stockholders, 29 Fed. Cas. No. 17,636.

48. Liberty Female College Assoc. *v.* Watkins, 70 Mo. 13; Umsted *v.* Buskirk, 17 Ohio St. 113; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

49. See *supra*, VIII, A, 1.

50. Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904. See Shaw *v.* Boylan, 16 Ind. 384; Norton *v.* Hodges, 100 Mass. 241; Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295.

51. See *supra*, VIII, A, 2.

52. See *supra*, VIII, A, 3, a.

53. See *supra*, VIII, A, 3, b.

54. Driesbach *v.* Price, 133 Pa. St. 560, 19 Atl. 569.

any sense upon the question whether the shareholder has received a certificate of stock.[55]

11. Individual Liability of Married Women as Shareholders. A general statute imposing an individual liability upon shareholders includes married women, and, unless they are specially mentioned by its terms, they are not exempted by reason of their coverture.[56] They are not exempted from the liability imposed by the act of congress[57] upon shareholders in national banks;[58] and this is so, whether the shares were acquired by subscription, purchase, bequest, or otherwise.[59] It is so, even where the husband may have transferred such shares to his wife to conceal them from his creditors, and if she accepts the transfer, ratifies it, or accepts benefits under it, so as to become the owner of the shares, she will be liable to be assessed as a shareholder, and the receiver of the bank may recover a judgment against her upon the assessment; but no opinion is expressed as to what property may be reached in the enforcement of the judgment.[60]

12. Individual Liability of Shareholders of National Banks — a. In General. This liability arises under that portion of the National Currency Act which is embodied in section 5152 of the Revised Statutes of the United States. The liability thus created is for all such contracts, debts, and engagements as have arisen in the ordinary course of business.[61] It is a several liability, and the solvent shareholders are not bound to make up deficiencies caused by the defaults of the insolvent ones, but each shareholder pays only what he would have to pay if all were solvent and able to respond.[62] It is regarded as being in the nature of an asset of the bank, to be resorted to in the event of insolvency as a species of guaranty fund.[63] A shareholder who with his assent is assessed under another section of the statute[64] to restore the impaired capital of the bank is not for this reason relieved from his individual liability under section 5151.[65]

b. Liability in Case of Increase of Shares. Where there has been a valid increase of the shares under the provisions of the statute, those original shareholders who, under the option given them, subscribe for the new shares and pay for them, become of course in the event of the insolvency of the bank individually liable in respect of them.[66]

13. Liability Extends to Holders of Preferred Stock. These statutes, unless they import the contrary, render the holders of preferred shares liable to creditors in common with the holders of the common shares.[67]

14. Other Questions Relating to These Statutes of Individual Liability. Where the corporation entered upon business without filling up the full amount of the capital named in the act of incorporation, they were held liable to make up the deficiency to creditors.[68] Shareholders will be held liable upon a construction of their charter by which they have held themselves out to creditors as being personally liable and will not be allowed to repudiate it.[69]

55. Mitchell *v.* Beckman, 64 Cal. 117, 28 Pac. 110.

56. *In re* Reciprocity Bank, 22 N. Y. 9. See also Dreisbach *v.* Price, 133 Pa. St. 560, 19 Atl. 569; Sayles *v.* Bates, 15 R. I. 342, 5 Atl. 497.

57. U. S. Rev. Stat. (1872), § 5151.

58. Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531; Witters *v.* Sowles, 32 Fed. 767, 35 Fed. 640, 1 L. R. A. 64; Anderson *v.* Line, 14 Fed. 405; Hobart *v.* Johnson, 8 Fed. 493, 19 Blatchf. 359.

59. Witters *v.* Sowles, 35 Fed. 640, 1 L. R. A. 64.

60. Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531.

61. Schrader *v.* Manufacturers' Nat. Bank, 133 U. S. 67, 10 S. Ct. 238, 33 L. ed. 564.

62. U. S. *v.* Knox, 102 U. S. 422, 26 L. ed. 216.

63. Irons *v.* Manufacturers' Nat. Bank, 21 Fed. 197.

64. U. S. Rev. Stat. (1872), § 5205.

65. Delano *v.* Butler, 118 U. S. 634, 7 S. Ct. 39, 30 L. ed. 260; Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968; Morrison *v.* Price, 23 Fed. 217.

66. Delano *v.* Butler, 118 U. S. 634, 7 S. Ct. 39, 30 L. ed. 260.

67. Railroad Co. *v.* Smith, 48 Ohio St. 219, 31 N. E. 743.

68. Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209.

69. Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

Effect of a statutory revision upon ques-

J. For What Debts These Statutes Make Shareholders Liable — 1. Liable Only For Debts Mentioned in Statute. Under any rule of construction, a shareholder cannot be charged with an individual liability for debts not mentioned in the statute.[70]

2. Liable Only For Debts Which Might Have Been Enforced Against Corporation — a. In General. Nor is he liable, except for debts that might have been enforced against the company.[71]

b. Ultra Vires Debts. For example where the element of estoppel does not supervene, shareholders are not liable for an obligation which the officers of the corporation have attempted to impose upon it, either in excess of their authority or in excess of the powers of the corporation,[72] although an exception to this rule has been admitted where the associates enter upon a business entirely distinct from the business which the corporation was authorized to carry on, and in the course of that business contract debts. But circumstances may arise which will estop the shareholder from setting up this defense.[73] For example shareholders are not liable as individuals or partners for goods bought in the name of the corporation by an *ultra vires* act of the directors.[74] But they may become so where they have acquiesced in the *ultra vires* dealings, and accepted the profits and derived dividends from them, so as to become estopped from setting up this defense.[75]

c. Debts Accruing From Money Loaned and Afterward Misappropriated. Shareholders may become personally liable under a statute in favor of one who has loaned money to the corporation, or in favor of shareholders of the corporation who repay the loan, although the loan has been misappropriated by the officers of the corporation,[76] the rule being that one who loans money to a trustee is not concerned with the use which he makes of the money, provided he possesses the power to borrow it.[77]

d. Contracts of Promoters. Shareholders of a corporation which has been organized in violation of a statute requiring a certain proportion of the stock to

tion of individual liability (Fairchild *v.* Masonic Hall Assoc., 71 Mo. 526) with the conclusion that a revision has not the effect of breaking the continuity of the statute law (St. Louis *v.* Foster, 52 Mo. 513). See also St. Louis *v.* Alexander, 23 Mo. 483.

No liability for doing business on credit in violation of a statute unless the statute says so. Rendall *v.* Jackson, 1 Pa. Dist. 726.

No liability on the part of the shareholders of the Central Pacific Railroad Company to the United States under California statute. U. S. *v.* Stanford, 161 U. S. 412, 16 S. Ct. 576, 40 L. ed. 751 [*affirming* 70 Fed. 346, 17 C. C. A. 143 (*affirming* 69 Fed. 25)].

Liability of shareholders of distilling companies for the federal distilling tax see Wolters *v.* Henningsan, 114 Cal. 433, 46 Pac. 277; Richter *v.* Henningsan, 110 Cal. 530, 42 Pac. 1077.

Liability under particular statutes.— Walter *v.* Merced Academy Assoc., 126 Cal. 582, 59 Pac. 136 (holding that actions in favor of creditors will lie against shareholders personally, and that the remedy is not limited to a sale of their shares); Santa Rosa Nat. Bank *v.* Barnett, 125 Cal. 407, 58 Pac. 85 (personal liability not referred to by Cal. Code Civ. Proc. §§ 348, 359, or Cal. Code Civ. Proc. § 309); McGowan *v.* McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149 (construing various provisions of the civil code of California); Dawnson *v.* Sholley, 4 Kan. App. 367, 45 Pac. 949 (Kan. Gen. Stat. p. 1204); Williams *v.* Nall, 108 Ky. 21, 55 S. W. 706, 21 Ky. L. Rep. 1526 (construing Ky. Stat. §§ 547, 573); Hirshfeld *v.* Bopp, 145 N. Y. 84, 39 N. E. 817, 64 N. Y. St. 535 (Banking Law of 1892, § 52, and Corporation Law, § 55).

70. Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295.

71. Van Hook *v.* Whitlock, 7 Paige (N. Y.) 373, 3 Paige (N. Y.) 409; Buffington *v.* Bardon, 80 Wis. 635, 50 N. W. 776.

72. Curtiss *v.* Murry, 26 Cal. 663; Smucker *v.* Duncan, 10 Pa. Co. Ct. 430; Athenæum L. Assur. Soc. *v.* Pooley, 1 Giff. 102, 4 Jur. N. S. 371.

73. Third Ave. Sav. Bank *v.* Dimock, 24 N. J. Eq. 26; Amerman *v.* Wiles, 24 N. J. Eq. 13; Medill *v.* Collier, 16 Ohio St. 599; Kearny *v.* Buttles, 1 Ohio St. 362.

74. Smucker *v.* Duncan, 10 Pa. Co. Ct. 340.

75. McNab *v.* McNab, etc., Mfg. Co., 62 Hun (N. Y.) 18, 16 N. Y. Suppl. 448, 41 N. Y. St. 906.

76. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

77. Goodwin *v.* American Nat. Bank, 48 Conn. 550; Fountain *v.* Anderson, 33 Ga. 372; Shaw *v.* Spencer, 100 Mass. 328, 97 Am. Dec. 107, 1 Am. Rep. 115; Ashton *v.* Atlantic Bank, 3 Allen (Mass.) 127; Mason *v.* Bank of Commerce, 16 Mo. App. 275.

be paid in are not liable upon a contract made by its promoters upon which the corporation itself would not have been liable, provided the corporation has not made itself liable by ratifying or adopting the contract.[78]

3. Torts and Judgments For Torts, When Within These Statutes — a. In General. There is a conflict among the decisions on the question whether statutes of individual liability include liability for the torts of the corporation. The solution of the question turns in many cases on the inquiry whether the statute is in its nature remedial or penal.[79]

b. View That Word "Debt" Includes Any Just Demand. If the statute is regarded as remedial, then it is a sound conclusion that the word "debt" is to be taken in its broadest sense as embracing any just demand, whether growing out of contract or out of tort.[80]

c. View That Word "Dues" Includes Obligations Growing Out of Torts as Well as Contracts. A well-founded view is that the expression "dues from corporations," in constitutional provisions requiring them to be secured by the individual liability of the shareholders, includes any just demand which may be due from the corporation, whether growing out of contract or out of tort.[81]

d. Contrary View Where Statute Is Deemed to Be Penal in Its Nature. Where the statute belongs to a class which have been held to be penal in their nature, such as a statute making the shareholders liable for the failure to file or publish an annual statement of the corporate indebtedness, the word "debt" or "debts" contracted does not embrace judgments recovered for torts, such as a judgment for damages for the negligent sinking of a steamboat,[82] or for a personal injury inflicted upon a passenger.[83]

e. Rule Where Statute Uses Words "Debts Contracted." The same conclusion has been reached under a statute using the words "debts contracted," the liability of an incorporated carrier for an injury to a passenger not being deemed a "debt" of this nature.[84]

f. Doctrine That Liability Extends to Judgments Against Corporation For Torts — (1) *In General.* A judgment against a corporation is certainly a debt of the corporation without reference to the question whether it was founded upon a tort or upon a contract.[85] Hence where it is sought merely to subject what remains unpaid by the shareholder in respect of his shares, it is clear that any demand against the corporation which has been reduced to a judgment will be available as a basis of such a proceeding without reference to the nature of the original claim.[86] If it is merged in the judgment it becomes a "debt of record," in the language of the common law; and upon this point there will be no difference of judicial opinion. So as already seen[87] constitutional provisions and statutes securing to creditors dues from corporations by a superadded individual liability of their shareholders are remedial in their nature, and hence embrace judgments against the corporation for damages in actions for its torts.[88]

78. Buffington *v.* Bardon, 80 Wis. 635, 50 N. W. 776.

79. See *infra*, VIII, J, 3, b *et seq.*

80. Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432, 2 Robb Pat. Cas. 141.

81. Rider *v.* Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432, 2 Robb Pat. Cas. 141.

82. Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214.

83. Doolittle *v.* Marsh, 11 Nebr. 243, 9 N. W. 54.

84. Bohn *v.* Brown, 33 Mich. 257. So where the statute made the shareholders of every corporation personally liable "to its creditors," and in describing the debt used the words "contract" and "becomes due" (Doyle *v.* Kimball, 23 Misc. (N. Y.) 431, 52 N. Y. Suppl. 195), and under a constitutional provision using the word "dues" and a statute using the words "debts unpaid" (Ward *v.* Joslin, 105 Fed. 224, 44 C. C. A. 456). See also under the latter statute Brown *v.* Trail, 89 Fed. 641.

85. See to the governing principle Conroy *v.* Sullivan, 44 Ill. 451; Dellinger *v.* Tweed, 66 N. C. 206.

86. Powell *v.* Oregonian R. Co., 36 Fed. 726, 13 Sawy. 535, 2 L. R. A. 270.

87. See *supra*, VIII, E, 2.

88. Rider *v.* Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513.

(II) *Extends to Judgments For Damages Resulting in Death.* So the word "dues," used in a state constitution imposing upon the shareholders of corporations a superadded liability, extends to judgments obtained under a statute giving a right of action for damages resulting in death.[89]

g. Unliquidated Damages For Breaches of Contract — (I) *In General.* The word "debt," in a statute making the members of a corporation liable for all its debts until its whole capital stock should be paid in and a certificate thereof filed for record, embraces unliquidated damages growing out of the breach of a contract.[90]

(II) *What Demands Deemed to Arise Ex Contractu.* Of this nature is a liability of directors for declaring dividends when the corporation is insolvent;[91] and the liability of a corporation for a breach of an implied warranty upon the sale of a chattel, the same being a "debt" within the meaning of such a statute.[92]

h. Unliquidated Damages For Torts — (I) *In General.* Denying a decision of Mr. Justice Story at circuit,[93] the supreme judicial court of Massachusetts has held that unliquidated damages for a tort are not embraced in a statute of individual liability which uses the word "debts" and the words "debts and contracts";[94] but the contrary conclusion was reached where the statute employed the words "debts" and "liabilities."[95]

(II) *Shareholders Not Primarily Liable For Frauds and Torts of Officers or Promoters.* Of course the shareholders of a corporation are not primarily liable for the frauds and torts of its officers and promoters, unless there is a statute making them so, or unless they themselves are such officers or promoters.[96]

4. Debts Barred by Limitation. Shareholders are not liable under such statutes for debts of the corporation which are barred by limitation.[97] And it has been held that this is so where the debt was so barred at the time of the dissolution of the corporation, although it could not have been enforced against the shareholders by action prior to the dissolution.[98]

5. Debts Which Have Been Renewed. As a general rule the renewal of a debt does not create a new debt, but merely operates to prolong and keep alive the old one. Therefore, on principle at least, a shareholder of a corporation is not relieved from individual liability because, when the indebtedness became due, new notes were given in renewal of old ones, for such renewal notes did not create a new debt or discharge or satisfy the old one, where it was not so expressly agreed between the parties.[99] It has been held, on grounds which the writer ventures to regard as untenable, that the liability of shareholders is so far like that of sureties that it cannot be revived or extended by any agreement between the creditor and the corporation renewing or extending the original debt.[1]

89. Rider *v.* Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513.

90. Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417, 455. *Compare* Child *v.* Boston, etc., Iron Works, 137 Mass. 516, 50 Am. Rep. 328 (where this case is explained and limited); Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214 (where it is criticized).

91. Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214.

92. Dryden *v.* Kellogg, 2 Mo. App. 87.

93. Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432, 2 Robb Pat. Cas. 141, demand for unliquidated damages for the infringement of a patent.

94. Child *v.* Boston, etc., Iron Works, 137 Mass. 516, 50 Am. Rep. 328 (damages arising out of negligence); Heacock *v.* Sherman, 14 Wend. (N. Y.) 58.

95. Haynes *v.* Brown, 36 N. H. 545.

96. Matthews *v.* Stanford, 17 Ga. 543.

97. Cook *v.* Wheeler, Harr. (Mich.) 443; Van Hook *v.* Whitlock, 3 Paige (N. Y.) 409.

98. Van Hook *v.* Whitlock, 3 Paige (N. Y.) 409.

99. Hauenschild *v.* Standard Coffin Co., 10 Ohio S. & C. Pl. Dec. 536.

When cessation of business for one year under a statute does not dissolve the corporation for all purposes and does not prevent its officers from giving a renewal note to which the statutory liability of the shareholders will attach. See Salina Nat. Bank *v.* Prescott, 60 Kan. 490, 57 Pac. 121 [*reversing* 9 Kan. App. 886, 53 Pac. 769].

1. Hyman *v.* Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Hardman *v.* Sage, 124 N. Y. 25, 26 N. E. 354, 35 N. Y. St. 54; Parrott *v.* Sawyer, 87 N. Y. 622 [*affirming* 22 Hun (N. Y.) 611]; Jagger Iron

6. Debts Due to Other Shareholders — a. In General. Generally speaking the mere fact that the creditor is also a shareholder will not deprive him of the ordinary remedies to secure his debt which the principles of the common law, equity, or the statute law accord to other shareholders.[2]

b. Debts Due to Shareholders Who Have Been Guilty of Wrong For Which Liability Is Denounced. The above rule does not apply in the case of debts which are due from the corporation to its shareholders, where the liability is denounced by the statute for the commission of a wrong in which they have participated, such as contracting debts beyond the prescribed limit.[3]

c. Debts Due to Shareholders Buying Up Claims After Insolvency. After a corporation has become insolvent and has made an assignment for its creditors under which a liquidation has commenced, there is nothing in the relation of a mere shareholder to the corporation which restrains him from buying up claims against it and proving them up the same as any other creditor may, and charging the shareholders with a personal liability with respect to them.[4] It is otherwise where a confidential relation, like that of treasurer, still subsists, in which case the purchase of the debts by him will extinguish them as against the corporation,[5] or at most prevent him from proving them for more than his disbursements.[6]

7. Debts Contracted After Suspension. After a corporation has gone into liquidation the power of its officers or contracting agents to bind its shareholders by the creation of new obligations ceases,[7] although this rule is not universal.

8. Rents Earned, Although After Insolvency. Rents earned from a corporation or its representatives, although after its insolvency, under a lease made while it was a going concern, constitute a debt which can be enforced against its shareholders, although this conclusion may in particular cases be influenced by statutes.[8]

9. Debts Paid by Sureties. The liability of a principal to indemnify his

Co. *v.* Walker, 76 N. Y. 521; Parrott *v.* Colby, 71 N. Y. 597 [*affirming* 6 Hun (N. Y.) 55].

This rule has been adopted in California although in that state the liability of shareholders is that of principal debtors and not that of sureties. Hyman *v.* Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178.

2. *California.* — Richardson *v.* Chicago Packing, etc., Co., (1900) 63 Pac. 74; Knowles *v.* Sandercock, 107 Cal. 629, 40 Pac. 1047.

Kansas.— Milford Sav. Bank *v.* Joslyn, 59 Kan. 778, 53 Pac. 756, after he has discharged his own statutory liability.

Minnesota.— Mendenhall *v.* Duluth Dry Goods Co., 72 Minn. 312, 75 N. W. 232; Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610 [*modified* in 69 N. W. 1069] (but the collection of assets will be stayed when it appears that the dividend coming to him as a creditor will pay any future assessments for which as a shareholder he will be liable); Oswald *v.* Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15.

New York.— Montgomery *v.* Brush Electric Illuminating Co., 48 N. Y. App. Div. 12, 62 N. Y. Suppl. 606.

Pennsylvania.— Schlaudecker's Appeal, (1888) 14 Atl. 229.

United States.— Brown *v.* Trail, 89 Fed. 641, after crediting upon his claim the amount of his own stock.

3. Connecticut River Sav. Bank *v.* Fiske, 62 N. H. 178. Nor can he have subrogation under a statute. Hill *v.* Frazier, 22 Pa. St. 320.

4. Craig's Appeal, 92 Pa. St. 396; Hill *v.* Frazier, 22 Pa. St. 320.

5. Hill *v.* Frazier, 22 Pa. St. 320.

6. Kisseberth *v.* Prescott, 91 Fed. 611. See also *infra*, IX, G, 15, b.

But where an agreement has been made between the corporation and the shareholder that he shall not be obliged to pay for his shares, then a creditor who has purchased claims against the corporation after it has become insolvent and after its affairs have been placed in the hands of a receiver, will not be granted relief in equity without showing that he paid a substantial consideration for the claims. Hospes *v.* Northwestern Mfg., etc., Co., 48 Minn. 174, 50 N. W. 1117, 13 Am. St. Rep. 637, 15 L. R. A. 470.

A note of a corporation taken up by its president with borrowed money with the intention of assigning to another for the purpose of bringing suit to enforce individual liability, when not deemed paid, see Knowles *v.* Sandercock, 107 Cal. 629, 40 Pac. 1047.

7. Union Bank *v.* Wando Min., etc., Co., 17 S. C. 339; Schrader *v.* Manufacturers' Nat. Bank, 133 U. S. 67, 10 S. Ct. 238, 33 L. ed. 564; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864. "The business of the bank must stop when insolvency is declared." U. S. *v.* Knox, 111 U. S. 784, 787, 4 S. Ct. 686, 28 L. ed. 603.

8. McIntyre *v.* Strong, 63 How. Pr. (N. Y.) 43, under a statute, rents accruing within two

surety for any payment which the latter may be compelled to make for the former takes effect from the time when the surety becomes responsible for the debt of his principal; so that upon payment by the surety the debt which the principal owes to him becomes a "debt contracted" at the time when the surety becomes responsible and not at the time of such payment.[9]

10. Debts Due to Directors of Corporation. It has been held that a statute creating an individual liability on the part of the corporators does not protect debts which are due to the directors of the corporation.[10]

11. Other Debts Not Already Enumerated. Decisions with respect to the personal liability of shareholders for other debts of the corporation not hitherto enumerated will be found in cases cited in the margin.[11]

12. Liability For Interest — a. Where Principal of Judgment, Together With Interest, Does Not Exhaust Sum For Which Shareholder Liable. If the principal of the judgment, together with the interest, does not exhaust the sum for which the shareholder is liable, then the judgment will carry interest as in other cases, and the shareholder will be liable for interest as well as for the principal.[12]

b. Liable For Interest From Commencement of Action, Although in Excess of Statutory Liability. It has been ruled that interest will run against the shareholder from the date of the commencement of the suit against him, although it results in charging him with a sum in excess of that for which he was individually liable.[13] Where the liability of the shareholders is what is called a "proportionate liability," each being liable as a principal debtor for his proportion of the debts of the corporation, they are liable for interest accruing upon such debts.[14]

c. View That Interest Is Not Recoverable. Several of the courts have denied the principle that interest is recoverable from the shareholder, proceeding chiefly on the ground that the liability is to be sought in the statute alone and that it is to be strictly construed.[15]

d. From What Time Interest Begins to Run. It has been held to run from the maturity of the debt;[16] in a winding-up proceeding, from the date of the final call and notice thereof to the shareholders;[17] in a case of liability to redeem the bills of a bank, from the time when the redemption was demanded by the bill-holders of the shareholder, and not from the time when payment was demanded of the bank;[18] under the New York Manufacturing Act,[19] from the time when

years recoverable, but rents accruing after two years not.

9. Rice *v.* Southgate, 16 Gray (Mass.) 142; Cox *v.* Gould, 6 Fed. Cas. No. 3,301, 4 Blatchf. 341. See also Byers *v.* Franklin Coal Co., 106 Mass. 131.

10. McDowall *v.* Sheehan, 129 N. Y. 200, 29 N. E. 299, 41 N. Y. St. 415.

11. Debts created by indorsement, where the liability is that of partners. Harger *v.* McCullough, 2 Den. (N. Y.) 119; Freeland *v.* McCullough, 1 Den. (N. Y.) 414, 43 Am. Dec. 685. Deposits in a savings-bank, where no certificate of deposit is issued, but where the deposit is noted in a pass-book. Dows *v.* Naper, 91 Ill. 44. Deficiency of indebtedness secured by a mortgage — stock liable for. Maine Trust, etc., Co. *v.* Southern Loan, etc., Co., 92 Me. 444, 43 Atl. 24. "Mortgage debt" under a statute exempting shareholder from liability for mortgage debts — what not such a debt. Barron *v.* Paine, 83 Me. 312, 22 Atl. 218. Shareholders liable for indebtedness of the corporation maturing after its dissolution. Cottrell *v.* Manlove, 58 Kan. 405, 49 Pac. 519. When debt is deemed to have been "contracted" under a statute making shareholders liable for all debts which should be contracted during a default in filing reports of the condition of the corporation, with the conclusion that there was no debt until the goods which had been purchased were delivered, the statute being penal. Garrison *v.* Howe, 17 N. Y. 458.

12. Grund *v.* Tucker, 5 Kan. 70; Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864.

13. Burr *v.* Wilcox, 22 N. Y. 551; Mason *v.* Alexander, 44 Ohio St. 318, 7 N. E. 435; Wehrman *v.* Reakirt, 1 Cinc. Super. Ct. 230.

14. Wells *v.* Enright, 117 Cal. 669, 60 Pac. 439, 49 L. R. A. 647. *Contra*, Grew *v.* Breed, 10 Metc. (Mass.) 569; Crease *v.* Babcock, 10 Metc. (Mass.) 525. *Compare In re* Blakely Ordnance Co., L. R. 3 Ch. 412, 37 L. J. Ch. 230, 17 L. T. Rep. N. S. 554, 16 Wkly. Rep. 322.

15. Munger *v.* Jacobson, 99 Ill. 349; Cole *v.* Butler, 43 Me. 401; Sackett's Harbor Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225.

16. Wheeler *v.* Millar, 90 N. Y. 353.

17. Andrew's Appeal, 1 Mon. (Pa.) 126.

18. Lane *v.* Morris, 10 Ga. 162.

19. N. Y. Laws (1848), c. 40, § 10.

suit is begun against the shareholder;[20] in the liquidation of a national bank, from the date of the suspension; and in case of book-accounts in favor of depositors, interest runs from such date, without any demand;[21] and under statutes of Wisconsin, from the date of the judgment by which it is ascertained that the assets of the bank have been exhausted, and that the deficiency exceeds the amount of the stock.[22]

13. LIABILITY FOR COSTS — a. In General. The shareholder is liable for the cost of the proceeding prosecuted to charge him as a shareholder.[23]

b. Where Proceeding Is in Equity. No settled rule can be stated with reference to the liability of shareholders for costs where the proceeding is in equity; because where there is no restraint by statute courts of equity give or refuse costs in the exercise of a sound discretion. Shareholders have been held liable for costs in proceedings in equity where the action was brought against the corporation and its members and the members were charged with a liability in respect of what was unpaid on their shares.[24] Shareholders who are defendants to a bill in equity under the Massachusetts statute, in which a decree is rendered against them, are jointly and severally liable for costs.[25] But the officers will be allowed the cost of their answer.[26] In an action to enforce a shareholder's liability, brought by one creditor for the benefit of all, he is equitably entitled to reimbursement for his reasonable expenses, and to an allowance for services of his attorney rendered for the common benefit of all the creditors.[27]

14. COUNSEL FEES. One court has held that in a suit in equity the court has power to allow to plaintiffs reasonable counsel fees, payable out of the fund;[28] but another court has held that the fees of plaintiff's solicitors should not be charged to the fund obtained from the shareholders.[29]

K. Statutes Making Shareholders Liable For Debts Due For Labor, Provisions, Goods, Etc.—1. SUCH STATUTES FAIRLY CONSTRUED BUT NOT EXTENDED — a. In General. Statutes exist in several of the states making the shareholders in corporations formed under them jointly and severally liable for wages due to laborers, and for supplies and materials furnished in the prosecution of the work of the corporation. These statutes rest on the same policy as mechanic's lien laws, and so far as the writer can see do not appear to have been construed

20. Burr *v.* Wilcox, 22 N. Y. 551 [*affirming* 6 Bosw. (N. Y.) 198].

21. Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864.

22. Cleveland *v.* Burnham, 64 Wis. 347, 25 N. W. 407.

The decisions under the English winding-up acts on the subject of interest do not seem to have much interest for us, since for the most part they seem to have been made in respect of companies where the liability of the shareholders was unlimited. See cases collected in Lindley Comp. L. (5th ed.) 724, 725. That interest on calls provided for in articles does not apply to calls in winding-up proceedings see *In re* Welsh Flannel, etc., Co., L. R. 20 Eq. 360, 44 L. J. Ch. 391, 32 L. T. Rep. N. S. 361, 23 Wkly. Rep. 558. That interest on a call runs from the date named in the notice for payment see *In re* Overend, L. R. 3 Ch. 784, 38 L. J. Ch. 15, 19 L. T. Rep. 271, 16 Wly. Rep. 1160.

23. Abbey *v.* Long, 44 Kan. 688, 24 Pac. 1111; Cole *v.* Butler, 43 Me. 401; Grose *v.* Hilt, 36 Me. 22.

24. Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209.

25. Burnap *v.* Haskins Steam-Engine Co., 127 Mass. 586.

Liability for calls to defray expenses of winding-up.— Matter of Sea, etc., Assur. Co., 3 De G. M. & G. 459, 18 Jur. 118, 387, 2 Wkly. Rep. 322, 23 Eng. L. & Eq. 422, 52 Eng. Ch. 358. As to the present rules in England see Lindley Comp. L. (5th ed.) 864–867. And see Fisk *v.* Keeseville Woolen, etc., Mfg. Co., 10 Paige (N. Y.) 592, where costs were not allowed which had accrued subsequently to the date of a *de facto* dissolution.

Where the object of the bill is a discovery merely, costs are not generally allowed. McIntyre *v.* Union College, 6 Paige (N. Y.) 239.

26. Masters *v.* Rossie Lead Min. Co., 2 Sandf. Ch. (N. Y.) 301. When a judgment against each defendant shareholder for the entire costs of the case, but providing that any shareholder who should pay the whole cost or have the right to control the judgment, so as to compel the others to contribute their *pro rata* share of the cost was not an abuse of discretion. Torras *v.* Raeburn, 108 Ga. 345, 33 S. E. 989.

27. Helm *v.* Smith-Fee Co., 79 Minn. 297, 82 N. W. 639.

28. Mason *v.* Alexander, 44 Ohio St. 318, 7 N. E. 435.

29. Alling *v.* Wenzell, 27 Ill. App. 511.

unfavorably to the special class of creditors falling fairly within their terms;[30] but the courts have refused to extend them by construction.

b. Liability Secondary. The liability created by such statutes is secondary, and the right of the labor-creditor to proceed against the shareholders comes into existence only when the assets of the corporation have been exhausted. If there are assets turned over to the trustees for the benefit of creditors, exceeding the amount of the debts of the company, the labor-creditor cannot proceed under such a statute.[31] But this may not be the interpretation of all such statutes.

2. Such Statutes Extend to Assignees of Such Debts — a. In General. Such statutes extend to the protection of the assignees of such debts.[32]

b. To Payee of Bill of Exchange Drawn by Laborer. They also extend to the payee of a bill of exchange drawn on a corporation by one to whom it is indebted for services as a laborer.[33]

3. Include Those Who Work by The Piece. Such statutes include those who work by the piece as well as those who work by the day, week, or month.[34]

4. Do Not Extend to Services of Professional Men — a. In General. Such statutes do not extend to the protection of persons whose labor or service is of a professional or quasi-professional character,[35] such as an attorney-at-law,[36] although performing services for the corporation at a weekly stipend.[37]

b. Supervising Architect. It seems that a supervising architect who draws the plans and superintends and directs the construction of a building is within the protection of a statute securing debts due to "laborers," etc.,[38] especially where the statute uses the word "work" instead of "labor."[39]

5. Engineers of Works, Master Mechanics, Conductors, Etc. — a. In General. Statutes and constitutional provisions of this kind using the word "labor" or "laborer" do not extend to the protection of such professional laborers as the chief engineer of a railway company,[40] a consulting engineer,[41] or a civil engineer.[42]

b. Doctrine That All Persons Not Distinctively Officers and Agents Are Within Protection of Such Statutes. It has been broadly laid down that "all persons employed in the service of a railway company who have not a due, proper, and

30. But see Hanson *v.* Donkersley, 37 Mich. 184.

Some decisions under particular statutes may be here noted. That Mich. Comp. Laws, § 2412, makes shareholders liable for labor debts only to the extent of their stock. Peck *v.* Miller, 39 Mich. 594. That this feature of the New York Manufacturing Act of 1848 is not retained in the act of 1875, c. 611. Richards *v.* Beach, 19 Abb. N. Cas. (N. Y.) 84. What the case must state to bring it within Wis. Rev. Stat. c. 73, § 25. Harrod *v.* Hamer, 32 Wis. 162. Conditions precedent to a right of recovery under Wis. Rev. Stat. § 1769. Sleeper *v.* Goodwin, 67 Wis. 577, 31 N. W. 335. That the New York Railroad Acts of 1848 and 1850 should be limited to corporations created under them. Rochester *v.* Barnes, 26 Barb. (N. Y.) 657.

31. Albitztigui *v.* Guadalupe Y Caloo Min. Co., 92 Tenn. 598, 22 S. W. 739.

32. Reading Industrial Mfg. Co. *v.* Graeff, 64 Pa. St. 395. To the contrary see Weigley *v.* Coal Oil Co., 5 Phila. (Pa.) 67, 19 Leg. Int. (Pa.) 292.

33. Pilcher *v.* Brayton, 17 Hun (N. Y.) 429.

34. Thayer *v.* Mann, 2 Cush. (Mass.) 371 (received materials from the corporation and took them to his own shop and there worked them up); Seiders' Appeal, 46 Pa. St. 57.

35. Adams *v.* Goodrich, 55 Ga. 233; Whitaker *v.* Smith, 81 N. C. 340, 31 Am. Rep. 503; Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189.

36. Bristor *v.* Smith, 158 N. Y. 157, 53 N. E. 42 [*affirming* 29 N. Y. App. Div. 624, 52 N. Y. Suppl. 1138 (*affirming* 22 Misc. (N. Y.) 55, 49 N. Y. Suppl. 404), and *distinguishing* Boyd *v.* Gorman, 157 N. Y. 365, 52 N. E. 113].

37. Bristor *v.* Kretz, 22 Misc. (N. Y.) 55, 49 N. Y. Suppl. 404.

38. Stryker *v.* Cassidy, 76 N. Y. 50, 32 Am. Rep. 262; Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389.

39. Commonwealth Bank *v.* Gries, 35 Pa. St. 423.

For analogies drawn from the subject of mechanics' liens, with the examination of numerous cases, see 3 Thompson Corp. p. 2264.

40. Brockway *v.* Innes, 39 Mich. 47, 33 Am. Rep. 348.

41. Ericsson *v.* Brown, 38 Barb. (N. Y.) 390.

42. Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189. But see to the contrary Williamson *v.* Wadsworth, 49 Barb. (N. Y.) 294, holding that a civil engineer and traveling agent employed at a fixed salary is a "servant" within the protection of such a statute. The court, how-

distinctive appellation, such as officers and agents of the company," are "laborers and servants," as for instance civil engineers, master mechanics, and conductors.[43]

6. MANAGER, SUPERINTENDENT, FOREMAN — a. In General. A bookkeeper and general manager is not a laborer, servant, or apprentice within the meaning of such a statute;[44] nor is the superintendent of a mining corporation within a provision of the charter of a corporation making shareholders liable for moneys due "laborers, servants, clerks, and operatives, . . . in case the company becomes insolvent";[45] nor is a person employed at a salary to perform the duties of the agent having superintendence of the affairs of a gold mining corporation during the absence of such agent;[46] nor is a mining superintendent in charge of a mine located in another county from the principal place of business of the corporation clothed with authority to contract for supplies, ores, workmen, etc.[47]

b. What Servants of This Class Are Within Such Statutes. But a superintendent or foreman of works has been held within the protection of statutes making shareholders personally liable for debts owing to "clerks," "servants," and "laborers."[48]

7. SECRETARY OF CORPORATION. The secretary of the corporation does not enjoy the protection of such a statute, although in addition to his duties as secretary he performs the duties of bookkeeper.[49]

8. BOOKKEEPER. A mere bookkeeper, having no other duties to perform than such as shall pertain to his position, is a "servant" within the protection of such a statute.[50]

9. TRAVELING SALESMAN. A traveling salesman employed by a corporation is not a "laborer" within the protection of a constitutional provision of this nature;[51] but if he spends part of the time on the road selling goods, making collections, etc., and the rest of the time working in a store, shipping and receiving goods, moving and handling stock, making sales, and collecting bills in the city, he is a "clerk" within the meaning of such a statute.[52]

10. ASSISTANT EDITOR AND REPORTER. Such a statute may well be held to extend to bookish or liberal labor, and to bring within its protection an assistant city editor and reporter, under the designation of "laborer."[53]

11. CONTRACTORS. Such statutes do not extend to the protection of contractors, such as the owner of a planing-mill who does works at his own mill and prepares materials to be delivered to the corporation for the erection of its building;[54] to a contractor for the building of a railway;[55] to one who has contracted for

ever, rests its decision upon Richardson *v.* Abendroth, 43 Barb. (N. Y.) 162, holding that the secretary of a manufacturing corporation is a "servant" within the statute. That decision was subsequently overruled in Coffin *v.* Reynolds, 37 N. Y. 640.

43. Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87 [*approved* in Coffin *v.* Reynolds, 37 N. Y. 640].

44. Wakefield *v.* Fargo, 90 N. Y. 213.

45. Cocking *v.* Ward, (Tenn. Ch. App. 1898) 48 S. W. 287.

46. Dean *v.* De Wolf, 16 Hun (N. Y.) 186.

47. Krauser *v.* Ruckel, 17 Hun (N. Y.) 463.

48. Sleeper *v.* Goodwin, 67 Wis. 577, 31 N. W. 335. Similarly see Short *v.* Medberry, 29 Hun (N. Y.) 39, foreman helping to manufacture, solicit orders, obtain loans, etc. See also Vincent *v.* Bamford, 33 N. Y. Super. Ct. 506, 42 How. Pr. (N. Y.) 109 (foreman of work who often discharged duties of superintendent and did everything that he was ordered to do); Hovey *v.* Ten Broeck, 3 Rob. (N. Y.) 316 (overseer and bookkeeper held to be a servant). *Compare* Jones *v.* Shawhan, 4 Watts & S. (Pa.) 257, for analogy drawn from the law of mechanics' liens.

49. Coffin *v.* Reynolds, 37 N. Y. 640 [*overruling* Richardson *v.* Abendroth, 43 Barb. (N. Y.) 162, and *citing* Viele *v.* Wells, 9 Abb. N. Cas. (N. Y.) 277].

50. Hovey *v.* Ten Broeck, 3 Rob. (N. Y.) 316 (overseer and bookkeeper); Chapman *v.* Chumar, 7 N. Y. Suppl. 230, 26 N. Y. St. 473.

51. Jones *v.* Avery, 50 Mich. 326, 15 N. W. 494.

52. Hand *v.* Cole, 88 Tenn. 400, 12 S. W. 922, 7 L. R. A. 96.

53. Harris *v.* Norval, 1 Abb. N. Cas. (N. Y.) 127.

54. Wis. Rev. Stat. (1858), c. 73, § 25.

55. Aikin *v.* Wasson, 24 N. Y. 482; Boutwell *v.* Townsend, 37 Barb. (N. Y.) 205. To the same effect under the Michigan statute see Peck *v.* Miller, 39 Mich. 594.

labor to be performed by his team of horses;[56] or to a contractor who has engaged to carry on certain quarrying operations at his own expense and for a period of years, in a quarry owned by the corporation, and to deliver the rock so quarried to the corporation at certain rates.[57]

12. ANOTHER SHAREHOLDER. Such statutes were not intended to give such remedy to one shareholder against another.[58]

13. ANOTHER CORPORATION AGGREGATE. A corporation aggregate cannot be the "employee" of another corporation within the meaning of such a statute.[59]

14. WAIVER OF THIS STATUTORY RIGHT — a. By Recovering Judgment, Receiving Dividend, Etc. This statutory right to proceed against individual shareholders is not waived by the servant by taking the note of the corporation for his debt, obtaining judgment thereon, and receiving a *pro rata* dividend out of the assets of the corporation upon such judgment.[60]

b. Accepting Promissory Note. One court has taken the isolated view that by taking the promissory note of the corporation the laborer waives the protection of such a statute;[61] but another court has held the contrary with much better reason.[62]

c. Whether Waived by Taking "Store Orders." It has been held with doubtful propriety that a laborer waives this statutory right by taking "store orders" of the corporation for his debt, which "store orders" are not honored.[63]

15. APPLICATION OF PAYMENTS BY LABORER. Where the statute limits the remedy of the servant or laborer to debts due for wages, not exceeding six months in any one case,[64] and the corporation keeps a running account with a laborer, and no particular application of an amount paid him within six months is made, he may apply it in payment of wages first earned by him.[65]

16. TO WHAT SHAREHOLDERS THIS LIABILITY ATTACHES. The liability created by such statutes generally attaches to those who were shareholders at the time when the labor was performed,[66] and the liability then incurred is not divested by a transfer of their shares.[67] They do not render a shareholder liable for debts of the corporation which were contracted before he became a member.[68]

17. RELEASE BY PLAINTIFF OF SOME SHAREHOLDERS. Where there is a general statute[69] authorizing one or more joint debtors to compromise their joint indebtedness in discharge of their joint liability without affecting the liability of the other joint debtors, and under another statute the liability of shareholders is several as well as joint, plaintiff, proceeding against the shareholders for a so-called "labor debt," may release some of the defendants, without affecting his right to recover the balance of his claim from the others.[70]

18. DEFENSES AVAILABLE TO SHAREHOLDER. Here as in other cases[71] he may escape liability by proof that he has not been a shareholder, or that he was not a shareholder within the period when, by operation of the statute, liability attached

56. Balch *v.* New York, etc., R. Co., 46 N. Y. 521. The reverse was held by the supreme court of Wisconsin in Hogan *v.* Cushing, 49 Wis. 169, 5 N. W. 490, in respect of a statute giving a lien "for labor and services upon logs."

57. Taylor *v.* Manwaring, 48 Mich. 171, 12 N. W. 28. For analogy see Wentroth's Appeal, 82 Pa. St. 469.

58. Richardson *v.* Abendroth, 43 Barb. (N. Y.) 162. But *compare supra*, VIII, J, 6, a *et seq.*

59. Dukes *v.* Love, 97 Ind. 341, construing Ind. Rev. Stat. (1881), § 3869.

60. Jackson *v.* Meek, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620, construing Tenn. Acts (1875), c. 142, § 21.

61. Hanson *v.* Donkersley, 37 Mich. 184, Marston, J., dissented, and his view more nearly accords with the current of opinion.

62. Jackson *v.* Meek, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620.

63. Beecher *v.* Dacey, 45 Mich. 92, 7 N. W. 689.

64. Wis. Rev. Stat. (1878), § 1769.

65. Sleeper *v.* Goodwin, 67 Wis. 577, 31 N. W. 335.

66. Macomber *v.* Wright, 108 Mich. 109, 65 N. W. 610; Kamp *v.* Wintermute, 107 Mich. 635, 65 N. W. 570.

67. Jackson *v.* Meek, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620.

68. Reeder *v.* Maranda, 66 Ind. 485.

69. Here, N. Y. Acts (1838), c. 257.

70. Herries *v.* Platt, 21 Hun (N. Y.) 132.

71. 3 Thompson Corp. § 3161.

to the shareholders for the particular debt.[72] He may plead the statute limiting the period within which such an action may be brought against the shareholders.[73] He may plead a previous payment and the exhaustion of his liability under limitations elsewhere considered; and it seems that under the New York statute[74] he is absolutely discharged from his liability by paying to any creditor for whose debts he is liable an amount equal to his stock;[75] while under the Massachusetts statute[76] it is no ground of defense to one of the defendants that he has paid some of the operatives other sums due them, and has a claim for contribution upon the other defendants.[77] But it is no defense that the corporation has been dissolved by its own voluntary act; that no judgment has been recovered against the corporation; that no receiver of the assets of the corporation has been appointed, or other means taken to ascertain whether a dividend in favor of creditors may not be made; or that plaintiff has presented his claim for the purpose of receiving and sharing in a dividend.[78]

19. **Remedy at Law or in Equity.** Some courts have deemed it consistent with justice to drive a common laborer into a complicated suit in equity in order to collect from shareholders his so-called "labor debts."[79] The sense of justice of the supreme court of Wisconsin holds that since the Michigan statute, in creating this right to hold shareholders liable for labor debts of the corporation, prescribes a remedy by an action in assumpsit, the remedy cannot migrate, so that the laborer has no remedy in the enlightened state of Wisconsin.[80]

20. **Complaint in Such Actions.** Where the condition of the statute is that the labor debt must have been contracted to be paid within one year, plaintiff must allege that the debt which is the subject of his action was so contracted.[81]

21. **Parties Defendant.** A servant who brings an action under the New York statute,[82] making all the shareholders parties defendant, cannot thereafter discontinue as to one without the consent of the others.[83]

22. **Other Points in Construction of Such Statutes.** The liability created by such a statute extends to the protection of laborers where labor is performed outside the state within which the corporation existed.[84]

23. **Statutes Making Shareholders Liable For Goods, Wares, and Merchandise Sold and Delivered.** A statute of Michigan (among other things) enacts that for all goods sold to a corporation each shareholder shall be held liable to the amount of his capital stock therein. As this statute is local and special, we will merely refer to cases in which it has received interpretation.[85]

L. To What Class of Shareholders Liability Attaches — Present and Past Members — 1. General Rule That Liability Follows Shares — a. Statement of Rule. In the absence of special statutory provisions the general rule,

72. Powell *v.* Eldred, 39 Mich. 552.

73. Arno *v.* Wayne Cir. Judge, 42 Mich. 362, 4 N. W. 147.

74. N. Y. Laws (1840), c. 40, § 18.

75. Mathez *v.* Neidig, 72 N. Y. 100, opinion by Church, C. J.

76. Mass. Stat. (1870), c. 224, § 42.

77. Burnap *v.* Haskins Steam-Engine Co., 127 Mass. 586.

For other available defenses see Mathez *v.* Neidig, 72 N. Y. 100.

78. Sleeper *v.* Goodwin, 67 Wis. 577, 31 N. W. 335.

79. Bell *v.* Spaulding, 3 Allen (Mass.) 485; Foster *v.* Posson, 105 Wis. 99, 81 N. W. 123 [*citing* Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922; Day *v.* Buckingham, 87 Wis. 215, 58 N. W. 254].

80. May *v.* Black, 77 Wis. 101, 45 N. W. 949.

81. Dean *v.* Mace, 19 Hun (N. Y.) 391. See further as to allegation, proof, and procedure under the same statute Dempsey *v.* Willett, 16 Hun (N. Y.) 264.

For a complaint in such an action which does not state a cause of action because it fails to show that plaintiff's claims are for labor done, etc., see Toner *v.* Fulkerson, 125 Ind. 224, 25 N. E. 218.

82. N. Y. Laws (1848), c. 40, § 18.

83. Dean *v.* Whiton, 16 Hun (N. Y.) 203.

Statutory changes in Michigan under which plaintiff might proceed at common law against the shareholder alone. Tilden *v.* Young, 39 Mich. 58.

84. Clokus *v.* Hollister Min. Co., 92 Wis. 325, 66 N. W. 398.

Provision of Dak. Comp. Laws, § 3111, impliedly repealed by section 2933, subsequently enacted. Busby *v.* Riley, 6 S. D. 401, 61 N. W. 164.

85. Kirkpatrick *v.* Bessalo, 116 Mich. 657, 74 N. W. 1042; Kirkpatrick *v.* Mehalitch, 113 Mich. 631, 71 N. W. 1077.

applicable alike to the English joint-stock company and the American corporation, is that liability as contributories or to creditors follows the shares,[86] and attaches, not merely to those who were members at the time or before the debt was contracted, but to those who were such either (1) when, by reason of the stoppage, dissolution, or winding-up[87] of the company, the right to transfer shares ceased; or, (2) in the case of direct proceedings by creditors against shareholders, when the right of the creditor against the shareholder became fixed in an appropriate proceeding.[88]

b. Need Not Have Been Shareholder at Time Creditor's Right of Action Accrued. It follows that in an action to enforce the individual liability of a shareholder under a statute, a recovery may be had against him, although he was not a shareholder when the creditor's cause of action accrued.[89]

2. Past Members Not Liable Unless Made So by Statute — a. In General. The general, and, it is believed, the universal rule is that members who have *bona fide* transferred their shares to others before the institution of proceedings to charge the shareholders are no longer liable in any form for the debts of the corporation, unless their liability has been continued by statute.[90] Where the liability is in respect to any balance due upon their shares, the liability attaches to the shares and is not affected by the time when the debts sought to be enforced accrued.[91]

b. Statutory Liability of Past Members in America — (i) *In General.* There are statutes in America which continue the liability of shareholders for limited periods after they have ceased to be such.[92]

(ii) *Liability For Debts Contracted at Time He Was Member.* In general the meaning of these statutes is that shareholders are liable for debts of the corporation contracted before or while the shareholder was a member, but not for debts contracted after he ceased to be a member.[93]

86. Williams *v.* Hanna, 40 Ind. 535; Chesley *v.* Pierce, 32 N. H. 388. See also *infra*, VIII, N, 1.

87. *In re* Asiatic Banking Corp., L. R. 5 Ch. 298, 39 L. J. Ch. 461, 22 L. T. Rep. N. S. 217, 18 Wkly. Rep. 366; *In re* Continental Bank Corp., L. R. 8 Eq. 504.

88. *Connecticut.*—Deming *v.* Bull, 10 Conn. 409; Middletown Bank *v.* Magill, 5 Conn. 28.

Illinois.— Root *v.* Sinnock, 120 Ill. 350, 11 N. W. 339, 60 Am. Rep. 558. See also Wheelock *v.* Kost, 77 Ill. 296.

Maine.— Longley *v.* Little, 26 Me. 162.

Massachusetts.— Child *v.* Coffin, 17 Mass. 64; Bond *v.* Appleton, 8 Mass. 472, 5 Am. Dec. 111.

Missouri.— McClaren *v.* Franciscus, 43 Mo. 452.

Ohio.— Brown *v.* Hitchcock, 36 Ohio St. 667.

England.— Dodgson *v.* Scott, 6 D. & L. 27, 2 Exch. 457, 12 Jur. 521, 17 L. J. Exch. 321, 5 R. & Can. Cas. 654; Nixon *v.* Green, 11 Exch. 550, 25 L. J. Exch. 209 [*affirmed* in 3 H. & N. 686, 6 Wkly. Rep. 772, 27 L. J. Exch. 509].

89. Root *v.* Sinnock, 120 Ill. 350, 11 N. E. 339, 60 Am. Rep. 558 [*distinguishing* Thompson *v.* Meisser, 108 Ill. 359; Buchanan *v.* Meisser, 105 Ill. 638; Hull *v.* Burtis, 90 Ill. 213; Fuller *v.* Ledden, 87 Ill. 310; Culver *v.* Chicago Third Nat. Bank, 64 Ill. 528].

90. *Minnesota.*— Olson *v.* Cook, 57 Minn. 552, 59 N. W. 635, under a statute.

Ohio.— Railroad Co. *v.* Smith, 48 Ohio St. 219, 31 N. E. 743, no defense to an action by creditors to enforce the statutory liability of the shareholders of an insolvent corporation, that defendants became shareholders after the liability of the corporation to such creditors was incurred.

Pennsylvania.— Fuller, etc., Mfg. Co. *v.* Brereton, 29 Pittsb. L. J. N. S. 366.

Vermont.— Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 47 Atl. 176.

Wisconsin.— Killen *v.* Barnes, 106 Wis. 546, 82 N. W. 536, under a statute.

See also *infra*, VIII, N, 1.

91. Maine Trust, etc., Co. *v.* Southern L. & T. Co., 92 Me. 444, 43 Atl. 24.

Where the liability is under a covenant in a mortgage, whether a corporation contract a debt when it covenanted to save one harmless from the payment of a mortgage previously given, or when the mortgage fell due, is immaterial as affecting the liability of a shareholder whose ownership of stock began before the date of the covenant and continued until after the mortgage fell due. Barron *v.* Burrill, 86 Me. 66, 29 Atl. 939.

92. Examples of such statutes and their interpretation will be found in Libby *v.* Tobey, 82 Me. 397, 19 Atl. 904; Ingalls *v.* Cole, 47 Me. 530.

93. *Alabama.*— Morris *v.* Glenn, 87 Ala. 628, 7 So. 90.

Illinois.— Fuller *v.* Ledden, 87 Ill. 310.

Maryland.— Hambleton *v.* Glenn, 72 Md. 331, 20 Atl. 115; McKim *v.* Glenn, 66 Md. 479, 8 Atl. 130.

(III) *Exceptional Rule of Liability as Partners Attaching to Those Who Were Shareholders When Debt Was Contracted.* Formerly, in New York, and still it seems in other states, an exceptional rule obtains under which the test of liability is that the shareholder was such at the time the debt was contracted.[94] As this subject of liability, namely, that of partners, is very exceptional and for the most part out of date, the subject will not be further pursued.[95]

3. Liability For Debts Contracted Before Membership — a. In General. From the premise that liability follows the shares,[96] the conclusion is stated with entire confidence to be that shareholders are liable on the insolvency of the corporation, to the extent of their contract of subscription or of the superadded statutory imposition, for the debts of the corporation contracted before they became members as well as for the debts contracted during their membership.[97]

b. Exception Where Liability Is That of Partners. Where the governing statute makes or leaves the shareholders liable as partners they are not liable for debts contracted before they became shareholders, by analogy to the well-known rule with regard to partnerships.[98]

c. Exception Where Liability Is in Nature of Penalty For Wrongful Act — (I) *In General.* Where the liability is in the nature of a penalty for a prohibited act, such as suffering the indebtedness of the corporation to exceed a given limit, then it does not attach to those shareholders who do not become members at the time of the doing of such act, since it would be intolerable to visit them with punishment for the doing of an act with which they were in any manner privy.[99]

(II) *As For Contracting Debts Before Stock Paid in.* It also follows that, under a statutory provision making shareholders liable to creditors until the whole amount of the capital is paid in, etc., a shareholder is not liable for debts contracted before he became a shareholder.[1] A transfer of shares to a purchaser does not operate to transfer such a liability to him, nor can the creditor be deemed to trust persons who, when the credit is given, are not yet shareholders.[2] And this conclusion may equally be rested on the ground that the

Ohio.— Cleveland Gas Co. *v.* Collins, 19 Ohio Cir. Ct. 247, 10 Ohio Cir. Dec. 475.

Tennessee.—Marr *v.* West Tennessee Bank, 4 Lea 578, original subscriber liable for the whole amount of his subscription, although he had transferred his shares.

Virginia.— Hamilton *v.* Glenn, 85 Va. 901, 9 S. E. 129.

United States.— Glenn *v.* Priest, 51 Fed. 400, 2 C. C. A. 305; Glenn *v.* Priest, 48 Fed. 19; Glenn *v.* Foote, 36 Fed. 824 (release by trustees in insolvency of assignor of shares does not release assignee).

Under New York Stock Corporation Law, § 54, must have been a shareholder before the debt was created where stock was originally issued to him. Doyle *v.* Kimball, 23 Misc. (N. Y.) 431, 52 N. Y. Suppl. 195.

94. *California.*— Larrabee *v.* Baldwin, 35 Cal. 155; Davidson *v.* Rankin, 34 Cal. 503; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 265.

Illinois.— Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Thompson *v.* Meisser, 108 Ill. 359; Fuller *v.* Ledden, 87 Ill. 310.

Indiana.— Williams *v.* Hanna, 40 Ind. 535.

Massachusetts.— Bordman *v.* Osborn, 23 Pick. 295.

New Hampshire.— Chesley *v.* Pierce, 32 N. H. 388.

New York.— Tracy *v.* Yates, 18 Barb. 152; McCullough *v.* Moss, 5 Den. 567; Harger *v.* McCullough, 2 Den. 119; Freeland *v.* McCullough, 1 Den. 414, 43 Am. Dec. 685; Adderly *v.* Storm, 6 Hill 624; Moss *v.* Oakley, 2 Hill 265; Judson *v.* Rossie Galena Co., 9 Paige 598, 38 Am. Dec. 569.

Ohio.— Brown *v.* Hitchcock, 36 Ohio St. 667.

Vermont.— Windham Provident Sav. Inst. *v.* Sprague, 43 Vt. 502.

95. But the reader is referred to a considerable note collecting the cases in 3 Thompson Corp. § 3173.

96. See *supra*, VIII, L, 1, a; and *infra*, VIII, N, 1.

97. Lee *v.* Imbrie, 13 Oreg. 510, 11 Pac 270.

98. Chesley *v.* Pierce, 32 N. H. 388; Moss *v.* McCullough, 7 Barb. (N. Y.) 279.

99. Windham Provident Sav. Inst. *v.* Sprague, 43 Vt. 502.

1. Tracy *v.* Yates, 18 Barb. (N. Y.) 152.

2. Tracy *v.* Yates, 18 Barb. (N. Y.) 152. *Contra*, McMaster *v.* Davidson, 29 Hun (N. Y.) 542.

statutory liability of a shareholder is in the nature of a contract with the creditors of the corporation.[8]

4. Statutes Under Which Liability Attaches to Those Who Are Shareholders at Time Liability Is Sought to Be Enforced. By analogy to the doctrine that the liability follows the shares,[4] the rule under many statutes and charters is that the superadded individual liability thus created attaches to those who are shareholders at the time when the action is brought to charge them,[5] whether by a winding-up proceeding, or by a direct action at law, in equity, or under a statute.[6]

5. At Time When Execution Against Corporation Is Returned Nulla Bona. Statutes exist which impose a liability upon shareholders to pay the debts of the corporation who were such at the time when execution upon a judgment against the corporation was returned *nulla bona*.[7]

6. Effect of Renewals Upon Liability of Present and Past Members. Where by the terms of the governing statute or by construction the shareholders are liable for no other than those debts which were contracted during the time when they held their shares the question is likely to arise, At what time is a debt to be deemed to have been contracted, when it is evidenced by a note in renewal of a previous one? In such a case it has been held that each note given in renewal is to be regarded as a new contract and a new debt.[8] But this rule does not apply in the case of a note given for a previous book-account debt; this is not the creating of a new debt, but the giving of a higher security for an existing debt; and therefore, where the liability attaches to those who were shareholders at the time the debt was contracted, it is unnecessary for the declaration of a creditor, in an action at law against a shareholder, to state that defendant was a shareholder when the note was given.[9]

7. Other Points Relating to Liability of Present and Past Members. These will be briefly stated in the marginal note.[10]

3. Hager *v.* Cleveland, 36 Md. 476; Norris *v.* Wrenschall, 34 Md. 492; Matthews *v.* Albert, 24 Md. 527; Holyoke Bank *v.* Burnham, 11 Cush. (Mass.) 183.

4. See *supra*, VIII, L, 1, a; and *infra*, VIII, N, 1.

5. Root *v.* Sinnock, 120 Ill. 350, 11 N. E. 339, 60 Am. Rep. 558 [*affirming* 24 Ill. App. 537].

6. Deming *v.* Bull, 10 Conn. 409 (liability attached to those who were shareholders when the debt was contracted and also when the suit was commenced); Root *v.* Sinnock, 120 Ill. 350, 11 N. E. 339, 60 Am. Rep. 558; Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Brown *v.* Hitchcock, 36 Ohio St. 667; Cleveland *v.* Burnham, 55 Wis. 598, 13 N. W. 677, 680. *Compare* Middletown Bank *v.* Magill, 5 Conn. 28; Southmayd *v.* Russ, 3 Conn. 52; Curtis *v.* Harlow, 12 Metc. (Mass.) 3; Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417; Dodgson *v.* Scott, 6 Dowl. & L. 27, 2 Exch. 457, 12 Jur. 521, 17 L. J. Exch. 321, 5 K. & Can. Cas. 654 (construing the words in the statute "for the time being," and holding that liability attaches at the time of suing out scire facias for an execution against the members).

7. Skrainka *v.* Allen, 76 Mo. 384 [*reversing* on this point 7 Mo. App. 434]; Bagley *v.* Tyler, 43 Mo. App. 195; Brown *v.* Trail, 89 Fed. 641; Nixon *v.* Green, 11 Exch. 550, 25 L. J. Exch. 209 [*affirmed* in 3 H. & N. 686, 27 L. J. Exch. 509, 6 Wklv. Rep. 772]. *Compare* Miller *v.* Great Republic Ins. Co., 50 Mo. 55; McClaren *v.* Franciscus, 43 Mo. 452 (at the time when execution is sued out).

8. Castleman *v.* Holmes, 4 J. J. Marsh. (Ky.) 1; Milliken *v.* Whitehouse, 49 Me. 527. The same ruling has been made where the question arose with reference to the statute of limitations. Fisher *v.* Martin, 47 Barb. (N. Y.) 159.

9. Freeland *v.* McCullough, 1 Den. (N. Y.) 414, 43 Am. Dec. 685. See this question in another relation, *supra*, VIII, J, 5.

10. Shareholder becoming such subsequently to constitutional amendment imposing individual liability not subject to the same. Ochiltree *v.* Iowa Contracting R. Co., 21 Wall. (U. S.) 249, 22 L. ed. 546 [*affirming* 54 Mo. 113]. Charter fixing the liability upon those who were shareholders at the time when payment was refused by corporation. Bond *v.* Appleton, 8 Mass. 472, 5 Am. Dec. 111. *Compare* McDougald *v.* Bellamy, 18 Ga. 411. Rule where the governing statute is such that execution upon the judgment obtained against the corporation will also run against the shareholders. Child *v.* Coffin, 17 Mass. 64. *Compare* Marcy *v.* Clark, 17 Mass. 330, where it is said that the execution might be levied upon him who was a member at the time of the levy. Effect in such case of death of shareholder before commencement of action against corporation. Child *v.* Coffin, 17 Mass. 64. *Compare* Longley *v.* Little, 26 Me. 162; Powis *v.* Butler, 3 C. B. N. S. 645, 91 E. C. L. 645. Assignee of shares not liable for fraudulent dividends received by his assignor. Hurlbut *v.* Taylor, 62 Wis. 607, 22 N. W. 855.

M. Status and Liability of Legal and Equitable Owners of Shares — **1. General Rule That Legal Owner Is Liable — a. Statement of Rule.** The general rule is that the legal owner, that is to say, he whose name rightfully[11] appears as owner on the books of the corporation, is to be regarded as the shareholder, both as to the corporation and as to the public.[12]

b. Pledgee Registered as Shareholder Liable as Such. Under the operation of this rule, a pledgee holding the stock of his pledger as collateral security, if registered as the legal owner, is liable to the creditors of the company as a shareholder, and if, in consequence of the operation of this rule, he suffer a loss, that is a matter between him and his pledger.[13]

c. Pledger Liable if Shares Continue to Stand in His Name on Corporate Books. If the shares continue to stand on the corporate books in the name of the pledger, he, and not the pledgee, will be liable to creditors, because he remains the owner of them.[14]

Under New York Manufacturing Act, liability attaches to those who were shareholders at the time of the purchase of their shares, and not at the time of the transfer of them on the books of the corporation. Washburn, etc., Mfg. Co. *v.* Clark, 17 N. Y. Suppl. 568, 43 N. Y. St. 709. Under a statute creating a liability for "debts contracted or due during the time of their holding stock therein," a shareholder is liable for a debt of the corporation contracted before he purchased his shares. Ball Electric Light Co. *v.* Child, 68 Conn. 522, 37 Atl. 391. There is no sense in a proposition found in an official syllabus in Georgia that in order to enable a creditor of a corporation to recover from one alleged to be a shareholder therein, and as such liable on an unpaid stock subscription, it must appear that the defendant was in fact such a shareholder at a time when he was in law so liable. Fouche *v.* Merchants' Nat. Bank, 110 Ga. 827, 36 S. E. 256.

11. Simmons *v.* Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476; Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531; *In re* Imperial Mercantile Credit Assoc., L. R. 3 Eq. 360.

12. *California.*— Baines *v.* Story, (1892) 30 Pac. 777; Baines *v.* Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158.

Connecticut.— State *v.* Ferris, 42 Conn. 560.

Illinois.— Wheelock *v.* Kost, 77 Ill. 296.

Iowa.— Hale *v.* Walker, 31 Iowa 344, 7 Am. Rep. 137.

Maine.— Skowhegan Bank *v.* Cutler, 49 Me. 315; Fowler *v.* Ludwig, 34 Me. 455; Stanley *v.* Stanley, 26 Me. 191.

Maryland.— Magruder *v.* Colston, 44 Md. 349, 22 Am. Rep. 47.

Massachusetts.— Holyoke Bank *v.* Burnham, 11 Cush. 183; Grew *v.* Breed, 10 Metc. 569; Crease *v.* Babcock, 10 Metc. 525.

Missouri.— Simmons *v.* Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476.

New York.— Matter of Empire City Bank, 18 N. Y. 199 [*reversing* 6 Abb. Pr. 385]; Rosevelt *v.* Brown, 11 N. Y. 148; Adderly *v.* Storm, 6 Hill 624.

United States.— Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864 [*distinguishing* Whitney *v.* Butler, 118 U. S. 655, 7 S. Ct. 61, 30 L. ed. 266]; Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. ed. 448; Pullman *v.* Upton, 96 U. S. 328, 24 L. ed. 818.

13. *Illinois.*— Wheelock *v.* Kost, 77 Ill. 296.

Massachusetts.— Holyoke Bank *v.* Burnham, 11 Cush. 183; Grew *v.* Breed, 10 Metc. 569; Crease *v.* Babcock, 10 Metc. 525.

Minnesota.— Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

Missouri.— Simmons *v.* Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476.

New York.— *In re* Empire City Bank, 18 N. Y. 199, 8 Abb. Pr. 192; Rosevelt *v.* Brown, 11 N. Y. 148; Adderly *v.* Storm, 6 Hill 624.

United States.— Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. ed. 448; Pullman *v.* Upton, 96 U. S. 328, 24 L. ed. 818; Moore *v.* Jones, 17 Fed. Cas. No. 9,769, 3 Woods 53.

England.— Franklin *v.* Neate, 14 L. J. Exch. 59, 13 M. & W. 481.

A person who allows a transfer to be made to him, upon the books of a national bank, of shares of stock therein, even though such a transfer is made solely as security for a debt due the transferee, is liable as a shareholder under U. S. Rev. Stat. (1872), § 5139. Moore *v.* Jones, 17 Fed. Cas. No. 9,769, 3 Woods 53.

Although the debt has been paid, yet so long as the shares stand in the name of the pledgee, he remains liable as a shareholder. Adderly *v.* Storm, 6 Hill (N. Y.) 624. But a retransfer divests him of all future liability. Holyoke Bank *v.* Burnham, 11 Cush. (Mass.) 183.

The rule of liability does not apply to the savings-bank holding shares in pledge which it has no right to own. Canada Exch. Bank *v.* City, etc., Sav. Bank, 6 Montreal Q. B. 196.

In California a pledgee who holds shares as security for a debt acquires only a lien or special property therein, and is not liable to assessment upon the shares in case of the insolvency of the corporation, although the stock stands upon the registry in the pledgee's name as such. Pauly *v.* State Loan, etc., Co., 58 Fed. 666, 7 C. C. A. 422 [*affirming* 56 Fed. 430].

14. Henkle *v.* Salem Mfg. Co., 39 Ohio St. 547; Welles *v.* Larrabee, 36 Fed. 866, 2

d. Liability of Pledgee of Unissued Shares of Corporation. In the absence of circumstances of estoppel arising in favor of creditors, the pledgee of the unissued shares of a corporation will occupy the position in which it was intended to place him by the contract of pledge, and will ordinarily not be liable as a shareholder.[15]

e. Pledgee Taking Transfer in Name of Irresponsible Party. The pledgee of shares in a national bank who, in good faith and with no fraudulent intent, takes the security for his own benefit in the name of an irresponsible trustee, for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a shareholder, incurs no liability as such to creditors of the bank in case of its failure.[16]

2. Trustees Registered as Owners Liable Personally — a. In General. If shares are registered in the name of a person with his consent[17] to be held in trust for another,[18] or in trust for a bank,[19] he assumes the responsibility of a shareholder, and if he thereby suffers loss he must seek indemnity from his *cestui que trust*.[20]

b. Statutes Making Trust Estate Liable and Exonerating Trustee. Statutes have been enacted in various jurisdictions providing that no person holding shares as executor, administrator, guardian, or trustee shall be subject to any liabilities as

L. R. A. 471; Becher *v.* Wells Flouring Mill Co., 1 Fed. 276, 1 McCrary 62. See also *supra*, VII, F, 1, c.

15. *Kansas.*— Tschumi *v.* Hills, 6 Kan. App. 549, 51 Pac. 619, no liability where the shares were void as not being issued in conformity with the charter of the corporation.

Maryland.— Matthews *v.* Albert, 24 Md. 527.

Missouri.— Union Sav. Assoc. *v.* Seligman, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776 [*overruling* Griswold *v.* Seligman, 72 Mo. 110, and *reversing* 11 Mo. App. 142].

United States.— Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359; Andrews *v.* National Foundry, etc., Works, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139 [*rehearing denied* in 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153], the latter case holding a pledgee not liable to creditors who were not misled, especially where he forbids the issue of unpaid stock and declares that it shall be void. But see National Foundry, etc., Works *v.* Oconto Water Co., 68 Fed. 1006, where it was held that the pledgees became the absolute owners and were liable to creditors of the corporation.

England.— *Ex p.* Currie, 32 L. J. Ch. 57, 11 Wkly. Rep. 675; Ashworth *v.* Bristol, etc., R. Co., 15 L. T. Rep. N. S. 561.

Canada.— McCraken *v.* McIntyre, 1 Can. Supreme Ct. 479.

16. Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 4 S. Ct. 525, 28 L. ed. 478.

17. If done without his consent it will not bind him unless ratified. *In re* Imperial Mercantile Credit Assoc., L. R. 3 Eq. 361. Nor will it if he is an infant and incapable of consenting, unless he affirms on becoming of age. *In re* North of England Joint-Stock Banking Co., 1 Hall & T. 580, 13 Jur. 951, 19 L. J. Ch. 69, 1 Macn. & G. 307, 47 Eng. Ch. 246. See in connection with this case Hoare's Case, 30 Beav. 225, 2 Johns. & H. 229.

18. Stover *v.* Flack, 30 N. Y. 64; *In re* International Contract Co., L. R. 7 Ch. 485, 41 L. J. Ch. 564, 26 L. T. Rep. N. S. 487, 20 Wkly. Rep. 430; *In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331; Cree *v.* Somervail, 4 App. Cas. 648; Cuninghame *v.* Glasgow Bank, 4 App. Cas. 607; *In re* Glasgow Bank, 4 App. Cas. 547; Muir *v.* Glasgow Bank, 4 App. Cas. 337, 40 L. T. Rep. N. S. 339, 27 Wkly. Rep. 603; Hoare's Case, 30 Beav. 225, 2 Johns. & H. 229; *Re* Australia Royal Bank, 2 Giff. 189, 6 Jur. N. S. 908, 2 L. T. Rep. N. S. 349; Lumsden *v.* Buchanan, 4 Macq. 959; *In re* Independent Assur. Co., 1 Sim. N. S. 389, 40 Eng. Ch. 389. *Compare In re* North of England Joint-Stock Banking Co., 1 Hall & T. 580, 13 Jur. 951, 19 L. J. Ch. 69, 1 Macn. & G. 307, 47 Eng. Ch. 246 [*reversing* 3 De G. & Sm. 80]; *Ex p.* Scully, 6 Ir. Ch. 72.

In case of an unlimited company, such trustees standing on the books as legal owners are liable as partners. Gillespie *v.* Glasgow Bank, 4 App. Cas. 632. And see Matter of Joint-Stock Co.'s Act, 4 De G. J. & S. 416, 10 Jur. N. S. 711, 10 L. T. Rep. N. S. 594, 12 Wkly. Rep. 925, 69 Eng. Ch. 320; Matter of St. Marylebone Banking Co., 3 De G. & Sm. 21; *In re* London, etc., Assur. Co., 4 Jur. N. S. 448, 27 L. J. Ch. 666, 6 Wkly. Rep. 479.

19. *In re* National Financial Co., L. R. 3 Ch. 791, 18 L. T. Rep. N. S. 895, 16 Wkly. Rep. 994; *In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331; Hemming *v.* Maddick, L. R. 9 Eq. 175 [*affirmed* in L. R. 7 Ch. 395, 41 L. J. Ch. 522, 26 L. T. Rep. N. S. 565, 20 Wkly. Rep. 433]; *In re* Imperial Mercantile Credit Assoc., L. R. 3 Eq. 361; Cree *v.* Somervail, 4 App. Cas. 648; Hoare's Case, 30 Beav. 225, 2 Johns. & H. 229; Preston *v.* Guyon, 5 Jur. 146, 10 L. J. Ch. 73, 11 Sim. 327, 34 Eng. Ch. 327.

20. Russell *v.* Bristol, 49 Conn. 251.

a shareholder. Such statutes have existed in Massachusetts[21] and in Rhode Island;[22] and such is one of the provisions of the act of congress governing national banks.[23] Under these statutes it has been held that the trust property is answerable for the debts of the company in like manner as the property of the shareholder would have been if he had not held the shares in trust.[24]

c. Trustees Holding Shares For Company. Where "treasury stock," so-called, is held in the name of a trustee for the company, the holder will not incur a liability to creditors providing the transaction is lawful,[25] and providing, in case the trustee thereby suffers loss, he is entitled to indemnity from the company;[26] but otherwise if the transaction is unlawful, *ultra vires*, or fraudulent, in which case he will be held to his liability, and will not be entitled to such indemnity.[27]

d. Liability of Trustee Who Conceals His Trust. Statutes exonerating persons who hold shares as trustees from personal liability apply only to cases where the trust is expressed on the books of the company. If the trust is concealed, the trustee stands liable to creditors precisely as though he were the actual owner.[28]

e. Holder of Shares Which Have Been Transferred to Him Without His Knowledge or Consent. Liability as a shareholder does not attach to one to whom shares have been transferred on the books of the corporation without his knowledge or consent,[29] unless he ratifies the transfer by accepting the shares.[30]

f. Effect of Trustee Resigning Trust and Substituting Another Trustee. A resignation of his trust by a trustee in whose name the shares stand on the books of the corporation will be ineffectual to exonerate him from liability as a shareholder; but he must go further and transfer the shares, on the books of the company, out of his name and into the name of another who may lawfully take them.[31] A substitution of trustees, made while the company is a going concern, and ending in a formal transfer of the shares on the books of the company to the new trustee, will of course terminate the liability of the retiring trustee.[32] But such a substitution of trustees, ending in a formal execution of a transfer from the retiring to the assuming trustee, will not be effectual to terminate the liability of the former where it is made after the corporation, by reason of insolvency, has ceased to be a going concern.[33]

g. Taking Shares in Name of Fictitious Trustee. Where shares are taken in

21. Mansur *v.* Pratt, 101 Mass. 60; Stedman *v.* Eveleth, 6 Metc. (Mass.) 114.

22. Sayles *v.* Bates, 15 R. I. 342, 5 Atl. 497.

23. U. S. Rev. Stat. (1872), § 5152.

24. Stedman *v.* Eveleth, 6 Metc. (Mass.) 114; Sayles *v.* Bates, 15 R. I. 342, 5 Atl. 497.

Trustee of national bank shares not liable where trust is expressed on the corporate books. Welles *v.* Larrabee, 36 Fed. 866, 2 L. R. A. 471.

25. Russell *v.* Bristol, 49 Conn. 251.

26. *In re* National Financial Co., L. R. 3 Ch. 791, 18 L. T. Rep. N. S. 895, 16 Wkly. Rep. 994; James *v.* May, L. R. 6 H. L. 328, 42 L. J. Ch. 802, 29 L. T. Rep. N. S. 217.

27. Nickoll's Case, 24 Beav. 639; Daniell's Case, 23 Beav. 568, 1 De G. & J. 372, 58 Eng. Ch. 289; Matter of St. Marylebone Banking Co., 3 De G. & Sm. 21. Further on this subject see and *compare In re* Imperial Mercantile Credit Assoc., L. R. 3 Eq. 361; Cree *v.* Somervail, 4 App. Cas. 648; Matter of Waterloo L., etc., Assur. Co., 2 De G. J. & S. 101, 10 Jur. N. S. 246, 10 L. T. Rep. N. S. 3, 12 Wkly. Rep. 502, 67 Eng. Ch. 80; *In re* Munster Bank, L. R. 17 Ir. 341; *In re* Ennis, etc., R. Co., L. R. 3 Ir. 94.

28. McKim *v.* Glenn, 66 Md. 479, 8 Atl. 130; Ollesheimer *v.* Thompson Mfg. Co., 44 Mo. App. 172.

29. Matter of St. George's Steam Packet Co., 3 De G. & Sm. 191, 14 Jur. 826 [*affirmed* in 2 Hall & T. 395, 19 L. J. Ch. 353, 2 Macn. & G. 201]; Matter of St. George's Steam Packet Co., 3 De G. & Sm. 11, 13 Jur. 530, 672, 18 L. J. Ch. 259, 1 Macn. & G. 291, 47 Eng. Ch. 232.

30. Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531. *Compare In re* Imperial Mercantile Credit Assoc., L. R. 3 Eq. 361; *In re* Glasgow Bank, 4 App. Cas. 547.

Nor will such a person be a "bona fide stockholder" within the meaning of a statute prescribing the qualification of corporate electors. Stewart *v.* Mahoney Min. Co., 54 Cal. 149.

31. Ker's Case, L. R. 4 H. L. Sc. 549; Buchan's Case, 4 App. Cas. 549; Mitchell's Case, 4 App. Cas. 548, 40 L. T. Rep. N. S. 758, 27 Wkly. Rep. 875.

32. *In re* Glasgow Bank, 4 App. Cas. 547.

33. Rutherfurd's Case, 4 App. Cas. 548.

the name of a fictitious trustee for the purpose of deceiving the public, a court of equity will discover the real beneficiary and hold him liable to creditors.[34]

h. Taking Shares in Name of Person Non Sui Juris. The same principle applies where a person, in order to evade liability as a shareholder while enjoying the benefits, takes shares in the name of a person incapable of contracting, as an infant[35] or a married woman.[36]

i. Cestui Que Trust Not Liable Provided Transaction Is "Out and Out," and Not a "Sham." According to English decisions if shares are taken by one in the name of another, in order that the former may escape the responsibilities while enjoying the benefits of a shareholder, and the latter authorizes, assents to, or ratifies this, he will be held to be a contributory and not the *cestui*, following the rule which looks only to the legal title; and this, although the trustee is insolvent, and the *cestui* is solvent.[37] That is to say, if the transaction although made with the design of escaping liability, and with a fraudulent intent as against the creditors of the corporation, is "out and out," and not a "sham," but not if it is not "out and out," as where the shares are held by a string which can be pulled if the tide turns and the venture becomes profitable.[38]

3. Assignees of Bankrupt or Insolvent Estates — a. In General. Assignees of insolvent estates, or of estates undergoing administration in a court of bankruptcy, a portion of whose assets consist of the shares of a corporation, do not become personally liable to the creditors of the corporation, unless they distinctly make themselves so by some act of their own, not required of them in the proper discharge of their official duties;[39] and it has been held that this is so, although the assignees attended the meetings of the corporation and acted as shareholders,[40] the rule being that assignees in bankruptcy are not bound to accept property of an onerous or unprofitable character.[41]

34. *In re* Hercules Ins. Co., L. R. 13 Eq. 566, 41 L. J. Ch. 580, 26 L. T. Rep. N. S. 274; Matter of Companies Act, 4 De G. J. & S. 53, 9 Jur. N. S. 1184, 33 L. J. Ch. 145, 9 L. T. Rep. N. S. 493, 3 New Rep. 97, 12 Wkly. Rep. 92, 69 Eng. Ch. 41.

35. *In re* Imperial Mercantile Credit Assoc., L. R. 19 Eq. 588, 44 L. J. Ch. 252, 32 L. T. Rep. N. S. 18, 23 Wkly. Rep. 467.

But where a father applied for shares on the part of his infant son and paid the deposit, and the company refused to allow him to execute the deed on behalf of his son, and the father did no further act, he was held not liable as a contributory. Maxwell's Case, 24 Beav. 321.

36. *In re* Hercules Ins. Co., L. R. 13 Eq. 566, 41 L. J. Ch. 580, 26 L. T. Rep. N. S. 274.

37. *In re* East of England Banking Co., 2 Dr. & Sm. 452, 11 Jur. N. S. 616, 35 L. J. Ch. 43, 12 L. T. Rep. N. S. 696, 13 Wkly. Rep. 911. See also Wilson *v.* Keating, 27 Beav. 121 [*affirmed* in 4 De G. & J. 588, 61 Eng. Ch. 465]; Newry, etc., R. Co. *v.* Moss, 14 Beav. 64, 15 Jur. 437, 20 L. J. Ch. 633; Fenwick's Case, 1 De G. & Sm. 557, 13 Jur. 204, 18 L. J. Ch. 112.

38. *In re* Great Wheal Busy Min. Co., L. R. 6 Ch. 196, 40 L. J. Ch. 361, 24 L. T. Rep. N. S. 599, 19 Wkly. Rep. 549; *In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331; *In re* Humber Ironworks, etc., Co., 1 Ch. D. 576, 45 L. J. Ch. 48; Chinnock's Case, Johns. 714, 8 Wkly. Rep. 255. There are English decisions which make an exception to this rule in the case of actual fraud, committed as against the rights of the public, as will be seen in the following cases: Matter of Companies' Acts, 4 De G. J. & S. 53, 9 Jur. N. S. 1184, 33 L. J. Ch. 145, 9 L. T. Rep. N. S. 493, 3 New Rep. 97, 12 Wkly. Rep. 92, 69 Eng. Ch. 41. *Compare In re* Great Wheal Busy Min. Co., L. R. 6 Ch. 196, 40 L. J. Ch. 361, 24 L. T. Rep. N. S. 599, 19 Wkly. Rep. 549; *In re* Cobre Copper Min. Co., L. R. 5 Ch. 614, 39 L. J. Ch. 753, 23 L. T. Rep. N. S. 287, 18 Wkly. Rep. 957; *In re* Imperial Mercantile Credit Assoc., L. R. 19 Eq. 588, 44 L. J. Ch. 252, 32 L. T. Rep. N. S. 18, 23 Wkly. Rep. 467; *In re* Hercules Ins. Co., L. R. 13 Eq. 566, 41 L. J. Ch. 580, 26 L. T. Rep. N. S. 274; *In re* London, etc., Bank, 18 Ch. D. 581, 50 L. J. Ch. 557, 45 L. T. Rep. N. S. 166, 30 Wkly. Rep. 118. See also *Ex p.* Scully, 6 Ir. Ch. 72.

39. Bangs *v.* Lincoln, 10 Gray (Mass.) 600; Gray *v.* Coffin, 9 Cush. (Mass.) 192.

40. Gray *v.* Coffin, 9 Cush. (Mass.) 192; American File Co. *v.* Garrett, 110 U. S. 288, 4 S. Ct. 90, 28 L. ed. 149.

41. Rugely *v.* Robinson, 19 Ala. 404; Streeter *v.* Sumner, 31 N. H. 542; Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523; *In re* Sneezum, 3 Ch. D. 463, 45 L. J. Bankr. 137, 35 L. T. Rep. N. S. 389, 25 Wkly. Rep. 49; *In re* East India Cotton Agency, 3 Ch. D. 264, 35 L. T. Rep. N. S. 53; South Staffordshire R. Co. *v.* Burnside, 5 Exch. 129.

b. Effect of Bankruptcy of Shareholder Upon Winding-Up Proceeding. According to English law if the company is wound up pending the bankruptcy of a shareholder, and whilst the assignee in bankruptcy is the legal holder of the shares, the assignee will be put on the list of contributories in his representative capacity;[42] which means that the calls made on the bankrupt shareholder in the proceeding to wind up the company must be proved by the receiver or liquidator of the company in the court of bankruptcy, where he takes his dividend with other creditors of the bankrupt[43] and subjects himself to the right of set-off the same as any other creditor of the bankrupt.[44]

4. Husband, When Liable For Wife. It has been laid down that where the common-law disabilities of married women have not been removed by statute, if a husband subscribes for shares in the name of his wife, and the corporation afterward becomes insolvent, he will be liable as a shareholder to its creditors, although she may have a separate estate, even where the husband purchased the shares for his wife under his statutory power as her trustee, and paid for them with moneys belonging to her separate estate, and caused certificates to be issued in her name, his name not appearing on the books of the corporation as owner of the shares, in trust or otherwise.[45]

N. Divesting Liability of Shareholder by Transferring His Shares — 1. Bona Fide Transfer of Shares Terminates Liability of Transferrer. The general rule is that a *bona fide* transfer of shares, whether they be paid or not, made in the prescribed manner on the books of the corporation, terminates the liability of the transferee either to the company or to its creditors.[46]

That the assigned estate is not liable was held under the operation of a particular statute in Kelton *v.* Phillips, 3 Metc. (Mass.) 61.

42. Matter of Kollmann's R. Locomotive, etc., Imp. Co., 3 De G. & Sm. 113.

43. *Ex p.* Pickering, L. R. 4 Ch. 58, 38 L. J. Bankr. 1, 19 L. T. Rep. N. S. 369, 17 Wkly. Rep. 38; *Ex p.* Cooper, L. R. 2 Ch. 578, 581, 36 L. J. Bankr. 28, 16 L. T. Rep. N. S. 580, 15 Wkly. Rep. 858 (per Lord Cairns, L. J.); Williams *v.* Harding, L. R. 1 H. L. 9, 12 Jur. N. S. 657, 35 L. J. Bankr. 25, 14 L. T. Rep. N. S. 139, 14 Wkly. Rep. 503; *Ex p.* Nicholas, 2 De G. M. & G. 271, 17 Jur. 6, 21 L. J. Bankr. 64, 51 Eng. Ch. 211.

44. *Ex p.* Pickering, L. R. 4 Ch. 58, 38 L. J. Ch. 233, 20 L. T. Rep. N. S. 93, 17 Wkly. Rep. 302; *Ex p.* Cooper, L. R. 2 Ch. 578, 581, 36 L. J. Bankr. 28, 16 L. T. Rep. N. S. 580, 15 Wkly. Rep. 858 (per Lord Cairns, L. J.); Williams *v.* Harding, L. R. 1 H. L. 9, 12 Jur. N. S. 657, 35 L. J. Bankr. 25, 14 L. T. Rep. N. S. 139, 14 Wkly. Rep. 503; *Ex p.* Nicholas, 2 De G. M. & G. 271, 17 Jur. 6, 21 L. J. Bankr. 28, 16 L. T. Rep. N. S. 580, 15 Wkly. Rep. 858.

Whether discharge in bankruptcy releases the bankrupt from his liability as a shareholder see and *compare* Kelton *v.* Phillips, 3 Metc. (Mass.) 61; *In re* General Estates Co., L. R. 4 Ch. 274, 38 L. J. Ch. 233, 20 L. T. Rep. N. S. 93, 17 Wkly. Rep. 302; Martin's Patent Anchor Co. *v.* Morton, L. R. 3 Q. B. 306, 9 B. & S. 183, 37 L. J. Q. B. 98; Lindley Comp. L. (5th ed.) 426.

45. National Commercial Bank *v.* McDonnell, 92 Ala. 387, 9 So. 149, Clopton, J., dissenting. But *compare In re* London, etc., Bank, 18 Ch. D. 581, 50 L. J. Ch. 557, 45 L. T. Rep. N. S. 166, 30 Wkly. Rep. 118.

Upon the point of what will amount to consent on the part of the wife or to a ratification of the act of the husband in placing the shares in her name see Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531.

46. *Alabama.*—Allen *v.* Montgomery R. Co., 11 Ala. 437.

Connecticut.— Middletown Bank *v.* Magill, 5 Conn. 28.

Missouri.— Miller *v.* Great Republic Ins. Co., 50 Mo. 55; McClaren *v.* Franciscus, 43 Mo. 452; Chouteau Spring Co. *v.* Harris, 20 Mo. 382.

New York.— Tucker *v.* Gilman, 121 N. Y. 189, 24 N. E. 302, 30 N. Y. St. 689; Billings *v.* Robinson, 94 N. Y. 415 [*affirming* 28 Hun 122]; Johnson *v.* Underhill, 52 N. Y. 203; Cole *v.* Ryan, 52 Barb. 168; Savage *v.* Putnam, 32 Barb. 420; Cowles *v.* Cromwell, 25 Barb. 413.

Pennsylvania.— Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697; West Philadelphia Canal Co. *v.* Innes, 3 Whart. 198; *In re* Glen Iron Works, 13 Phila. 479, 34 Leg. Int. 346.

Tennessee.— Jackson *v.* Sligo, etc., Co., 1 Lea 210.

Washington.— Stewart *v.* Walla Walla Printing, etc., Co., 1 Wash. 521, 20 Pac. 605.

United States.— Johnson *v.* Laflin, 13 Fed. Cas. No. 7,393, 5 Dill. 65 [*affirmed* in 103 U. S. 800, 26 L. ed. 532].

England.— Grissell *v.* Bristowe, L. R. 3 C. P. 112; Matter of Pennant, etc., Consol. Lead Min. Co., 5 De G. M. & G. 837, 1 Jur. N. S. 566, 24 L. J. Ch. 353, 3 Wkly. Rep. 95, 54 Eng. Ch. 656; Matter of Oundle Union Brewery Co., 1 De G. M. & G. 600, 50 Eng.

2. TRANSFERRER LIABLE FOR DEBTS CONTRACTED DURING MEMBERSHIP AND PRIOR TO TRANSFERRING SHARES. The transferrer of shares does not by transferring them absolve himself from liability for debts of the corporation contracted while he held them, and before he transferred them, which is no more than saying that a shareholder is liable for debts of the corporation contracted while he held that relation.[47]

3. TRANSFEREE SUCCEEDS TO RIGHTS AND LIABILITIES OF TRANSFERRER. The transferee succeeds, not only to the rights, but also to the liabilities, of the transferrer;[48] he is bound to pay the unpaid purchase-money of the shares as it shall be called for by the directors;[49] he is answerable in an action of assumpsit, or under the codes of procedure in an action of the like nature, for unpaid instalments due thereon, the calls for which are made since the transfer;[50] and in the event of the insolvency of the corporation he is liable to contribute to the payment of its debts in like manner as if he were an original subscriber,[51] subject to exceptions in particular instances where the original subscribers are notwithstanding liable by charters or general statutory provisions.[52] The ground most usually taken by the courts in support of this conclusion is that when the transferee is accepted by the corporation, and the shares are transferred to him on its books, he comes into privity with the corporation, and with its consent takes the place and assumes the liabilities of the transferrer, so that there is a species of novation.[53]

Ch. 463; Matter of Australia Royal Bank, 3 De G. & Sm. 262, 14 Jur. 966; Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36.

Compare Williams *v.* Hanna, 40 Ind. 535; Bond *v.* Appleton, 8 Mass. 472, 5 Am. Dec. 111; Moss *v.* Oakley, 2 Hill (N. Y.) 265.

See 12 Cent. Dig. tit. "Corporations," § 960.

47. Young *v.* Wempe, 46 Fed. 354 (referring to the statutory liability of a shareholder in a national bank); Sumner *v.* Marcy, 23 Fed. Cas. No. 13,609, 3 Woodb. & M. 105.

48. *Connecticut.*— Hartford, etc., R. Co. *v.* Boorman, 12 Conn. 530.

Maryland.— Hall *v.* U. S. Insurance Co., 5 Gill 484; Bend *v.* Susquehanna Bridge, etc., Co., 6 Harr. & J. 128, 14 Am. Dec. 261.

Michigan.— Merrimac Min. Co. *v.* Bagley, 14 Mich. 501.

Missouri.— Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274.

New York.— Cowles *v.* Cromwell, 25 Barb. 413; Mann *v.* Currie, 2 Barb. 294.

Pennsylvania.— Citizens', etc., Sav. Bank, etc., Co. *v.* Gillespie, 115 Pa. St. 564, 9 Atl. 73; Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532; Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697; West Philadelphia Canal Co. *v.* Innes, 3 Whart. 198.

49. Hartford, etc., R. Co. *v.* Boorman, 12 Conn. 530; Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36. That the purchaser takes the shares *cum onere* see Campbell *v.* American Zylonite Co., 55 N. Y. Super. Ct. 562, 3 N. Y. Suppl. 822.

50. *Connecticut.*— Hartford, etc., R. Co. *v.* Boorman, 12 Conn. 530.

Maryland.— Bend *v.* Susquehanna Bridge, etc., Co., 6 Harr. & J. 128, 14 Am. Dec. 261.

Michigan.— Merrimac Min. Co. *v.* Bagley, 14 Mich. 501.

United States— Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384.

England.— Huddersfield Canal Co. *v.* Bickley, 7 T. R. 36.

51. Mann *v.* Currie, 2 Barb. (N. Y.) 294; Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384; De Pass's Case, 4 De G. & J. 544; Cape's Case, 2 De G. M. & G. 562.

52. Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

53. Allen *v.* Montgomery R. Co., 11 Ala. 437, 451; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384 (where the doctrine is clearly stated by Strong, J.). See also Cowles *v.* Cromwell, 25 Barb. (N. Y.) 413; Stewart *v.* Walla Walla Printing, etc., Co., 1 Wash. 521, 20 Pac. 605; Upton *v.* Hansbrough, 28 Fed. Cas. No. 16,801, 3 Biss. 417. So it has been held that if the unpaid portion of the subscription has been secured by a mortgage, and the president and directors accept a new mortgage from the transferee, this releases the transferrer. Haynes *v.* Palmer, 13 La. Ann. 240. As hereafter stated (see *infra*, VIII, N, 5), there is an exceptional rule in Pennsylvania, but that court has applied the general rule of the above text in construing a Michigan statute (Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697 [*distinguishing* Palmer *v.* Ridge Min. Co., 34 Pa. St. 288, Delaware, etc., Canal Nav. *v.* Sansom, 1 Binn. (Pa.) 70]). In Franks Oil Co. *v.* McCleary, 63 Pa. St. 317, 319, it is remarked that Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697, was decided on a Michigan charter, and that the court considered itself bound by the decisions of the supreme court of that state. That is true; but the case nevertheless is sound in all its expositions of law.

4. Exception in Favor of Bona Fide Purchasers of Shares Which Purport to Be Paid Up. As already seen[54] an exception to the foregoing rules exists in favor of *bona fide* purchasers of shares which are issued by the company as having been fully paid. A transferee of shares which purport on their face to be paid up, who takes them for value in the ordinary course of business, without notice of the fact that they are subject to future calls, is not liable for any unpaid balance which may in fact be due upon them.[55]

5. Exceptional Charters and Statutes Under Which Shareholder Continues Liable, Even After He Has Transferred Shares. Many statutes and charters create an exception to the rule of the preceding text and make the shareholder liable for the debts of the corporation which were created while he was a shareholder, even after he has transferred his shares.[56] And in general if the constitution of the company provides that transferrers shall continue liable for obligations of the company accruing prior to their transfer, they continue liable accordingly, until the statute of limitations has run in their favor.[57]

6. Right of Shareholder to Divest His Liability by Transferring His Shares — a. In General. The general rule, subject to qualifications growing out of the peculiar nature of the property, and others founded on the governing statute or constitution of the company, is that a shareholder may freely transfer his shares to any other person capable of making or taking a contract, thus introducing the latter as a member of the corporation in his stead.[58]

54. See *supra*, VI, M, 3, a *et seq.*

55. Wintringham *v.* Rosenthal, 25 Hun (N. Y.) 580; West Nashville Planing-Mill Co. *v.* Nashville Sav. Bank, 86 Tenn. 252, 6 S. W. 340, 6 Am. St. Rep. 835; Johnson *v.* Laflin, 13 Fed. Cas. No. 7,393, 5 Dill. 65. *Compare* Ross *v.* Kelly, 36 Minn. 38, 29 N. W. 591, 31 N. W. 219.

56. *Georgia.*— Mason *v.* Force, 30 Ga. 99.

Illinois.— Hull *v.* Burtis, 90 Ill. 213, statute of double liability charging shareholders for debts of the corporation contracted during their membership and for three months after they had ceased to be shareholders.

Louisiana.— Vicksburg, etc., R. Co. *v.* McKeen, 14 La. Ann. 724, exempted from liability to the company only those who have transferred their share of stock after the payment of fifty per cent on each share.

New York.— Worrall *v.* Judson, 5 Barb. 210.

Pennsylvania.— Cass *v.* Pittsburg, etc., R. Co., 80 Pa. St. 31; Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146, all of which were decided under a statute providing that no transfer should have the effect of discharging the liabilities incurred by the owners of shares.

57. *In re* Portsmouth Banking Co., L. R. 2 Eq. 167, 14 L. T. Rep. N. S. 47, 14 Wkly. Rep. 417.

Exceptional statutory rule in Ohio under which shareholders remain liable for debts contracted while they were shareholders, their transferees being liable also, but with the right to claim indemnity from their transferrers. Mason *v.* Alexander, 44 Ohio St. 318, 7 N. E. 435; Bonewitz *v.* Van Wert County Bank, 41 Ohio St. 78; Brown *v.* Hitchcock, 36 Ohio St. 667. In a subsequent case the following decision was formulated in the official syllabus: "A stockholder who has, in good faith, sold and assigned his stock to one who becomes insolvent, is liable to creditors of the corporation, for such portion only of the debts existing while he held the stock, and remaining due, (not in excess of the amount of stock assigned) as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders, liable in respect of the same debts, who are within the jurisdiction, to be ascertained at the time judgment is rendered." Harpold *v.* Stobart, 46 Ohio St. 397, 406, 21 N. E. 637, 15 Am. St. Rep. 618.

Exceptional statutory rule in Virginia, under which both the transferrer and the transferee are liable, whether the instalments accrue before or after the assignment. Brinkley *v.* Hambleton, 67 Md. 169, 8 Atl. 904 (implied obligation of assignee to indemnify assignor extends only to calls made while the assignee holds the shares); McKim *v.* Glenn, 66 Md. 479, 8 Atl. 130 (broker purchasing and immediately assigning becomes so liable); Hamilton *v.* Glenn, 85 Va. 901, 9 S. E. 129; Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184; Glenn *v.* Priest, 48 Fed. 19; Glenn *v.* Foote, 36 Fed. 824 (liability of assignor not a joint liability with assignee, and a release of one does not release the other).

Exception in case of a statutory liability for wages due to laborers see Jackson *v.* Meek, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620.

58. *Alabama.*— Planters', etc., Bank *v.* Leavens, 4 Ala. 573.

Massachusetts.— Hutchins *v.* State Bank, 12 Metc. 421; Waltham Bank *v.* Waltham, 10 Metc. 334.

Missouri.— Bent *v.* Hart, 10 Mo. App. 143.

New York.— Rochester, etc., Land Co. *v.* Raymond, 158 N. Y. 576, 53 N. E. 507, 47

b. Right to Transfer Subject to Any Valid Lien of Corporation on Shares — (I) *In General.* The right of a shareholder to transfer his shares is subject to the right of the corporation to restrain such transfer, where the corporation holds a valid lien upon the shares, arising under the provisions of the charter, the governing statute, or the by-laws, assuming their validity.[59] Liens of this kind generally exist where the shareholder is indebted to the corporation.[60] But the law gives no such implied lien, but it must be expressly created by some governing instrument.[61]

(II) *Statutes and Charters Creating Such Lien.* And such a lien may of course be created by a provision in the charter[62] of the corporation, or in a general statute governing it. Such a lien for a general balance is created by a charter provision that no shareholder indebted to the corporation shall be permitted to make any transfer of his stock or receive any dividend until such debt is paid or secured.[63] Statutes which provide that no transfer of bank-stock shall be valid or effectual until it is registered in a book of the bank to be kept for that purpose, and that debts of the vendor due to the bank shall be first paid, are intended merely for the protection of the corporation, to give them such a lien and enable them to know to whom dividends are due.[64]

(III) *Lien Created by Articles of Incorporation.* Unless the governing statute expressly or impliedly prohibits the creation of such a lien and grants a free right of alienation, such a lien may be created by a reservation in the articles of incorporation.[65]

(IV) *Effect and Extent of Such Lien* — (A) *In General.* Such a lien has been held paramount to that acquired by the levy of an execution upon shares

L. R. A. 246, 248 [*affirming* 4 N. Y. App. Div. 600, 39 N. Y. Suppl. 145, in the absence of special provisions to the contrary either in the statutes or in the by-laws of the company]; Attica Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501; Nash *v.* Hall, 11 Misc. 468, 32 N. Y. Suppl. 701, 66 N. Y. St. 9 (shareholder will not be enjoined from disposing of his shares in any manner he may see fit); Denton *v.* Livingston, 9 Johns. 96, 6 Am. Dec. 264.

North Carolina.— Heart *v.* State Bank, 17 N. C. 111.

Ohio.— Johns *v.* Johns, 1 Ohio St. 350; State *v.* Franklin Bank, 10 Ohio 91.

Pennsylvania.— Slaymaker *v.* Gettysburg Bank, 10 Pa. St. 373; Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720.

Rhode Island.— Arnold *v.* Ruggles, 1 R. I. 165.

Tennessee.—Brightwell *v.* Mallory, 10 Yerg. 196; Union Bank *v.* State, 9 Yerg. 490.

Vermont.— Isham *v.* Bennington Iron Co., 19 Vt. 230; Wheelock *v.* Moulton, 15 Vt. 519.

For an illustrative case turning upon the question of this right see Bent *v.* Hart, 10 Mo. App. 143.

59. *In re* Coalport China Co., [1895] 2 Ch. 404, 64 L. J. Ch. 710, 73 L. T. Rep. N. S. 46, 2 Manson 532, 12 Reports 462, 44 Wkly. Rep. 38, holding that directors have power to refuse a transfer without giving any reason therefor — decision arising under a particular constating instrument.

60. Gibbs *v.* Long Island Bank, 83 Hun (N. Y.) 92, 31 N. Y. Suppl. 406, 63 N. Y. St. 854.

61. Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398; Heart *v.* State Bank, 17 N. C. 111. *Contra,* Downer *v.* Zanesville Bank, Wright (Ohio) 477. That there is no such lien at common law see People *v.* Crockett, 9 Cal. 112; Driscoll *v.* West Bradley, etc., Mfg. Co., 59 N. Y. 96.

What knowledge of a transfer of shares in pledge will dispense with the statutory notice of such transfer in order to make it valid as against the lien of the company on the shares for subsequent liabilities of the president growing out of his embezzlements. Hotchkiss, etc., Co. *v.* Union Nat. Bank, 68 Fed. 76, 15 C. C. A. 264.

Circumstances where lien not enforceable. — Circumstances under which a corporation which issues shares in consideration of a transfer of the property of another corporation cannot enforce a lien upon such shares for a debt of such other corporation. Lanier Lumber Co. *v.* Rees, 103 Ala. 622, 16 So. 637, 49 Am. St. Rep. 57.

Actual notice to a corporation of an assignment of its stock is equivalent to statutory notice, for the purpose of preventing a lien on the stock for subsequent liabilities of the transferrer. Hotchkiss, etc., Co. *v.* Union Nat. Bank, 68 Fed. 76, 15 C. C. A. 264.

62. German Security Bank *v.* Jefferson, 10 Bush (Ky.) 326; Brent *v.* Bank of Washington, 10 Pet. (U. S.) 596, 9 L. ed. 547.

63. Kenton Ins. Co. *v.* Bowman, 84 Ky. 430, 1 S. W. 717.

64. Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526.

65. Leggett *v.* Sing Sing Bank, 24 N. Y. 283; Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424.

by a judgment creditor of the shareholder, although the indebtedness of the shareholder to the corporation was evidenced by notes which had been renewed and which were not due at the time of the levy.[66] Such a lien is in the nature of a right of retainer, and extends to all the shares of the shareholder so long as he remains indebted to the corporation, although the debt be less than the value of the shares, the corporation not being obliged to appropriate a part and transfer the rest.[67] The assignee of the shares may tender to the corporation what is due, and then have an action against it for refusing to transfer.[68] But where the transferee gives the corporation no notice of the transfer, the lien extends to advances subsequently made by the corporation to the transferrer.[69] And this is so where the secretary of the corporation has actual knowledge of the transfer, provided he acquires that knowledge in a transaction in his private capacity, so that he is not interested in disclosing it to the corporation.[70]

(B) *Effect Upon Rights of Indorsers and Sureties.* In the case of a banking corporation which has discounted the notes of one of its shareholders, with the indorsement of a third person thereon, it operates in favor of the indorser, in the sense that he is entitled to be subrogated to the rights of the bank.[71] Hence if the bank permits the shares to be sold, and the proceeds to be applied to discharge a debt due to the bank by the same debtor on a note of a subsequent date, the surety in the previous case will be thereby discharged.[72]

(V) *Waiver of Lien by Corporation.* Although this lien may have been created by express statute, yet it may be waived by the corporation through its proper officers, expressly or by a reasonable implication.[73] This is done where the corporation issues a certificate of shares which recites without qualification that the shares are transferable.[74] It is done where the corporation allows the transfer to be registered on its books; and if the shares are not fully paid up, and a call is subsequently made, the transferee cannot set up the defense to the payment of the same that the corporation had such a lien.[75] Such a lien is in the nature of an option on the part of the corporation to refuse to make a transfer, and is not perfected until the option is declared.[76]

c. **Corporation Has No Power to Restrain Alienation of Its Shares.** In the absence of a valid lien upon its shares under the conditions stated in the preceding paragraph, it follows that a corporation cannot restrain one of its members from transferring his shares, unless the legislature has given it power so to do, or unless the members themselves have clothed it with such power in the by-laws or other governing instrument; but such a transfer is good as between the parties, and the company cannot rightfully refuse to register it upon its books.[77] An attempt to restrain such a transfer is void as being in restraint of trade.[78] The

66. Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285.

67. Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285.

68. Pierson *v.* Washington Bank, 19 Fed. Cas. No. 11,155, 3 Cranch C. C. 363. *Compare* Conant *v.* Reed, 1 Ohio St. 298.

69. Jennings *v.* California Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

70. See for a good illustration Platt *v.* Birmingham Axle Co., 41 Conn. 255.

Circumstances under which a bank which had discounted the note of its shareholder had a right to assert its lien when the shareholder attempted to make a transfer of his shares on the last day of grace. Klopp *v.* Lebanon Bank, 46 Pa. St. 88.

71. Klopp *v.* Lebanon Bank, 46 Pa. St. 88.

72. Kuhns *v.* Westmoreland Bank, 2 Watts (Pa.) 136.

73. Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039.

74. Fitzhugh *v.* Shepherdsville Bank, 3 T. B. Mon. (Ky.) 126, 16 Am. Dec. 90.

75. Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484.

76. Perrine *v.* Fireman's Ins. Co., 22 Ala. 575.

What evidence of the cashier of a bank was not sufficient to show that a loan to a shareholder had been made upon his personal credit alone, so as to waive the lien of the bank upon his shares. Jennings *v.* California Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

77. People *v.* Crockett, 9 Cal. 112.

78. Moore *v.* Bank of Commerce, 52 Mo. 377.

power to regulate transfer of shares conferred by the by-laws does not enable the corporation to restrain such transfers entirely, even to an insolvent.[79]

d. Validity of By-Law Attempting to Restrain Such Transfers. By-laws attempting to restrain or to impede the members in transferring their shares are therefore void, except so far as they are necessary to conserve the rights of the corporation.[80]

e. Restraining Transfers of Shares When Shareholder Is Indebted to Corporation — (I) *In General.* Every corporation possesses the power, within the limits prescribed by its charter and by the general law, to make regulations prohibiting the transfer of its shares by members who stand indebted to the corporation.[81]

(II) *By-Laws Valid Which Prohibit Transfer of Shares While Transferrer Is Indebted to Corporation.* Such by-laws are therefore in general valid;[82] but no absolute rule on this subject can be stated, which may not be influenced by the language of particular statutes or charters.[83]

(III) *Such By-Laws Not Retroactive.* On a principle already considered,[84] such a by-law cannot be made so as to operate to invalidate a transfer of shares made before its passage.[85]

79. Chonteau Spring Co. *v.* Harris, 20 Mo. 382; Driscoll *v.* West, etc., Mfg. Co., 36 N. Y. Super. Ct. 488. See also *In re* Smith, L. R. 4 Ch. 20.

80. Moore *v.* Bank of Commerce, 52 Mo. 377; *In re* Klaus, 67 Wis. 401, 29 N. W. 582. See also as to national banks Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398; Feckheimer *v.* National Exch. Bank, 79 Va. 80.

Attempted distinction between a restraint upon the alienation of shares imposed by a by-law, and by the charter or governing statute of the corporation, with the conclusion that where the restraint is imposed by a by-law merely this is to be allowed to operate no further than is necessary to protect the rights of the corporation, leaving the transfer good as between the transferrer and the transferee; but that where it is prohibited by the charter or governing statute that prohibition renders the transfer void even as between the parties to it. O'Brien *v.* Cummings, 13 Mo. App. 197, 198.

How as to national banks.— That a national banking association can make a by-law restraining the transfer of its shares without the assent of the directors so long as the shareholder is indebted to the bank see Young *v.* Vough, 23 N. J. Eq. 325; Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253. That such a by-law is void as being in contravention of the statute which prohibits such banks from making loans on the security of their own shares see Feckheimer *v.* National Exch. Bank, 79 Va. 80.

81. Kahn *v.* St. Joseph Bank, 70 Mo. 262; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149.

82. People *v.* Crockett, 9 Cal. 112 [as *explained* in Pendergast *v.* Stockton Bank, 19 Fed. Cas. No. 10,918, 2 Sawy. 108, 116]; Weston *v.* Bear River, etc., Min. Co., 5 Cal. 186, 63 Am. Dec. 117; Vansands *v.* Middlesex County Bank, 26 Conn. 144; McDowell *v.* Wilmington, etc., Bank, 1 Harr. (Del.) 27; Leggett *v.* Sing Sing Bank, 24 N. Y. 283. But the contrary view was taken in Attica Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501.

83. Child *v.* Hudson's Bay Co., 2 P. Wms. 207, holding that a by-law is good which provides that when any member becomes indebted to the company his stock shall be liable for the debt. In Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 89, 11 Am. Dec. 575, the court speak of the doctrine of this case as the recognized law. Other charter and statute provisions which have been held broad enough to authorize such by-laws may be discovered in the following cases: Cunningham *v.* Alabama L. Ins., etc., Co., 4 Ala. 652; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149.

Interpretation of such by-laws, charters, etc.— "Indebted" as including surety or indorser. St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149, 154; Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140. See also Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285, construing a similar word in a statute. "All debts due." Leggett *v.* Sing Sing Bank, 24 N. Y. 283. That the word "indebted," standing alone, is not large enough to embrace an uncalled balance due by the shareholder upon his shares. Kahn *v.* St. Joseph Bank, 70 Mo. 262 [*distinguishing* Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146]. The word "indebtedness" in such a statute provision includes general indebtedness, and is not confined to indebtedness in respect to shares. Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77. The word "indebted" in such a statute includes a note discounted, but not due. Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285; Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140.

Such a lien is paramount even to claim of the United States. Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547.

84. See *supra*, V, C, 8.

85. People *v.* Crockett, 9 Cal. 112.

(iv) *When Purchaser of Shares Chargeable With Notice of Such By-Law.* A purchaser of shares of an incorporated bank takes an equitable assignment, subject to the rights of the bank under its charter, of which the assignee is bound to take notice.[86] A purchaser of shares who takes with express notice of such an encumbrance, although in the form of a by-law (assuming the same to be valid), takes subject to the rights of the corporation thereunder.[87]

(v) *Usage That Shares Are Not Transferable Where Holder Is Indebted to Company.* Such a usage is valid as against a voluntary assignment,[88] and also where the certificate recites that the corporation has a lien on the shares for any indebtedness due by the shareholder to it.[89] But if a lien has been created in some other lawful mode, the fact that there was no usage from which such a lien on the shares in favor of the corporation could arise is no defense to its enforcement, where it does not appear that there was any usage against it.[90]

f. When Transfers of Shares Require Approval of Directors. Under the constitutions of English companies, which are mere private instruments, although drawn under the authorization of statutes, the transfers of shares in order to be valid require the approval of the directors;[91] but the reader is cautioned that these decisions are of little value under American law.

g. Power to Impose Restraint Upon Alienation of Shares by Recitals in Share Certificate. It has been doubtfully held that where a banking corporation issues such a certificate to an original taker of its shares, reciting thereon that no transfer will be made until all indebtedness to the bank by the person in whose name the shares stand on its books shall have been paid, he assents to that condition, and that one who purchases from him his shares evidenced by such a certificate also assents to it; so that if the bank refuses a transfer because the transferrer is indebted to it, the transferee cannot maintain an action against it for damages, and this although there was no by-law or custom of the bank restraining such a transfer.[92]

7. Fraudulent Transfers to Escape Liability — a. In General. The right of a shareholder to transfer his shares is subject to this limitation: That a fraudulent transfer, made with a view to avoid his liability to the company or to its creditors, is void and leaves him still liable;[93] and he will be chargeable as a

86. Farmers' Bank *v.* Iglehart, 6 Gill (Md.) 50.

87. State Sav. Assoc. *v.* Nixon-Jones Printing Co., 25 Mo. App. 642.

88. Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575.

89. Vansands *v.* Middlesex County Bank, 26 Conn. 144.

90. Jennings *v.* California Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

91. *In re* Overend, L. R. 2 Eq. 554, 35 L. J. Ch. 826, 14 L. T. Rep. N. S. 32, 14 Wkly. Rep. 1008; Robinson *v.* Chartered Bank, L. R. 1 Eq. 32 (holding that the directors must not exercise this power unreasonably, and that they will be controlled in this respect by a court of equity). Effect of procuring the consent of the directors by fraud see Williams' Case, L. R. 9 Eq. 225 note; *In re* Imperial Mercantile Credit Assoc., L. R. 9 Eq. 223; *In re* Coalport China Co., [1895] 2 Ch. 404, 64 L. J. Ch. 710, 73 L. T. Rep. N. S. 46, 2 Manson 532, 44 Wkly. Rep. 532.

Where the directors make no inquiry the transfer is void. *In re* Smith, L. R. 4 Ch. 20; Williams' Case, L. R. 9 Eq. 225 note; *In re* Humber Ironworks, etc., Co., 1 Ch. D. 576, 45 L. J. Ch. 48.

Where the directors possess full knowledge and accept an insolvent transferee this ends liability of the transferrer. *In re* Wheal Unity Wood Min. Co., 15 Ch. D. 13, 42 L. T. Rep. N. S. 636, 28 Wkly. Rep. 897.

That the transferee is described as "gentleman" when he is not entitled to be so called will not invalidate the transfer. *In re* Financial Ins. Co., L. R. 7 Ch. 296, note 3; *In re* European Bank, L. R. 7 Ch. 292, 41 L. J. Ch. 501, 26 L. T. Rep. N. S. 269, 20 Wkly. Rep. 499.

92. Jennings *v.* State Bank, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

93. *Alabama.*— Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120.

California.— Welch *v.* Sargent, 127 Cal. 72, 50 Pac. 319; National Carriage Mfg. Co. *v.* Story, etc., Commercial Co., 111 Cal. 531, 44 Pac. 157.

Connecticut.— Buck *v.* Ross, 68 Conn. 29, 35 Atl. 763, 57 Am. St. Rep. 60 (transfer of the shares to the corporation in exchange for good securities void); Paine *v.* Stewart, 33 Conn. 516.

Illinois.— Tuttle *v.* National Bank of Republic, 48 Ill. App. 481.

shareholder in a suit in equity by a receiver of the corporation,[94] in any other appropriate proceeding.[95]

b. English Distinction Between Real and Sham Transfers — (i) *In General.* After much consideration of this subject, the English courts have settled upon

Kentucky.— Roman *v.* Fry, 5 J. J. Marsh. 634.

Louisiana.— Mandion *v.* Fireman's Ins. Co., 11 Rob. 177.

Massachusetts.— Marcy *v.* Clark, 17 Mass. 330.

Missouri.— Provident Sav. Inst. *v.* Jackson Place Skating, etc., Rink, 52 Mo. 557; Miller *v.* Great Republic Ins. Co., 50 Mo. 55; McClaren *v.* Franciscus, 43 Mo. 452.

New York.— Rochester, etc., Land Co. *v.* Raymond, 158 N. Y. 576, 53 N. E. 507, 47 L. R. A. 246 [*affirming* 4 N. Y. App. Div. 600, 39 N. Y. Suppl. 145]; *In re* Reciprocity Bank, 22 N. Y. 9; Sinclair *v.* Dwight, 9 N. Y. App. Div. 297, 41 N. Y. Suppl. 193, 75 N. Y. St. 641 (under New York Stock Corporation Law); Olney *v.* Baird, 7 N. Y. App. Div. 95, 40 N. Y. Suppl. 202, 74 N. Y. St. 765; Veiller *v.* Brown, 18 Hun 571; Christensen *v.* Quintard, 5 Silv. Supreme 226, 8 N. Y. Suppl. 400, 29 N. Y. St. 61; Nathan *v.* Whitlock, 9 Paige 152 [*affirming* 3 Edw. 215].

Ohio.— Wick Nat. Bank *v.* Union Nat. Bank, 62 Ohio St. 446, 57 N. E. 320, 78 Am. St. Rep. 734; Ford *v.* Lamson, 17 Ohio Cir. Ct. 539, 9 Ohio Cir. Dec. 374 (subscribers not released by a sale of their shares as fully paid to an insolvent); Wehrman *v.* Reakirt, 1 Cinc. Super. Ct. 230. In this state the following inexplicable decision has been made: An owner of stock in a corporation for profit, created under the laws of Ohio, may, in the absence of a by-law to the contrary, dispose of the same by sale or gift at his pleasure; and if the same is made in good faith and the shares sold or donated are transferred on the books of the corporation, the transferrer does not continue liable to assessment for the payment of future corporate debts, although at the time of the transfer both the corporation and the transferee are insolvent, and the transfer is made for the sole purpose of escaping liability for future debts. Peter *v.* Union Mfg. Co., 56 Ohio St. 181, 46 N. E. 894.

Pennsylvania.— Aultman's Appeal, 98 Pa. St. 505.

Texas.— In this state a shareholder who transfers his stock in good faith, with no intention to defraud, while the corporation is solvent, and has the transfer entered upon the books of the corporation, is not ordinarily liable either to the corporation or to its creditors for unpaid subscriptions on the stock. Cole *v.* Adams, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Vermont.— Shrewsbury *v.* Brown, 25 Vt. 197.

United States.— Ward *v.* Joslin, 100 Fed. 676 (without consideration, in view of the anticipated insolvency of the corporation, and at a time when it was in fact insolvent, although still a going concern); Sykes *v.* Holloway, 81 Fed. 432; Foster *v.* Lincoln, 79 Fed. 170, 24 C. C. A. 470 (shareholder in national bank); Cox *v.* Montague, 78 Fed. 845, 24 C. C. A. 364 (transfer to an irresponsible person, although he still hopes that the corporation will pull through); Stuart *v.* Hayden, 72 Fed. 402, 18 C. C. A. 618; *Re* Bachman, 2 Fed. Cas. No. 707; Bowden *v.* Santos, 3 Fed. Cas. No. 1,716, 1 Hughes 158.

England.— *In re* Joint Stock Discount Co., L. R. 3 Ch. 459 note; *In re* China Steamship, etc., Coal Co., L. R. 3 Ch. 458, 16 Wkly. Rep. 1002; Castellan *v.* Hobson, L. R. 10 Eq. 47, 39 L. J. Ch. 490, 22 L. T. Rep. N. S. 575, 18 Wkly. Rep. 731; Williams' Case, L. R. 9 Eq. 225 note; *In re* Imperial Mercantile Credit Assoc., L. R. 9 Eq. 223; Eyre's Case, 31 Beav. 177; *In re* Mexican, etc., Min. Co., 27 Beav. 465, 5 Jur. N. S. 400, 28 L. J. Ch. 628, 7 Wkly. Rep. 333; Munt's Case, 22 Beav. 55; Daniell's Case, 22 Beav. 43; *In re* Cameron's Coalbrook, etc., R. Co., 18 Beav. 339; Matter of Ireland's Electric Tel. Co., 3 De G. F. & J. 297, 64 Eng. Ch. 234; Matter of Mexican, etc., Co., 2 De G. F. & J. 302, 6 Jur. N. S. 1270, 30 L. J. Ch. 113, 3 L. T. Rep. N. S. 421, 9 Wkly. Rep. 6, 63 Eng. Ch. 234; Matter of Companies' Act, 4 De G. J. & S. 53, 9 Jur. N. S. 1184, 33 L. J. Ch. 145, 9 L. T. Rep. N. S. 493, 3 New Rep. 97, 12 Wkly. Rep. 92, 69 Eng. Ch. 41; Chinnock's Case, Johns. 714, 8 Wkly. Rep. 255. *Compare* Maynard *v.* Eaton, L. R. 9 Ch. 414, 43 L. J. Ch. 641, 30 L. T. Rep. N. S. 241, 22 Wkly. Rep. 457; *In re* Financial Ins. Co., L. R. 7 Ch. 296, note 3; *In re* Smith, L. R. 7 Ch. 296, note 1; *In re* European Bank, L. R. 7 Ch. 292, 41 L. J. Ch. 501, 26 L. T. Rep. N. S. 269, 20 Wkly. Rep. 499; *In re* Hindustan, etc., Bank, L. R. 6 Ch. 286, 40 L. J. Ch. 333, 24 L. T. Rep. N. S. 691, 19 Wkly. Rep. 572; *In re* Great Wheal Busy Min. Co., L. R. 6 Ch. 196, 40 L. J. Ch. 361, 24 L. T. Rep. N. S. 599, 19 Wkly. Rep. 549; *In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331; *Re* Haford Lead Min. Co., 35 Beav. 391, 12 Jur. N. S. 242, 35 L. J. Ch. 304, 14 L. T. Rep. N. S. 95, 14 Wkly. Rep. 446; Matter of London, etc., Assur. Co., 2 De G. & J. 638, 59 Eng. Ch. 501.

94. Lesassier *v.* Kennedy, 36 La. Ann. 539; Bowden *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386; Davis *v.* Stevens, 7 Fed. Cas. No. 3,653, 17 Blatchf. 259.

95. Rider *v.* Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513. But in Kansas it seems that the question of the shareholder's liability cannot be tried in the summary proceeding consequent upon issuing an execution under a suit against the shareholder after an execution and return of *nulla bona* on a judgment against the corporation. Parkinson Sugar Co. *v.* Topeka Sugar Co., 8 Kan. App. 79, 54 Pac. 331.

the rule that a man may transfer his shares to a man of straw, at a time when the company is in a failing condition, for the sole purpose of escaping liability, and for a nominal consideration merely or as a mere gift; and that if the transfer is out and out, is not merely colorable — a sham — the transferee remaining a trustee for the transferrer, the device will be successful, the transferrer will escape liability as a contributory, and honest shareholders and creditors will suffer accordingly.[96] But if the transaction is merely colorable, if in fact the transferee is a mere nominee of the transferrer, so that as between themselves there has been no real transfer, but in the event of the company becoming prosperous the transferrer would participate in the profits, the transfer will be held for naught, and the transferrer will be put upon the list of contributories.[97]

(II) *English Doctrine That Power to Transfer Ceases After Commencement of Winding-Up Proceedings.* This doctrine, arising under the interpretation of a statute, is useful in America only by way of a remote analogy, as disclosed by the cases cited in the margin.[98] It has been held in this country that a transfer by a shareholder is as good after the insolvency of the corporation as before, and that it imposes on the transferee the liability of a shareholder in like manner as though made before.[99] After a national bank has become insolvent and closed its doors for business, the liability of its shareholders to its creditors becomes so fixed that any transfer of shares thereafter made must be held inoperative and void as against its creditors;[1] and this would simply be the rule applicable to other corporations.

c. American Doctrine That Transfers to Insolvent or Incapable Persons to Escape Liability Are Void, Although Out and Out — (I) *In General.* According to the American doctrine a transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder to a person who from any cause[2] is incapable of responding in respect of such liability

96. *In re* Financial Ins. Co., L. R. 7 Ch. 296, note 3; *In re* Smith, L. R. 7 Ch. 296, note 1; *In re* European Bank, L. R. 7 Ch. 292, 41 L. J. Ch. 501, 26 L. T. Rep. N. S. 269, 20 Wkly. Rep. 499; *In re* Hindustan, etc., Bank, L. R. 6 Ch. 286, 40 L. J. Ch. 333, 24 L. T. Rep. N. S. 691, 19 Wkly. Rep. 572; *In re* Great Wheal Busy Min. Co., L. R. 6 Ch. 196, 40 L. J. Ch. 361, 24 L. T. Rep. N. S. 599, 19 Wkly. Rep. 549; *In re* Smith, L. R. 4 Ch. 20; *Re* Hafod Lead Min. Co., 35 Beav. 391, 12 Jur. N. S. 242, 35 L. J. Ch. 304, 14 L. T. Rep. N. S. 95, 14 Wkly. Rep. 446; *In re* Taurine Co., 25 Ch. D. 118, 53 L. J. Ch. 271, 49 L. T. Rep. N. S. 514, 32 Wkly. Rep. 129; *In re* Humber Ironworks, etc., Co., 1 Ch. D. 576, 45 L. J. Ch. 48; Matter of Mexican, etc., Co., 4 De G. & J. 544, 5 Jur. N. S. 1191, 28 L. J. Ch. 769, 7 Wkly. Rep. 681, 61 Eng. Ch. 430; Matter of London, etc., Assur. Co., 2 De G. & J. 638, 59 Eng. Ch. 501; *In re* Phœnix L. Ins. Co., 8 Jur. N. S. 380, 31 L. J. Ch. 340, 6 L. T. Rep. N. S. 123, 10 Wkly. Rep. 313; *In re* Home Counties L. Assur. Co., 6 L. T. Rep. N. S. 374, 10 Wkly. Rep. 457. English cases, where the transfer was held good because out and out, are referred to in detail in Thompson Stockh. § 213. English cases, where the transfer was held void because a sham, are set out in detail in Thompson Stockh. § 214.

97. *Re* National Provincial Mar. Ins. Co., L. R. 5 Ch. 559, 18 Wkly. Rep. 938; *In re* Hindustan, etc., Bank, L. R. 5 Ch. 95, 39 L. J. Ch. 193, 21 L. T. Rep. N. S. 688, 18 Wkly. Rep. 197; *In re* Imperial Mercantile Credit Assoc., L. R. 9 Eq. 223; Matter of Ireland Electric Tel. Co., 3 De G. F. & J. 297, 64 Eng. Ch. 234; Matter of Mexican, etc., Co., 2 De G. F. & J. 302, 6 Jur. N. S. 1270, 30 L. J. Ch. 113, 3 L. T. Rep. N. S. 421, 9 Wkly. Rep. 6, 63 Eng. Ch. 234; Matter of Mexican, etc., Co., 1 De G. F. & J. 75, 6 Jur. N. S. 181, 29 L. J. Ch. 243, 1 L. T. Rep. N. S. 115, 8 Wkly. Rep. 52, 62 Eng. Ch. 58; Chinnock's Case, Johns. 714, 8 Wkly. Rep. 255. Rule not displaced by the fact that the constitution of the company declares that trustees shall not be recognized, etc. Chinnock's Case, Johns. 714, 8 Wkly. Rep. 255.

98. *In re* Accidental Death Ins. Co., L. R. 6 Ch. 905 note; *In re* Accidental Death, etc., Co., L. R. 6 Ch. 902, 25 L. T. Rep. N. S. 438, 20 Wkly. Rep. 9 (Sir G. Mellish, L. J., dissenting); *In re* Accidental Death Ins. Co., L. R. 16 Eq. 449, 43 L. J. Ch. 116, 21 Wkly. Rep. 900 (before Lord Selborne, L. C.); *In re* Consols Ins. Assoc., L. R. 10 Eq. 479, 40 L. J. Ch. 35.

99. Robison *v.* Beall, 26 Ga. 17. *Compare* Morgan *v.* Brower, 77 Ga. 627; Lesassier *v.* Kennedy, 36 La. Ann. 539.

1. Irons *v.* Manufacturers' Nat. Bank, 17 Fed. 308.

2. Transfers to persons who are *non sui juris* are separately considered in a succeeding subdivision. See *infra*, VIII, N, 8, a *et seq.*

is void as to creditors of the company and as to other shareholders, although as between the transferrer and the transferee the transfer may have been out and out.[3] The trust fund for creditors, of which the unpaid subscriptions consist, cannot thus be frittered away and dissipated, even with the consent of the directors, since the giving of such consent would be a breach of trust on their part.[4]

(II) *Stress Laid by American Judges on Question of Intent*—(A) *In General.* It will be observed, upon a reading of the American cases, that they lay the principal stress on the question of an intent on the part of the transferrer to escape liability.[5]

(B) *How Fraudulent Intent Proved.* This fraudulent intent is generally incapable of direct proof, but must be inferred from varying circumstances, as that the corporation or the transferee, or both, were at the time notoriously insolvent;[6] but that the shareholder knew of the insolvency of the corporation at the time of the transfer.[7]

(C) *When Question of Intent Material.* Where by the law of the corporation,[8] whether founded in an express statute or in a valid by-law, or, as in Pennsylvania, in judicial construction,[9] the original subscriber remains liable, notwithstanding he may have transferred his shares to another, and the transferee assumes no liability to the company for subsequent calls,[10] the question of the motive of the transferrer of course becomes immaterial; and the rule would necessarily be the same in Ohio[11] and in Virginia,[12] where the transferrer remains liable and the transferee also becomes so.[13]

d. Transfers Made With Consent of Directors, but Beyond Their Power. By the English doctrine transfers made to a nominee of the directors, in pursuance of arrangements between discontented members and the directors, whereby the former are permitted to retire from the company, have been treated

3. Marcy *v.* Clark, 17 Mass. 330; Provident Sav. Inst. *v.* Jackson Place Skating, etc., Rink, 52 Mo. 557; Miller *v.* Great Republic Ins. Co., 50 Mo. 55; McClaren *v.* Franciscus, 43 Mo. 452; Nathan *v.* Whitlock, 3 Edw. (N. Y.) 215 [*affirmed* in 9 Paige (N. Y.) 152].

4. Nathan *v.* Whitlock, 3 Edw. (N. Y.) 215 [*affirmed* in 9 Paige (N. Y.) 152].

5. Read for example the opinions in the following cases:

California.— Moore *v.* Boyd, 74 Cal. 167, 15 Pac. 670, per Hayne, C.

Louisiana.— Smith *v.* Saloy, 42 La. Ann. 183, 7 So. 450.

Massachusetts.— Marcy *v.* Clark, 17 Mass. 330, per Parker, C. J.

Missouri.— McClaren *v.* Franciscus, 43 Mo. 452, per Wagner, J. [*quoted* with approval in Provident Sav. Inst. *v.* Jackson Place Skating, etc., Rink, 52 Mo. 557].

United States.— Johnson *v.* Laflin, 13 Fed. Cas. No. 7,393, 5 Dill. 65, per Dillon, J.

6. Bowden *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386. That such testimony will overbear that of a single witness see Bowden *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386 [*citing* Clark *v.* Van Reimsdyk, 9 Cranch (U. S.) 153, 3 L. ed. 688].

7. Miller *v.* Great Republic Ins. Co., 50 Mo. 55.

Circumstances tending to overcome the presumption of fraudulent intent. Johnson *v.* Laflin, 13 Fed. Cas. No. 7,393, 5 Dill. 65 [*affirmed* in 103 U. S. 800, 26 L. ed. 532].

That the transferrer is not bound to know that the transferee is insolvent see Miller *v.* Great Republic Ins. Co., 50 Mo. 55.

Transfer to an insolvent while action is pending against corporation upon a demand in respect of which a shareholder would become individually liable, of no avail in discharging him from such liability. Rider *v.* Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513.

8. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

9. The rule in Pennsylvania is that a subscription to the stock of a railroad company creates a debt against the subscriber, from which he cannot relieve himself by an assignment or transfer made without the sanction of the directors. Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146.

10. Messersmith *v.* Sharon Sav. Bank, 96 Pa. St. 440; Franks Oil Co. *v.* McCleary, 63 Pa. St. 317; Palmer *v.* Ridge Min. Co., 34 Pa. St. 288; Delaware, etc., Canal Nav. Co. *v.* Sansom, 1 Binn. (Pa.) 70. *Compare* Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697, under a Michigan statute.

11. See *supra*, VIII, L, 3, o; VIII, N, 5, note 57.

12. See *supra*, VIII, N, 5, note 57.

13. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

as involving acts inconsistent with the duty of the directors, and beyond their power, and such transferrers have been held liable as contributories.[14] For stronger reasons such transfers would be void under the American law, since it is beyond the power of the directors and a breach of their trust thus to give away that portion of the assets of the corporation of which the unpaid subscriptions, or even under some theories, the statutory liability of the shareholders, consists.[15]

e. Reorganization of Corporation For Purpose of Defrauding Its Creditors. If the formation of a new company is promoted by persons interested in an old one which is insolvent, for the purpose of relieving those interested in the old company and fastening its liabilities upon the members of the new, and the new company, after its formation, buys the property of the old and becomes liable to the creditors of the latter for the amount due them, such creditors are not affected by the fraud, and can compel the shareholders of the old company to pay their subscriptions.[16]

f. Rule Where Real Purchaser of Shares Takes Transfer in Name of Irresponsible Person to Avoid Liability. The rule is the same where the real purchaser of corporate shares, instead of perfecting the transfer in his own name, or, being a corporation, in its own name, causes the transfer to be registered in the name of an irresponsible third person, for the purpose of escaping the personal liability of a shareholder. In such a case the real, and not the colorable, transferee will be charged with the liability of a shareholder, and this notwithstanding what appears on the face of the books.[17]

8. Transfers to Persons Incapable of Contracting — a. In General. The general rule is that transfers to persons incapable of contracting are void as to creditors and non-assenting shareholders, and that the transferrer remains a contributory, as though no transfer had been made.[18]

b. Transfers to Infants — (I) *In General.* Under a well-understood rule a transfer of shares to an infant is not void, but is voidable in the sense that the transfer may be rejected by the directors, and avoided by the infant within a reasonable time after attaining his majority.[19]

(II) *To Escape Liability to Creditors.* A transfer to an infant, made with the purpose on the part of the transferrer of escaping liability to the creditors of the corporation stands on a different footing, which is that of a fraudulent conveyance considered in preceding paragraphs, and is ordinarily voidable at the

14. Nathan *v.* Whitlock, 3 Edw. (N. Y.) 215 [*affirmed* in 9 Paige (N. Y.) 152]; Matter of Cameron's Coalbrook Steam Coal, etc., Co., 5 De G. M. & G. 284, 24 L. J. Ch. 130, 2 Wkly. Rep. 448, 54 Eng. Ch. 226 [*affirming* 18 Beav. 339]; Matter of Vale of Neath, etc., Brewery Co., 1 De G. & Sm. 750.

15. See *supra*, VIII, B, 2, a *et seq.*

16. Jewell *v.* Rock River Paper Co., 101 Ill. 57. *Compare* Morgan *v.* Brower, 77 Ga. 627.

17. Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. ed. 448. But this principle has been denied by the same court where the pledgee had the shares transferred in the first instance to an irresponsible trustee to avoid personal liability in respect of them. Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 4 S. Ct. 525, 28 L. ed. 478. The two decisions cannot be reconciled, and the latter is unsound. Opposed to the latter decision and following the former is Case *v.* Small, 10 Fed. 722, 4 Woods 78. Upon the question whether the original vendor in such a case is entitled to contribution from a fraudulent subvendee see the misdecided case of Lesassier *v.* Kennedy, 36 La. Ann. 539.

Transfers for the benefit of creditors of the transferrer see Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696.

18. United Soc. *v.* Eagle Bank, 7 Conn. 456; Marcy *v.* Clark, 17 Mass. 330; Veiller *v.* Brown, 18 Hun (N. Y.) 571.

19. *In re* Contract Corp., L. R. 7 Ch. 115, 41 L. J. Ch. 275, 25 L. T. Rep. N. S. 726, 20 Wkly. Rep. 169; *Re* Constantinople, etc., Hotels Co., L. R. 5 Ch. 302, 39 L. J. Ch. 679, 22 L. T. Rep. N. S. 424, 18 Wkly. Rep. 394; *In re* Blakely Ordnance Co., L. R. 4 Ch. 31, 17 Wkly. Rep. 65; *In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331; *In re* India, etc., Commercial Bank Corp., L. R. 8 Eq. 240; *In re* Alexandra Park Co., L. R. 6 Eq. 512, 38 L. J. Ch. 85, 16 Wkly. Rep. 1033; Matter of St. George's Steam Packet Co., 3 De G. & Sm. 31, 13 Jur. 673, 18 L. J. Ch. 256.

election of the corporation, its representative after insolvency, its shareholders, or its creditors.[20]

(III) *Transfer Through Infant to Adult.* The mere fact that a transfer of shares has been made through several infants to an adult, the conveyances having been attended with due formality, will not entitle the liquidator to put the name of the original transferrer on the list in place of the last transferee, although the company did not know that the intermediate conveyees were infants. The last shareholder being in all respects competent, the company was estopped from disputing his title to those shares. From the time they had a good shareholder on their register, in respect to whom they were bound, and who was bound in respect to them, they ceased to have any interest in the voidable character of the intermediate transfers.[21]

(IV) *What if Company Is Wound Up During Minority of Transferee.* Such a contract, however, is voidable by the company or by its representative until ratified by the infant after attaining his majority. Hence if the company is wound up before that time the person who has purchased the shares for the infant, executed the necessary conveyance, and entered into the necessary covenants for him, may be held as a contributory;[22] for it cannot be assumed in such a case that the infant, after attaining his majority, would ratify the transaction; and this was done even where the infant, having attained his majority after the winding-up, expressed by affidavit a desire to retain the shares, although he could not at that time pay the amount due on them.[23] Upon like grounds, where a father transfers his shares to an infant, and the company is wound up before the latter attains his majority, the transfer will be treated as void, and the transferrer held as a contributory.[24] But where a father applied for shares in the name of his infant son and paid the deposits thereon, and the company refused to allow him to execute the deed on behalf of his son, and he did no further act, he was not a contributory.[25]

(V) *Ratification by Infant Transferee After Attaining Majority.* What circumstances will amount to a ratification of a contract for the purchase is a question to be determined largely upon the facts of each case. The English courts have in several cases acted upon the principle that the fact that a person

20. Roman *v.* Fry, 5 J. J. Marsh. (Ky.) 634; Castleman *v.* Holmes, 4 J. J. Marsh. (Ky.) 1; Creed *v.* Lancaster Bank, 1 Ohio St. 1; *In re* Cohre Copper Min. Co., L. R. 5 Ch. 614, 39 L. J. Ch. 753, 23 L. T. Rep. N. S. 287, 18 Wkly. Rep. 957; *In re* Joint Stock Discount Co., L. R. 3 Ch. 459 note; *In re* China Steamship, etc., Coal Co., L. R. 3 Ch. 458, 16 Wkly. Rep. 1002; *In re* Imperial Mercantile Credit Assoc., L. R. 19 Eq. 588, 44 L. J. Ch. 252, 32 L. T. Rep. N. S. 18, 23 Wkly. Rep. 467.

21. *In re* Contract Corp., L. R. 8 Ch. 266, 42 L. J. Ch. 381, 28 L. T. Rep. N. S. 148, 21 Wkly. Rep. 181 [*reversing* L. R. 14 Eq. 454].

22. *In re* Asiatic Banking Corp., L. R. 5 Ch. 298, 39 L. J. Ch. 461, 22 L. T. Rep. N. S. 217, 18 Wkly. Rep. 366; *In re* Imperial Mercantile Credit Assoc., L. R. 19 Eq. 588, 44 L. J. Ch. 252, 32 L. T. Rep. N. S. 18, 23 Wkly. Rep. 467; *In re* Continental Bank Corp., L. R. 8 Eq. 504; Reaveley's Case, 1 De G. & Sm. 550; *In re* North of England Joint-stock Banking Co., 1 Hall & T. 118, 13 Jur. 158, 18 L. J. Ch. 110.

23. *In re* Continental Bank Corp., L. R. 8 Eq. 504.

24. *In re* Cohre Copper Min. Co., L. R. 5 Ch. 614, 39 L. J. Ch. 753, 23 L. T. Rep. N. S. 287, 18 Wkly. Rep. 957; Reid's Case, 24 Beav. 318.

25. Maxwell's Case, 24 Beav. 321. In an early case in Kentucky, a corporator endeavored to escape liability to creditors by taking shares in the names of infants. This was treated as "a fraud on the community." Roman *v.* Fry, 5 J. J. Marsh. (Ky.) 634. Where, however, the shares were sold in open market and purchased by an infant, of which fact the transferrer had no knowledge, and the company, after discovering this fact, failed for more than two years — at the expiration of which time the company was wound up — to notify the transferrer of such fact, and that they had repudiated the transfer on account of it, the laches of the company precluded the right to put the name of the transferrer again on the register. *In re* European Cent. R. Co., L. R. 8 Eq. 656, 39 L. J. Ch. 64. Where a father purchased shares, and had them registered in the name of his infant son, whom he personated, upon winding up, the son's name was removed from the register and the father made a contributory in his stead. *In re* Imperial Mer-

allows his name to remain for a length of time on the list of contributories of a company, without making any objection, does not raise an equity against his applying to have it removed, where no loss is sustained by the estate which would have been avoided if the application had been made earlier.[26] Some distinct act, they have held, must be shown to make him liable; and such an act was not discovered in the fact that his solicitor had attended, for himself and others, at a judge's chambers, to make opposition to a judicial order for a call.[27] Other of those courts have discovered an intention to ratify in failing to repudiate, for two years after majority, the company being a going concern.[28] And where the infant acquiesced for five months after majority, and transferred some of his shares, and did not object until four months after winding up, it was held that there was a ratification.[29] In another case acquiescence for more than a year was deemed sufficient, where the late infant had executed a transfer of his shares;[30] but the contrary was held of an acquiescence of three years without knowledge that his name was on the list.[31] And it seems that the infant will be held in any case, on the ground of fraud, where he procures the shares with the intention of keeping them if the company succeeds and repudiating them if it fails.[32]

c. Transfers to Married Women — (I) *Validity of.* A married woman has the legal capacity to receive a transfer of stock in a national banking corporation, although the consideration may have proceeded wholly from the husband.[33] We have seen that[34] by the principles of the common law the husband is liable for calls in respect of shares held by his wife. In a corporation created under the laws of a state where married women are under the common-law disability, he makes himself answerable to creditors in respect of them.[35] Where the condition of the local law is such that a married woman can enter into contracts as if sole so as to charge her separate estate, she can purchase shares in a corporation or joint-stock company on the credit of such an estate, so as to bind it and make her a contributory in respect of it;[36] and whether she does so contract and is understood as so contracting by the other contracting parties will be a question depending upon the facts and circumstances of each particular case.[37]

(II) *Whether Husband or Wife Liable Where She Owns Shares Before Marriage.* Where the status of a married woman remains as at common law, if she owned the stock before her coverture, after which time her husband reduced it into his possession, in the event of the insolvency of the corporation, he of course will be liable to creditors; but where he did not thus

cantile Credit Assoc., L. R. 19 Eq. 588, 44 L. J. Ch. 252, 32 L. T. Rep. N. S. 18, 23 Wkly. Rep. 467.

26. *In re* Mexican, etc., Co., L. R. 2 Ch. 387; *In re* Alexandra Park Co., L. R. 6 Eq. 512, 38 L. J. Ch. 85, 16 Wkly. Rep. 1033.

27. *In re* India, etc., Commercial Bank Corp., L. R. 8 Eq. 240.

28. *In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331.

29. *In re* Blakely Ordnance Co., L. R. 4 Ch. 31, 17 Wkly. Rep. 65.

30. *Re* Constantinople, etc., Hotels Co., L. R. 5 Ch. 302, 39 L. J. Ch. 679, 22 L. T. Rep. N. S. 424, 18 Wkly. Rep. 394.

31. *In re* Contract Corp., L. R. 7 Ch. 115, 41 L. J. Ch. 275, 25 L. T. Rep. N. S. 726, 20 Wkly. Rep. 169.

32. *Re* Constantinople, etc., Hotels Co., L. R. 5 Ch. 302, 39 L. J. Ch. 679, 22 L. T. Rep. N. S. 424, 18 Wkly. Rep. 394.

33. Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531.

34. See *supra*, VI, G, 1.

35. National Commercial Bank *v.* McDonnell, 92 Ala. 387, 9 So. 149.

36. *In re* Leeds Banking Co., L. R. 3 Eq. 781, 36 L. J. Ch. 90, 15 L. T. Rep. N. S. 266, 15 Wkly. Rep. 146, and so in *In re* Northumberland, etc., Dist. Banking Co., 1 De G. F. & J. 533, 6 Jur. N. S. 331, 29 L. J. Ch. 269, 8 Wkly. Rep. 297. Power of married woman to transfer stock without consent of her husband. Howard *v.* Bank of England, L. R. 19 Eq. 295, 44 L. J. Ch. 329, 31 L. T. Rep. N. S. 871, 23 Wkly. Rep. 303. Mandamus awarded to compel registry of shares in the name of married woman. Reg. *v.* Carnatic R. Co., L. R. 8 Q. B. 299, 42 L. J. Q. B. 169, 28 L. T. Rep. N. S. 413, 21 Wkly. Rep. 621.

37. *In re* Leeds Banking Co., L. R. 3 Eq. 781, 36 L. J. Ch. 90, 15 L. T. Rep. N. S. 266, 15 Wkly. Rep. 146; Johnson *v.* Gallagher, 3 De G. F. & J. 494, 7 Jur. N. S. 273, 30 L. J. Ch. 298, 4 L. T. Rep. N. S. 72, 9 Wkly. Rep. 506, 64 Eng. Ch. 387. Special provisions in the constitution of an English company may prevent married women from holding its

reduce the shares into his possession, but allowed the wife to receive the dividends, she was held responsible to the creditors of the corporation under a general statute making shareholders individually liable.[38] But the English cases hold that where a man marries a shareholder and allows the shares to remain in her name, he will be a contributory in respect to them;[39] but both husband and wife should be put on the list, since if she survives her liability will survive also.[40] But one who marries a female shareholder, without reducing her shares into his possession, is liable as a contributory only in respect of the liabilities of the company accruing or incurred during the coverture.[41]

(III) *When Trustees For Feme Covert Shareholders Become Personally Liable.* Upon grounds fully stated elsewhere,[42] if a married woman's shares are held by trustees for her, in the absence of statutes providing otherwise, they must respond as shareholders and look to her for indemnity.[43]

d. Transfers to Corporation Itself — (I) *In General Void.* The general rule is that unless the governing statute or constitution of a company authorizes it in express terms to purchase its own shares, such a purchase is *ultra vires*.[44] Where this rule prevails the selling shareholder will remain liable to creditors, unless he sells his shares innocently to one capable in law of purchasing and holding them, not knowing that such purchaser is using the funds of the corporation;[45] and not even in that case, according to the best theory.[46] The reason is, that he gets — without rendering a lawful consideration — a part of those assets which are a trust fund for the creditors; and the fact that he gets them innocently furnishes no reason whatever why he should not restore them.[47]

(II) *Exceptions to, and Denial of, This Rule.* Authority for stating some exceptions to this rule will be found in the American cases, and in others the rule is denied entirely.[48] Thus it has been held that a corporation may take its own stock in payment of debts owing to it, and may hold and sell stock thus acquired.[49] The directors have power to sell such stock and take notes for the price, under the general power which they possess of managing the corporate business.[50] So a bequest to a corporation of its own shares has been held valid.[51] But whilst stock thus taken by the corporation in payment or pledge does not merge so that it may be reissued,[52] it cannot be voted at corporate election; for it is not to be tolerated that the power shall thus be put into the hands of the officers of the corporation of securing themselves against the possibility of removal.[53]

shares, such as appears to have controlled in Angas' Case, 1 De G. & Sm. 560, 13 Jur. 76.

38. *In re* Reciprocity Bank, 22 N. Y. 9.

39. White's Case, 3 De G. & Sm. 157, 14 Jur. 454, 19 L. J. Ch. 497; Matter of North of England Joint-stock Banking Co., 3 De G. & Sm. 36, 13 Jur. 674, 18 L. J. Ch. 251; Matter of North of England Joint-stock Banking Co., 3 De G. & Sm. 18.

40. Matter of North of England Joint-stock Banking Co., 3 De G. & Sm. 36, 13 Jur. 674, 18 L. J. Ch. 251.

41. Matter of Vale of Neath Brewery Co., 3 De G. & Sm. 210, 14 Jur. 898, 19 L. J. Ch. 385.

42. See *supra*, VIII, M, 2, h.

43. Butler *v.* Cumpston, L. R. 7 Eq. 16, 38 L. J. Ch. 35, 17 Wkly. Rep. 241.

44. Merchants' Nat. Bank *v.* Overman Carriage Co., 17 Ohio Cir. Ct. 253.

45. Johnson *v.* Laflin, 103 U. S. 800, 26 L. ed. 532 [*affirming* 13 Fed. Cas. No. 7,393, 5 Dill. 65].

46. Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560.

47. *Compare* Alexander *v.* Rollins, 14 Mo. App. 109 [*affirmed* in 84 Mo. 657]. See also Bent *v.* Hart, 10 Mo. App. 143.

48. 3 Thompson Corp. § 3277.

49. Cooper *v.* Frederick, 9 Ala. 738; Columbus City Bank *v.* Bruce, 17 N. Y. 507; Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barb. (N. Y.) 397; Taylor *v.* Miami Exporting Co., 5 Ohio 162, 22 Am. Dec. 785.

50. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Chillicothe Branch Ohio State Bank *v.* Fox, 5 Fed. Cas. No. 2,683, 3 Blatchf. 431. An agreement of a corporation to sell its own shares for less than their par value has been held valid, it not appearing how the company acquired the stock. Otter *v.* Brevoort Petroleum Co., 50 Barb. (N. Y.) 247.

51. Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183.

52. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418.

53. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; *Ex p.* Holmes, 5 Cow. (N. Y.) 426.

(III) *Effect of Want of Knowledge on Part of Transferrer That Shares Are Being Purchased For Corporation.* If a shareholder, in selling his shares, deals at arm's length with the company, and conveys them to a qualified person under circumstances which do not charge him with knowledge that the transferee is a mere trustee for the company, and he in point of fact has no such knowledge, the existence of such a fact will not avoid the transfer and make him a contributory.[54] The same rule has been applied where the shares were sold to a qualified person through a broker, the vendor having no knowledge of the fact that the transferee received them in trust for the company, or that they were purchased with the company's funds.[55]

e. Transfer of Shares to Non-Existent or Fictitious Person. It is not necessary to do more than state the proposition that a shareholder cannot escape the obligation of performing his contract of subscription by the device of transferring his shares to a fictitious or non-existent person, under the theory that he has thus abandoned his shares.[56]

9. Exoneration of Transferrer — a. General Rule That Who Is Transferrer Is Determined by Corporate Books — (I) *Statement of Rule.* The general rule already noticed,[57] then, is that every person whose name, by his authority, has been placed on the books of a corporation as a shareholder, is such, both as to the corporation[58] and to its creditors, so long as his name remains there.[59]

(II) *Although He Holds as Trustee, Pledgee, Etc.* He may hold the shares as trustee for others,[60] or for the company itself,[61] or as collateral security

Untenable decision upholding a resolution of a board of directors that any shareholder indebted to the company on stock notes might have the privilege of paying any part or all of such indebtedness in the capital stock of the company at a rate specified in the resolution. Columbus City Bank *v.* Bruce, 17 N. Y. 507.

That any manipulation which disperses the trust fund of which unpaid share subscriptions consist, or even converts it into common assets, is void as against creditors who have given credit on the faith of it see Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731.

Validity of bona fide compromise by which a corporation receives its own shares in payment of a debt which it would have otherwise lost. Currier *v.* Lebanon Slate Co., 56 N. H. 262. English cases depending upon special circumstances, which are set out at length in Thompson Stockh. § 238, are: London, etc., Exch. Bank *v.* Henry, L. R. 7 Eq. 334; *In re* West Hartlepool Iron Co., 1 Ch. D. 664, 45 L. J. Ch. 342, 34 L. T. Rep. N. S. 164 24 Wkly. Rep. 508; Matter of Waterloo L., etc., Assur. Co., 2 De G. J. & S. 101, 10 Jur. N. S. 246, 10 L. T. Rep. N. S. 3, 12 Wkly. Rep. 502, 67 Eng. Ch. 80.

54. Matter of Joint-Stock Co.'s Winding-Up Acts, 1 De G. J. & S. 488, 9 Jur. N. S. 631, 32 L. J. Ch. 326, 8 L. T. Rep. N. S. 98, 11 Wkly. Rep. 385, 66 Eng. Ch. 379.

55. Johnson *v.* Laflin, 13 Fed. Cas. No. 7,393, 5 Dill. 65 [*affirmed* in 103 U. S. 800, 26 L. ed. 532]; Nicol's Case, 3 De G. & J. 387.

56. Muskingum Valley Turnpike Co. *v.* Ward, 13 Ohio 120, 42 Am. Dec. 191.

57. See *supra*, VIII, M, 1, a.

58. See *supra*, VII, D, 5, a, (I).

59. *Connecticut.*—State *v.* Ferris, 42 Conn. 560.

Georgia.— Force *v.* Dahlonega Tanning etc., Mfg. Co., 22 Ga. 86.

Maine.— Skowhegan Bank *v.* Cutler, 49 Me. 315; Fowler *v.* Ludwig, 34 Me. 455; Stanley *v.* Stanley, 26 Me. 191.

Massachusetts.— Holyoke Bank *v.* Burnham, 11 Cush. 183; Grew *v.* Breed, 10 Metc. 569; Crease *v.* Babcock, 10 Metc. 525.

Missouri.— A. Wight Co. *v.* Steinkemeyer, 6 Mo. App. 575.

New York.— U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, 6 Abb. Pr. 385; Worrall *v.* Judson, 5 Barb. 210.

Pennsylvania.— Bell's Appeal, 115 Pa. St. 88, 2 Am. St. Rep. 532.

United States.— Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551 (under California code); Irons *v.* Manufacturers' Nat. Bank, 27 Fed. 591.

60. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551; *In re* International Contract Co., L. R. 7 Ch. 485, 41 L. J. Ch. 564, 26 L. T. Rep. N. S. 487, 20 Wkly. Rep. 430; *In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331; *In re* Independent Assur. Co., 1 Sim. N. S. 389, 40 Eng. Ch. 389. See also *supra*, VIII, M, 2, a *et seq.*

61. *In re* National Financial Co., L. R. 3 Ch. 791, 18 L. T. Rep. N. S. 895, 16 Wkly. Rep. 994; Hemming *v.* Maddick, L. R. 9 Eq. 175 [*affirmed* in L. R. 7 Ch. 395, 41 L. J. Ch. 522, 26 L. T. Rep. N. S. 565, 20 Wkly. Rep. 433]; *In re* Imperial Mercantile Credit Assoc., L. R. 3 Eq. 361; Hoare's Case, 30 Beav. 225, 2 Johns. & H. 229. See also *supra*, VIII, M, 2, c.

for money loaned;[62] and yet he is personally liable as a shareholder, and if he suffers loss in consequence of his position he must seek indemnity from the equitable owner.[63] Nor will a private agreement between the transferrer and transferee that the former shall not be liable relieve him from such liability.[64]

(III) *Holder Liable After Sale of Shares and Delivery of Certificate Until Name Removed From Corporate Books.* So although he may have sold his shares to another and received pay for them, and delivered to the purchaser his certificate, yet until the transfer has been perfected by registering the transfer on the corporate books as required by the charter, statute, articles of association, or deed of settlement governing the company, the transfer, although valid as between him and the transferee,[65] does not divest his liability as a shareholder to the company[66] or to its creditors.[67]

62. *Illinois.*— Wheelock *v.* Kost, 77 Ill. 296.

Maryland.— Magruder *v.* Colston, 44 Md. 349, 22 Am. Rep. 47.

Massachusetts.— Holyoke Bank *v.* Burnham, 11 Cush. 183; Crease *v.* Babcock, 10 Metc. 525.

Missouri.— Simmons *v.* Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476.

New York.— U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199; Rosevelt *v.* Brown, 11 N. Y. 148; Adderly *v.* Storm, 6 Hill 624.

United States.—Pullman *v.* Upton, 96 U. S. 328, 24 L. ed. 818.

And see *supra*, VIII, M, 1, b.

63. Stover *v.* Flack, 30 N. Y. 64; *In re* National Financial Co., L. R. 3 Ch. 791, 18 L. T. Rep. N. S. 895, 16 Wkly. Rep. 994; Hemming *v.* Maddick, L. R. 9 Eq. 175 [*affirmed* in L. R. 7 Ch. 395, 41 L. J. Ch. 522, 26 L. T. Rep. N. S. 565, 20 Wkly. Rep. 433].

64. Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

65. *Alabama.*— Duke *v.* Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472.

Maryland.— Hall *v.* U. S. Insurance Co., 5 Gill 484.

Massachusetts.—Brigham *v.* Mead, 10 Allen 245; Sargent *v.* Essex Mar. R. Corp., 9 Pick. 202; Sargent *v.* Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Nesmith *v.* Washington Bank, 6 Pick. 324; Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476.

Missouri.— Moore *v.* Bank of Commerce, 52 Mo. 377; Chouteau Spring Co. *v.* Harris, 20 Mo. 382; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149.

New York.—Johnson *v.* Underhill, 52 N. Y. 203; Gilbert *v.* Manchester Iron Mfg. Co., 11 Wend. 627; Utica Bank *v.* Smalley, 2 Cow. 770, 14 Am. Dec. 526.

England.— McEuen *v.* West London Wharves, etc., Co., L. R. 6 Ch. 655, 40 L. J. Ch. 471, 25 L. T. Rep. N. S. 143, 19 Wkly. Rep. 837; *In re* Joint Stock Discount Co., L. R. 2 Ch. 16, 36 L. J. Ch. 32, 15 L. T. Rep. N. S. 198, 15 Wkly. Rep. 117; Castellan *v.* Hobson, L. R. 10 Eq. 47, 39 L. J. Ch. 490, 22 L. T. Rep. N. S. 575, 18 Wkly. Rep. 731; Walker *v.* Bartlett, 18 C. B. 845, 2 Jur. N. S. 643, 25 L. J. C. P. 263, 4 Wkly. Rep. 681, 36 Eng. L. & Eq. 368, 86 E. C. L. 845; Shaw *v.* Rowley, 11 Jur. 911, 16 L. J. Exch. 180, 16 M. & W. 810, 5 R. & Can. Cas. 47; Sheffield, etc., R. Co. *v.* Woodcock, 11 L. J. Exch. 26, 7 M. & W. 574, 2 R. & Can. Cas. 522.

An assignment not made in conformity with the law governing the corporation will pass an equitable title which will bind all persons having notice of it. Black *v.* Zacharie, 3 How. (U. S.) 483, 11 L. ed. 690.

66. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579; Helm *v.* Swiggett, 12 Ind. 194; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337; Coleman *v.* Spencer, 5 Blackf. (Ind.) 197.

67. *California.*— Visalia, etc., R. Co. *v.* Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136.

Iowa.— Perkins *v.* Lyons, 111 Iowa 192, 82 N. W. 486; White *v.* Green, 105 Iowa 176, 74 N. W. 928 [*affirming* 70 N. W. 182, under a comparison and construction of statutes].

Kansas.— Plumb *v.* Enterprise Bank, 48 Kan. 484, 29 Pac. 699, transferrer cannot complain that no by-law has been enacted prescribing the manner of making transfers, or claim exemption from individual liability on the stock sold on that ground.

Maine.— Dane *v.* Young, 61 Me. 160.

Minnesota.— Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069, assignor of corporate stock, whose transfer was not registered on the corporate books until after the corporation had made an assignment, when it was registered as a transfer to the corporation itself.

New York.— Shellington *v.* Howland, 53 N. Y. 371; Powers *v.* Knapp, 71 Hun 371, 25 N. Y. Suppl. 19, 55 N. Y. St. 23 (under a statute); Worrall *v.* Judson, 5 Barb. 210.

Ohio.— Herrick *v.* Wardwell, 58 Ohio St. 294, 50 N. E. 903 (unless the transfer is noted in the stock-book, or in the absence of such book on the stubs of the stock certificate, although an examination of the book as a whole would show a transfer of the stock); Wehrman *v.* Reakirt, 1 Cinc. Super. Ct. 230.

Pennsylvania.— Burt *v.* Real Estate Exch., 175 Pa. St. 619, 34 Atl. 923, 38 Wkly. Notes Cas. 277, 52 Am. St. Rep. 858.

United States.— Giesen *v.* London, etc., Mortg. Co., 102 Fed. 584, 42 C. C. A. 515.

England.— McEuen *v.* West London Wharves, etc., Co., L. R. 6 Ch. 655, 40 L. J. Ch. 471, 25 L. T. Rep. N. S. 143, 19 Wkly. Rep. 837; *In re* Imperial Mercantile Credit

(iv) *Further Explanation of This Rule*—(a) *In General.* The registration being intended in part for the protection of the public,[68] one who has parted with his shares, and yet suffers his name to remain on the register, remains a shareholder by conduct or estoppel, upon familiar grounds already discussed.[69] And where the governing statute provides that transfers can be made only by deed and by alteration of the register, and a shareholder transfers his shares in another way, although the company may recognize the transfer by receiving assessments from the transferee, this, it has been held in England, does not discharge the transferrer from liability to the company as a shareholder. If this were not so the wholesome requirement of the law might be entirely elnded; and any person who examined the register, whether a creditor who wished to know the names of the shareholders, or a shareholder who wished to know the names of his co-shareholders, would be entirely deceived.[70]

(b) *English Rule on This Point Agrees With American Rule.* In this respect the English rule coincides for the most part with the American rule, and where the constitution of a company requires that a transfer of shares be executed by both parties, and it is not executed by the transferee, the English courts will not, under sections 35 and 98 of the Companies Act of 1862, rectify the register, but will put the transferrer on the list of contributories, and leave the transferrer and transferee to their remedies against each other.[71]

(v) *View That Transferrer Is Relieved Unless Guilty of Negligence in Seeing to Regulation of Transfer*—(a) *In General.* In England, subject to the exception of one year's time in the Companies Act of 1862, the transferrer will not be liable as a contributory, unless his name was suffered to remain on the register through his negligence;[72] the rule being that where the transferrer has done all in his power to complete the formality of the transfer he is discharged from liability as a shareholder;[73] or that a transferrer who has negligently suffered his name to remain on the register will be held as a contributory,[74] but one whose name remains there notwithstanding he has been guilty of no laches will not;[75] and the corresponding rule in the courts of the United States is that

Assoc., L. R. 2 Ch. 596, 36 L. J. Ch. 468, 16 L. T. Rep. N. S. 368, 15 Wkly. Rep. 683; *In re* Anglo-Danubian Steam Nav., etc., Co., L. R. 6 Eq. 30, 37 L. J. Ch. 651, 16 Wkly. Rep. 749; *In re* Overend, L. R. 5 Eq. 193, 37 L. J. Ch. 161, 16 Wkly. Rep. 247.

Compare Efird *v.* Piedmont Land Imp., etc., Co., 55 S. C. 78, 32 S. E. 758 [*rehearing denied* in 55 S. C. 88, 32 S. E. 897], construction of statutes.

68. The rule is intended for the benefit of the company also (see *supra*, VII, D, 5, a, (II)); and hence as between the transferee and the company, unless his own transfer is made upon the books of the company, he is not a shareholder. The mere fact that he owns the certificate of stock does not make him a shareholder. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579; Helm *v.* Swiggett, 12 Ind. 194; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337; Coleman *v.* Spencer, 5 Blackf. (Ind.) 197.

69. Plumb *v.* Enterprise Bank, 48 Kan. 484, 29 Pac. 699; *In re* Reciprocity Bank, 22 N. Y. 9. See also *supra*, VI, P, 7, a, (I).

70. McEuen *v.* West London Wharves, etc., Co., L. R. 6 Ch. 655, 40 L. J. Ch. 471, 25 L. T. Rep. N. S. 143, 19 Wkly. Rep. 837.

71. *In re* Imperial Mercantile Credit Assoc., L. R. 2 Ch. 596, 36 L. J. Ch. 468, 16 L. T. Rep. N. S. 368, 15 Wkly. Rep. 683; *In re* Overend, L. R. 5 Eq. 193, 37 L. J. Ch. 161, 16 Wkly. Rep. 247.

72. *In re* Joint Stock Discount Co., L. R. 4 Ch. 769, note 2; *In re* Joint Stock Discount Co., L. R. 4 Ch. 768, 21 L. T. Rep. N. S. 151, 17 Wkly. Rep. 978; *In re* Overend, L. R. 4 Eq. 189; *In re* Contract Corp., L. R. 3 Eq. 84, 36 L. J. Ch. 121; *In re* Joint Stock Discount Co., L. R. 3 Eq. 77; *In re* London, etc., Exch. Bank, L. R. 2 Eq. 226; *In re* Newcastle-Upon-Tyne Mar. Ins. Co., 19 Beav. 107; Shortridge *v.* Bosanquet, 16 Beav. 84.

73. *In re* Contract Corp., L. R. 3 Eq. 84, 36 L. J. Ch. 121; *In re* London, etc., Exch. Bank, L. R. 2 Eq. 226; *In re* Newcastle-Upon-Tyne Mar. Ins. Co., 19 Beav. 107; Shortridge *v.* Bosanquet, 16 Beav. 84. But see Bosanquet *v.* Shortridge, 4 Exch. 699, 14 Jur. 71, 19 L. J. Exch. 221.

74. *In re* Joint Stock Discount Co., L. R. 2 Ch. 16, 36 L. J. Ch. 32, 15 L. T. Rep. N. S. 198, 15 Wkly. Rep. 117; *In re* Anglo-Danubian Steam Nav. Co., L. R. 6 Eq. 30, 37 L. J. Ch. 651, 16 Wkly. Rep. 749; *In re* Contract Corp., L. R. 3 Eq. 84, 36 L. J. Ch. 121.

75. Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; *In re* Joint Stock Discount Co., L. R. 4 Ch. 769, note 2; *In re* Joint Stock Discount Co., L. R. 4 Ch. 768, 21 L. T. Rep. N. S. 151, 17 Wkly. Rep. 978; *In re* Overend, L. R. 4 Eq. 189; *In re* Joint

where the shareholder in selling his shares does all that a careful and prudent business man should do to discharge himself from liability as a shareholder, he will not be held responsible for the neglect and carelessness of an officer of the corporation in failing to register the transfer.[76]

(B) *Not Relieved Because There Is No By-Law Requiring Recording of Transfers.* But while recognizing this principle it has been held that a shareholder who after a sale of his stock permits his name to remain on the books of the corporation as a shareholder and knows, or should know, the common usage of the corporation as to the recording of transfers cannot complain that no by-law has been enacted prescribing the manner of transfer, or claim exemption from individual liability on that ground because of his negligence.[77]

(C) *Rule as to Negligence in Recording Transfer Where Transferrer Is Director.* The rule which requires the transferrer to see to it that the name of the transferee is substituted for his on the books of the company seems to apply without exception where the transferrer is a director. He is in a very different position from that of an ordinary shareholder, for he has the means of seeing that all the formalities of transfer required by the constitution of the company are complied with, and he is therefore bound in transferring his shares to see to the regularity of the transfer. If he fails in this he remains a contributory.[78] The same principle has been applied where the auditor of a failing company transferred his shares to the managing director under circumstances of doubtful good faith, and where the requisite formalities were not attended to.[79]

b. Liability of Purchaser of Shares Which Are Not Formally Transferred on Books of Corporation. It is impossible to state a statutory rule on this subject. It has been held that a purchaser of corporate shares becomes liable to the creditors of the corporation, although the transfer was not recorded on the books of the company.[80]

Stock Discount Co., L. R. 3 Eq. 77 (holding that a delivery of the share certificate indorsed in blank to the president of the corporation, not as president, but as purchaser of the shares, did not discharge these as the transferrer, where the transfer was not in fact registered). For a further illustration of this doctrine see Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250, 30 N. E. 644, 43 N. Y. St. 876 [*reversing* 16 Daly (N. Y.) 28, 9 N. Y. Suppl. 285, 29 N. Y. St. 726]. This doctrine is denied in Ohio, and a transferrer is liable to creditors until he gets his name off the corporate books, although he is unable to do it, and notwithstanding the corporation treats the transferee as the owner of the shares. Harpold *v.* Stohart, 46 Ohio St. 397, 21 N. E. 637, 15 Am. St. Rep. 618, transferrer not registered in consequence of the neglect of the company.

76. Whitney *v.* Butler, 118 U. S. 655, 7 S. Ct. 61, 30 L. ed. 266; Young *v.* McKay, 50 Fed. 394; Hayes *v.* Yawger, 39 Fed. 912; Hayes *v.* Shoemaker, 39 Fed. 319.

77. Plumb *v.* Enterprise Bank, 48 Kan. 484, 29 Pac. 699.

78. *In re* Newcastle-Upon-Tyne Mar. Ins. Co., 19 Beav. 97. There is one untenable decision to the contrary. Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250, 30 N. E. 644, 43 N. Y. St. 876. See also Beals *v.* Buffalo Expanded Metal Constr. Co., 49 N. Y. App. Div. 589, 63 N. Y. Suppl. 635, transferrer was both a director and the president.

79. *In re* Newcastle-Upon-Tyne Mar. Ins. Co., 19 Beav. 107.

"Rectifying the register" under English Companies Act (1862), § 35. *In re* Joint Stock Discount Co., L. R. 4 Ch. 769, note 2; *In re* Joint Stock Discount Co., L. R. 4 Ch. 768, 21 L. T. Rep. N. S. 151, 17 Wkly. Rep. 978; *In re* Hercules Ins. Co., L. R. 9 Eq. 589, 39 L. J. Ch. 458, 18 Wkly. Rep. 370; *In re* Joint Stock Discount Co., L. R. 3 Eq. 77; *In re* London, etc., Exch. Bank, L. R. 2 Eq. 226; Lindley Comp. L. (5th ed.) 61, 748, 755, 832, 834. Where name wrongly on register in first instance. *In re* Anglo-Danubian Steam Nav. Co., L. R. 6 Eq. 30, 37 L. J. Ch. 651, 16 Wkly. Rep. 749; *In re* Canadian Native Oil Co., L. R. 5 Eq. 118, 37 L. J. Ch. 257; *In re* European Assur. Soc. Arbitration Acts, 3 Ch. D. 21, 45 L. J. Ch. 801, 34 L. T. Rep. N. S. 929; *In re* European Assur. Soc. Arbitration Acts, 3 Ch. D. 10, 45 L. J. Ch. 804, 34 L. T. Rep. N. S. 926.

80. White *v.* Marquardt, 105 Iowa 145, 74 N. W. 930 [*affirming* (Iowa 1897) 70 N. W. 193, under the operation of statutes]; Bissell *v.* Heath, 98 Mich. 472, 57 N. W. 585 (where the transfer has been accepted by the corporation); Basting *v.* Northern Trust Co., 61 Minn. 307, 63 N. W. 721 (under the operation of a statute, purchaser at execution sale of stock of a corporation keeping no regular stock-book). But it has been held that a purchaser of stock in a national bank, who indorses his certificate to the cashier of the

c. Effect Upon Liability of Shareholders of Waiver by Corporation of Formal Transfer. This question need not be here considered, in so far as it affects the rights of the corporation itself. The rule which requires transfers to be registered on the books of the company is for the most part intended for the benefit of the company itself.[81] The company may therefore waive it and estop itself from suing the transferrer for future assessments,[82] and it will not be allowed to derive an advantage from its own negligence.[83] And this rule also estops a receiver of a corporation where the theory prevails that his rights are derivative from the corporation, and that he possesses no higher title than the corporation itself had.[84] In general the corporation becomes estopped from treating the transferrer as its shareholder after it has accepted the transferee as such, as by paying annual dividends to him for a number of years.

d. Liability to Creditors Where Consent of Directors to Transfer Is Necessary, but Has Not Been Obtained. If the constitution or governing statute of a joint-stock company exacts a condition precedent to a valid transfer of shares, as that the consent of the directors shall have been obtained or that the transferrer shall have paid all assessments,[85] a transfer without the performance of this condition, not being good between the transferrer and the company, leaves him of course liable to its creditors.[86]

e. Other Questions Relating to Divesting Liability of Transferrer. These will be briefly noted in the margin.[87]

O. Liability of Executors, Administrators, Heirs, and Legatees — 1. Corporate Shares Are Personal Property. Corporate shares are personal property and pass to the personal representative of the deceased shareholder and not to his heirs.[88]

bank upon a sale to the latter individually, at a time when the bank is solvent, cannot be held liable upon such stock because of the failure of such cashier to perform the duty of transferring the stock upon the bank-books, especially where the bank has recognized the validity of the transfer by paying dividends to the cashier. Snyder *v.* Foster, 73 Fed. 136, 19 C. C. A. 406.

81. See *supra*, VII, D, 5, a, (I) *et seq.*

82. Isham *v.* Buckingham, 49 N. Y. 216; Bank of Commerce *v.* Newport Bank, 63 Fed. 896, 11 C. C. A. 484; Upton *v.* Burnham, 28 Fed. Cas. No. 16,798, 3 Biss. 431. See also Billings *v.* Robinson, 94 N. Y. 415 [*affirming* 28 Hun (N. Y.) 122].

83. Central Nat. Bank *v.* Williston, 138 Mass. 244; Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637.

84. Cutting *v.* Damerel, 88 N. Y. 410, 411 [*reversing* 23 Hun (N. Y.) 339]; Earle *v.* Coyle, 97 Fed. 410, 38 C. C. A. 226 [*affirming* 95 Fed. 99].

85. *Re* National Provincial Mar. Ins. Co., L. R. 5 Ch. 559, 18 Wkly. Rep. 938.

86. *In re* Overend, L. R. 2 Eq. 554, 35 L. J. Ch. 826, 14 L. T. Rep. N. S. 32, 14 Wkly. Rep. 1008; Bosanquet *v.* Shortridge, 4 Exch. 699, 14 Jur. 71, 19 L. J. Exch. 221. But see Shortridge *v.* Bosanquet, 16 Beav. 84; Matter of North of England Joint-stock Banking Co., 3 De G. & Sm. 36, 13 Jur. 674, 18 L. J. Ch. 251; Matter of North of England Joint-stock Banking Co., 1 De G. M. & G. 576, 16 Jur. 435, 50 Eng. Ch. 444. But if this condition is exacted by the by-laws merely it may be waived by an established usage on the part of the company. Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120.

87. Where the transfer was to the corporation itself — facts on which it was held that the transferrer remained a shareholder and liable as such. Merchants' Bank *v.* Cook, 4 Pick. (Mass.) 405. Rule where the transferrer owns and transfers all the shares — circumstances under which not liable to creditors. Morgan *v.* Brower, 77 Ga. 627. Statutory provisions requiring the giving of public notice of transfers of shares generally in newspapers — statute not complied with, transferrer remains liable. Mason *v.* Force, 30 Ga. 99; Force *v.* Dahlonega Tanning, etc., Mfg. Co., 22 Ga. 86. *Compare* Lane *v.* Morris, 8 Ga. 468. Statutory provision avoiding transfers unless made within a given time prior to the failure of the corporation. Lumpkin *v.* Jones, 1 Ga. 27. No liability of shareholder for rent accruing under lease after he ceased to be such by transferring his shares. Bordman *v.* Osborn, 23 Pick. (Mass.) 295.

88. *Alabama.*— Planters', etc., Bank *v.* Leavens, 4 Ala. 753.

Massachusetts.— Hutchins *v.* State Bank, 12 Metc. 421; Waltham Bank *v.* Waltham, 10 Metc. 334.

New York.— Denton *v.* Livingston, 9 Johns. 96, 6 Am. Dec. 264.

North Carolina.— Heart *v.* State Bank, 17 N. C. 111.

Ohio.— Johns *v.* Johns, 1 Ohio St. 350; State *v.* Franklin Bank, 10 Ohio 91.

Pennsylvania.— Slaymaker *v.* Gettysburg Bank, 10 Pa. St. 373; Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720.

2. Estate of Deceased Shareholder Liable, Not His Executor or Administrator — a. In General. Executors or administrators of deceased shareholders are liable as contributories, not on the same principle as other trustees, but in general only in respect of their trust estate.[89]

b. Doctrine That Estate Not Liable. The doctrine of the supreme judicial court of Massachusetts that the estate of a deceased shareholder is not liable to creditors of the corporation is so far out of line with the current of authority and with ordinary conceptions of justice that it will not be discussed at length, but some of the decisions will be alluded to.[90]

c. General American Doctrine. The general American doctrine is that the liability of a shareholder whether merely to pay what is unpaid in respect of his shares,[91] to respond to a superadded liability imposed by statute,[92] or to answer in common with the other shareholders for the debts of the corporation, under the joint and several liability of partners,[93] does not die with him, but survives in respect of his estate in the hands of his executor or administrator.

d. Rule Confined to Cases Where Liability Is Contractual in Its Nature. The rule of survivorship does not extend to cases where the statutory liability is in the nature of a penalty or forfeiture, but it is confined to cases where the liability, although a superadded liability created by statute in excess of the liability which exists at common law, is in the nature of a contract, that is to say, a liability voluntarily assumed by the act of becoming a shareholder in the face of the statute.[94]

e. Whether Executor or Legatee a Contributory. Under a provision in the charter of a corporation that on the death of a shareholder his heirs or legal representatives might continue the relation, it was held that the right to continue the membership was in the heirs or devisees and not in the personal representative.[95]

Rhode Island.— Arnold *v.* Ruggles, 1 R. I. 165.

Tennessee.— Brightwell *v.* Mallony, 10 Yerg. 196; Union Bank *v.* State, 9 Yerg. 490.

Vermont.— Isham *v.* Bennington Iron Co., 19 Vt. 230; Wheelock *v.* Moulton, 15 Vt. 519.

For an early conception that corporate shares are real property see Welles *v.* Cowles, 2 Conn. 567; Howe *v.* Starkweather, 17 Mass. 240; Tippets *v.* Walker, 4 Mass. 595; *In re* Meason, 4 Watts (Pa.) 341.

89. Taylor *v.* Taylor, L. R. 10 Eq. 477, 39 L. J. Ch. 676, 18 Wkly. Rep. 1102; Houldsworth *v.* Evans, L. R. 3 H. L. 263, 37 L. J. Ch. 800, 19 L. T. Rep. N. S. 211, *In re* Herefordshire Banking Co., 33 Beav. 435; *In re* Northern Coal Min. Co., 13 Beav. 133, 19 L. J. Ch. 566 [*affirmed* in 16 Jur. 299, 3 Macn. & G. 726, 49 Eng. Ch. 558]; Matter of St. George's Steam Packet Co., 3 De G. & Sm. 279; Matter of North of England Joint-stock Banking Co., 3 De G. & Sm. 258; *In re* North of England Joint-stock Banking Co., 15 Jur. 137, 20 L. J. Ch. 188, 3 Macn. & G. 187, 49 Eng. Ch. 141. See also Grew *v.* Breed, 10 Metc. (Mass.) 569; New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688; Matter of Australia Royal Bank, 6 De G. M. & G. 572, 55 Eng. Ch. 445.

90. Ripley *v.* Sampson, 10 Pick. (Mass.) 371 (opinion by Shaw, C. J.); Child *v.* Coffin, 17 Mass. 64. See also Dane *v.* Dane Mfg. Co., 14 Gray (Mass.) 488; Gray *v.* Coffin, 9 Cush. (Mass.) 192, 199; Cutler *v.* Middlesex Factory Co., 14 Pick. (Mass.) 483; Andrews *v.* Callender, 13 Pick. (Mass.) 484.

91. Davidson *v.* Rankin, 34 Cal. 503; Manville *v.* Edgar, 8 Mo. App. 324; Bailey *v.* Hollister, 26 N. Y. 112. See also Matter of Australia Royal Bank, 6 De G. M. & G. 572, 55 Eng. Ch. 445; *In re* Northern Coal Min. Co., 16 Jur. 299, 3 Macn. & G. 726, 49 Eng. Ch. 558.

92. See *supra*, VIII, E, 8.

93. Chase *v.* Lord, 77 N. Y. 1, under the National Banking Act. So under the New York statutes. Cochran *v.* Weichers, 119 N. Y. 399, 23 N. E. 803, 29 N. Y. St. 388, 7 L. R. A. 553 [*affirming* 6 N. Y. Suppl. 304, 25 N. Y. St. 571]; Chase *v.* Lord, 77 N. Y. 1, 6 Abb. N. Cas. (N. Y.) 258 [*reversing* 16 Hun (N. Y.) 369]; Diven *v.* Duncan, 41 Barb. (N. Y.) 520.

94. Lowry *v.* Inman, 46 N. Y. 129 (per Allen, J.); Richmond *v.* Irons, 121 U. S. 27, 55, 56, 7 S. Ct. 788, 30 L. ed. 864. See also Wiles *v.* Suydam, 64 N. Y. 173; Bailey *v.* Hollister, 26 N. Y. 112, 116 (reasoning of Gould, J.); Flash *v.* Conn, 109 U. S. 371, 3 S. Ct. 263, 29 L. ed. 966; Hobart *v.* Johnson, 8 Fed. 493, 19 Blatchf. 359.

Liability where the charter has been extended and debts have been contracted by the corporation after the death of the shareholder. Bailey *v.* Hollister, 26 N. Y. 112.

95. Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413. *Compare* Security Loan Assoc. *v.* Lake, 69 Ala. 456.

Under the English law, in some deeds of settlement, the consent of the directors was necessary to introduce a legatee as shareholder.[96]

3. Mode of Enforcing Contribution From Estate of Deceased Shareholder — a. By Proving Claim Against Estate — (I) *In General.* This depends in every case upon the state of the statute law with respect to the administration of the estates of deceased persons and with respect to insolvent corporations. Under many statutory systems the proper way would be to prove the demand against the estate in the probate court, after presenting it to the executor or administrator for allowance, or giving him the statutory notice.[97]

(II) *Time Within Which Demand Against Estate of Deceased Shareholder Must Be Presented.* This depends upon statutes which are local and special, and which are in the nature of special statutes of limitation. They will not therefore be considered in detail, but cases construing them will be cited in the margin.[98]

(III) *Creditors Not to Be Delayed Until Settlement of Estate of Deceased Shareholder.* It has been held by one of the appellate courts of Illinois that complainants in a suit in equity to enforce the liability of shareholders are not bound to wait for the settlement of claims for contribution between living shareholders and the estates or heirs of deceased shareholders, but that the adjustment of such controversies should be left to a suit or suits having that as the main and primary object in view.[99]

b. By Proceeding in Equity. It may be stated with confidence that an appropriate remedy to charge the estate of a deceased shareholder, even with a statutory liability, is a proceeding in equity, unless this remedy is excluded by the condition of the statute law.[1]

c. By Suing Executor or Administrator Without Proceeding in Probate Court. Under some systems the creditor is permitted to bring a direct action at law against the executor or administrator of the deceased shareholder without proving up his claim against the estate of the deceased in the probate court.[2]

96. Matter of Vale of Neath, etc., Brewery Co., 3 De G. M. & G. 272, 52 Eng. Ch. 213.

Right of executor to contribution as against residuary legatee.— For cases where the executor was compelled to pay in respect of the shares of his testator see Jervis *v.* Wolferstan, L. R. 18 Eq. 18, 43 L. J. Ch. 809, 30 L. T. Rep. N. S. 452; Whittaker *v.* Kershaw, 45 Ch. D. 320, 60 L. J. Ch. 9, 63 L. T. Rep. N. S. 203, 39 Wkly. Rep. 23.

Heirs assessable to the extent of assets received from ancestors, to make up deficiency after an estate fully administered. Payson *v.* Hadduck, 10 Fed. Cas. No. 10,862, 8 Biss. 300.

97. Nolan *v.* Hazen, 44 Minn. 478, 47 N. W. 155. A claim in favor of the creditors of a corporation against the estate of a deceased shareholder, before the assets of the corporation are fully administered, is a "contingent claim" within the meaning of Minn. Gen. Stat. c. 53, relating to claims against decedents' estates. Hospes *v.* Northwestern Mfg., etc., Co., 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470. In case of the death of one of the partners in a firm which holds shares in a corporation, a claim for his liability may be proved against his estate as if it were a joint and several liability, under a statute which provides that when two or more persons are indebted on a joint contract and either of them dies his estate shall be liable therefor as if the contract had been joint and several. Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 47 Atl. 176.

98. Greenabaum *v.* Elliott, 60 Mo. 25; Burton *v.* Rutherford, 49 Mo. 255; Chambers *v.* Smith, 23 Mo. 174 (statute runs from time when the substantial right of recovery accrues); Miller *v.* Woodward, 8 Mo. 169; Garesche *v.* Lewis, 15 Mo. App. 565 [*affirmed* in 93 Mo. 197, 6 S. W. 54]; Larkin *v.* Willi, 12 Mo. App. 135; Hicks *v.* Jamison, 10 Mo. App. 35.

99. Wood *v.* Wood, 40 Ill. App. 182.

Liability of the estates of deceased nonresident shareholders see Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557, 18 N. W. 356.

1. Grew *v.* Breed, 10 Metc. (Mass.) 569; New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688; Turquand *v.* Kirby, L. R. 4 Eq. 123, 36 L. J. Ch. 570, 16 L. T. Rep. N. S. 260, 15 Wkly. Rep. 730. *Compare Re* Agriculturist Cattle Ins. Co., L. R. 5 Ch. 725, 23 L. T. Rep. N. S. 424, 18 Wkly. Rep. 1094, where this case is noticed.

2. Thompson *v.* Reno Sav. Bank, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883 [*citing* Gunter *v.* Janes, 9 Cal. 643; Hull *v.* Standard Coal, etc., Co., 7 Ohio S. & C. Pl. Dec. 527, 7 Ohio N. P. 157].

4. When Executor or Administrator Personally Liable — a. In General. If the executor or administrator invests the funds of the estate in corporate shares — in case of an executor, without authority so to do in the will — the shares are treated as belonging to him, and not to the estate; and he and not the estate is responsible as shareholder;[3] and if in consequence of so acting he suffers loss, he must seek indemnity out of the trust estate.[4] Such an acceptance of shares has been discovered in the act of an executor participating in the profits of the corporation, that is to say, in receiving dividends.[5]

b. Executor Liable For Breach of Trust. Outside of this principle an executor may make himself personally liable to contribute for the benefit of creditors, by committing a breach of trust in improperly disposing of the trust fund in his hands, out of which contribution is regularly sought, as where executors of a deceased shareholder, in a going and solvent company, commit a breach of trust in paying a legacy without providing for the liability attaching to the testator's estate at the time of his death in respect of such shares; so that in the event of the company afterward being wound up he must pay out of his own pocket the calls made upon him as a contributory.[6]

5. Liability of Estates of Deceased Shareholders in National Banks. By the National Banking Act "persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable, in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act, and hold the stock in his own name."[7] Under this statute it has been held that an administrator is not personally liable to assessment on bank-stock which always remained in his hands in his representative capacity, and was never transferred to him on the books of the bank, although he is sole heir to the intestate.[8] Under this statute executors who accept shares in a national bank which were held by their testator, by including them in the inventory, become liable as shareholders, as executors, and in respect of the trust assets in their hands, but not in their individual liability.[9]

P. Conditions Precedent to Right to Proceed Against Shareholders — 1. Dissolution of Corporation — a. Contracts of Corporations With Third Parties Do Not Perpetuate Its Existence. Contracts entered into between a corpora-

3. Diven *v.* Lee, 36 N. Y. 302, 1 Transcr. App. (N. Y.) 54, 34 How. Pr. (N. Y.) 197; Spence's Case, 17 Beav. 203 (per Lord Romilly, M. R.). That an executor who carries on business of his testator makes himself personally liable see Alsop *v.* Mather, 8 Conn. 584, 21 Am. Dec. 703; Stedman *v.* Feidler, 20 N. Y. 437; Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619; *Ex p.* Richardson, Buck 202, 3 Madd. 138; Liverpool Borough Bank *v.* Walker, 4 De G. & J. 24, 61 Eng. Ch. 19; Labouchere *v.* Tupper, 11 Moore P. C. 198, 5 Wkly. Rep. 797, 14 Eng. Reprint 670; Wightman *v.* Townroe, 1 M. & S. 412, 14 Rev. Rep. 475; *Ex p.* Garland, 1 Smith K. B. 220, 10 Ves. Jr. 110, 7 Rev. Rep. 352.

4. *In re* Leeds Banking Co., L. R. 1 Ch. 231; Jackson *v.* Turquand, L. R. 4 H. L. 305, 39 L. J. Ch. 11; *In re* Cheshire Banking Co., 32 Ch. D. 301, 54 L. T. Rep. N. S. 558; Lindley Comp. L. (5th ed.) 814.

5. Matter of North of England Joint-stock Banking Co., 3 De G. & Sm. 258. See also Matter of St. George's Steam Packet Co., 3 De G. & Sm. 279. *Compare In re* Herefordshire Banking Co., 33 Beav. 435, where the acceptance of dividends was held not to bind an executrix under the circumstances. See also Matter of St. George's Steam Packet Co., 3 De G. & Sm. 11, 13 Jur. 530, 672, 18 L. J. Ch. 259, where the acceptance was not held to bind the executor. It has been held that an executor who, pursuant to the provisions of the will, procures stock standing in his own name to be transferred to himself as executor, is, on the insolvency of the corporation, secondarily liable for the shareholder's statutory superadded liability, while the estate is primarily liable. Markell *v.* Ray, 75 Minn. 138, 77 N. W. 788, construing Minn. Gen. Stat. (1894), § 3419.

6. Taylor *v.* Taylor, L. R. 10 Eq. 477, 39 L. J. Ch. 676, 18 Wkly. Rep. 1102. For another illustration of the principle on which this case was decided see Knatchbull *v.* Fearnhead, 1 Jur. 687, 3 Myl. & C. 122, 14 Eng. Ch. 122.

7. U. S. Rev. Stat. (1872), § 5152.

8. Matter of Bingham, 10 N. Y. Suppl. 325, 32 N. Y. St. 782.

9. Parker *v.* Robinson, 71 Fed. 256, 18 C. C. A. 36.

tion and a third party cannot be invoked to endow the corporation with the perpetuity of existence contrary to the terms of its charter.[10]

b. Judgment Against Dead Corporation a Nullity. A judgment cannot be rendered against a dead corporation any more than against a dead person, but such a judgment is a nullity or at least subject to a reversal on error.[11]

c. Death of Corporation Does Not Impair Obligation of Its Contracts — (I) *Statement of Rule.* As in the case of a natural person, so the death of a corporation does not extinguish its contracts but they survive in the sense that they are capable of being enforced against any property of the corporation which has not passed into the hands of a *bona fide* purchaser without notice.[12]

(II) *Consequences of This Principle* — (A) *What Statutes Providing For Administration of Assets of Dissolved Corporations Are Valid.* It follows that a legislative act dissolving a corporation and transferring its franchises to another is not unconstitutional, since it does not impair the obligation of its contracts.[13] So it is a sound view that a man has no constitutional right not to pay his debts;[14] an act of the legislature compelling him so to do does not impair the obligation of his contracts with his creditors, but gives vitality to them; and hence a statute providing that when a judgment is entered against an incorporated bank, ousting it of its franchises, its debtors shall not thereby be released from their debts and liabilities, and prescribing a mode for collecting such debts and enforcing such liabilities is a valid exercise of legislative power.[15] A statute providing for a distribution among creditors of the property of corporations whose charters had become forfeited was likewise valid.[16] On the other hand a law distributing the property of an insolvent trading or banking corporation among its shareholders, giving it to strangers, or seizing it to the use of the state would as clearly impair the obligation of its contracts as a law giving to the heirs the personal effects of a deceased natural person would impair the obligation of its contracts.[17]

(B) *When Equity Will Take Charge of and Wind Up Dissolved Corporation.* It follows that a corporation cannot, by dissolving itself, defeat the rights of its creditors; but if its officers die, resign, or refuse to act, and its shareholders neglect or refuse to appoint others in their place, a court of equity, which never allows a trust to fail for want of a trustee, will interfere and appoint a receiver or manager *ad interim*, for the purpose of winding-up and putting an end to the concern.[18]

10. Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945, per Story, J.

11. Bonaffe *v.* Fowler, 7 Paige (N. Y.) 576; Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 287, 8 L. ed. 945 (per Story, J.).

12. *Georgia.*— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Illinois.— Tarbell *v.* Page, 24 Ill. 46.

Mississippi.— Nevitt *v.* Port Gibson Bank, 6 Sm. & M. 513, opinion furnished by ex-Chancellor Kent as counsel [*quoted* with approval in Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412].

New York.— Tinkham *v.* Boist, 31 Barb. 407.

United States.— Bacon *v.* Robertson, 18 How. 480, 15 L. ed. 499; Curran *v.* Arkansas, 15 How. 304, 14 L. ed. 705; Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. ed. 945.

In Alabama the supreme court held in 1847 that a shareholder of a dissolved corporation was not liable to be garnished by a creditor. Paschall *v.* Whitsett, 11 Ala. 472. The old rule of the common law that with the dissolution of a corporation both the debts due to it and from it are extinguished is now thoroughly exploded. See Curry *v.* Woodward, 53 Ala. 371. An isolated case is found in North Carolina holding that when the debts of a corporation become extinguished by the dissolution of its charter, the individual liability of the shareholders becomes extinct also. Malloy *v.* Mallett, 59 N. C. 345. A weak conception of the same kind crops out in Robinson *v.* Beall, 26 Ga. 17, and in Hopkins *v.* Whitesides, 1 Head (Tenn.) 31.

13. Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945.

14. Harris *v.* Glenn, 56 Ga. 94, 96; Sparger *v.* Cumpton, 54 Ga. 355.

15. Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

16. Mudge *v.* New Orleans Exch., etc., 10 Rob. (La.) 460.

17. Curran *v.* Arkansas, 15 How. (U. S.) 304, 312, 14 L. ed. 705, per Curtis, J.

18. Curry *v.* Woodward, 53 Ala. 371; Brown *v.* Union Ins. Co., 3 La. Ann. 177;

(c) *Dissolution of Corporation Does Not Extinguish Liability of Shareholders.* An application of the foregoing principle is that the dissolution of a corporation does not extinguish or affect the liability of its shareholders as toward its creditors.[19] Nor does it increase their liability as shareholders, or render them personally liable for the debts of the corporation except so far as the governing statute makes them so.[20]

(d) *Dissolution Fixes Liability of Shareholder.* But under a statute giving to creditors of an insolvent corporation direct remedies against its shareholders, it is said that the liability of the shareholder to the corporation, in respect of what is unpaid on its shares, becomes fixed by the insolvency and dissolution of the corporation, and then becomes a primary liability.[21]

(e) *Excuses Creditor From Reducing His Demand to Judgment.* Moreover, as we shall hereafter see,[22] a dissolution of the corporation, even a *de facto* dissolution, excuses the creditor from the vain proceeding of reducing his claim to judgment against the corporation before the proceeding to enforce against the shareholders those remedies which the statute on the general principles of law gives him.[23]

d. Statutes and Constitutional Provisions Making Liability of Shareholders Depend on Dissolution of Corporation. Statutes and constitutional provisions exist in many states, which, in various forms of expression, impose a liability upon shareholders to pay such debts of the corporation as may exist at the time of its dissolution. An examination of them will show that they generally predicate the right to proceed against the shareholders upon the fact that the corporation becomes dissolved leaving debts unpaid. The operation of such statutes is such that a dissolution of the corporation opens the door to an action by any creditor of the corporation against any of its shareholders, without first exhausting his remedies against the corporation by a judgment, execution, and return of *nulla bona*.[24]

e. What Constitutes Dissolution[25] Such as Lets in Remedies of Creditors Against Shareholders — (i) *Not Necessary That Dissolution Should Have Been Judicially Declared.* It is not necessary that the forfeiture and dissolution should have been declared by the judgment of a court of competent jurisdiction.[26]

(ii) *Expiration of Charter — Dissolution by Operation of Law.* Such a dissolution may indeed take place under a statute when its charter expires by operation of law, and when an injunction restraining it from doing business has been made perpetual.[27]

(iii) *Dissolution by Insolvency, Bankruptcy, Cesser of Business, Etc.* — (a) *In General.* But an adjudication of bankruptcy[28] or a cessation of business by reason of utter insolvency will equally have this effect.[29]

Carlen *v.* Drury, 1 Ves. & B. 154, 12 Rev. Rep. 203. See also Knowlton *v.* Ackley, 8 Cush. (Mass.) 93.

19. Hyman *v.* Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178.

20. Tarbell *v.* Page, 24 Ill. 46.

21. Garesche *v.* Lewis, 98 Mo. 197, 6 S. W. 54.

22. See *infra*, VIII, P, 3, a *et seq.*

23. Shellington *v.* Howland, 53 N. Y. 371 [*affirming* 67 Barb. (N. Y.) 14]. With which *compare* Kincaid *v.* Dwinelle, 59 N. Y. 548 [*affirming* 37 N. Y. Super. Ct. 326].

24. Gibbs *v.* Davis, 27 Fla. 531, 8 So. 633. So under a similar statute of Alabama. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120. It has been held that a creditor of a corporation which has expired by the limitation of its charter may enforce his claim against a shareholder when liability of the shareholder became fixed under the statute prior to the dissolution of the corporation. Fox *v.* Atchison First Nat. Bank, 9 Kan. App. 18, 57 Pac. 241.

25. How fact of dissolution pleaded.— See Perry *v.* Turner, 55 Mo. 418; Poughkeepsie Bank *v.* Ibbotson, 24 Wend. (N. Y.) 473; Blake *v.* Hinkle, 10 Yerg. (Tenn.) 218.

26. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120; Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274.

27. Dane *v.* Young, 61 Me. 160, opinion by Dickerson, J.

28. Tibballs *v.* Libby, 87 Ill. 142; State Sav. Assoc. *v.* Kellogg, 52 Mo. 583.

29. Penniman *v.* Briggs, Hopk. (N. Y.) 300 [*affirmed* in 8 Cow. (N. Y.) 387, 18 Am. Dec. 454].

(B) *What Constitutes Insolvency For This Purpose.* It has been ruled that a corporation whose property, at a fair valuation, is insufficient to pay its debts, including the amount paid in on the subscriptions to its stock, is insolvent, so as to allow creditors to enforce payment by shareholders of unpaid subscriptions.[30]

(IV) *Dissolution by Doing or Suffering Acts Which Destroy End and Object For Which Corporation Created.* A dissolution *de facto* within the meaning of statutes letting in the remedies of creditors against shareholders may take place whenever the corporation suffers acts to be done which destroy the end and object for which it was created.[31]

f. What Does Not Constitute Such Dissolution. On the other hand the rule seems to be well established that a mere neglect to comply with the requirements of the charter or by-laws in regard to the time of electing officers does not work a forfeiture of corporate rights and privileges.[32]

2. Necessity of Creditor Exhausting Remedy at Law Against Corporation Before Proceeding to Charge Shareholder — a. In General. The general rule, where the creditor seeks to charge the shareholder in respect of what remains

30. Goetz *v.* Knie, 103 Wis. 366, 79 N. W. 401 [*citing* Jackson *v.* Traer, 64 Iowa 469, 20 N. W. 764, 52 Am. Rep. 449; Minneapolis Paper Co. *v.* Swinburne Printing Co., 66 Minn. 378, 69 N. W. 144; Skrainka *v.* Allen, 76 Mo. 384; Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968; Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731]. See also the following cases:

Alabama.— McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

Florida.— Gibbs *v.* Davis, 27 Fla. 531, 8 So. 633.

Kentucky.— Chesapeake, etc., R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323, 9 Ky. L. Rep. 177.

Ohio.— Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798.

United States.— Mellen *v.* Moline Malleable Iron Works, 131 U. S. 352, 9 S. Ct. 781, 33 L. ed. 178.

So where the corporation becomes not only insolvent but a "nominal inert body." Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120.

31. Gibbs *v.* Davis, 27 Fla. 531, 8 So. 633; Chesapeake, etc., R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323, 9 Ky. L. Rep. 177; Perry *v.* Turner, 55 Mo. 418; State Sav. Assoc. *v.* Kellogg, 52 Mo. 583; Dryden *v.* Kellogg, 2 Mo. App. 87; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454 [*affirming* Hopk. (N. Y.) 300]; Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273. Of this nature are failing to elect trustees or to transact other business at a regular annual meeting, and the suffering of a sale of all the corporate property. Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

Suspension of business for more than a year under Kansas statute.— A statute of Kansas (Kan. Gen. Stat. (1889), § 1200), provides that a corporation shall be deemed dissolved for the purpose of enabling its creditors to prosecute suits against its shareholders to enforce their individual liability, if it is shown that such corporation has suspended business for more than one year. Within the meaning of this statute, the business of a bank is suspended when the bank commissioners take possession of it to wind it up. Crocker *v.* Ball, 10 Kan. App. 364, 59 Pac. 691. A corporation is dissolved within the meaning of the statute when it has made an assignment of all its assets for more than one year before the commencement of an action against its shareholders. Krider *v.* Coley, 7 Kan. App. 349, 51 Pac. 919. Suspending business, within the meaning of the statute, is the ceasing to carry on the usual and ordinary business of the corporation and not by the officers performing the acts necessary to wind it up. Jones *v.* Edson, 10 Kan. App. 110, 62 Pac. 249. But such a suspension does not take place merely because the corporation has temporarily suspended a portion of its business while it continues to carry on the remainder, its place of business remaining open and occupied, and its officers being paid as usual. Mechanics' Sav. Bank *v.* Fidelity Ins., etc., Co., 91 Fed. 456. The suspension of business for more than a year has no other effect than to operate as a dissolution of the corporation for the purpose of enabling its creditors to pursue its shareholders. Jones *v.* Edson, 10 Kan. App. 110, 62 Pac. 249. It does not render a judgment void which has been entered against the corporation after the expiration of one year from the suspension of its business. Siceper *v.* Norris, 59 Kan. 555, 53 Pac. 757. The fact that a corporation organized to deal in land makes a single deed conveying land more than three years after its suspension of business is not such a revival of business as will toll the statute of limitations in favor of the right of its creditor to prosecute an action against its shareholders. Jones *v.* Edson, 10 Kan. App. 110, 62 Pac. 249.

Effect of dissolution.—Dissolution of a bank created by an expiration of charter a perpetual injunction against further prosecution of business. Dane *v.* Young, 61 Me. 160; Wiswell *v.* Starr, 48 Me. 401.

32. Knowlton *v.* Ackley, 8 Cush. (Mass.) 93; People *v.* Runkle, 9 Johns. (N. Y.) 147;

unpaid on his shares, and also where he seeks to enforce against him an individual statutory liability, is that he must first exhaust his remedy against the corporation.[33]

b. Ordinary Legal Remedies. It is not necessary to exhaust all remedies against the corporation before proceeding against its shareholders in equity, but only all remedies against it at law.[34] It will be generally sufficient for the creditor to show that he exhausted the ordinary processes of the law against the corporation; and this will ordinarily appear by a judgment, an execution, and a return of *nulla bona*.[35] On the other hand this may be shown as a fact; and in one case it was held proper to admit evidence that the corporation had no property in the hands of an assignee to whom it had made a voluntary assignment, which could be applied in satisfaction of plaintiff's claim.[36] A judgment creditor of a corporation is not obliged, as a condition precedent to a suit in equity, to enforce the liability of its shareholders to subject the corporation's equity of redemption in property to levy and sale, where the property is worth less than the debt secured by the mortgage thereon.[37]

c. Measure of Diligence Is Judgment, Fieri Facias, and Nulla Bona — (i) *In General.* Generally speaking no greater degree of diligence is required of the creditor in prosecuting his demand against the corporation, before he can proceed against the shareholder, than is implied in the recovery of a judgment against the corporation, the suing out of a writ of fieri facias against it, and a return of *nulla bona* thereon.[38] But in many jurisdictions[39] this measure of diligence is required.

(ii) *This Means Return of Execution Unsatisfied in County of Home Office of Corporation.* This return of *nulla bona* is the return of an execution against the corporation, unsatisfied, in the county of its home office; and this is sufficient to justify an action by the judgment creditor against a shareholder personally;[40] and this has been held to be true under a Michigan statute,

Blake *v.* Hinkle, 10 Yerg. (Tenn.) 218. *Compare* Ward *v.* Sea Ins. Co., 7 Paige (N. Y.) 294.

33. *Georgia.*— Lane *v.* Harris, 16 Ga. 217; Thornton *v.* Lane, 11 Ga. 459.

Maine.— Drinkwater *v.* Portland Mar. R. Co., 18 Me. 35.

Massachusetts.— Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532; Priest *v.* Essex Hat Mfg. Co., 115 Mass. 380; Cambridge Water Works *v.* Somerville Dyeing, etc., Co., 4 Allen 239.

Missouri.— McClaren *v.* Franciscus, 43 Mo. 452.

New York.— Handy *v.* Draper, 89 N. Y. 334; Cuykendall *v.* Corning, 88 N. Y. 129; Shellington *v.* Howland, 53 N. Y. 371 [*affirming* 67 Barb. 14]; Andrews *v.* Vanderbilt, 37 Hun 468; Birmingham Nat. Bank *v.* Mosser, 14 Hun 605; Richards *v.* Beach, 19 Abb. N. Cas. 84, 5 N. Y. Suppl. 574; Richards *v.* Coe, 19 Abb. N. Cas. 79; Lindsley *v.* Simonds, 2 Abb. Pr. N. S. 69.

Ohio.— Wehrman *v.* Reakirt, 1 Cinc. Super. Ct. 230.

Oregon.— Bush *v.* Cartwright, 7 Oreg. 329.

Rhode Island.— New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

Tennessee.— Jackson *v.* Meek, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620; Blake *v.* Hinkle, 10 Yerg. 218.

Vermont.— Dauchy *v.* Brown, 24 Vt. 197.

United States.— Swan Land, etc., Co. *v.* Frank, 39 Fed. 456.

34. Masters *v.* Rossie Lead Min. Co., 2 Sandf. Ch. (N. Y.) 301.

35. See *infra*, VIII, P, 2, c, (I) *et seq.*

36. Sleeper *v.* Goodwin, 67 Wis. 577, 31 N. W. 335.

37. Pickering *v.* Townsend, 118 Ala. 351, 23 So. 703.

38. Baines *v.* Story, (Cal. 1892) 30 Pac. 777; Baines *v.* Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Thornton *v.* Lane, 11 Ga. 459; U. S. Bank *v.* Dallam, 4 Dana (Ky.) 574.

39. *Georgia.*— Lamar *v.* Allison, 101 Ga. 270, 28 S. E. 686.

Nebraska.— Wehn *v.* Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397.

New York.— Walton *v.* Coe, 110 N. Y. 109, 17 N. E. 677, 16 N. Y. St. 866 (under the language of the New York Business Corporation Act of 1875); Berwind-White Coal Min. Co. *v.* Ewart, 90 Hun 60, 35 N. Y. Suppl. 573, 70 N. Y. St. 233 [*affirming* 11 Misc. 49, 32 N. Y. Suppl. 716, where the creditor released a levy on corporate property under an illegal agreement with the directors]; U. S. Glass Co. *v.* Levett, 24 Misc. 429, 53 N. Y. Suppl. 688 (although corporation is dissolved after commencement of creditors' action against it and the necessity is not obviated by a temporary order appointing a receiver of the corporation in a pending proceeding for a temporary dissolution, etc.).

Ohio.— Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798.

United States.— Swan Land, etc., Co. *v.* Frank, 39 Fed. 456.

40. Ripley *v.* Evans, 87 Mich. 217, 49 N. W. 504; Bagley *v.* Tyler, 43 Mo. App. 195.

although it may appear that the corporation had property or effects in another county in the state.[41]

(III) *When This Requirement Dispensed With.* In an action by the receiver of a foreign corporation to enforce the liability of a resident shareholder, the provisions of the statutes of the state where the action is brought, requiring judgment against the corporation, and the return of execution unsatisfied as a condition precedent to the action, will not be enforced, since service of process cannot be had.[42]

d. Whether Return of Nulla Bona Is Conclusive. On principle and the weight of authority, a *nulla bona* return of the execution against the corporation is conclusive of the fact that there are no legal assets of the corporation which can be made available to satisfy the demand of the judgment creditor.[43] Other courts have declined to hold that a return of *nulla bona* upon an execution against the corporation is conclusive against the shareholder, unless notice has been given to him of the issuing of the execution, to the end that he might point out corporate property.[44]

e. Rule Where Liability Is Said to Be Primary — (I) *Doctrine That Remedy Against Corporation Must Be First Exhausted.* Some courts hold that the rule which requires the creditor to exhaust his remedy against the corporation applies even where the liability of the shareholder is primary, like that of an original undertaker or partner.[45] The doctrine of these cases is something like this: Although here is a partnership, a creditor must first exhaust the partnership funds, or proceed till he finds none, before he can attach the separate property of the several members.[46] We find statutes under which the liability of the shareholder is declared to be primary, in the sense which distinguishes it from the liability of a surety or guarantor;[47] and also in the sense that the foundation of their liability consists in the original demand against the company, and not in the judgment which the creditor has obtained against it;[48] and in the further sense which makes them liable as original debtors at the instant when the

41. Ripley *v.* Evans, 87 Mich. 217, 49 N. W. 504.

42. Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 30 N. Y. Civ. Proc. 306, 47 L. R. A. 725 [*affirming* 39 N. Y. App. Div. 151, 57 N. Y. Suppl. 187].

43. *California.*— Baines *v.* Babcock, 95 Cal. 531, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158.

Kansas.— Steffins *v.* Gurney, 61 Kan. 292, 59 Pac. 725; Thompson *v.* Pfeiffer, 60 Kan. 409, 56 Pac. 763, in the absence of fraud on the part of the levying officer.

Maine.— Chaffin *v.* Cummings, 37 Me. 76.

Michigan.— Ripley *v.* Evans, 87 Mich. 217, 49 N. W. 504.

United States.— Platt *v.* Larter, 94 Fed. 610, holding that the fact that there may be some assets in the hands of a receiver of an insolvent corporation is no defense to an action against a shareholder under Kansas statute, if execution against corporation returned unsatisfied.

For a statement of the governing principle see Jones *v.* Green, 1 Wall (U. S.) 330, 17 L. ed. 553. That this principle is applicable to creditors of corporations see Van Weel *v.* Winston, 115 U. S. 228, 6 S. Ct. 22, 29 L. ed. 384. For a long collection of decisions by Mr. Justice Cooley on the conclusiveness of a sheriff's return see Michels *v.* Stark, 52 Mich. 260, 17 N. W. 833, collected at length in 3 Thompson Corp. § 3362.

44. Lane *v.* Harris, 16 Ga. 217. But a plea that the corporation had assets, without specifying what they were, was deemed insufficient, in an action against a shareholder after a return of *nulla bona.* Lane *v.* Morris, 8 Ga. 468.

45. Stone *v.* Wiggin, 5 Metc. (Mass.) 316; Marcy *v.* Clark, 17 Mass. 330. *Compare* Stedman *v.* Eveleth, 6 Metc. (Mass.) 114; Leland *v.* Marsh, 16 Mass. 389; Perkins *v.* Church, 31 Barb. (N. Y.) 84.

46. Means' Appeal, 85 Pa. St. 75; Dauchy *v.* Brown, 24 Vt. 197. Numerous statutes exist affirming this principle, such as Mass. Stat. (1862), c. 218, §§ 3, 4; Mass. Stat. (1870), c. 224, §§ 40, 42; 8 & 9 Vict. c. 16 (Companies Clauses Consolidation Act, 1845), § 36. See Peele *v.* Phillips, 8 Allen (Mass.) 86.

47. Hyman *v.* Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Young *v.* Rosenbaum, 39 Cal. 646; Mokelumne Hill Canal, etc., Min. Co. *v.* Woodbury, 14 Cal. 265.

48. Such was the liability under a statute of New York relating to joint-stock companies. Witherhead *v.* Allen, 4 Abb. Dec. (N. Y.) 628, 3 Keyes (N. Y.) 562, 8 Abb. Pr. N. S. (N. Y.) 164, 33 How. Pr. (N. Y.) 620.

contract with the corporation is completed.[49] And yet in these cases the courts recognize the principle that the liability, in a remedial statute, is secondary to that of the corporation, that is, the creditor is not permitted in ordinary cases to ignore the corporation and proceed directly against the shareholder, but must proceed first against the corporation and exhaust his remedy there, and then proceed against the shareholder.

(II) *Doctrine That It Need Not Be First Exhausted* — (A) *In General.* The general, although not the universal, rule is, that where the member is liable as a partner or principal debtor it is not necessary, as a condition precedent to the right to proceed against him, that the creditor should have first exhausted his remedy against the corporation. In such cases the members are responsible to the same extent and in the same manner as though there were no act of incorporation, and no attempt to organize as a corporation under a general law;[50] for such a liability is primary and absolute, and attaches the moment the debt is created.[51]

(B) *Statutes Under Which Exhaustion of Corporate Assets Must Be Judicially Ascertained* — (1) In General. Statutes and constitutional provisions exist under which, before creditors of the corporation can proceed against its shareholders, the fact that the corporate assets have been exhausted must have been judicially ascertained.[52] When the assignee has settled, and the insolvency court has approved an account showing a complete administration of the assets of the corporation by their reduction to cash, and showing the net amount available for the payment of claims, then, if claims have been proved and allowed in excess of the net amount, the fact and amount of the default of the corporation, as to creditors at least, is *ipso facto* judicially determined, so as to entitle the assignee to sue the shareholders for the difference between the value of property taken in payment of stock and the agreed value.[53]

(2) Whether Simple Contract Creditor Can Sue. It is necessarily a part

49. Conklin *v.* Furman, 57 Barb. (N. Y.) 484.

50. Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797.

51. *Alabama.*— See McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120 (holding that a statutory individual liability becomes primary and absolute as soon as the corporation is dissolved, and that creditors need not aver or prove the insolvency of the corporation); Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120 (where complainant, suing in behalf of himself and all the other creditors who might come in and make themselves parties, was not himself a judgment creditor); Spence *v.* Shapard, 57 Ala. 598.

California.— See Hyman *v.* Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Sonoma Valley Bank *v.* Hill, 59 Cal. 107; Young *v.* Rosenbaum, 39 Cal, 646; Mokelumne Hill Canal, etc., Min. Co., *v.* Woodbury, 14 Cal. 265.

Connecticut.— Southmayd *v.* Russ, 3 Conn. 52, holding that scire facias on judgment against corporation would not lie against a shareholder, because his liability was primary.

Georgia.— Robinson *v.* Lane, 19 Ga. 337.

Massachusetts.— Stone *v.* Wiggin, 5 Metc. 316; Marcy *v.* Clark, 17 Mass. 330; Leland *v.* Marsh, 16 Mass. 389 (holding that no scire facias or other process against the shareholder is allowed under a statute, but that he is charged, at the peril of the creditor, on the same process which issued against the corporation).

New Hampshire.— Erickson *v.* Nesmith, 46 N. H. 371.

New York.— The following holdings more or less closely illustrate this theory: Moss *v.* Averell, 10 N. Y. 449; Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Abbott *v.* Aspinwall, 26 Barb. 202; Moss *v.* McCullough, 7 Barb. 279; Worrall *v.* Judson, 5 Barb. 210; Moss *v.* McCullough, 5 Hill 131; Moss *v.* Oakley, 2 Hill 265.

Rhode Island.— New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

Wisconsin.— Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797.

52. Gillin *v.* Sawyer, 93 Me. 151, 44 Atl. 677 (where the liability is secondary and analogous to that of guarantor); Van Pelt *v.* Gardner, 54 Nebr. 701, 74 N. W. 1083, 75 N. W. 874 (amount justly due the creditors from the corporation is "judicially ascertained" by judgment, execution, and return of *nulla bona*); German Nat. Bank *v.* Farmers', etc., Bank, 54 Nebr. 593, 74 N. W. 1086 (meaning of the words "judicially ascertained").

53. Gillin *v.* Sawyer, 93 Me. 151, 44 Atl. 677.

of the doctrine of the last preceding paragraph that the claim of the creditor need not be reduced to judgment, the liability of the shareholder being original and primary; but that a simple contract creditor can sue.[54] Under principles of equity a simple contract creditor cannot proceed against a shareholder without first reducing his demand to a judgment at law.[55] But statutes exist dispensing with this requirement and enabling creditors to proceed against the corporation, when it becomes insolvent, by a bill in equity without first reducing their demands to judgment at law.[56]

f. Where Liability of Shareholder Is Secondary and Collateral Corporate Assets Must Be First Exhausted. Under most statutes creating or defining the liability of shareholders such liability is held to be secondary or collateral to that of the corporation, to be resorted to by creditors only in case of the insolvency of the corporation or where payment cannot be enforced by the ordinary legal process.[57]

g. When Judgment at Law Against Corporation Necessary to Let in Equitable Relief in Equity Against Shareholders — (i) *In General.* On a well-known rule of equity procedure, a creditor of a corporation cannot have equitable relief against its shareholders until he has prosecuted his demand to a judgment at law against a corporation, unless circumstances existed excusing him from doing so; and this rule is of special importance where his demand sounds in damages, since here the corporation is entitled to a trial by jury.[58] Nor will a mere *de facto* dissolution of a corporation, which is evidenced by its having distributed all its assets among its shareholders and ceased to make any use of its franchises, be such a dissolution as will dispense with the necessity of prosecuting such an action against it before attacking its shareholders.[59]

(ii) *Facts Not Sufficient to Dispense With Necessity of Obtaining Such Judgment.* No facts will be sufficient to excuse the creditor from obtaining a judgment at law against the corporation, except facts which are such as to make it impracticable for him to obtain such a judgment. The mere insolvency of the corporation;[60] the expiration of its charter by limitation, provided the governing statute does not allow this fact to prevent the obtaining of a judgment against it,[61] a mere *de facto* dissolution of the corporation, consisting of a permanent suspension of its business and an abandonment of its franchise by reason of insolvency,[62] do not have this effect. But a legal dissolution does, since a judgment cannot be recovered against a dead corporation any more than against a dead man.[63]

h. Assessment as Foundation of Action by Receiver. Generally speaking a valid assessment, either by the board of directors or by a receiver or other

54. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120; Spence *v.* Shapard, 57 Ala. 598.

55. Medberry *v.* Troutman, 94 Fed. 952.

56. Cohn *v.* Waters, 83 Ill. App. 387. See also Chase *v.* Horton Bank, 9 Kan. App. 186, 59 Pac. 39; De Camp *v.* Levoy, 19 Ohio Cir. Ct. 335, 10 Ohio Cir. Dec. 509.

57. *Massachusetts.*— Pratt *v.* Bacon, 10 Pick. 123.

Nebraska.— German Nat. Bank *v.* Farmers', etc., Bank, 54 Nebr. 593, 74 N. W. 1086, provision of the constitution of Nebraska to this effect applies to shareholders in banking corporations.

Pennsylvania.— Patterson *v.* Wyomissing Mfg. Co., 40 Pa. St. 117, holding that the court will apply the usual remedy against grantors.

Vermont.— Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 47 Atl. 176; Dauchy *v.* Brown, 24 Vt. 197.

West Virginia.— Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184.

58. Swan Land, etc., Co. *v.* Frank, 39 Fed. 456. See to the general doctrine Drinkwater *v.* Portland Mar. R. Co., 18 Me. 35; Cambridge Water Works *v.* Somerville Dyeing, etc., Co., 4 Allen (Mass.) 239.

59. Swan Land, etc., Co. *v.* Frank, 39 Fed. 456. On the general principle that the remedy at law must be exhausted before invoking the aid of equity see Van Weel *v.* Winston, 115 U. S. 228, 6 S. Ct. 22, 29 L. ed. 384; Jones *v.* Green, 1 Wall. (U. S.) 330, 17 L. ed. 553.

60. Trabell *v.* Page, 24 Ill. 46.

61. Andrews *v.* Vanderbilt, 37 Hun (N. Y.) 468.

62. Blake *v.* Hinkle, 10 Yerg. (Tenn.) 218.

63. Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945.

trustee acting under direction of a court, is necessary to enable the receiver to maintain actions at law against the several shareholders to recover what each one ought to contribute to make up the deficiency necessary for the satisfaction of creditors and the payment of the costs of the administration.[64] If the deficiency in the corporate assets is equal to the amount of the unpaid stock, in other words if all that is due from the shareholders is required, then no assessment is necessary to an action against a single shareholder.[65] An assessment does not preclude a shareholder from showing that he is not the holder of so large an amount of stock as is alleged, or that he has a claim against the corporation which he is entitled to set off against the assessment.[66]

3. WHAT WILL EXCUSE NECESSITY OF EXHAUSTING LEGAL REMEDIES AGAINST CORPORATION — a. De Jure Dissolution of Corporation. A *de jure* dissolution of the corporation, as by the judgment of a court of competent jurisdiction,[67] renders it impossible to recover a judgment against it, since a valid judgment cannot be recovered against a dead corporation.[68]

b. De Facto Dissolution of Corporation — (I) *IN GENERAL.* Under many theories a *de facto* dissolution of the corporation has the same effect, not because it renders it impossible to recover a valid judgment against the corporation, but because it renders the recovery of such a judgment nugatory, and the law does not require a man to do a vain thing.[69]

(II) *WHEN DE FACTO DISSOLUTION DOES NOT EXCUSE RECOVERY OF JUDGMENT AT LAW* — (A) *In General.* But under many theories a mere *de facto* dissolution of the corporation will not excuse the creditor in failing to prosecute his demand to judgment at law against it before proceeding to charge the shareholders, but nothing less than a legal dissolution will have this effect.[70]

(B) *De Facto Dissolution Not Sufficient Where Claim Sounds in Damages.* A *de facto* dissolution does not dispense with the necessity of the creditor prosecuting his demand to a judgment at law, where it sounds in damages, since in such a case the corporation is entitled to a trial by jury.[71]

c. Appointment of Receiver — (I) *IN GENERAL.* The appointment of a receiver, in a proceeding to wind up the affairs of a corporation, will generally have the effect of preventing the prosecution by separate creditors of their statutory remedies against particular shareholders, the theory of many courts being that not only the indebtedness of the shareholder to the company in respect of any unpaid portion of his subscription for his shares, but also his superadded statutory liability, is in the nature of equitable assets of the corporation, which pass into the hand of the receiver for administration; and this necessarily excludes the right of creditors to prosecute separate suits against shareholders.[72]

64. Bennett *v.* Great Western Tel. Co., 53 Ill. App. 276 (court cannot assess equally); Gillin *v.* Sawyer, 93 Mo. 151, 44 Atl. 677.

65. Dunn *v.* Howe, 96 Fed. 160 [*citing* Potts *v.* Wallace, 146 U. S. 689, 13 S. Ct. 196, 36 L. ed. 1135].

66. Straw, etc., Mfg. Co. *v.* L. D. Kilbourne Boot, etc., Co., 80 Minn. 125, 83 N. W. 36.

Assessment is indebtedness "duly ascertained."— An assessment declared necessary by a vote of the board of directors of an insurance company to meet outstanding indebtedness is, as against such directors, an indebtedness duly ascertained and enforceable, in an action against them by a receiver of the corporation, to collect unpaid subscriptions for corporate stock. Wyman *v.* Williams, 52 Nebr. 833, 73 N. W. 285 [*rehearing denied* in 53 Nebr. 670, 74 N. W. Rep. 48].

67. As in Hardman *v.* Sage, 124 N. Y. 25, 26 N. E. 354, 35 N. Y. St. 54.

68. Hardman *v.* Sage, 124 N. Y. 25, 26 N. E. 354, 35 N. Y. St. 54; Arnot *v.* Sage, 5 N. Y. Suppl. 477; Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 287, 8 L. ed. 945 (per Story, J.).

69. Shellington *v.* Howland, 53 N. Y. 371 [*affirming* 67 Barb. (N. Y.) 14, with which *compare* Kincaid *v.* Dwinelle, 59 N. Y. 548 (*affirming* 37 N. Y. Super. Ct. 326)]; Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798 [*following* Morgan *v.* Lewis, 46 Ohio St. 1, 17 N. E. 558].

70. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; Swan Land, etc., Co. *v.* Frank, 39 Fed. 456, (opinion by Blodgett, J.).

71. Swan Land, etc., Co. *v.* Frank, 39 Fed. 456, opinion by Blodgett, J.

72. Paine *v.* Stewart, 33 Conn. 516; Merchants' Nat. Bank *v.* Northwestern Mfg., etc., Co., 48 Minn. 361, 51 N. W. 119; Showalter

(II) *Does Not Prevent Recovery of Judgment Against Corporation.* On the other hand the mere appointment of a receiver to wind up does not prevent the recovery of a judgment at law against the corporation until an injunction has been issued against the prosecution of actions against it,[73] although it may be necessary to present such judgment to the receiver to have it satisfied as a claim against the corporation. For instance a national bank does not, by passing into liquidation in the hands of a receiver, lose its capacity of suing and being sued.[74]

(III) *Nor Does Fact of Corporation Being Adjudged Bankrupt.* It has been held that the fact that the corporation has been adjudged a bankrupt and that its tangible assets have passed into the hands of an assignee in bankruptcy does not dispense with the necessity of the creditor prosecuting his demand to a judgment at law against the corporation before proceeding to enforce the statutry liability of a shareholder.[75]

(IV) *When Appointment of Receiver Does Have This Effect*—(A) *In General.* But where the assets of the corporation have been impounded by a court of equity, by means of a receiver, for the purposes of a general winding-up and distribution, especially if there is also an injunction against the further prosecution of judgments at law,[76] then the conclusion may be different.

(B) *Rule Where Bankruptcy Law Restrains Prosecution of Judgments at Law.* This is of course the rule where the terms of the bankruptcy statute restrains the prosecution of judgments at law against the bankrupt.[77]

d. Failure to Comply With Statutory Prerequisites to Incorporation. Where the supposed shareholders fail to comply with the statutory prerequisites to an incorporation the road is open to a creditor to a direct action against them as though they had never attempted to become incorporated, and they may be sued without the necessity of first exhausting the social assets,[78] on the principle of being liable as partners.

e. Either Corporation Must Be Insolvent Generally or Creditor Must Have Exhausted Legal Remedies Against It. The conclusion then is, that under any theory of law or equity, where the liability of the shareholder is not primary, as in the case of a mere partner or original undertaker, one of two things must supervene before a creditor of a corporation will be permitted to proceed against him: Either that the corporation has suspended business by reason of insolvency, and

v. Laredo Imp. Co., 83 Tex. 162, 18 S. W. 491.

73. Hardman *v.* Sage, 124 N. Y. 25, 26 N. E. 354, 35 N. Y. St. 54; Kincaid *v.* Dwinelle, 59 N. Y. 548 [*affirming* 37 N. Y. Super. Ct. 326]; Matter of Reformed Presbyterian Church, 7 How. Pr. (N. Y.) 476; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351; Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

74. Hardman *v.* Sage, 124 N. Y. 25, 26 N. E. 354, 35 N. Y. St. 54; Arnot *v.* Sage, 5 N. Y. Suppl. 477; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Bethel First Nat. Bank *v.* National Pahquioque Bank, 14 Wall. (U. S.) 383, 20 L. ed. 840; Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 287, 8 L. ed. 945 (per Story, J.).

75. New York City Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 7 S. Ct. 757, 30 L. ed. 825.

76. Paine *v.* Stewart, 33 Conn. 516. See also *infra*, VIII, P, 3, c, (IV), (B).

77. As in Shellington *v.* Howland, 53 N. Y. 371 [with which *compare* Handy *v.* Draper, 98 N. Y. 334; Rocky Mountain Bank *v.* Bliss, 89 N. Y. 338; Birmingham Nat. Bank *v.* Mosser, 14 Hun (N. Y.) 695], and in Flash *v.* Conn, 109 U. S. 371, 3 S. Ct. 263, 27 L. ed. 966. *Compare* Cohen *v.* New York Mut. L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522; Loomis *v.* Tifft, 16 Barb. (N. Y.) 541; People *v.* Bartlett, 3 Hill (N. Y.) 570; Lovett *v.* Cornwell, 6 Wend. (N. Y.) 369; New York City Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 7 S. Ct. 757, 30 L. ed. 825; Semmes *v.* Hartford City F. Ins. Co., 13 Wall. (U. S.) 158, 20 L. ed. 490; Hanger *v.* Abbott, 6 Wall. (U. S.) 532, 18 L. ed. 939.

78. Marshall *v.* Harris, 55 Iowa 182, 7 N. W. 509.

Concurrent actions against corporation and shareholder.— When concurrent actions may be prosecuted against corporation and the shareholder see Walton *v.* Coe, 110 N. Y. 109, 17 N. E. 676, 16 N. Y. St. 866; Young *v.* Brice, 3 N. Y. Suppl. 123, 18 N. Y. St. 945.

suffered what is called a *de facto* dissolution;[79] or else, although the corporation may not be totally insolvent, and may continue to be what is called a "going concern," the creditor must have exhausted his legal remedies against it without procuring the satisfaction of his debt. Accordingly it is the rule in Ohio that where a corporation, possessed of property subject to levy and sale on execution, although not sufficient to pay all its debts, continues to transact its business, the right of a creditor to enforce the statutory liability of its shareholders does not accrue until an execution issued upon a judgment against it has been returned unsatisfied for want of goods whereon to levy; while, if there is such a *de facto* dissolution as is evidenced by a suspension of business by reason of general insolvency, this condition is dispensed with.[80]

4. Other Conditions Precedent[81] — a. Necessity of Proving Claim Before Receiver Before Resorting to Statutory Liability of Shareholders. There is authority for the proposition that if the assets of the corporation are undergoing administration in the hands of a receiver, a creditor must first prove his claim before the receiver and take his dividends there, thus exhausting the corporate assets before he can resort to the statutory liability of shareholders.[82]

b. Whether Necessary to Exhaust Equitable Assets of Corporation Before Resorting to Statutory Liability. This question is ordinarily answered in the negative, the rule being as already seen[83] that it is sufficient to exhaust the legal assets of the corporation, the ordinary evidence of which is a judgment against it and execution thereon and a return of *nulla bona*. Therefore in a proceeding against a shareholder a plea which alleges the existence of choses in action, not subject to garnishment, in the hands of a receiver of the corporation, of equitable assets, and of an uncalled subscription for stock in the hands of shareholders is bad on demurrer.[84]

c. Exhausting Remedy Against Other Judgment Debtors of Corporation. Where plaintiff's judgment not only runs against the corporation, but also against others impleaded with the corporation, he cannot maintain a proceeding against a shareholder to sequester what is due by him to the corporation, in respect of his unpaid subscription, without first exhausting his remedy against his judgment debtors other than the corporation.[85]

d. Not Necessary to Exhaust Individual Liability Before Subjecting What Is Due on Share Subscriptions. The creditor can proceed against the shareholder in equity to subject to the payment of his debt what is due from the shareholder as unpaid on his share subscription, without having proceeded to charge the shares holders in respect of their superadded statutory liability, that is to say, to exhaust his legal remedies against them.[86]

e. When Demand on Corporation Dispensed With Before Proceeding Against Shareholders — (I) *In General.* A general suspension by a banking corporation, and its failure to pay its billholders generally, was held sufficient to enable a

79. Hospes *v.* Northwestern Mfg., etc., Co., 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470.

80. Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798.

81. Other statutory conditions precedent. — Exhausting deposits made with the state. Toucey *v.* Bowen, 24 Fed. Cas. No. 14,107, 1 Biss. 81. Notifying shareholder of the proceeding against the corporation under Massachusetts statute. Mason *v.* Cheshire Iron Works, 4 Allen (Mass.) 398; Handraham *v.* Cheshire Iron Works 4 Allen (Mass.) 396; Robbins *v.* Suffolk County Super. Ct., 12 Gray (Mass.) 225; Farnum *v.* Ballard Vale Mach. Shop, 12 Cush. (Mass.) 507; Holyoke Bank *v.* Goodman Paper Mfg. Co., 9 Cush. (Mass.) 576. The necessity of commencing action against the corporation within a given time after contracting the debt, generally one year. Shellington *v.* Howland, 67 Barb. (N. Y.) 14 [*affirmed* in 53 N. Y. 371].

82. Grew *v.* Breed, 10 Metc. (Mass.) 569.

83. See *supra*, VIII, P, 2, b.

84. Thornton *v.* Lane, 11 Ga. 459. But *compare* Stewart *v.* Lay, 45 Iowa 604; *In re* Reciprocity Bank, 22 N. Y. 9.

85. Burch *v.* Glover, 1 Wash. 250, 24 Pac. 439; Burch *v.* Moore, 1 Wash. 249, 24 Pac. 439; Burch *v.* Taylor, 1 Wash. 245, 24 Pac. 438.

86. Baines *v.* Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Potter *v.* Dear, 95 Cal. 578, 30 Pac. 777.

billholder to sue a shareholder without making a special demand of payment.[87] And so, where a bank had failed and closed its doors, it was held that the holder of one of its certificates of deposit might bring an action under a statute against one of its shareholders, without first going through the vain formality of making a demand upon the bank.[88]

(II) *What Necessary to Good Demand Upon Corporation Where Statute Requires It.* As statutes requiring a demand to be made upon the corporation before bringing suit against its shareholders are unfrequent, it is thought to be sufficient merely to cite the cases in the margin upon the question what constitutes a good demand for such a purpose.[89]

f. Call by Directors Not Necessary to Right of Action by Creditor. Where the creditor is proceeding with respect to the liability of the shareholder upon his unpaid subscription, and his subscription is by its terms payable upon call, the creditor need not, as a prerequisite to his right of action, have tried to induce the corporation to make a call.[90]

g. Assessing Shareholders After Insolvency of Corporation — (I) *In General.* After the insolvency of the corporation the assessment must ordinarily be made by the court or by some officer authorized by statute to make it. For instance in the winding-up of a national bank it is ordered by the comptroller of the currency, under a provision of the National Currency Act.[91]

(II) *Court, and Not Receiver, Must Determine Amount to Be Assessed* — (A) *In General.* In the absence of a statute authorizing a receiver to make it it cannot be made by him; but it is for the court to determine the amount of the indebtedness of the corporation, and to fix the percentage which will be assessed against each share.[92]

(B) *To This End an Account Should Be Taken and Stated.* To this end it is necessary, according to the ordinary practice of chancery, that an account should be taken of the assets and debts of the corporation, of the aggregate amount unpaid by the shareholders or otherwise assessable against them, and of the amount unpaid or otherwise assessable against each particular shareholder, in order that a just and ratable assessment may be made upon them; and this necessarily requires a proceeding in equity, or under the codes a proceeding of that nature.[93] Until such an account has been taken, and an order of the court made, in the nature of a call upon the shareholders, the receiver cannot maintain an action against them;[94] and the same rule is applicable where the assets of the insolvent corporation are being administered by an assignee under a state insolvent law.[95]

(III) *Rule Under This Head Restated.* In such a case the rule, after careful consideration, has been said to be this: That where the total amount which is due and payable from all the shareholders is not more than sufficient to pay the debts of the corporation, no previous assessment, either by the directors or by a court of equity, is necessary as a prerequisite to the bringing of an action at law

87. Lane *v.* Morris, 8 Ga. 468.

88. Hodgson *v.* Cheever, 8 Mo. App. 318.

89. Barre First Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563 (demand at usual place of business of corporation and evidence sufficient to prove what that place of business is); Connecticut River Sav. Bank *v.* Fiske, 60 N. H. 363 (circumstances under which demand by letter good); Harvey *v.* Chase, 38 N. H. 272 (setting out in detail the elements of a good demand for such a purpose); Haynes *v.* Brown, 36 N. H. 545 (must be personally made by someone authorized to receive payment).

90. Thompson *v.* Reno Sav. Bank, 19 Nev. 171, 7 Pac. 870, 3 Am. St. Rep. 881. See also Samainego *v.* Stiles, (Ariz. 1889) 20 Pac. 607. But if the directors refuse to make the call or if the circumstances are such that they have no legal right to make it the court will make it by its own receiver or other trustee. Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184.

91. Kennedy *v.* Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476. See also *dictum* in Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220.

92. Chandler *v.* Keith, 42 Iowa 99.

93. Mann *v.* Pentz, 3 N. Y. 415.

94. Chandler *v.* Keith, 42 Iowa 99; Mann *v.* Pentz, 3 N. Y. 415.

95. Boeppler *v.* Menown, 17 Mo. App. 447.

by the assignee of the corporation against a shareholder for his unpaid balance. But where the total amount due by the shareholders will if collected be much more than sufficient to pay the corporate debts, either an assessment by the directors of the necessary amount, or an order of a court of equity as a substitute for such assessment, is necessary as a preliminary to the right to sue at law.[96]

h. Notifying Shareholder of Default of Corporation. It is held to be necessary under the general principles of the law for the creditor, before he can bring his action against a shareholder, to notify the shareholder of the default of the corporation,[97] the position of the shareholder being analogous to that of a guarantor.[98]

Q. Conclusiveness and Effect of Judgment Against Corporation — 1. Conclusive Upon Shareholder — a. In General. In any proceeding to charge a shareholder the judgment against the corporation establishing the demand of the creditor is conclusive unless impeached for fraud or want of jurisdiction.[99] And this although the shareholder may not have been served with process, and would have had notice of the proceeding against the corporation, the doctrine being that he is bound by representation through the corporation.[1] The shareholder cannot hence dispute the validity of the appointment of a receiver in an action brought by the receiver against the shareholder for unpaid subscriptions to the capital stock, although the shareholder was not a party to the proceeding in which the receiver was appointed.[2]

96. Boeppler *v.* Menown, 17 Mo. App. 447. To the same effect see Citizens', etc., Sav. Bank, etc., Co. *v.* Gillespie, 115 Pa. St. 564, 9 Atl. 73.

97. Hicks *v.* Burns, 38 N. H. 141.

98. *Compare* Ingalls *v.* Cole, 47 Me. 530.

99. *California.*— Baines *v.* Story, (Cal. 1892) 30 Pac. 777; Baines *v.* Babcock, 95 Cal. 581, 30 Pac. 776, 29 Am. St. Rep. 158.

Georgia.— Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

Illinois.— Cleveland Rolling Mill Co. *v.* Crawford, 9 R. & Corp. L. J. 171.

Iowa.— Corse *v.* Sanford, 14 Iowa 235; Donworth *v.* Coolbaugh, 5 Iowa 300; Hampson *v.* Weare, 4 Iowa 13, 66 Am. Dec. 116.

Kansas.— Grund *v.* Tucker, 5 Kan. 70.

Maine.— Barron *v.* Paine, 83 Me. 312, 22 Atl. 218; Milliken *v.* Whitehouse, 49 Me. 527; Came *v.* Brigham, 39 Me. 35; Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

Massachusetts.— Thayer *v.* New England Lithographic Steam Printing Co., 108 Mass. 523; Gaskill *v.* Dudley, 6 Metc. 546, 39 Am. Dec. 750.

Minnesota.— Hinckley *v.* Kettle River R. Co., 80 Minn. 32, 82 N. W. 1088.

New York.— Miller *v.* White, 57 Barb. 504, 6 Abb. Pr. N. S. 46; Belmont *v.* Coleman, 1 Bosw. 188; Corklin *v.* Furman, 8 Abb. Pr. N. S. 161; Moss *v.* Oakley, 2 Hill 265; Slee *v.* Bloom, 20 Johns. 669. *Contra,* McMahon *v.* Macy, 51 N. Y. 155; Miller *v.* White, 50 N. Y. 137; Belmont *v.* Coleman, 21 N. Y. 96, 1 Bosw. 188; Moss *v.* Averell, 10 N. Y. 449; Lawyer *v.* Rosebrook, 48 Hun 453, 1 N. Y. Suppl. 594, 16 N. Y. St. 316; Strong *v.* Wheaton, 38 Barb. 616; Moss *v.* McCullough, 5 Hill 131.

North Carolina.— Heggie *v.* People's Bldg., etc., Assoc., 107 N. C. 581, 12 S. E. 275, in principle.

Pennsylvania.— Wilson *v.* Pittsburgh, etc., Coal Co., 43 Pa. St. 424.

United States.— Glenn *v.* Liggett, 135 U. S. 533, 10 S. Ct. 876, 34 L. ed. 262; Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. 584; Stutz *v.* Handley, 41 Fed. 531.

England.— Peddell *v.* Gwyn, 1 H. & N. 590, 3 Jur. N. S. 188, 26 L. J. Exch. 199, 5 Wkly. Rep. 283; Bradley *v.* Eyre, 1 D. & L. 260, 12 L. J. Exch. 450, 11 M. & W. 432; Fowler *v.* Rickerby, 9 Dowl. P. C. 682, 10 L. J. C. P. 149, 2 M. & G. 760, 3 Scott N. R. 138, 40 E. C. L. 843.

1. Mason *v.* Force, 30 Ga. 99; Powell *v.* Oregonian R. Co., 38 Fed. 187, 13 Sawy. 543, 3 L. R. A. 201; Glenn *v.* Springs, 26 Fed. 494.

2. Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711. See also *infra,* VIII, Q, 3.

Such a judgment is conclusive of the existence of the corporation, and, whether founded upon a demand arising *ex contractu* or *ex delicto,* is an indebtedness for which the shareholder is liable. Powell *v.* Oregonian R. Co., 38 Fed. 187, 13 Sawy. 543, 3 L. R. A. 201. That such a judgment is presumptive evidence of corporate existence see Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248.

Conflicting decisions on this subject in New York may be discovered by one who has the patience and the curiosity to examine them in McMahon *v.* Macy, 51 N. Y. 155, where the cases are reviewed by Gray, Com. See also Miller *v.* White, 50 N. Y. 137 [*reversing* 59 Barb. (N. Y.) 434, 10 Abb. Pr. N. S. (N. Y.) 385]; Belmont *v.* Coleman, 21 N. Y. 96; Atcherson *v.* Troy, etc., R. Co., 1 Abb. Dec. (N. Y.) 13, 6 Abb. Pr. N. S. (N. Y.) 329; Lawyer *v.* Rosebrook, 48 Hun (N. Y.) 453, 1 N. Y. Suppl. 594, 16 N. Y. St. 316; Wheeler *v.* Miller, 24 Hun (N. Y.) 541; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87; Moss *v.* McCullough, 7 Barb. (N. Y.) 279; Moss *v.* McCullough, 5

b. Where Action Is Against Directors or Trustees to Enforce Personal Liability For Official Defaults. Judgments against the corporation are not deemed conclusive against the shareholders, where the proceeding is penal in its nature, and hence to be strictly construed and pursued, as where it is brought under a statute to charge shareholders with personal liability for the debts of the corporation because of defaults in the officers of the corporation in failing to file reports of the capital and debts of the corporation, as required by the statute law, in which case the proceeding against the corporation is deemed with respect to shareholders to be *res inter alios acta*.[3]

c. Doctrine That Judgment Against Corporation Is Prima Facie Evidence of Debt in Proceeding Against Its Shareholder. This doctrine, which exists chiefly in New York and under former statutes, is peculiar and hence no more will be done here than to cite a collection of cases expounding and illustrating it.[4]

d. Subject to Be Impeached For Fraud or Collusion. All judgments are subject to be impeached in equity by a direct proceeding to that end, or by way of an equitable defense by a shareholder where the rules of the jurisdiction admit of the setting up of equitable defense for fraud or collusion in their concoction.[5]

e. Going Behind Judgment Where Shareholder Is Liable Only For Particular Class of Debts. If the shareholder is made liable only for a particular class of debts, or only for debts due to a particular class of persons, then it is necessary under either of the foregoing rules to go behind the judgment so far as to prove that the debt then recovered upon belonged to the class embraced in the statute or constitution.[6] It has been so held under a statute making the shareholders of a railway company jointly and severally liable for moneys due by the corporation to their servants for their wages.[7] So where the statute made the shareholder liable for all debts except loans, the shareholder could, after judgment against the company, contest his liability, on the ground that the debt recovered upon was for money loaned.[8] So where the shareholder is liable only for debts of the corporation contracted at a given period,[9] and the record of the judgment against the corporation does not show at what period the debt therein recovered upon was contracted, evidence *aliunde* is necessary to fix such date; and without such evi-

Hill (N. Y.) 131; Jackson *v.* Griswold, 4 Hill (N. Y.) 522; Moss *v.* Oakley, 2 Hill (N. Y.) 265; Slee *v.* Bloom, 20 Johns. (N. Y.) 669. *Compare* Jones *v.* Barlow, 62 N. Y. 202; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616. The New York rule differs with respect to the liability for unpaid shares, making judgment against the corporation *prima facie* evidence against the shareholder. Hastings *v.* Drew, 76 N. Y. 9.

Judgment by default is just as conclusive as judgment in the defended action. Green *v.* Nixon, 23 Beav. 530, 3 Jur. N. S. 993, 27 L. J. Ch. 819, 5 Wkly. Rep. 433. See also *In re* South Essex Estuary Co., L. R. 11 Eq. 157, 40 L. J. Ch. 153, 19 Wkly. Rep. 430. But see Doak *v.* Stahlman, (Tenn. Ch. App. 1899) 58 S. W. 741, where a decree *pro confesso* against the corporation was held not to be conclusive against the shareholder where none of the officers of the corporation can or will defend its interests.

3. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 72, 20 Am. Rep. 504 (per Allen, J.); Chase *v.* Curtis, 113 U. S. 452, 5 S. Ct. 554, 28 L. ed. 1038.

4. Corse *v.* Sanford, 14 Iowa 235; Grund *v.* Tucker, 5 Kan. 70; Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248; Stephens *v.* Fox, 83 N. Y. 313 [*affirming* 17 Hun (N. Y.) 435]; Hastings *v.* Drew, 76 N. Y. 9; Belmont *v.* Coleman, 21 N. Y. 96 [*affirming* 1 Bosw. (N. Y.) 188]; Moss *v.* Averell, 10 N. Y. 449; Hoagland *v.* Bell, 36 Barb. (N. Y.) 57; Moss *v.* McCullough, 7 Barb. (N. Y.) 279; Squires *v.* Brown, 22 How. Pr. (N. Y.) 35.

5. See for an example of this Bissit *v.* Kentucky River Nav. Co., 15 Fed. 353, where a judgment thus obtained against a corporation for a large amount was made the foundation of an action against a county to recover an unpaid subscription by the county to the shares of the corporation, and it was held that the county could be heard upon the question of the amount of the true indebtedness of the corporation to plaintiff, notwithstanding the judgment; and also that plaintiff being himself a shareholder must as such contribute to the payment of the debt of the corporation to him.

6. Ward *v.* Joslin, 100 Fed. 676 [*affirmed* in 105 Fed. 224, 44 C. C. A. 456].

7. Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87, holding that in such a case the burden is on the creditor to prove that the debt was one for which the shareholder is liable.

8. Wilson *v.* Pittsburgh, etc., Coal Co., 43 Pa. St. 424.

9. See *supra*, VIII, H, 7.

dence the judgment is not effective to charge a shareholder.[10] Again, where the action against the corporation is for a tort, the cause of action is not so far merged in the judgment recovered by plaintiff that the judgment becomes a debt of the corporation, within the meaning thus put upon such a statute; but a court will look behind the judgment, and inquire into the nature of the demand in which it was founded, and evidence *aliunde* is admissible for this purpose.[11]

2. JUDGMENT AGAINST CORPORATION AFTER DISSOLUTION NOT EVIDENCE TO CHARGE SHAREHOLDER — a. Rule Stated. Although the assets of a defunct corporation are subject to be collected and administered by a court of equity for the benefit of its creditors, yet a judgment at law cannot be rendered against a dead corporation any more than against a dead man.[12] A reasonable deduction from this rule is that a judgment recovered against a corporation after it has been dissolved is not even *prima facie* evidence of a debt due from the corporation at the time of its dissolution, for the purpose of charging those who were then its shareholders.[13]

b. Does Not Prevent Action Against Shareholders Where Liability Is That of Partners or Original Undertakers. But the operation of this principle does not prevent a creditor from suing a shareholder and recovering his debt from him where the shareholder is liable as an original undertaker, as in New York.[14]

3. DECREE ASSESSING SHAREHOLDERS IN WINDING-UP PROCEEDING CONCLUSIVE WITHOUT PERSONAL SERVICE. Where a corporation has suspended business by reason of insolvency, and a receiver or trustee has been appointed by a court of equity, in a proceeding instituted by or on behalf of its creditors to wind up its affairs and administer its assets, the court will, according to the usual course of practice in chancery cases, take and state an account of the assets and liabilities of the corporation, and of what is due from its shareholders in the aggregate, and from each of them respectively; and will, upon the basis thus furnished, make an interlocutory decree ordering an assessment upon the shareholders to raise money to liquidate its debts and to pay the costs of the proceeding. This interlocutory decree will be conclusive upon all shareholders, resident and non-resident, whether they were served with process, or made parties to the winding-up proceeding or not. The theory is that the corporation is still in a sense their agent, and that they are parties to the proceeding by representation.[15]

10. Larrabee *v.* Baldwin, 35 Cal. 155.

11. Bohn *v.* Brown, 33 Mich. 257. A judgment against a corporation will for the purpose of enforcing the liability of shareholders be deemed founded upon contract to the extent that it allowed plaintiff's claim for the value of coal, taken from his land by defendant, although such taking was in connection with a trespass upon the realty for damages to which a separate allowance is made. Devin *v.* Walsh, 108 Iowa 428, 79 N. W. 133.

Under the law of Kansas, as established by decisions that a corporation which has received the benefit of a contract is estopped to contest it on the ground that it was *ultra vires*, a judgment against a corporation is not conclusive upon a shareholder in an action to charge him with individual liability in such sense as to preclude him from showing the nature of the original claim, and that the contract sued on was *ultra vires* and hence not of the class for which he is liable. Ward *v.* Joslin, 105 Fed. 224, 44 C. C. A. 456 [*affirming* 100 Fed. 676].

12. Merrill *v.* Suffolk Bank, 31 Me. 57, 1 Am. Rep. 649; Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945.

13. Bonaffe *v.* Fowler, 7 Paige (N. Y.) 576. And see the reasoning in Kincaid *v.* Dwinelle, 59 N. Y. 548, and repeated in Hardman *v.* Sage, 124 N. Y. 25, 26 N. E. 354, 35 N. Y. St. 54. *Compare* Schrader *v.* Manufacturers' Nat. Bank, 133 U. S. 67, 10 S. Ct. 238, 33 L. ed. 564, judgment recovered against a national bank in an action commenced three years after it went into liquidation not conclusive as against the shareholders, but they are entitled to recontest the merits.

14. Bonaffe *v.* Fowler, 7 Paige (N. Y.) 576.

15. *Alabama.*— Glenn *v.* Semple, 80 Ala. 159, 60 Am. Rep. 92.

Georgia.— Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

Maryland.— Glenn *v.* Williams, 60 Md. 93, especially the observations of Alvey, J., at p. 115, as to the propriety and necessity of this rule.

Virginia.— Hamilton *v.* Glenn, 85 Va. 901, 9 S. E. 129; Vanderwerken *v.* Glenn, 85 Va. 9, 6 S. E. 806; Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866.

United States.— Glenn *v.* Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262; Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed.

4. WHETHER SUIT AGAINST SHAREHOLDER IS UPON JUDGMENT AGAINST CORPORATION OR UPON ORIGINAL DEMAND. In New York, where the rule is that the liability of a shareholder is, in a qualified sense, that of a partner,[16] it has been held that, although the statute requires that a judgment shall have been obtained against the company before an action can be prosecuted against a shareholder, yet the action against the shareholder is on the original demand, and not on the judgment.[17] The uniform practice in that state seems to have conformed to this view,[18] and under the rulings in that state that the judgment is not even *prima facie* evidence of the existence of a debt of the corporation this is necessarily so.[19]

5. RIGHT OF SHAREHOLDER TO APPEAL OR PROSECUTE ERROR FROM JUDGMENT AGAINST CORPORATION. Where this right exists, it exists under very special rules of procedure and not in conformity with the general law.[20]

IX. DIRECTORS.

A. Right to, and Tenure of, Office of Director — 1. QUALIFICATIONS FOR OFFICE OF DIRECTOR — a. In General. A corporation which has the general power to make by-laws may make a by-law declaring that no person who is an attorney in a suit against the corporation shall be eligible as a director.[21] A director can

184; Morgan County *v.* Allen, 103 U. S. 498, 26 L. ed. 498; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220.

That shareholders will not be permitted to intervene and defend in the winding-up proceeding was held in Hamilton *v.* Glenn, 85 Va. 901, 9 S. E. 129. That they are not proper parties in the winding-up proceedings was said by Alvey, J., in Glenn *v.* Williams, 60 Md. 93, 116.

The decree in the winding-up proceeding is deemed to be necessarily binding upon the members of the corporation in the absence of fraud, and that this is involved in their contract on becoming shareholders. Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184 [*quoted* and *reaffirmed* in Glenn *v.* Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262].

16. See *supra*, VIII, H, 5; VIII, Q, 1, a, note 2.

17. Bailey *v.* Bancker, 3 Hill (N. Y.) 188, 38 Am. Dec. 625.

18. Belmont *v.* Coleman, 21 N. Y. 96; Moss *v.* Averell, 10 N. Y. 449; Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87; Moss *v.* McCullough, 5 Hill (N. Y.) 131.

19. See *supra*, VIII, Q, 1, a, note 2.

For early and exceptional cases in support of this view see Southmayd *v.* Russ, 3 Conn. 52 (therefore no scire facias could be maintained against them on a judgment against the corporation); Hume *v.* Winyaw, etc., Canal Co., 1 Car. L. J. 217; Salmon *v.* Hamborough Co., 1 Ch. Cas. 204, 1 Kyd Corp. 273.

20. Dennis *v.* Table Mountain Water Co., 10 Cal. 369; Came *v.* Brigham, 39 Me. 35; Rankin *v.* Sherwood, 33 Me. 509.

When a shareholder may proceed by a process called "illegality" in Georgia see Thompson Stockh. § 333; Lowry *v.* Parsons, 52 Ga. 356; Heard *v.* Sibley, 52 Ga. 310.

Recitals in judgment or decree against corporation not evidence against shareholder not party to action.— Chestnut *v.* Pennell, 92 Ill. 55.

Judgment against shareholders in actions against the corporation under very special conceptions of procedure. Comanche Min. Co. *v.* Rumley, 1 Mont. 201; Gillig *v.* Lake Bigler Road Co., 2 Nev. 214.

Conclusiveness of judgment against corporation in supplementary proceeding thereunder against shareholder.— Hampson *v.* Weare, 4 Iowa 13, 66 Am. Dec. 116.

As to the former practice in England of suggesting on the record of the judgment against the corporation the liability of a member similar to that allowed by motion in Missouri see Bartlett *v.* Pentland, 1 B. & Ad. 704, 20 E. C. L. 657; Sainter *v.* Fergusson, 8 C. B. 619, 7 D. & L. 301, 65 E. C. L. 619.

A decree on a creditor's bill against a corporation which merely gives complainants the right to avoid a conveyance by the corporation as fraudulent, or in the alternative to subject the proceeds to the payment of their debts is *res judicata* as against the claim of one of the complainants to a personal decree against the shareholders to charge them in respect to their statutory liability. Vance *v.* McNabb Coal, etc., Co., (Tenn. Ch. App. 1897) 48 S. W. 235.

Where a "garnishment bill" is brought against an insolvent corporation and against a shareholder thereof to recover a subscription due from him to the insolvent corporation, it has been held that a *pro confesso* judgment against the corporation is not conclusive against the shareholder, where none of the officers of the corporation can or will defend its interests. Doak *v.* Stahlman, (Tenn. Ch. App. 1899) 58 S. W. 741.

21. Cross *v.* West Virginia Cent., etc., R. Co., 37 W. Va. 342, 16 S. E. 587, 18 L. R. A. 582.

A by-law which would render a class of persons eligible to office who by the charter are ineligible is bad. Rex *v.* Bumstead, 2 B. & Ad. 699, 9 L. J. K. B. O. S. 321, 22 E. C. L. 292; Rex *v.* Spencer, 3 Burr. 1827.

not be regarded as disqualified for the office, and his election consequently invalid, by reason of anything which he may contemplate doing when he gets into office.[22] Unless there is a prohibition in the governing statute, in the charter, or in some valid by-law or other governing instrument, any person who can be the business agent of another can be a director in a corporation, whether or not he or she is a person who in the language of the civil law would be called *sui juris*. An infant may therefore, it is assumed, be a director; and it has been held that a married woman may be a trustee in a corporation.[23] No reason exists why an alien who is a resident of the place of the corporation should be deemed ineligible as a director, unless made so by the charter, governing statute, or other valid governing instrument;[24] and for similar reasons non-residence does not seem to render a shareholder ineligible for the office of director, unless it is so declared, although there are statutes, as in Kansas,[25] declaring that a certain proportion of the directors in every corporation must be residents of the state; and such a statute has been held mandatory.[26]

b. In Respect of Being Shareholder — (i) *In General.* As directors are merely business agents, incapable of performing constituent acts, in the absence of a contrary provision in the governing statute, or in a valid by-law or other governing instrument, it is not an insuperable disqualification of a director that he is not a shareholder.[27] But statutes and charters generally annex to the office of director the qualification that he must be a shareholder in the corporation;[28] and in the absence of such a statute provision this is the implication of the common law, founded on grounds of public policy in the case of railway companies.[29] This means a real and not a sham shareholder;[30] but if he is a real shareholder, it makes no difference how he acquired his shares, whether by gift or purchase.[31] He must be the actual, beneficial owner, and not merely the ostensible owner according to the registry.[32] According to one view he does not "own" shares within the meaning of a statute, where he holds them merely as trustee for another, although the legal title is in him;[33] but the other and better view is that eligibility follows the legal ownership, irrespective of the trusts under which the

22. Railway Co. *v.* State, 49 Ohio St. 668, 32 N. E. 933.

23. People *v.* Webster, 10 Wend. (N. Y.) 554.

A provision in a bank charter requiring a certain portion of the directors to be practical mechanics has been held not to require that they should be in actual practice as mechanics at the time of their election. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

The treasurer of a corporation may well be a director, since the two offices are not incompatible. Gray *v.* Mechanics' Bank, 10 Fed. Cas. No. 5,723, 2 Cranch C. C. 51, but the cashier of a bank could not in Massachusetts, because it was so provided by statute.

24. Com. *v.* Hemmingway, 131 Pa. St. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

25. Kan. Gen. Stat. (1889), § 1190.

26. Horton *v.* Wilder, 48 Kan. 222, 29 Pac. 566. Under a statute permitting a minority of the directors of corporations constructing railroads, canals, or flumes, etc., to reside out of the state, a court declined to inquire into the length, extent, or magnitude of the railroad or canal, in order to ascertain whether a non-resident of the state was qualified to be a director in a certain company. State *v.* Smith, 15 Oreg. 98, 14 Pac. 814, 15 Pac. 137, 386.

27. Wight *v.* Springfield, etc., R. Co., 117 Mass. 226, 19 Am. Rep. 412 [*criticizing* Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684]; State *v.* McDaniel, 22 Ohio St. 354.

28. See for example Ark. Dig. Stat. (1884), § 964.

Where there is a statute or by-law requiring directors to be the owners of a certain number of shares, the fact that a person serves as director furnishes evidence to charge him as a shareholder in favor of creditors to the extent of the shares necessary to qualify him for the office of director. *Ex p.* Stock, 33 L. J. Ch. 731.

29. Durkee *v.* People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340 [*affirming* 53 Ill. App. 369].

30. Bartholomew *v.* Bentley, 1 Ohio St. 37.

31. Especially this must be so held where the rights of third persons, e. g., creditors of the corporation, are involved. Burden *v.* Burden, 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499.

32. Bainbridge *v.* Smith, 41 Ch. D. 462, 60 L. T. Rep. N. S. 879, 37 Wkly. Rep. 594, Lindley, L. J., dissenting.

33. *In re* Elias, 17 Misc. (N. Y.) 718, 40 N. Y. Suppl. 910.

shares may be held.[34] Upon the question who is the beneficial owner within this principle there is no difficulty in concluding that the giving to a third person does not divest him of the title so as to render him ineligible to vote thereon at a corporate election.[35] And so, where the shares have been mortgaged, the mortgagor may still be deemed not to have lost his qualification to serve as a director.[36] A by-law providing that any person chosen as a director shall cease to be such when he ceases to be a proprietor renders by reasonable implication any one who is not a proprietor ineligible to the office of director.[37] Where the statute requires that the members of the board must be holders of at least a given number of shares, a director who assigns all his shares to another *ipso facto* divests himself of his title to the office,[38] although a different rule has been declared in case of a director removing out of the country.[39] A statutory provision[40] prescribing that a director must be a holder of a given number of shares is not dispensed with by the mere fact that the corporation has ceased to be a going concern, its franchises being extended merely for the purpose of liquidation.[41] It has been held by one court that the election of a person as trustee of a corporation is not cured by a subse-

34. Schmidt *v.* Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. L. Rep. 763, 72 Am. St. Rep. 427.

35. *In re* Newcomb, 18 N. Y. Suppl. 16, 42 N. Y. St. 442.

36. Cumming *v.* Prescott, 2 Y. & C. Exch. 488.

37. Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

38. Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250, 30 N. E. 644, 43 N. Y. St. 876 [*reversing* 16 Daly (N. Y.) 28, 9 N. Y. Suppl. 285, 29 N. Y. St. 726]. *Compare* Beardsley *v.* Johnson, 121 N. Y. 224, 24 N. E. 380, 30 N. Y. St. 691. That unless the person elected possesses this statutory qualification he does not become even a director *de facto* see *In re* Newcomb, 18 N. Y. Suppl. 16, 42 N. Y. St. 442.

39. Com. *v.* Detwiller, 131 Pa. St. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360. And *compare* Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

40. U. S. Rev. Stat. (1872), § 5146.

41. Richards *v.* Attleborough Nat. Bank, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.

Ownership of preferred stock as qualification.— The power of the directors of a railroad company to issue preferred stock to contractors for the purpose of completing the road, and to make the holding of a certain number of shares of such stock a necessary qualification of a majority of the directors, was upheld under circumstances of acquiescence and estoppel on the part of the shareholders. Haslehurst *v.* Savannah, etc., R. Co., 43 Ga. 13.

Statute of Connecticut providing that any one of the directors, etc., of a corporation owning stock in another corporation may be a director in the latter not repealed. Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

That one of two cotrustees of the stock of a manufacturing corporation cannot be elected a director by the votes of the remaining shareholders, where he has disfranchised the stock held by them by persisting in voting for himself against the protest of his cotrustees, see *In re* Elias, 17 Misc. (N. Y.) 718, 40 N. Y. Suppl. 910.

The requirement of General Corporation Law, § 16, that the directors of a corporation shall be shareholders therein does not apply to the first directors of a consolidated corporation named in the consolidation certificate. Camden Safe-Deposit, etc., Co. *v.* Burlington Carpet Co., (N. J. Ch. 1895) 33 Atl. 479, holding that shareholders in the constituent corporation, who are obviously entitled to shares in the consolidated corporation, are in effect shareholders in the latter, although no certificates have been issued to them.

A board of directors organized under W. Va. Act, Feb. 28, 1877, known as the "Boom law," must be composed of shareholders, but they need not be residents of the state. Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620.

Holders of one share of stock in a corporation may serve as directors, although parties to an outstanding executory contract by which they agreed at the option of a purchaser to sell such share at a nominal price, so long as such option has not been exercised. Kuhn *v.* Woolson Spice Co., 13 Ohio Cir. Ct. 547.

What is a sufficient holding of shares to qualify one as director see Richards *v.* Attleborough Nat. Bank, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781; Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250, 30 N. E. 644, 43 N. Y. St. 876; State *v.* Smith, 15 Oreg. 98, 14 Pac. 814, 15 Pac. 137, 386.

When holding of shares is unnecessary see Wight *v.* Springfield, etc., R. Co., 117 Mass. 226, 19 Am. Rep. 412; State *v.* McDaniel, 22 Ohio St. 354.

Eligibility of husband where shares were purchased by his wife and the certificate was by mistake made out to him, and he afterward concluded to retain the shares. *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

Construction of statute under which a person who "holds" shares of stock, issued in his name, is to be recognized as a shareholder

quent gift of shares to him, although he retains them;[42] but the better and prevailing opinion is that he need not be the holder of any shares at the date of his election, but that it will be sufficient if he qualifies himself by becoming the holder of the requisite number of shares before he enters upon the office of director.[43]

(II) *Whether Must Be Registered Shareholder.* Presumptively the stock register is to be looked to for the purpose of determining who is qualified to be a director by reason of being a shareholder; and this is especially true where there is a statute, in affirmation of the rule of the common law, making the stock register *prima facie* evidence as to who are shareholders. And it has been held that this *prima facie* qualification can be impeached only by showing that the shares were put in the name of the person colorably, with the view to qualifying him as a director in furtherance of some dishonest or fraudulent scheme touching the organization or control of the company.[44] Clearly a person is *prima facie* eligible to the office of a director who holds, according to the stock register of the corporation, the requisite number of shares, unless the register distinctly shows that he does not hold them in his own right, but that he holds them as a naked or dry trustee for another.[45] As already seen[46] the inspectors of election cannot decide the question of eligibility, but in case of a contest it can only be decided by the court.[47]

2. Right to Vote For Director. The right to vote for director in a corporation does not continue with respect to a shareholder after he has transferred the entire beneficial interest in his shares. Nor can an irrevocable power of attorney to direct the vote of corporate shares be vested in a person who has no interest in such shares, and who does not represent persons who are interested in them. When therefore certain shares of corporate stock were placed in the hands of a trustee, upon an agreement that they were to be divided on a certain date, and that a certain person was to have the right to direct the vote of them until such division, it was held that the agreement did not give to such person the right to direct the vote of them after he had transferred his interest in them.[48]

as well as one who "owns" them. State *v.* Leete, 16 Nev. 242.

42. Rozecrans Gold Min. Co. *v.* Morey, 111 Cal. 114, 43 Pac. 585.

43. Stetson *v.* Northern Invest. Co., 104 Iowa 393, 73 N. W. 869; Greenough *v.* Alabama, etc., R. Co., 64 Fed. 22. Therefore a notice given at a meeting of shareholders for the election of directors that one of the candidates held no stock in his own name is not such a notice of the candidate's ineligibility as to discredit the votes cast for him and give the election to a candidate having a minority of votes. Schmidt *v.* Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. L. Rep. 763, 72 Am. St. Rep. 427 [*citing* People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508; Reg. *v.* Tewkesbury, L. R. 3 Q. B. 629, 37 L. J. Q. B. 288].

44. *In re* Leslie, 58 N. J. L. 609, 33 Atl. 954.

45. *In re* Argus Printing Co., 1 N. D. 434, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L. R. A. 781. And where the governing statute, like the English Companies Act of 1862 (25 & 26 Vict. c. 89, § 30), provides that no notice of any trust shall be entered upon the register, the conclusion would seem to be very cogent that he is to be deemed a shareholder in his own right, for the purpose of being eligible as a director, who holds the requisite number of shares according to the register of the company. Such was the view of that eminent equity judge, Sir George Jessel, M. R. (Pulbrook *v.* Richmond Consol. Min. Co., 9 Ch. D. 610, 48 L. J. Ch. 65, 27 Wkly. Rep. 377) overruled on doubtful grounds by the court of appeal, with one dissenting judge, as stated in the preceding section (Bainbridge *v.* Smith, 41 Ch. D. 462, 60 L. T. Rep. N. S. 879, 37 Wkly. Rep. 594, Lindley, L. J., dissenting). So an American court has held that although the by-laws of a corporation provide that transfers of stock shall be made only on the corporate books, and that the transfer-book shall be closed for ten days previous to the day of the annual meeting of the shareholders, a *bona fide* owner of shares of stock is eligible as a director, although the transfer of his shares to him has not been registered, and although he might for that reason be refused permission to vote or to receive dividends. State *v.* Smith, 15 Oreg. 98, 15 Pac. 137, 386, 14 Pac. 814.

46. See *supra*, IV, G, 2, a *et seq.*

47. *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

Where a person has a right to vote on stock as a shareholder he is also eligible to any office to which a shareholder is eligible. State *v.* Ferris, 42 Conn. 560.

48. State *v.* Oftedal, 72 Minn. 498, 75 N. W. 692; Clowes *v.* Miller, 60 N. J. Eq. 179, 47 Atl. 345; Chapman *v.* Bates, 60 N. J.

3. Status of Directors Named in Certificate of Incorporation. There is no presumption that a person named as director for the first year in the original certificate of an incorporation holds over after the expiration of his term, so as to make him liable as such.[49]

4. Acceptance of Office Necessary. Whatever the rule may be with regard to strictly public offices, it is clear that no one can be compelled to serve as a director in a private corporation against his will. It is not enough therefore that one is elected to the office of director in a private corporation; there must also be an acceptance of the office by him which must be formally expressed or fairly implied from his conduct.[50] If he declines to accept the office, it is not necessary to treat him as a director thereafter, or to notify him of meetings of the board, in order to the regularity of the proceedings which take place thereat.[51]

5. Qualification by Taking Official Oath. Where the governing statute prescribes an oath of office to be taken by directors, one chosen as a director who fails to take this oath is not a director *de jure*.[52]

6. When Take Office. In case of an amendment of the corporate by-laws, whereby the membership of the board is increased, those who are chosen to fill out the increased board take office immediately and not at the next annual election.[53]

7. Directors Holding Over. By the principles of the common law the failure to elect officers of a corporation, public or private, does not dissolve the corporation, but the old officers hold over until their successors are chosen and qualify;[54] and this principle has been frequently declared by statute out of abundant caution.[55]

Eq. 17, 46 Atl. 591 [*affirmed* in 61 N. J. L. 658, 47 Atl. 638, 88 Am. St. Rep. 459]; Com. *v.* Park, 14 Pa. Co. Ct. 481 (holding that the right to vote acquired by giving money to a charitable corporation expires with the death of the donor).

Election not illegal because cumulative system of voting was not employed, where no shareholder was deprived of his right to vote cumulatively. Schmidt *v.* Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. L. Rep. 763, 72 Am. St. Rep. 427.

Statute under which shareholders not authorized to cumulate their votes. State *v.* Halloway, 1 Ohio Cir. Ct. 157, 1 Ohio Cir. Dec. 90.

Procedure for contesting corporate elections under New Jersey statute applicable to all corporations having a capital stock the shares of which are held by individuals as private property. Rankin *v.* Newark Library Assoc., 64 N. J. L. 265, 45 Atl. 622.

49. Metropolis Bank *v.* Faber, 38 N. Y. App. Div. 159, 56 N. Y. Suppl. 542.

Increasing the number of trustees under N. Y. Laws (1878), c. 316, § 2. Formal meeting of board of trustees not necessary for the purpose. Burden *v.* Burden, 159 N. Y. 287, 54 N. E. 17 [*affirming* 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499].

50. United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Suppl. 906.

51. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203.

That one elected a director is presumed to have accepted the office see Halpin *v.* Mutual Brew. Co., 20 N. Y. App. Div. 583, 47 N. Y. Suppl. 412.

52. Schwab *v.* Frisco Min., etc., Co., 21 Utah 258, 60 Pac. 940.

53. *In re* A. A. Griffing Iron Co., 63 N. J. L. 168, 41 Atl. 931 [*affirmed* in 63 N. J. L. 357, 46 Atl. 1097].

54. *Connecticut.*— Bethany Congr. Soc. *v.* Sperry, 10 Conn. 200; McCall *v.* Byram Mfg. Co., 6 Conn. 428.

Delaware.—Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

Maine.— South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547.

Mississippi.— Smith *v.* Natchez Steamboat Co., 1 How. 479.

Tennessee.— Nashville Bank *v.* Petway, 3 Humphr. 522.

England.— Foot *v.* Prowse, 1 Str. 625.

When right to hold over ceases.— That the title of a person receiving the necessary votes to elect him to a certain office is complete the moment the vote is declared, so that the right of the former incumbent to hold over ceases, see Booker *v.* Young, 12 Gratt. (Va.) 303. That where a charter speaks of "years," with reference to an office, years of office, and not calendar years, are intended, see Rex *v.* Swyer, 10 B. & C. 486, 8 L. J. K. B. O. S. 221, 21 E. C. L. 209. For an analogy, with the conclusion that the prior incumbent holds over until his successor is not only chosen, but sworn in, see Williams *v.* Lunenburg School Dist., 21 Pick. (Mass.) 75, 32 Am. Dec. 243. By-law under which a person reëlected to the office of clerk continues to hold over under his first election until he is qualified under the second, see Hastings *v.* Blue Hill Turnpike Corp., 9 Pick. (Mass.) 80.

55. People *v.* Vail, 20 Wend. (N. Y.) 12; People *v.* Jones, 17 Wend. (N. Y.) 81. Some of these statutes are: Ark. Dig. Stat. (1884), §§ 965, 5432; Deering Code Cal. pt. 4, § 306; Minn. Rev. Stat. (1881), § 404; Nebr. Comp.

Somewhat opposed to the foregoing, it has been held that where a power exists to fill a vacancy in the board by the directors already elected, or by holding a new election by the shareholders, the failure legally to elect a full board at a meeting of shareholders will not authorize the old board to hold over.[56] And clearly an existing board cannot against the will of the shareholders enlarge their term of office as fixed by the charter, by changing the time of holding the annual election, by a by-law or otherwise.[57]

8. Resignation of Office of Director. Whatever doubt there may be with respect to the right of the incumbents of public offices to resign[58] there is no doubt that a director in a private corporation has the unqualified right so to do.[59] The analogies of the common law show that the resignation of the office of director need not be by deed, but may be by parol;[60] although statutes and charters exist requiring written notice, in which case a simple communication to the proper officer of the corporation tendering a resignation of the office is effectual.[61] Moreover an intent to resign may be inferred from an acceptance of an incompatible office.[62]

9. Vacation of Office Otherwise Than by Resignation. By the analogies of the common law, the office of director may be vacated by many acts which do not take the form of a direct resignation of it, such as by accepting an incompatible office[63] or by losing the qualification required by the statute or other governing

Stat. (1887), c. 16, § 38; Tenn. Code (1884), § 1705; Sayle Stat. Tex. (1888), arts. 583, 4125.

56. Schmidt *v.* Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. L. Rep. 763, 72 Am. St. Rep. 427 [*citing* People *v.* Fleming, 59 Hun (N. Y.) 518, 13 N. Y. Suppl. 715, 37 N. Y. St. 157].

57. State *v.* McCullough, 3 Nev. 202; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 467.

Presumption as to holding over.—Presumption that one named for director for the first year in certificate of incorporation under the New York Manufacturers Act of 1848, and prior to the statute of 1892, holds over after his term, in an action to hold him liable as a director for failing to file a statutory report for the subsequent year. Metropolis Bank *v.* Faber, 38 N. Y. App. Div. 159, 56 N. Y. Suppl. 542.

58. See State *v.* Ferguson, 31 N. J. L. 107.

59. Fearing *v.* Glenn, 73 Fed. 116, 19 C. C. A. 388.

60. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Rex *v.* Bedford Level Corp., 6 East 356, 2 Smith K. B. 535.

Language which was held, under the circumstances, not to amount to a resignation of the office of director. Union Nat. Bank *v.* Scott, 53 N. Y. App. Div. 65, 66 N. Y. Suppl. 145.

Language which was held effectual to resigning the office of secretary and treasurer of a corporation. Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250, 30 N. E. 644, 43 N. Y. St. 876 [*reversing* 16 Daly (N. Y.) 28, 9 N. Y. Suppl. 285, 29 N. Y. St. 726].

Circumstances under which participating in a new election by a director does not amount to a resignation of his office. Berry *v.* Cross, 3 Sandf. Ch. (N. Y.) 1; Rex *v.* Sandwich, 2 Keb. 92.

That directors are under no obligation to resign because they are small shareholders see Bayles *v.* Vanderveer, 11 Misc. (N. Y.) 207, 32 N. Y. Suppl. 1117, 66 N. Y. St. 572.

61. Lewis *v.* Oliver, 4 Abb. Pr. (N. Y.) 121.

62. Rex *v.* Goodwin, Dougl. 382, note 22; Verrior *v.* Sandwich, 1 Sid. 305; Milward *v.* Thatcher, 2 T. R. 81, 1 Rev. Rep. 431. *Compare* Staniland *v.* Hopkins, 9 M. & W. 178; Rex *v.* Pateman, 2 T. R. 777, 1 Rev. Rep. 621.

63. Astley *v.* Tivoli, [1899] 1 Ch. 151, 68 L. J. Ch. 90, 79 L. T. Rep. N. S. 541, 6 Manson 64, 47 Wkly. Rep. 326 (construction of the words "place of profit," with the conclusion that the trusteeship of a deed covering or securing the debentures, the trustees of which are appointed and paid, although not removable by the company, is a "place of profit" under the company, within the meaning of the articles of incorporation, vacating the office of a director who accepts or holds any other "place of profit" under the company); Rex *v.* Goodwin, Dougl. 382, note 22; Staniland *v.* Hopkins, 9 M. & W. 178; Verrior *v.* Sandwich, 1 Sid. 305; Rex *v.* Pateman, 2 T. R. 777, 1 Rev. Rep. 621; Milward *v.* Thatcher, 2 T. R. 81, 1 Rev. Rep. 431.

Informalities for which elections will not be disturbed on a summary hearing under the New Jersey statute. *In re* A. A. Griffing Iron Co., 63 N. J. L. 357, 26 Atl. 1097 [*affirming* 63 N. J. L. 168, 41 Atl. 931]. That a library association having both stock and shareholders is within the meaning of this statute providing a summary proceeding to investigate the election of directors see *In re* Newark Library Assoc., 64 N. J. L. 217, 43 Atl. 435.

Certificate of judges of election not conclusive where there is proof of fraud, although the by-laws provide that the decision

instrument, such as the possession of a stated number of shares of the stock of the corporation.[64]

10. Removal of Directors — a. In General. With respect to the power of a corporation to remove its officers, a distinction exists between those offices which imply a franchise and those which consist of the mere employment. The power of removal in case of the former is restricted; in case of the latter the power of removal exists and may be exercised as fully as by a private person with respect to a private employment.[65] Whatever doubts may have existed on this question in early times, when nearly all corporations were organized for public purposes,[66] there is much modern authority tending to the conclusion that every corporation has an implied power, incident to its existence as a corporation, and independent of charter or statutory provisions, to remove an officer for cause.[67] But this has been denied with respect to modern joint-stock corporations; and it has been held that neither such a corporation in its aggregate capacity nor its board of directors

of such judges as to the qualification of voters and the sufficiency of proxies shall be final and conclusive in all cases. Triesler *v.* Wilson, 89 Md. 169, 42 Atl. 926.

That the adverse parties must be served with notice of an intended application for an order directing a new election of directors, under the Delaware statute, but not necessarily, on the return-day, to procure a rule to show cause why the prayer of the petition should not be granted before a hearing on the petition see Petition of Vernon, 1 Pennew. (Del.) 202, 40 Atl. 60.

64. Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250, 30 N. E. 644, 43 N. Y. St. 876; Fearing *v.* Glenn, 73 Fed. 116, 19 C. C. A. 388. As where the director made an assignment of all his property for the benefit of creditors, and then left the state. Wright *v.* First Nat. Bank, 52 N. J. Eq. 392, 28 Atl. 719. *Compare* Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747; Bainbridge *v.* Smith, 41 Ch. D. 462, 60 L. T. Rep. N. S. 879, 37 Wkly. Rep. 594 (under the English Company Law).

That a director thus disqualified may continue to be such de facto and his acts hence valid see Dawson *v.* African Consol. Land, etc., Co., [1898] 1 Ch. 6, 67 L. J. Ch. 47, 77 L. T. Rep. N. S. 392, 46 Wkly. Rep. 132.

That disqualification is no ground upon which a corporate officer can refuse to deliver the books and papers of the office to his successor see Crawford *v.* Powel, 2 Burr. 1013, 1 W. Bl. 229.

Director never having requisite number of shares.— That the provision of the articles of association that the office of director shall be vacated if the incumbent ceases to hold the requisite qualification shares contemplates that the director has held the shares and lost them and does not apply where he never held them see Salton *v.* New Beeston Cycle Co., [1899] 1 Ch. 775, 68 L. J. Ch. 370, 80 L. T. Rep. N. S. 521, 6 Manson 238, 47 Wkly. Rep. 462.

65. See on this subject the language of Daly, F. J., in White *v.* Brownell, 4 Abb. Pr. N. S. (N. Y.) 162, 192 [*citing* Fuller *v.* School Trustees, 6 Conn. 532; People *v.* Medical Soc., 24 Barb. (N. Y.) 570; Evans *v.* Philadelphia Club, 50 Pa. St. 107; Com. *v.* St. Patrick's Benev. Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453; Earle's Case, Carth. 173; Bagg's Case, 11 Coke 93*b*]. See also Willcock Corp. 270.

66. It was said in one case in the king's bench that there are authorities [*citing* 11 Coke 99; Palm 451, 1 Roll. Rep. 224; Stiles 477] that the power of amotion is not inherent in a corporation, but that such a power must exist by charter or prescription in order to its exercise. Rex *v.* Doncaster, Barn. 264, 2 Ld. Raym. 1564.

67. *District of Columbia.*— Adamantine Brick Co. *v.* Woodruff, MacArthur & M. 318.

Illinois.— People *v.* Higgins, 15 Ill. 110.

Indiana.— State *v.* Vincennes University, 5 Ind. 77.

New York.— Fawcett *v.* Charles, 13 Wend. 473; Auburn Academy *v.* Strong, Hopk. 278.

Pennsylvania.— Statement of doctrine by Woodward, C. J., at *nisi prius* in Evans *v.* Philadelphia Club, 50 Pa. St. 107, 117 [*affirmed* by an equal division of the supreme court, in 50 Pa. St. 127].

Virginia.— Burr *v.* McDonald, 3 Gratt. 215.

England.— Rex *v.* Doncaster, Barn. 264, 2 Ld. Raym. 1564; Rex *v.* Richardson, 1 Burr. 517, 2 Ld. Ken. 85; Bruce's Case, 2 Str. 819; Haddock's Case, T. Raym. 435.

Effect of by-laws.—Therefore a by-law authorizing the removal of corporate officers for cause may be good, although no power of removal is expressly given by charter or is possessed by prescription. Rex *v.* Richardson, 1 Burr. 517, 2 Ld. Ken. 85. On the other hand a by-law undertaking to restrict this inherent power would be bad. Reg. *v.* Darlington Free Grammar School, 6 Q. B. 682, 14 L. J. Q. B. 67, 51 E. C. L. 682.

It has been held that this power resides in the corporation alone, and cannot be exercised by the judicial courts. Neall *v.* Hill, 16 Cal. 145, 76 Am. Dec. 508. But this cannot be affirmed with any confidence. The better view is that directors, being trustees, are like other trustees removable by a court of equity for breaches of their trust, at the suit of shareholders who have exhausted their remedy within the corporation, and that a receiver may be appointed in their stead; but that this will not be done for mere errors of judgment,

can remove a member of its board of directors, except in conformity with the provisions of statute, or of some valid by-law, or other constating instrument.[68]

b. Directors Cannot Remove Each Other, but Constituent Body Only Can Remove. It may be stated with confidence, on the analogies of the common law, that the removal of the directors or trustees of a corporation is a constituent act which can be performed only by the constituent body, that is to say, in joint-stock corporations by the shareholders only; and that, in the absence of express statutory authorization thereto, directors cannot remove each other,[69] although there are statutes changing this rule and conferring the power of removal upon the board of directors, generally to be exercised by a two-thirds vote.[70] Nor can a board of directors create a vacancy in their board by ousting a director whom they may regard as ineligible; although it seems that they may decide and settle the actual fact of the existence of a vacancy for the purpose of filling it, and that this is the extent of their power.[71]

c. Grounds For Which Directors May Be Removed. The analogies of the common law point to the following as grounds upon which directors may be removed: "1st, Such as have no immediate relation to his office, but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise. 2d, Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office. 3d, . . . [Such as are] of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law."[72] Obvi-

or for anything less than abuses of trust amounting to misconduct in office. Ward *v.* Davidson, 89 Mo. 445. Circumstances where the court refused to remove the trustees in charge of the liquidation and appoint a receiver after an assignment for the equal benefit of creditors. State Bank *v.* Ruff, 7 Gill & J. (Md.) 448. That the shareholders of a corporation who do not vote against the reëlection of directors may be deemed to acquiesce by such omission in acts of such directors done prior to the reëlection, and of which shareholders had information sufficient to put them on inquiry, and are not entitled afterward to have those directors suspended on the ground of misconduct previous to the reëlection see Ramsey *v.* Erie R. Co., 7 Abb. Pr. N. S. (N. Y.) 156, 38 How. Pr. (N. Y.) 193.

Construction of a statute (2 N. Y. Rev. Stat. (1st ed.) 426) conferring on the chancellor jurisdiction to suspend trustees or officers of corporations, with the conclusion that this power would not be exercised for the cause of their having made improper expenditures touching the business of the corporation, nor on charges of personal immorality. Ramsey *v.* Erie R. Co., 7 Abb. Pr. N. S. (N. Y.) 156, 190, 38 How. Pr. (N. Y.) 193.

68. Nathan *v.* Timpkins, 82 Ala. 437, 2 So. 747.

That a director of an English joint-stock company, appointed for a definite period, cannot be removed before the expiration of that period by virtue of any inherent power in the company see Imperial Hydropathic Hotel Co. *v.* Hampson, 23 Ch. D. 1, 49 L. T. Rep. N. S. 147, 31 Wkly. Rep. 330.

That the board of directors of a corporation cannot create a vacancy for the purpose of filling it, although if the member resigns, they may act on his resignation and supply the vacancy see Com. *v.* Detwiller, 131 Pa. St. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

69. Fuller *v.* School Trustees, 6 Conn. 532; Rex *v.* Lyme Regis, 1 Dougl. (3d ed.) 149. But see State *v.* Vincennes University, 5 Ind. 77.

It has been held that the directors of a national bank have power to remove the president, both under the National Banking Act, and under the articles of association of the particular bank, where such articles give the directors express power to remove. Taylor *v.* Hutton, 43 Barb. (N. Y.) 195, 18 Abb. Pr. (N. Y.) 16.

70. 1 Ballinger Anno. Codes & Stat. Wash. § 4255.

"By two thirds of the stockholders," which is held to mean two thirds in value of the shareholders, that is to say, two thirds of the stock. State *v.* Horan, 22 Wash. 197, 60 Pac. 135.

71. Com. *v.* Detwiller, 131 Pa. St. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

72. Rex *v.* Richardson, 1 Burr. 517, 2 Ld. Ken. 85, where Lord Mansfield discussed the whole subject at great length and with great learning. The same grounds of amotion were restated by Lord Mansfield in Rex *v.* Liverpool, 2 Burr. 723, 732, 2 Ld. Ken. 391. Lord Mansfield's statement has been approved in numerous American cases. Evans *v.* Philadelphia Club, 50 Pa. St. 107, 114 (per Woodward, C. J.); Com. *v.* Guardians of Poor, 6 Serg. & R. (Pa.) 469; Com. *v.* St. Patrick's Benev. Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453; State *v.* Chamber of Commerce, 20 Wis. 63. In these and other American cases it has been applied to the subject of the expulsion of members. But the right to expel members

ously before a director can be expelled for having committed an infamous crime there must have been a previous trial and conviction, "as in cases of general perjury, forgery, libelling, etc." [73] But in the second and third cases above mentioned by Lord Mansfield, where the matter concerns the relation of the officer of the corporation to the corporation itself it is not necessary, in order to the power of amotion, that there should have first been an indictment and conviction in the ordinary course of law; because in respect of these offenses the corporation possesses the power of trial as well as the power of amotion.[74] Even the misemployment of the money of a corporation has been held not sufficient ground for removing an officer, where it does not amount to a breach of trust.[75] But bribing a corporator to vote for a particular candidate at a corporate election [76] and receiving a bribe in the case of a common councilman, under a charter conferring power to remove for disorderly conduct,[77] have been held sufficient to warrant an amotion. Ancient authority warrants the conclusion that misconduct, excluding cases of convictions for infamous crimes, on the part of a director, when furnishing a ground of removal at common law, must be specially connected with the execution of the office, and also the result of improper motives.[78] Alteration of the corporate records with a fraudulent intent has been held sufficient ground of removal; but the fraudulent intent is essential and must be averred.[79] But the refusal to deliver over the corporate books intrusted to his custody as the proper officer, to a person applying for them with an order from the corporation, has been held not sufficient.[80] The analogies of the common law indicate that directors or trustees are removable for a prolonged and obstinate non-attendance at corporate meetings, although not for a single or casual non-attendance,[81] unless the duties of the office are such as to require their constant presence.[82] The analogies of the common law also point to the conclusion that the cause for which alone a director can be removed must be something which has arisen subsequently to his election and admission into the office, and that the power of removal cannot be exercised for a defect in his original qualification.[83] Bankruptcy, it has been held, does not disqualify a person from being a member of the common council of a municipal corporation, since it does not disable him from discharging the duties of his office;[84] but it seems that it might disqualify one from holding the

or shareholders does not exist in joint-stock companies.

73. Rex *v.* Richardson, 1 Burr. 517, 2 Ld. Ken. 85.

74. Rex *v.* Richardson, 1 Burr. 517, 2 Ld. Ken. 85 [*overruling* on this point the *dicta* in Bagg's Case, 11 Coke 93*b*].

75. Com. *v.* Guardians of Poor, 6 Serg. & R. (Pa.) 469; Rex *v.* Wilton, 1 Ld. Raym. 225, 5 Mod. 257, 2 Salk. 428.

76. Rex *v.* Tiverton, 8 Mod. 186.

77. State *v.* Jersey City, 25 N. J. L. 536.

78. Reg. *v.* Newbury, 1 Q. B. 751, 1 G. & D. 388, 6 Jur. 385, 10 L. J. Q. B. 250, 41 E. C. L. 751; Bagg's Case, 11 Coke 93*b*.

The ancient books of the law teem with analogies more or less supporting this statement, but they are only analogous since they related either to municipal corporations or to incorporated guilds or societies, and not to joint-stock companies. See for example Rex *v.* Doncaster, Barn. 264, 2 Ld. Raym. 1564; Rex *v.* Derby, Cas. t. Hardw. 153; Innes *v.* Wylie, 1 C. & K. 257, 47 E. C. L. 257; Bagg's Case, 11 Coke 93*b*; Clerk's Case, Cro. Jac. 506; Reg. *v.* Rogers, 2 Ld. Raym. 777; Rex *v.* London, 2 Lev. 200; Rex *v.* Guilford, 1 Lev. 162; Haddock's Case, T. Raym. 435; Clark's Case, Ventr. 327.

That a trustee cannot be removed for uttering disrespectful or defamatory language concerning his associates see Com. *v.* German Soc., 15 Pa. St. 251. As where he calls them "rascals, scoundrels and Turks." Fuller *v.* School Trustees, 6 Conn. 532.

79. Wigon *v.* Pilkington, 1 Keb. 597; Rex *v.* Wilton, 1 Ld. Raym. 225, 5 Mod. 257, 2 Salk. 428.

80. Anonymous, Barn. 402; Reg. *v.* Ipswich, 2 Ld. Raym. 1232, 2 Salk. 434; Rex *v.* Ingram, 1 W. Bl. 50.

81. Fuller *v.* School Trustees, 6 Conn. 532; Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244 (professor in a theological seminary); Reg. *v.* Pomfret, 10 Mod. 107.

82. Rex *v.* Wells, 4 Burr. 1999.

83. Rex *v.* Lyme Regis, 1 Dougl. (3d ed.) 149.

Other grounds of removal applied in cases of officers of municipal and eleemosynary corporations are stated in 1 Thompson Corp. § 815.

84. Rex *v.* Liverpool, 2 Burr. 723, 2 Ld. Ken. 391.

Provisions in the articles of an English banking company that if any person chosen to act as the public registered officer of the company should become bankrupt he should be

office of director in a private joint-stock corporation, since it would necessarily operate as an assignment of the shares necessary to qualify him for the office. But the individual bankruptcy of a director or other officer of a corporation does not *ipso facto* vacate his office.[85]

d. Statutory or Charter Power. Although the inherent power to remove its directors may exist in a corporation, yet where the charter or governing statute prescribes the terms or conditions under which the power must be exercised they must be pursued.[86]

e. How Power to Remove Exercised — (i) *In General.* Some corporate action is of course necessary to remove a corporate officer — something that distinctly signifies the corporate will that he shall no longer be an officer.[87] In those cases where the office is in the nature of a franchise, the officer cannot be removed without the agency of a tribunal competent to investigate the cause and pronounce the sentence of the loss of right. The office is not *ipso facto* vacated by neglect or abuse; wrongs do not thus execute their own punishment; but an act done or the exercise of power is requisite to work the forfeiture and determine the title to the office.[88] The analogies of the common law point to the conclusion that the power to remove a director can be exercised only by the constituent body, unless otherwise provided by statute or charter, and then only in a corporate meeting duly assembled in pursuance of notice as in other cases of special meeting;[89] and then only by a vote of a majority of the assembled quorum, counting the one on trial, who has the right to be counted and to vote.[90] Nor can such a removal take place without notice and a judicial inquiry analogous to that which satisfies the expression "due process of law."[91] It may be collected from analogous holdings that principles on which the judicial courts proceed in reviewing sentences of amotion require them to disregard mere irregularities with respect to what has taken place before the judicatory, and to set aside such a sentence for illegality only.[92] To render the proceeding legal, there should be: (1) A monition or citation directed to the offending person, to appear at the appointed meeting for trial; (2) a charge given to him to which he is required to make answer; (3) a compe-

disqualified and his office become vacant have been construed to mean that his office was to become vacant at the election of the company; but if after the bankruptcy they treated and held him out to the world as their public registered officer they might sue and be sued in his name. Steward *v.* Dunn, 12 M. & W. 655, 1 D. & L. 642, 8 Jur. 218, 13 L. J. Exch. 324.

85. Atlas Nat. Bank *v.* F. B. Gardner Co., 2 Fed. Cas. No. 635, 8 Biss. 537; Phelps *v.* Lyle, 10 A. & E. 113, 3 Jur. 479, 2 P. & D. 314, 37 E. C. L. 82.

86. State *v.* Vincennes University, 5 Ind. 77. That where the governing statute prescribes the cause for which an officer may be removed he cannot be removed for any other cause see Shaw *v.* Macon, 19 Ga. 468. That the charter power of removal does not authorize a suspension see State *v.* Jersey City, 25 N. J. L. 536. That a provision in a governing statute or in the foundation of a private charity that the visitors shall and may remove officers for specified causes may be read "must" see Atty.-Gen. *v.* Lock, 3 Atk. 164, 26 Eng. Reprint 897.

87. *Indiana.*— State *v.* Vincennes University, 5 Ind. 77.

Massachusetts.— Murdock *v.* Phillips Academy, 12 Pick. 244.

New Jersey.— Doremus *v.* English Neighborhood Dutch Reformed Church, 3 N. J. Eq. 332.

Pennsylvania.— Com. *v.* Pennsylvania Beneficial Inst., 2 Serg. & R. 141.

England.— Rex *v.* Ponsonby, 2 Bro. P. C. 311, 1 Ld. Ken. 1, 1 Ves. Jr. 1, 1 Eng. Reprint 965; Rex *v.* Heaven, 2 T. R. 772.

88. State *v.* Vincennes University, 5 Ind. 77.

89. Rex *v.* Taylor, 3 Salk. 231.

90. Reg. *v.* Sutton, 10 Mod. 74.

91. Jarvis *v.* New York, 2 N. Y. Leg. Obs. 396; Rex *v.* Doncaster, 2 Burr. 738, 2 Ld. Ken. 391; Rex *v.* Liverpool, 2 Burr. 723, 2 Ld. Ken. 391; Rex *v.* Richardson, 1 Burr. 517, 2 Ld. Ken. 85.

Courts of equity proceed upon the same principles; so that where a removal rests in the discretion of the trustees, in the due execution of the powers and trusts reposed in them, so that it is under the control of a court of chancery, a removal upon an *ex parte* hearing without giving the officer an opportunity of making defense will be set aside. Willis *v.* Childe, 13 Beav. 117, 20 L. J. Ch. 113.

92. Fuller *v.* Plainfield Academic School, 6 Conn. 532; Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244; Murdock's Appeal, 7

tent time assigned for proofs and answers; (4) liberty of counsel to defend him, and to except to proofs and witnesses; and (5) a solemn sentence after a hearing of proofs and answers.[93] He is entitled to what has been called a particular summons, to attend and answer a particular charge laid against him.[94] He is entitled to have the offense with which he is charged "fully and plainly, substantially and formally, described to him."[95] The notice or citation being in the nature of an indictment, it has been held that if he is tried and removed upon a charge, the variance will be fatal and he will be restored by mandamus.[96] Although the summons be defective in so far as it sets forth the time when the person cited should appear, yet as in other cases if he does appear and submit to trial without objection this will be a waiver of the informality.[97]

(II) *Whether Under Seal or by Resolution Merely.* Under the conception of the old law an officer appointed under the common seal of a corporation could only be discharged by an instrument authenticated in the like manner.[98] But as we shall see hereafter the necessity of a corporate seal as an evidence of a corporate act is no longer required by the modern law, except in those cases where an individual acting in the same way would be required to act under seal.[99] Even under old conceptions it was not necessary that the removal of a mere ministerial officer should be made by the corporation under its common seal.[1] An officer appointed by resolution only, and holding during pleasure, might be removed by a mere resolution rescinding the former one.[2] If the officer be liable to removal at the pleasure of the corporation, the choosing of another person to fill the office is a declaration of such pleasure.[3]

(III) *When Resolution of Removal Takes Effect so as to Terminate Liability of Sureties.* A resolution of a corporation suspending or removing an officer in a place at a distance is not regarded as taking effect so as to terminate the liability of his sureties, until the necessary time for communicating knowledge of the resolution to him has elapsed.[4]

f. Notice Not Required in Case of Continued Desertion and Non-Residence. By the analogies of the common law a notice is not required in the case of a continued desertion and non-residence on the part of the director, such as prevents the giving of notice,[5] although of course this rule would not apply in the case of a mere temporary absence.[6]

g. Assembling Meeting For Trial — Notifying Members. In the absence of a governing statute or by-law it seems that it will be sufficient if the meeting is assembled in the mode which has been the customary method employed by the corporation, as by mailing a postal card to each member notifying him of the time

Pick. (Mass.) 303; Osgood *v.* Nelson, L. R. 5 H. L. 636, 41 L. J. Q. B. 329; Rex *v.* Axbridge, Cowp. 523; Rex *v.* Bristol, 1 D. & R. 389, 16 E. C. L. 43; s. c. *sub nom.* Rex *v.* Griffiths, 5 B. & Ald. 731, 7 E. C. L. 398; Rex *v.* London, 2 T. R. 177.

93. Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244.

94. Delacy *v.* Neuse Nav. Co., 8 N. C. 274, 9 Am. Dec. 636; Black, etc., Soc. *v.* Vandyke, 2 Whart. (Pa.) 309, 30 Am. Dec. 263; Com. *v.* Pennsylvania Beneficial Inst., 2 Serg. & R. (Pa.) 141; Bagg's Case, 11 Coke 93*b*; Exeter *v.* Glide, 4 Mod. 33.

95. Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244; *In re* Murdock, 7 Pick. (Mass.) 303.

96. Reg. *v.* Ipswich, 2 Ld. Raym. 1232, 2 Salk. 434.

97. Reg. *v.* Ipswich, 2 Ld. Raym. 1232, 2 Salk. 434; Rex *v.* Wilton, 1 Ld. Raym. 225, 5 Mod. 257, 2 Salk. 428.

98. Rex *v.* Rippon, 1 Ld. Raym. 563, 2 Salk. 433; Rex *v.* Wilton, 1 Ld. Raym. 225, 5 Mod. 257, 2 Salk. 428.

99. See *infra*, XII, D, 1, g, (I) *et seq.*

1. Dighton *v.* Stratford on Avon, 2 Keb. 641.

2. Reg. *v.* Thomas, 8 A. & E. 183, 2 Jur. 347, 7 L. J. Q. B. 141, 3 N. & P. 288, 35 E. C. L. 543; Rex *v.* Wilton, 1 Ld. Raym. 225, 5 Mod. 257, 2 Salk. 428.

3. Atty.-Gen. *v.* Poole, 8 Beav. 75, 9 Jur. 318, 14 L. J. Ch. 101; Rex *v.* Canterbury, 11 Mod. 403, 1 Str. 674.

4. McGill *v.* U. S. Bank, 12 Wheat. (U. S.) 511, 6 L. ed. 711.

5. Rex *v.* Leicester, 4 Burr. 2087.

6. Reg. *v.* Truebody, Holt K. B. 449, 2 Ld. Raym. 1275, 11 Mod. 75.

The analogies of the modern law would require the giving of such notice to the directors as might be practicable under all the circumstances.

and place of the meeting, in which case it will be presumed that the cards so mailed have been received.[7]

h. Conduct of Trial — Evidence. It does not follow from the preceding that the trial is to be conducted with the same formality as a trial in a court of law. It need not be conducted with open doors, no more than one witness need be admitted at a time, nor need the triers admit the declarations of the accused, in explanation of his conduct, although they may do so if they think proper.[8] It is not necessary that the evidence should be of such a character as would be necessary to its admission in a judicial trial; it is sufficient if it be of that character of which men ordinarily act in their private affairs, so that nothing takes place which violates the principle of natural justice already stated. Unless the rules of the society or the statute law otherwise provide, the witnesses need not be examined under oath.[9]

i. Remedies to Restore Expelled Director — (i) *Certiorari.* Analogies exist which point to the use of the writ of certiorari, which as is well known was a writ issuing out of the court of king's bench, and running to inferior bodies not of record, to bring up their record in a given proceeding — such was the solecism — and have the proceeding quashed where the body acted outside of its jurisdiction.[10] And for this purpose what would be mere error in a court of record would be regarded as an excess of jurisdiction in an inferior body.[11]

(ii) *Extent of Relief in Equity.* A court of equity has not, unless thereto empowered by statute, any superintendence over the officers of a corporation, beyond holding them answerable and restraining them in cases of frauds and breaches of trust, and compelling them to account as trustees.[12] The jurisdiction of equity has been refused to reinstate directors who have been removed by vote of the shareholders.[13] But where, under the statute or other instrument which governs the execution of a trust, the trustees have the power of removing an officer at will, an officer removed by them will be reinstated by a court of equity, if it appear that they have exercised their power of removal dishonestly or corruptly; otherwise not.[14] If the power of removal is discretionary in the trustees of the corporation, their discretion will it seems be subject to the control of a court of chancery.[15]

(iii) *Mandamus.* Mandamus is the ancient common-law writ constantly used for the purpose of restoring an officer or member of a public corporation, who has

7. People *v.* Albany Medical College, 26 Hun (N. Y.) 348 [*reversing* 10 Abb. N. Cas. (N. Y.) 122, 62 How. Pr. (N. Y.) 220].

8. *In re* Murdock, 7 Pick. (Mass.) 303.

9. People *v.* New York Commercial Assoc., 18 Abb. Pr. (N. Y.) 271; *Ex p.* Ramshay, 18 Q. B. 173, 16 Jur. 684, 21 L. J. Q. B. 238, 83 E. C. L. 173. It is hence no objection that a witness was not properly sworn. Pitcher *v.* Chicago Bd. of Trade, 121 Ill. 412, 13 N. E. 187.

Copious analogies upon this subject will be found in a discussion relating to the expulsion of members, and especially pertaining to municipal corporations and societies, but not to joint-stock companies, in 1 Thompson Corp. § 846 *et seq.*

10. See, generally, as to the office of this writ Jordan *v.* Hayne, 36 Iowa 9; Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776; State *v.* Chicago, etc., R. Co., 89 Mo. 523, 14 S. W. 522; House *v.* Clinton County Ct., 67 Mo. 522; Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294. See also Certiorari, 6 Cyc. 73*a*.

11. The statutory writ of certiorari is used in New York for the purpose of reviewing the proceedings of such inferior bodies as municipal boards, police commissioners, tax commissioners, and the like. People *v.* Board of Police Com'rs, 93 N. Y. 97; People *v.* Board of Fire Com'rs, 82 N. Y. 358; People *v.* Board of Police, 69 N. Y. 408; People *v.* Police Com'rs, 23 Hun (N. Y.) 351; People *v.* Police Com'rs, 20 Hun (N. Y.) 402. No precedent has come to the attention of the writer which justifies the use of the writ of certiorari for the purpose of reviewing the proceedings of the judicatories of strictly private corporations and societies in removing their officers or in expelling their members.

12. Griffin *v.* St. Louis Vine, etc., Growers' Assoc., 4 Mo. App. 596.

13. Inderwick *v.* Snell, 2 Hall & T. 412, 14 Jur. 727, 19 L. J. Ch. 542, 2 Macn. & G. 216, 48 Eng. Ch. 167.

14. Hayman *v.* Rugby School, L. R. 18 Eq. 28, 43 L. J. Ch. 834, 30 L. T. Rep. N. S. 217, 22 Wkly. Rep. 587. See also Dummer *v.* Chippenham, 14 Ves. Jr. 245.

15. Willis *v.* Childe, 13 Beav. 117, 15 Jur. 303, 20 L. J. Ch. 113.

been disfranchised of his membership.[16] But as used in England this writ proceeds only on grounds of public right, and is consequently not used to restore an officer or member of a strictly private corporation or company.[17] In the United States, as is well known, this writ is sometimes used in cases of a private nature, where there is a clear right, founded on the principles of the common law, or given by the constitutional or statutory law. In one American case the idea has been put forward that the right to the remedy by mandamus rests on clear ground where the office from which the relator has been removed is not attended with pecuniary profit, the reason being that having sustained no pecuniary loss he cannot have redress of the injury which has been put upon him by an action for damages.[18]

11. Contesting Election of Directors — a. Inadequacy of Remedy by Certiorari. In a state where the remedy by certiorari had been frequently resorted to

16. Fuller *v.* Plainfield Academic School, 6 Conn. 532.

17. Vaughan *v.* London Gun-Makers Co., 2 Ld. Raym. 989, 6 Mod. 82. *Compare* Hurst's Case, 1 Keb. 349; 1 Thompson Corp. § 829 *et seq.* (where there is a long note embodying much of the musty learning on this subject).

18. Fuller *v.* Plainfield Academic School, 6 Conn. 532. *Compare* Rex *v.* Barker, 3 Burr. 1265, 1 W. Bl. 300.

Several writs where there are several officers. Rex *v.* Chester, Comb. 307; Andover's Case, Holt K. B. 441, 2 Salk. 433.

Allegations of the writ. Fuller *v.* Plainfield Academic School, 6 Conn. 532.

What if directed to the individuals by name and not to the corporation. Fuller *v.* Plainfield Academic School, 6 Conn. 532; *In re* Abingdon Town Case, Carth. 499, 1 Ld. Raym. 559, 2 Salk. 431, 699 [*overruling* Holt's Case, 7 Jones 51]; Rex *v.* Rippon, 1 Ld. Raym. 563, 2 Salk. 433.

Office and scope of the return to the writ under the old law. Rex *v.* Griffiths, 5 B. & Ald. 731, 7 E. C. L. 398; Rex *v.* Lyme Regis, 1 Dougl. (3d ed.) 149; Green *v.* Pope, 1 Ld. Raym. 125; Audly's Case, Latch. 123; Anonymous, 2 Salk. 428. *Compare* Rex *v.* Liverpool, 2 Burr. 723, 2 Ld. Ken. 391; *In re* Abingdon Town Case, Carth. 499, 1 Ld. Raym. 559, 2 Salk. 431, 699 (per Lord Holt, C. J.); Buckley *v.* Palmer, 2 Salk. 430; Rex *v.* Morpeth, 1 Str. 58. That the remedy was an action for a false return and not to traverse the return see *In re* Abingdon Town Case, Carth. 499, 1 Ld. Raym. 559, 2 Salk. 431, 699 (per Lord Holt, C. J.); Buckley *v.* Palmer, 2 Salk. 430. If return bad for repugnancy, peremptory writ granted. Reg. *v.* Norwich, Holt K. B. 444, 2 Salk. 432. Return that the prosecutor has resigned his office. Rex *v.* Rippon, 1 Ld. Raym. 563, 2 Salk. 433. Return of *non fuit electus*. Reg. *v.* Cornwall, 11 Mod. 174; Reg. *v.* Twitty, 7 Mod. 83. And see Reg. *v.* Aldborough, 10 Mod. 100. Return of subsequent disqualification. Weber *v.* Zimmerman, 23 Md. 45. Return embodying a negative pregnant. Rex *v.* York, 5 T. R. 66. Rule that return should traverse the facts and not the conclusions. Rex *v.* York, 5 T. R. 66. When necessary for return to set up the manner of election, in order to support the statement that the relator was not duly elected. Rex *v.* Stafford, 2 Keb. 264. When not a good return to describe the constitution in other terms than that employed in the writ, and to show a compliance with it as thus described. Rex *v.* Malden, 1 Ld. Raym. 481, 2 Salk. 431. When necessary that the existence of a custom should be alleged in positive terms. Rex *v.* Coventry, 1 Ld. Raym. 391, 2 Salk. 430. Return may show any number of causes, provided they are consistent with each other (Wright *v.* Fawcett, 4 Burr. 2041; Reg. *v.* Norwich, 2 Ld. Raym. 1244, 2 Salk. 436), but not where they are repugnant to each other (Rex *v.* Cambridge, 2 T. R. 456). Illustration of such a repugnancy, peremptory writ granted. Reg. *v.* Norwich, 2 Ld. Raym. 1244, 2 Salk. 436. When the court may quash the bad causes returned, and send the good ones to the prosecutor to plead to them. Rex *v.* Cambridge, 2 T. R. 456. *Compare* Rex *v.* York, 5 T. R. 66. Other ancient returns, good, bad, and indifferent. Rex *v.* Taunton, Cowp. 413; Rex *v.* York, 5 T. R. 66 [*explained* in 1 Thompson Corp. § 834]; Rex *v.* Cambridge, 2 T. R. 456. When not necessary to aver in the return the power of removal. Rex *v.* Lyme Regis, 1 Dougl. (3d ed.) 149. Instances of good returns in such cases. 1 Thompson Corp. § 836; Lambert's Case, Carth. 170; Rex *v.* Lyme Regis, 1 Dougl. (3d ed.) 149; Rex *v.* Colchester, 2 Keb. 188; Rex *v.* Rippon, 2 Keb. 15; Rex *v.* Mills, 1 Keb. 623; Wigon *v.* Pilkington, 1 Keb. 597. Sufficient if return made by proper officer until falsified. *In re* Abingdon Town Case, Carth. 499, 1 Ld. Raym. 559, 2 Salk. 431, 699; Rex *v.* Norwich, Holt K. B. 444, 2 Salk. 432. Not necessary that the return should be under the corporate seal. Lidleston *v.* Exeter, Comb. 422; Rex *v.* Colchester, Comb. 324; Rex *v.* St. John's College, Comb. 279; Powell *v.* Price, Comb. 41.

Doctrine that court will not interfere by mandamus where there has been such evidence before the proper corporate judicatory as would justify a court in leaving the question of the inability or neglect of duty of the officer to a jury. Osgood *v.* Nelson, L. R. 5 H. L. 636, 41 L. J. Q. B. 329.

in case of the illegal election or appointment of public officers,[19] it was pointed out that an information in the nature of a quo warranto is specially adapted to such cases, and is the peculiarly appropriate remedy to try the right to the office and to give the full measure of redress in case of success.[20]

b. Remedy by Mandamus. By the common law of England, the writ of mandamus was constantly used to compel the induction into public offices of persons duly elected thereto or unlawfully expelled therefrom.[21] In England the writ of mandamus was never used to vindicate merely private rights; it was therefore denied when applied for to restore officers of merely private corporations;[22] but an authoritative court in this country has held, after a review of the precedents, that a writ of mandamus may be used where a manufacturing corporation is in fact and theory the petitioner to compel a board of usurping corporate officers, elected by the casting of illegal votes, to surrender their offices to those having the highest number of legal votes.[23] Some courts have on the other hand denied the remedy by mandamus, on the ground that the appropriate remedy is an information in the nature of a quo warranto;[24] and clearly this is the appropriate remedy.[25] Even where a mandamus is deemed an appropriate remedy, it would not be granted to restore a director, unless he was such *de jure*. And this also where he has served as secretary, which office could be filled only by a director under the acquiescence of the other directors, they being of the impression that his election was valid.[26]

c. Inadequacy of Remedy in Equity. Courts of equity proceed on the three grounds of fraud, trust, and account. Speaking generally they have no jurisdiction over contests for the possession of corporate offices.[27] Their writ of injunction has been refused to reinstate directors who have been removed by a vote of the shareholders[28] and will not go to restrain directors from exercising the functions of their offices on the ground that they have been illegally chosen.[29]

19. As to the use of this remedy in such cases see People *v.* Van Slyck, 4 Cow. (N. Y.) 297; Wildy *v.* Washburn, 16 Johns. (N. Y.) 49; Wood *v.* Peake, 8 Johns. (N. Y.) 69; Lawton *v.* Highway Com'rs, 2 Cai. (N. Y.) 179.

20. People *v.* Seaman, 5 Den. (N. Y.) 409.

21. Instances of this use of the writ, where it was granted or refused, may be collected from the following among many other cases: Roe's Case, Comb. 145; Parkinson's Case, Comb. 143; Anonymous, Comb. 105; Rex *v.* Knapton, 2 Keb. 445; King's Case, 1 Keb. 517; Audly's Case, Latch. 123; Appleford's Case, 1 Mod. 82.

22. Anonymous, Comb. 133; Anonymous, Comb. 41; *In re* Rex, etc., Case, 1 Keb. 625.

23. American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377.

24. People *v.* Matteson, 17 Ill. 167; St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355.

In this country mandamus has been used to compel the trustees of a religious corporation to induct a pastor (People *v.* Steele, 2 Barb. (N. Y.) 397. But see People *v.* Dikeman, 7 How. Pr. (N. Y.) 124); to compel a board of examiners to give a certificate of the election of the relator to a public office (*In re* Strong, 20 Pick. (Mass.) 484); and to compel a judge to receive a bond, if found to be good and sufficient, tendered to him by the claimant of the office of clerk of his court (State *v.* Wear, 37 Mo. App. 325).

25. People *v.* Seaman, 5 Den. (N. Y.) 409.

Therefore an election to fill an alleged vacancy will not be enjoined, but should be allowed to proceed so that the person entitled may contest his right and that of his opponent in quo warranto proceeding. Hooe *v.* Hall, 4 Ohio Cir. Dec. 547.

26. People *v.* New York Infant Asylum, 122 N. Y. 190, 25 N. E. 241, 33 N. Y. St. 296, 10 L. R. A. 381.

27. Griffin *v.* St. Louis Vine, etc., Growers' Assoc., 4 Mo. App. 596.

28. Hughes *v.* Parker, 20 N. H. 58; Inderwick *v.* Snell, 2 Hall & T. 412, 14 Jur. 727, 19 L. J. Ch. 542, 2 Macn. & G. 216, 48 Eng. Ch. 167.

29. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. (N. Y.) 321, 19 How. Pr. (N. Y.) 245. See for analogies Hardenburgh *v.* Farmers', etc., Bank, 3 N. J. Eq. 68; Updegraff *v.* Crans, 47 Pa. St. 103. But it has been held that if the question of the validity of a corporate election necessarily arises in a suit properly cognizable by a court of equity, such court will determine it, as it would any other question of law or fact necessary to be decided to settle the rights of the parties. Mechanics' Nat. Bank *v.* H. C. Burnet Mfg. Co., 32 N. J. Eq. 236. Another decision out of line with the current of authority is to the effect that equity will step in and give relief where there are grave charges of a breach of trust. Dart *v.* Houston, 22 Ga. 506.

d. Nature of This Use of Information in Nature of Quo Warranto — (I) *In General.* By the ancient common law the writ of quo warranto was the regular remedy resorted to on behalf of the crown to oust an intruder from a public office. In the place of the ancient writ the more flexible remedy of an information in the nature of a quo warranto was substituted, and this remedy is in ordinary use in the United States[30] with few exceptions.[31] By analogy to the use of this remedy in the case of public offices it is very generally held that the same remedy exists to oust persons who have usurped or intruded into the offices of either public or private corporations.[32] This proceeding is the proper remedy to oust bank directors who have come into their offices through the forms of law, and are hence *de facto* officers, if they have been in fact illegally elected.[33]

(II) *Is a Civil Proceeding.* An information in the nature of a writ of quo warranto as thus used to test the right to an office in a corporate directorate is distinguishable from the same remedy as used to oust usurpers of a corporate or public franchise. As here used it is regarded as a civil proceeding.[34] Although partaking of the character of a criminal proceeding in its origin and form, the information, answer, and reply are generally subject to rules corresponding to those which obtain in strictly civil cases[35] — the information answering to the declaration or complaint in an ordinary civil suit.[36] The action is one of legal, not of equitable, cognizance, and the issues are strictly legal issues.[37]

e. Burden of Proof — When Relator Bound to Show Title. According to the ancient conception and use of the remedy by quo warranto, it was a writ of right, whereby the king demanded to know by what authority the respondent presumed to exercise a certain office or franchise.[38] The burden to show that authority, or to disclaim the exercise of the office or franchise, lay upon the respondent. He was bound either to disclaim or to justify. If he disclaimed the king had judgment. If he justified he was bound to show his title specially, and all particulars upon which it was founded; and this became the rule under the remedy of an information in the nature of a quo warranto.[39] This conception of the remedy

30. *Arkansas.*—State *v.* Evans, 3 Ark. 585, 36 Am. Dec. 468.

California.— People *v.* Woodbury, 14 Cal. 43; People *v.* Scannell, 7 Cal. 432.

Illinois.— People *v.* Matteson, 17 Ill. 167; People *v.* Forquer, 1 Ill. 104.

Massachusetts.— Sudbury First Parish *v.* Stearns, 21 Pick. 148; Com. *v.* Fowler, 10 Mass. 290.

Mississippi.— Lindsey *v.* Atty.-Gen., 33 Miss. 508.

Missouri.— St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; *Ex p.* Bellows, 1 Mo. 115.

New York.— New York *v.* Conover, 5 Abb. Pr. 171; Lewis *v.* Oliver, 4 Abb. Pr. 121; People *v.* Van Slyck, 4 Cow. 297.

Pennsylvania.— Clark *v.* Com., 29 Pa. St. 129; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Respublica *v.* Wray, 3 Dall. 490, 1 L. ed. 692.

South Carolina.— State *v.* Deliesseline, 1 McCord 52. *Compare* State *v.* Wadkins, 1 Rich. 42.

31. Terry *v.* Stauffer, 17 La. Ann. 306.

32. State *v.* Coffee, 59 Mo. 59; People *v.* Kip, 4 Cow. (N. Y.) 382 note; People *v.* Tibbets, 4 Cow. (N. Y.) 358; State *v.* Buchanan, Wright (Ohio) 233.

33. State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460; State *v.* Ashley, 1 Ark. 513; Smith *v.* State Bank, 18 Ind. 327.

Some holdings restrain the use of this remedy to cases of persons claiming to exercise some public office or authority. Com. *v.* Dearborn, 15 Mass. 125.

In England a quo warranto will be granted to oust a usurping corporate officer after a proper corporate judicatory has passed a sentence of amotion. Rex *v.* Truro, 3 B. & Ald. 590, 5 E. C. L. 340, 2 Chit. 257, 18 E. C. L. 621; Rex *v.* Ponsonby, 2 Bro. P. C. 311, 1 Ld. Ken. 1, 1 Ves. Jr. 1, 1 Eng. Reprint 965; Rex *v.* Heaven, 2 T. R. 772.

34. State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265; State *v.* Lawrence, 38 Mo. 535; State *v.* Stewart, 32 Mo. 379; State *v.* Lingo, 26 Mo. 496.

35. People *v.* Albany, etc., R. Co., 1 Lans. (N. Y.) 308, 55 Barb. (N. Y.) 344, 7 Abb. Pr. N. S. (N. Y.) 265, 38 How. Pr. (N. Y.) 228.

36. State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

37. People *v.* Albany, etc., R. Co., 57 N. Y. 161.

38. 3 Bl. Comm. 362; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

39. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Pease, 27 N. Y. 63; People *v.* Thompson, 21 Wend. (N. Y.) 235 [*reversed* in 23 Wend. (N. Y.) 537]; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Cole Quo. War. 221; Kyd Corp. 399.

has come down into some American jurisdictions even with respect to contests for the possession of a private corporate office.[40] In one such jurisdiction, where a writ of quo warranto — not an information in the nature of quo warranto — was directed against defendant as director of a banking corporation, it was held that his plea must allege that he was a shareholder in the corporation; and that the election under which he claimed to have been chosen was held under and in pursuance of an ordinance or direction of the board of directors, fixing a time and place where the same should be held, agreeably to the provisions and requirements of the charter.[41] But according to the modern conception of an information in the nature of a writ of quo warranto, where it is used merely in a contest between private individuals for the possession of a corporate office, the burden of proof is on the relator to show that the respondent is exercising the functions of the office without authority of law. The reason is that in such a case the respondent, in possession of the office and exercising its functions *de facto*, is presumed to be regularly and lawfully there until the contrary appears, and it is for the relator to overcome this presumption by evidence.[42] The burden of proof is none the less on the relator because the form of the issue requires defendant to show cause.[43] The reason of the rule is that the ordinary presumption of right-acting applies to the acts of corporations as well as to those of individuals.[44] This is especially so where the respondent holds a certificate of election or appointment to the office which is in the nature of a muniment of title, constituting *prima facie* a right thereto.[45] If a statute, by-law, or other governing instrument has annexed a qualification to the office, he must prove that he possesses that qualification.[46] If a body of men sue as directors they must show that they are directors; and if the name of one who was also a director is omitted as plaintiff they must show that his character of director has legally ended.[47]

f. Who May Be Plaintiff or Relator. Although an information in the nature of a quo warranto to oust usurpers of corporate franchises or of public offices can be prosecuted by the state only through its proper law officer, yet the information for the purpose of contesting a corporate election may be brought by a private person, and it seems by any person who has an interest in the matter.[48] While the plaintiff or relator is usually the person claiming the right to the office, and while, in one jurisdiction, the proceeding can be prosecuted only by the corporation or by a shareholder,[49] yet in New York, where the legislative policy permits the attorney-general to intervene in many matters respecting private corporations, that officer may it seems institute and carry on the proceeding.[50] The

40. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312, under New York statutes, enlarging the ancient remedy.

41. State *v.* Ashley, 1 Ark. 513. And see People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

42. State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

43. State *v.* Hunton, 28 Vt. 594.

44. State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265; McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

45. Kerr *v.* Trego, 47 Pa. St. 292.

46. Tufton *v.* Nevinson, 2 Ld. Raym. 1354.

47. Phelps *v.* Lyle, 10 A. & E. 113, 3 Jur. 479, 2 P. & D. 314, 37 E. C. L. 82.

48. Com. *v.* Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50. *Compare* Com. *v.* Fowler, 10 Mass. 290. See also State *v.* Patterson, etc., Turnpike Co., 21 N. J. L. 9; Com. *v.* Cluley, 56 Pa. St. 270, 94 Am. Dec. 75; Com. *v.* Jones, 12 Pa. St. 365; State *v.* Orvis, 20 Wis. 235.

49. Baggot *v.* Turner, 21 Wash. 339, 58 Pac. 212.

50. People *v.* Albany, etc., R. Co., 1 Lans. (N. Y.) 308, 55 Barb. (N. Y.) 344, 7 Abb. Pr. N. S. (N. Y.) 265, 38 How. Pr. (N. Y.) 228 [*affirmed* in 57 N. Y. 161].

What the information must allege.— See for a alogy Lavalle *v.* People, 68 Ill. 252. An information to oust an officer of a private corporation, alleging that he was elected at an illegal meeting, and that he deceived the relators as to the time of such meeting, need not allege that the relator would have voted against him if present. Armington *v.* State, 95 Ind. 421.

What the plea must set up.— Where the remedy is used as at common law the plea must allege specifically the facts which go to show the right of the respondent to hold the office. State *v.* Ashley, 1 Ark. 513.

In case of judgment by default the court will merely give judgment of ouster, but will not determine the right of the relator to hold

proceeding may be brought by a director whose title to the office is not questioned, for the purpose of questioning the title of the other directors, on the ground that the votes of the relator as a shareholder were not properly counted.[51]

g. Extent of Remedy by Quo Warranto — (i) *Does Not Extend to Mere Irregularities, Mistakes, Etc.* A remedy by quo warranto to contest the title of one holding a corporate office does not extend to cases where there have been mere irregularities in the election not affecting substantial right, and where there has been no bad faith, whereby the result of the election has been affected,[52] such as holding the election on the wrong day, by a common mistake.[53]

(ii) *Does Not Extend to Municipal Officers, Servants, or Employees Removable at Pleasure.* The remedy by an information in the nature of a writ of quo warranto does not extend so far as to enable a mere municipal officer, employee, or servant of a corporation, who has been removed, to contest the lawfulness of his removal by this means.[54] The power to set aside a corporate election has been denied, even in case of an election of directors of a banking corporation, on the same ground, namely, that such an officer may be removed at the pleasure of the corporation;[55] and another court has supported this theory by

the office. People *v.* Connor, 13 Mich. 238. But where the remedy exists in its modern and more enlarged form, the relator must not only show that the respondent has entered into the office without lawful warrant, but he must show his own title to the office. Miller *v.* English, 21 N. J. L. 317.

Where the information proceeds upon the loss by the respondent of the qualifications necessary to hold the office, the plea must set out the continuance of every qualification down to the filing of the information. State *v.* Beecher, 15 Ohio 723. Where the qualification for the office is the holding of real estate, the respondent must in his plea of justification describe the real estate of which he is the owner and his title thereto. State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460. Strictness required where the ownership of stock is a requisite to holding the office. State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460. Strictness required in describing the election by which the respondent was chosen. State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460. Not necessary to state that the electors by whom the respondent was elected were possessed of the proper qualifications. State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460.

Misjoinder of parties in quo warranto proceedings.— Parties claiming different offices cannot join as relators. People *v.* De Mill, 15 Mich. 164. Several informations against several persons having distinct offices will not be consolidated. Rex *v.* Warlow, 2 M. & S. 75, 14 Rev. Rep. 592. But this rule against misjoinder did not apply in a quo warranto proceeding against three to show why they held the office of bank directors, where one disclaimed and the other two pleaded to an issue. Com. *v.* Sparks, 6 Whart. (Pa.) 416.

Leave to file information discretionary with court.— Where the information is brought to oust a person alleged to be usurping an office under a private corporation, leave to allow the information to be filed must be sought from the court, and the granting of it is discretionary with the court. State *v.* Lawrence, 38 Mo. 535; People *v.* Kip, 4 Cow. (N. Y.) 382 note; People *v.* Tibbets, 4 Cow. (N. Y.) 358; Com. *v.* Arrison, 15 Serg. & R. (Pa.) 127, 16 Am. Dec. 531; Gunton *v.* Ingle, 11 Fed. Cas. No. 5,870, 4 Cranch C. C. 438. For theories on the subject of the necessity of obtaining leave to file an information in the nature of a quo warranto see 5 Thompson Corp. § 6783. For circumstances under which such leave was denied see 5 Thompson Corp. § 6784. Issuing a rule to show cause why an information should not be filed. 5 Thompson Corp. § 6785. Affidavits against the rule. 5 Thompson Corp. § 6786. Dismissing the information upon cause shown against its being filed. 5 Thompson Corp. § 6787.

51. Com. *v.* Stevens, 168 Pa. St. 582, 32 Atl. 111.

In California shareholders whose stock has been sold to satisfy an assessment thereon, to carry into effect an illegal contract made by a board of directors illegally elected, may maintain an action to review the illegal election and oust them from office, and to have the illegal contract set aside. Whitehead *v.* Sweet, 126 Cal. 67, 58 Pac. 376.

52. Reg. *v.* Ward, L. R. 8 Q. B. 210, 42 L. J. Q. B. 126, 28 L. T. Rep. N. S. 118, 21 Wkly. Rep. 632.

53. State *v.* Tolan, 33 N. J. L. 195.

That a court will not set aside a corporate election without substantial grounds, founded on proper and sufficient evidence, see Conant *v.* Millaudon, 5 La. Ann. 542.

Nor will an injunction be granted to prevent the instalment of the officers elected, unless it appear that the election was entirely without authority and void. Hardenburgh *v.* Farmers', etc., Bank, 3 N. J. Eq. 68.

54. People *v.* Hills, 1 Lans. (N. Y.) 202. And see State *v.* Curtis, 35 Conn. 374, 95 Am. Dec. 263; Dighton *v.* Stratford on Avon, 2 Keb. 641. *Contra*, State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265, case of the secretary of an insurance company.

55. *In re* Dansville Bank, 6 Hill (N. Y.) 370.

holding that the shareholders in a modern joint-stock corporation, in which the general public has no interest, may remove the officers without notice or trial.[56]

(III) *EXISTS ONLY AGAINST PARTY IN POSSESSION.* This remedy can be exercised only against a person in actual possession of the office. It is not sufficient that he has been merely elected to it and has tendered himself to be sworn in.[57]

h. Matters of Evidence in Such Proceeding. Proof of user of the office may be made by any witness who has knowledge of the fact.[58] It is competent to prove who were elected directors by the oral evidence of persons present at the meeting, where no record of the fact was kept.[59] But where a record is kept in unambiguous language, parol evidence will not be heard to vary it.[60]

i. Court Will Decide All Questions Properly Arising. The court will decide all questions properly arising in the controversy involved in the final result, including constitutional questions.[61]

j. Rule of Decision Where Legal Votes Have Been Rejected or Illegal Votes Received. Persons receiving no more than a minority of the votes cast for directors cannot, in this proceeding, even where it is enlarged to the scope of a civil action to contest an election, be declared elected, although it is made to appear that the judges improperly rejected enough legal votes offered to give them a majority.[62] It is no objection that illegal votes were received, unless such votes were sufficient in number to change the result; the mere fact that illegal votes were cast will not avoid such an election.[63] But where the persons for whom the votes wrongfully rejected were tendered would with such votes have had the votes of a majority of all the shares, the court will set aside the election and order the admission of those persons who would have been elected if such votes had been received.[64] It has been reasoned that the mere assertion in such case that the votes may be illegal is not sufficient to put the officers elected on proof of their legality. The hypothesis presented assumes a fraud upon the charter; and fraud is not to be presumed.[65] The court also reasoned that one who contests an election on the ground that votes given by an elector acting as trustee were for the benefit of other shareholders, who had already voted up to the limit allowed by the charter must show it affirmatively. The bare possibility that the votes were held for such persons is not to be regarded. The contingency is too remote to deserve notice as a legal presumption.[66] Where it is sought to overthrow such an election on the ground that the stock has been unlawfully increased, and that additional shares have been unlawfully voted, the effort will fail if it appear that the directors received, not only a majority of the stock as

56. Adamantine Brick Co. *v.* Woodward, McArthur & M. (D. C.) 318.

57. Rex *v.* Whitwell, 5 T. R. 85, 2 Rev. Rep. 545.

58. Facey *v.* Fuller, 13 Mich. 527.

59. Partridge *v.* Badger, 25 Barb. (N. Y.) 146. See also Old Town *v.* Dooley, 81 Ill. 255.

The official character of persons who acted as defendant's officers may be proved by parol, without producing the records of the corporation. Pusey *v.* New Jersey West Line R. Co., 14 Abb. Pr. N. S. (N. Y.) 434.

60. Peterborough R. Co. *v.* Wood, 61 N. H. 418. That warnings and proceedings of a corporation which has a clerk are not provable by parol see Stevens *v.* Eden Meeting-House Soc., 12 Vt. 688.

Circumstances under which evidence of conversations had prior to the election is admissible. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

61. Taggart *v.* Perkins, 73 Mich. 303, 41 N. W. 426; Atty.-Gen. *v.* Amos, 60 Mich. 372, 27 N. W. 571; People *v.* Holihan, 29 Mich. 116; People *v.* Maynard, 15 Mich. 463; People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285. *Compare* People *v.* Whitcomb, 55 Ill. 172.

62. *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529; Downing *v.* Potts, 23 N. J. L. 66; *In re* Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; State *v.* McDaniel, 22 Ohio St. 354.

63. Sudbury First Parish *v.* Stearns, 21 Pick. (Mass.) 148; Downing *v.* Potts, 23 N. J. L. 66; *Ex p.* Murphy, 7 Cow. (N. Y.) 153.

64. *In re* Cape May, etc., Nav. Co., 51 N. J. L. 78, 16 Atl. 191; *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529. But see *In re* Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

65. Conant *v.* Millaudon, 5 La. Ann. 542.

66. Conant *v.* Millaudon, 5 La. Ann. 542.

increased, but also a majority of the stock as it stood prior to the increase.[67] The governing principle is that the election will not be held invalid if those entitled to vote have had a full and fair opportunity of expressing their choice, and if the officers chosen are the choice of a majority of the persons voting.[68]

k. Party Receiving Next Highest Number of Votes, Where Successful Candidate Disqualified. Where the successful candidate is for any reason disqualified from holding the office, this fact does not, it has been held, give the candidate receiving the next highest number of votes such an interest as entitles him to maintain a quo warranto to contest the election; since as he received no more than a minority of the votes cast, if the fee were ousted he could not be inducted into the office. He therefore according to this view has no more right to make the contest than any other member of the public, and the question can be raised only by the attorney-general.[69]

l. Validity of Election Where Whole Number Not Elected. It seems that an election of directors of a corporation is not rendered invalid by the mere fact that the whole number prescribed by the governing statute are not elected, if enough are elected to constitute such a quorum as the statute requires.[70]

m. Judgment Where Term of Office Has Expired. If the term of office has expired before the court can proceed to judgment, and if it be found that the relator was entitled to the office, a general judgment will be entered in his favor for costs.[71]

n. Quo Warranto Against Disqualified Incumbent. It seems that this remedy extends to ousting an incumbent who does not possess the legal qualifications for the office, and is not restricted to an inquiry into the lawfulness of the election by which he obtained the office.[72]

o. Estoppel to Raise Objection to Legality of Corporate Election by Quo Warranto. A corporator who, with full knowledge of the objections to the legality of a certain class of votes, attends a meeting of the corporation, participates in its deliberations, and acquiesces in its decisions, by canvassing and voting in the election of officers, cannot question the title of the officers elected, on the ground that such class of votes was illegal.[73] So where a member who had knowledge of

67. Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894.

68. Philips *v.* Wickham, 1 Paige (N. Y.) 590.

What if two factions organize and hold two meetings.— Matter of Pioneer Paper Co., 36 How. Pr. (N. Y.) 111.

69. Com. *v.* Cluley, 56 Pa. St. 270, 94 Am. Dec. 75. See also Reg. *v.* Hiorns, 7 A. & E. 960, 2 Jur. 108, 1 N. & P. 148, 34 E. C. L. 496; Rex *v.* Bridge, 1 M. & S. 76, 14 Rev. Rep. 395; Cole Quo War. 141, 142. *Compare* Rex *v.* Parry, 14 East 549; Rex *v.* Hawkins, 10 East 211. And see Com. *v.* Cluley, 56 Pa. St. 270, 94 Am. Dec. 75, where the foregoing cases are compared and distinguished.

But a minority candidate may acquire a sufficient title and interest, at a subsequent election, to enable him to dispute the title of the opposing candidate in this way. Com. *v.* Small, 26 Pa. St. 31.

70. *In re* Union Ins. Co., 22 Wend. (N. Y.) 591. See also Wright *v.* Com., 109 Pa. St. 560, 2 Atl. 794.

Rule where the statute is silent as to the number to be chosen, but where a majority of the number actually chosen were recognized as a competent board by the legislature. Dart *v.* Houston, 22 Ga. 506.

Electing a reduced number after passage of statute authorizing the reduction, but before any corporate action thereunder. *In re* Excelsior Ins. Co., 38 Barb. (N. Y.) 297.

71. People *v.* Seaman, 5 Den. (N. Y.) 409; People *v.* Loomis, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33.

Effect on leave to file information.— That the court will refuse the attorney-general leave to file an information in the nature of a quo warranto, where it is apparent that the term of office will have expired before the court can proceed to judgment, leaving the party to any other remedy which he may have, see People *v.* Sweeting, 2 Johns. (N. Y.) 184. See also Morris *v.* Underwood, 19 Ga. 559; State *v.* Jacobs, 17 Ohio 143. That leave to file such an information will not be refused on this ground see People *v.* Tibbets, 4 Cow. (N. Y.) 358.

Effect of dispute on legality of subsequent election.— The fact that the election was disputed during the term of office by quo warranto does not affect the legality of the next election, on the ground of illegality in the first, provided the incumbents acted as officers *de facto*. Com. *v.* Smith, 45 Pa. St. 59.

72. State *v.* Gastinel, 18 La. Ann. 517, 20 La. Ann. 114.

73. State *v.* Lehre, 7 Rich. (S. C.) 234.

defects in the preliminaries of the organization of the corporation nevertheless took part in an election for directors, and the directors so elected acted and contracted as such in behalf of the corporation, the member was thereafter estopped to file an information in the nature of a quo warranto against them.[74] Nor can the right of one to hold the office of director be impeached for fraud by one who concurred in his election.[75] Plainly a person regularly elected and inducted into the office of director of a corporation is such *de facto* for the protection of the rights of third persons, so long as he is permitted by those having the right to oust him to exercise the functions of the office; but this is not so where he does not accept the office, exercise its functions, or hold himself out as being such director, and where he finally repudiates it.[76]

p. Presumptions in Favor of Regularity of Corporate Elections. Every reasonable intendment is to be made in favor of the regularity of the proceedings of a private corporation in their corporate acts.[77] This rule applies to corporate meetings and corporate elections and also to the meetings of directors.[78] A corporate meeting, or a meeting of corporate directors, will be presumed to be regular unless the contrary appears.[79]

B. Directors and Other Officers De Facto — 1. General Statement of Doctrine. The acts of those who publicly exercise the functions of directors and other officers[80] of private corporations are upheld on the same principle which upholds the acts of *de facto* public officers and of *de facto* corporations.[81] As a general rule they are deemed valid in respect of third persons,[82] in respect of the corporation,[83] in respect of its shareholders,[84] and in respect of the directors themselves.[85] The more general statement of the doctrine is that persons acting publicly as the officers of a corporation are presumed to be rightfully in the possession of their offices, and that their acts are binding on the corporation so far as is necessary to uphold the rights of third persons.[86] The particular officer may be

74. Cole *v.* Dyer, 29 Ga. 434. But that such an estoppel does not arise in the case of ignorance of some fact making the election invalid see Wiltz *v.* Peters, 4 La. Ann. 339; and for analogies see Rex *v.* Clarke, 1 East 38, 5 Rev. Rep. 505.

75. *In re* Leslie, 58 N. J. L. 609, 33 Atl. 954.

76. Rozecrans Gold Min. Co. *v.* Morey, 111 Cal. 114, 43 Pac. 585. There is an unsound holding to the effect that a person elected director in violation of the governing statute cannot be a director *de facto*. *In re* Newcomb, 18 N. Y. Suppl. 16, 42 N. Y. St. 442. But this displays no conception of what an officer *de facto* is.

77. McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

78. Lane *v.* Brainerd, 30 Conn. 565; State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265; McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

79. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; People *v.* Batchelor, 22 N. Y. 128; Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253. *Compare* Atlantic Mut. F. Ins. Co. *v.* Fitzpatrick, 2 Gray (Mass.) 279.

80. For example a general manager. Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434.

81. See *supra*, I, O, I, a *et seq.*

82. It is perhaps better to say that their acts are binding on the corporation to the extent of protecting the rights of third persons. Scanlan *v.* Snow, 2 App. Cas. (D. C.) 137, 22 Wash. L. Rep. 62; Hall *v.* Carey, 5 Ga. 239; Hamilton Trust Co. *v.* Clemes, 17 N. Y. App. Div. 152, 45 N. Y. Suppl. 141.

83. Charter Gas Engine Co. *v.* Charter, 47 Ill. App. 36; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Burr *v.* McDonald, 3 Gratt. (Va.) 215.

84. Rockville, etc., Turnpike Road *v.* Van Ness, 20 Fed. Cas. No. 11,986, 2 Cranch C. C. 449.

85. 3 Thompson Corp. § 3893.

86. *Georgia.*— Hall *v.* Carey, 5 Ga. 239.

Illinois.— Merrill *v.* Farris, 22 Ill. 303; Schofield *v.* Watkins, 22 Ill. 66.

Indiana.— By statute in Indiana no act of any board of directors done shall be invalid by reason of any informality or irregularity in time, place, and manner of their election. 2 Ind. Rev. Stat. (1888), § 3021.

Maryland.— Susquehanna Bridge, etc., Co. *v.* General Ins. Co., 3 Md. 305, 56 Am. Dec. 740; Smith *v.* Erb, 4 Gill 437.

Michigan.— Facey *v.* Fuller, 13 Mich. 527.

New Hampshire.— Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Lovett *v.* German Reformed Church, 12 Barh. 67; *In re* Mohawk, etc., R. Co., 19 Wend. 135.

Pennsylvania.—McGargell *v.* Hazleton Coal Co., 4 Watts & S. 424; Kingsbury *v.* Ledyard, 2 Watts & S. 37; York County *v.* Small, 1

ineligible;[87] he may have been elected by a less number of votes than the charter requires;[88] he may be in office under a judicial decision subsequently reversed;[89] or he may have been otherwise elected irregularly or illegally.[90] Although this subtitle is devoted especially to the subject of directors, yet the principle under discussion applies equally to other corporate officers, such as the president[91] and the treasurer.[92] The rule validates, so far as third persons are concerned, the acts of a person not qualified for the office of director, but who has nevertheless been elected such and permitted to act as such.[93] It is a necessary consequence of this doctrine that the appointment and powers of corporate officers may be inferred from the continued acquiescence of the corporation in their official acts, for instance in the case of an insurance company, the recognition by the company of the fact that a certain person has openly and notoriously transacted its business as its secretary, has had the custody of its books, and has borrowed money and entered accounts of it therein.[94]

2. WHO ARE DIRECTORS DE FACTO. Persons publicly exercising the functions of directors of private corporations have been held to be directors within the foregoing principle, where they were elected for a fixed term and were holding over after its expiration,[95] and it should be added that such directors are directors *de jure*;[96] where the election at which they were chosen was held outside the limits of the state by which the charter was granted;[97] where a judicial decision had been rendered removing them from their offices, but, on the same day and before the judgment had been filed and recorded, they had met and executed a note for the company;[98] or where the election was held by the proper body, but by a less number than the charter required.[99] So of persons elected directors of a railroad corporation under authority of an act of the legislature subsequently declared unconstitutional;[1] of trustees elected to fill vacancies on the board by all the available members thereof, who are less than a majority thereof, but who thereby

Watts & S. 315; Riddle *v.* Bedford County, 7 Serg. & R. 386.

South Carolina.—St. Luke's Church *v.* Mathews, 4 Desauss. 578, 6 Am. Dec. 619.

Vermont.— Lemington *v.* Blodgett, 37 Vt. 210; State *v.* Williams, 27 Vt. 755.

Virginia.—Burr *v.* McDonald, 3 Gratt. 215; Durkin *v.* Exchange Bank, 2 Patt. & H. 277.

England.— Definition of officers *de facto*. Rex *v.* Bedford Level, 6 East 356, 2 Smith K. B. 535.

87. Knight *v.* Wells, Lutw. 508.

88. Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411.

89. Ebaugh *v.* German Reformed Church, 3 E. D. Smith (N. Y.) 60.

90. Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411. See also the following cases:

Indiana.— Smith *v.* State Bank, 18 Ind. 327.

Maine.— Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78.

Massachusetts.— Blanford School Dist. No. 3 *v.* Gibbs, 2 Cush. 39.

Nevada.— State *v.* Cronan, 23 Nev. 437, 49 Pac. 41.

Pennsylvania.— Jenkins *v.* Baxter, 160 Pa. St. 199, 28 Atl. 682, 34 Wkly. Notes Cas. 114; Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131.

91. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

92. All Saints Church *v.* Lovett, 1 Hall (N. Y.) 213; Vernon Society *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; Spokane *v.* Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141.

For the analogous rule as to officers of municipal corporations see Tucker *v.* Aiken, 7 N. H. 113.

For the analogous rule as to proof of agency by the agent holding himself out as authorized, with the knowledge and consent of the principals, see among hundreds of other cases Beard *v.* Kirk, 11 N. H. 397; Davis *v.* Lane, 10 N. H. 156. See also 4 Thompson Corp. § 4881, and cases there cited.

93. Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

94. Talladega Ins. Co. *v.* Peacock, 67 Ala. 253. The act of the proper officer in making an appointment to an office has been said to be in the nature of a judicial act which is not to be questioned in any collateral action between individuals. People *v.* Seaman, 5 Den. (N. Y.) 409; Widdy *v.* Washburn, 16 Johns. (N. Y.) 49; Wood *v.* Peake, 8 Johns. (N. Y.) 69.

95. Thorington *v.* Gould, 59 Ala. 461.

96. See *supra*, IV, A, 3, b; IX, A, 7.

97. Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 86 Am. Dec. 128.

98. Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707.

99. Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411.

1. Bradford *v.* Frankfort, etc., R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819.

secure peaceable possession of office;[2] of a person elected a director by the body in which the right to elect was invested, but by a less number than the charter required;[3] of persons ineligible to the office, who have nevertheless been elected to it;[4] of a person who has ceased to be a shareholder during the term for which he was elected a director, but who continues to act as director, no judgment of ouster being rendered against him;[5] and of persons who are ineligible by reason of not being citizens of the state.[6]

3. Who Are Not Directors De Facto. But this implies that the officers are in the apparent possession of the office, and in the apparent exercise of its functions, since otherwise they are not officers in fact. It must therefore follow that one who is neither qualified for the office of a director in a corporation, and who, although elected to the office, has never accepted it, nor exercised its functions, nor held himself out as being such a director in any way, is not to be regarded as a *de facto* director.[7] A board of directors, not such *de jure*, cannot be regarded as such *de facto* when not in possession of the office of the corporation, or of its seal, records, or property, and where their title to the office is disputed.[8] The rule does not extend so far as to validate, even in respect of third persons, the acts of naked trespassers or intruders.[9] Thus it has been held that where an action has been commenced in the name of a corporation, by direction of its officers *de facto*, no other persons claiming a right to act as the officers of the corporation, defendant cannot be permitted to show for the purpose of defeating the action that the officers were illegally elected.[10] Where trustees and shareholders of a business corporation have sold out all the shares to others, and the trustees have closed their accounts and have done no further act as trustees until after a lapse of three years, when they meet and assume to allow an account against the corporation, and to draw a check upon its funds in favor of one who knows the facts, their act will be held invalid on the ground that they are neither trustees *de jure* nor *de facto*.[11]

4. Title to Office of Directors De Facto Cannot Be Impeached Collaterally. It is a part of this doctrine that the title to the office of a director *de facto* cannot be impeached collaterally, but can be impeached only in a direct proceeding by the state, or by a person having an interest in calling it in question as already

2. Baggot *v.* Turner, 21 Wash. 339, 58 Pac. 212.

3. Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411.

4. Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; *Re* Newcomb, 18 N. Y. Suppl. 16, 42 N. Y. St. 442. Especially in a case where the corporation itself endeavors to impeach the act of a director whom it has held out as such, on the ground of his ineligibility. Beard *v.* Kirk, 11 N. H. 397; Davis *v.* Lane, 10 N. H. 156. The principle applies in a case where a creditor of the corporation is contesting a mortgage of corporate property as against the mortgagee. Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

5. San Jose Sav. Bank *v.* Sierra Lumber Co., 63 Cal. 179.

6. Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131.

7. Rozecrans Gold Min. Co. *v.* Morey, 111 Cal. 114, 43 Pac. 585.

8. Stated more carefully there was a meeting of directors on the day after an illegal election, but not at the office of the company; at this meeting a quorum of *de jure* directors was present; the meeting was held without notice to those who were not present, and who had a right to such notice; those who thus met did not acquire possession of the corporate seal, records, and property; their authority was disputed by the *de jure* directors; it was disputed by those who up to that date had been president, vice-president, and secretary of the corporation; it was disputed by the majority of the executive committee of the corporation. It was held that those who thus met and were not directors *de jure* were not such *de facto*. Waterman *v.* Chicago, etc., R. Co., 139 Ill. 658, 29 N. E. 689, 32 Am. St. Rep. 228, 15 L. R. A. 418.

9. A bare swearing-in and acting does not make an officer *de facto*. There must be at least the form of an election, although the election may be subsequently set aside. Rex *v.* Lisle, 2 Str. 1090.

10. Middle Parish Charitable Assoc. *v.* Baldwin, 1 Metc. (Mass.) 359, opinion by Dewey, J.

11. Orr Water Ditch Co. *v.* Reno Water Co., 17 Nev. 166, 30 Pac. 695. See also where the lapse of time of the abandonment had been sixteen years. Bartholomew *v.* Bentley, 1 Ohio St. 37.

stated.[12] For example the title of *de facto* directors cannot be impeached by showing an irregularity in their election, in an action on a note executed by the corporation pursuant to their resolution.[13] Conflicting claims to a corporate office cannot be determined in an action of ejectment, brought in the name of the corporation by persons claiming to be its legal trustees;[14] in an action of replevin for personalty of the corporation;[15] upon a habeas corpus granted to a party who has been arrested on a warrant issued by such officer;[16] upon a motion to vacate judicial proceedings as irregular, where summons was served on persons claiming to be corporate officers, who were not in possession of the offices, although the court would vacate the proceedings, because they were not officers *de facto*;[17] on the ground of the invalidity of their election, so as to invalidate a resolution adopted by them, substituting a new trustee under a deed of trust made for the benefit of the corporation;[18] in a suit in equity by a shareholder to restrain the directors of a corporation from exercising the functions of their offices upon the ground of the illegality of their election;[19] in an action to try the title of their appointee to a corporate office;[20] in an action brought by the corporation on the ground that its trustees, who were the corporation, were not regularly elected, without showing a judgment of ouster;[21] or in an action by the board of directors in possession of the franchises of the corporation, against persons claiming to be the board, for a trespass respecting the corporate property.[22]

C. Powers of Directors — 1. Nature of Office in General. Generally speaking the directors of a joint-stock corporation are trustees in the control of its property and in the direction and management of its business affairs.[23] As hereafter seen shareholders have not as a general rule any direct voice in the management of the business affairs of the corporation, but their voice can be heard only when speaking through the directors, who are deemed in a qualified sense their agents, but are really mandataries.[24] There are three different views with refer-

12. See *supra*, IX, A, 11, f.

13. Barrell *v.* Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

14. Bellport Parish *v.* Tooker, 29 Barb. (N. Y.) 256.

15. Desmond *v.* McCarthy, 17 Iowa 525.

16. *Ex p.* Strahl, 16 Iowa 369.

17. Berrian *v.* New York Methodist Soc., 4 Abb. Pr. (N. Y.) 424.

18. Balfour-Guthrie Invest. Co. *v.* Woodworth, 124 Cal. 169, 56 Pac. 891.

19. Hughes *v.* Parker, 20 N. H. 58.

20. People *v.* Hills, 1 Lans. (N. Y.) 202, the office being that of secretary and treasurer of a railroad company.

21. Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429.

22. Atlantic, etc., R. Co. *v.* Johnson, 70 N. C. 348. *Compare* Walker *v.* Flemming, 70 N. C. 483. But see to the contrary where the action was forcible entry and detainer People *v.* Runkle, 9 Johns. (N. Y.) 147. And note that the celebrated Dartmouth College decision began in an action of trover by one set of the trustees suing as a corporation, against one claiming the office of secretary and treasurer, under the statutes of New Hampshire, to recover the records of the college. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

Contrary to the trend of the foregoing text it has been held that where, under the articles of incorporation, an assessment by directors duly elected and qualified under the statute is essential to create a liability upon shareholders, the validity of the acts of a board of directors *de facto*, and their authority as such may be called in question by any shareholder who has not acquiesced therein, whenever such acts are detrimental to his interests, affect his property rights, or impose a liability upon him, and the rights of third parties do not intervene. Schwab *v.* Frisco Min., etc., Co., 21 Utah 258, 60 Pac. 940. Similarly it has been held that the election of a new set of officers of a corporation dependent on the vote of a director illegally chosen cannot be upheld on the ground that he was a *de facto* director, in a direct proceeding between two sets of officers to try the title to the officers of the company. Schmidt *v.* Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. L. Rep. 763, 72 Am. St. Rep. 427.

23. Montgomery Light Co. *v.* Lahey, 121 Ala. 131, 25 So. 1006; Parker *v.* Nickerson, 112 Mass. 195; Bent *v.* Priest, 86 Mo. 475; Butts *v.* Wood, 38 Barb. (N. Y.) 181; Abbott *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578.

In some statutory schemes of incorporation the word "director" is defined to embrace all persons having by law the direction or management of the affairs of any such corporation, by whatever name they may be described in its charter or known in law. 2 N. Y. Rev. Stat. (Banks & Bros. (6th ed.) 1876), p. 303, § 56; Utah Comp. Laws (1876), p. 637, § 333. So in Cal. Pen. Code, § 572.

24. See *infra*, IX, C, 5.

ence to the duties and powers of directors: (1) That they are the body which has been incorporated, and hence the corporation itself. This is true in some cases.[25] (2) That they are general agents of the shareholders.[26] (3) That they are special agents of the shareholders in the sense that the public are bound to take notice of the limits of their authority.[27] But plainly, they are not agents in the strict sense; but an examination of their powers will lead to the conclusion that in most cases they derive their authority partly from the voice of the shareholders expressed in general meeting duly convened, partly from the charter, partly from applicatory statutes, partly from by-laws duly enacted and (in some cases) partly from other governing instruments.[28]

25. Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395. See also Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672. See also *supra*, I, A, 6.

26. Judicial theory in America greatly preponderates in the doctrine that in so far as directors can be treated as agents of the shareholders they are to be considered as general or managing agents.

Alabama.— Spyker *v.* Spence, 8 Ala. 333; Mobile Branch State Bank *v.* Collins, 7 Ala. 95.

Connecticut.— Goodwin *v.* U. S. Annuity, etc., Ins. Co., 24 Conn. 591.

Illinois.— Chetlain *v.* Republic L. Ins. Co., 86 Ill. 220.

Indiana.— Wright *v.* Bundy, 11 Ind. 398.

Maine.— Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34.

New Jersey.— Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659.

New York.—Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Leavitt *v.* Yeates, 4 Edw. 134.

Ohio.— Dayton, etc., R. Co. *v.* Hatch, 1 Disn. 84, 12 Ohio Dec. (Reprint) 501.

Pennsylvania.— Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Dana *v.* U. S. Bank, 5 Watts & S. 223; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Vermont.— State *v.* Smith, 48 Vt. 266; Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144; Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159.

27. This seems to be the English doctrine. Lindley Partn. (4th ed.) 249; Thompson *v.* Wesleyan Newspaper Assoc., 8 C. B. 849, 19 L. J. C. P. 114, 65 E. C. L. 849; Burmester *v.* Norris, 6 Exch. 796, 21 L. J. Exch. 43, 8 Eng. L. & Eq. 487; Ernest *v.* Nicholls, 6 H. L. Cas. 401, 3 Jur. N. S. 919, 6 Wkly. Rep. 24. See also Fountaine *v.* Carmarthen R. Co., L. R. 5 Eq. 316, 37 L. J. Ch. 429, 16 Wkly. Rep. 476. Occasionally, however, a more liberal interpretation of granted powers and a less rigid construction of deeds of settlement prevails. *In re* Ireland Land Credit Co., L. R. 4 Ch. 460, 39 L. J. Ch. 27, 20 L. T. Rep. N. S. 641, 17 Wkly. Rep. 689; Waterlow *v.* Sharp, L. R. 8 Eq. 501, 20 L. T. Rep. N. S. 902. See Peirce *v.* Jersey Waterworks Co., L. R. 5 Exch. 209, 39 L. J. Exch. 156, 22 L. T. Rep. N. S. 519, 18 Wkly. Rep. 838; Webb *v.* Herne Bay, L. R. 5 Q. B. 642, 39 L. J. Q. B. 221, 22 L. T. Rep. N. S. 745, 19 Wkly. Rep. 241; Hill *v.* Manchester, etc., Waterworks Co., 5 B. & Ad. 866, 3 L. J. K. B. 19, 2 N. & M. 573, 27 E. C. L. 364; Clarke *v.* Imperial Gas Light, etc., Co., 4 B. & Ad. 315, 2 L. J. K. B. 30, 1 N. & M. 206, 24 E. C. L. 143; Smith *v.* Hull Glass Co., 11 C. B. 897, 16 Jur. 595, 21 L. J. C. P. 106, 7 R. & Can. Cas. 287, 73 E. C. L. 897; Prince of Wales Assur. Soc. *v.* Athenæum Assur. Soc., 3 C. B. N. S. 756 note, 91 E. C. L. 756; Agar *v.* Athenæum L. Assur. Soc., 3 C. B. N. S. 725, 4 Jur. N. S. 211, 27 L. J. C. P. 95, 6 Wkly. Rep. 277, 91 E. C. L. 725; Anglo-Australian Ins. Co. *v.* British Provident Ins. Soc., 4 De G. F. & J. 341, 8 Jur. N. S. 628, 6 L. T. Rep. N. S. 517, 10 Wkly. Rep. 588, 65 Eng. Ch. 264 [*reversed* in 3 Giff. 521, 8 Jur. N. S. 299, 1 L. T. Rep. N. S. 126, 6 L. T. Rep. N. S. 68]; Royal British Bank *v.* Turquand, 5 E. & B. 248, 85 E. C. L. 248 [*affirmed* in 6 E. & B. 327, 1 Jur. N. S. 1086, 24 L. J. Q. B. 327]; Prince of Wales L., etc., Assur. Co. *v.* Harding, E. B. & E. 183, 4 Jur. N. S. 851, 27 L. J. Q. B. 297, 96 E. C. L. 183; *In re* Joint-Stock Co.'s Winding-up Acts, 4 Jur. N. S. 1140, 4 Kay & J. 549, 27 L. J. Ch. 829, 6 Wkly. Rep. 779.

28. An examination of Pierce *v.* Jersey Waterworks Co., L. R. 5 Exch. 209, will show that the English courts generally regard what is there called a company as a numerous partnership; from which it follows that the directors, in so far as they can be regarded as agents are agents of the partners or shareholders. But in the United States where, pursuing the subtlety of Chief Justice Marshall in the Dartmouth College case (Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. See also *supra*, I, A, 3), a corporation is deemed an invisible and intangible entity, and a person, in law, distinct from its shareholders, its directors, in so far as they can be regarded as agents, are the agents of this intangible, invisible, ideal body, the corporation. Since they can bind the corporation by acts done outside the state of its creation, they are necessarily agents; for the corporation itself cannot migrate. Wright *v.* Bundy, 11 Ind. 398; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274. See, however, Miller *v.* Ewer, 27 Me. 509, 46 Am. Dec. 619. *Compare* McCall *v.* Byram Mfg. Co., 6 Conn. 428. That directors are agents of the shareholders in a sense is discovered in the doctrine that the shareholders'

2. DOCTRINE THAT DIRECTORS MAY DO WHATEVER CORPORATION MAY DO — a. Statement of Doctrine. Loose expressions are found in judicial opinions to the effect that the board of directors or trustees practically constitute the corporation, and in general may act as the corporation, and unless specially restricted exercise the corporate powers.[29] But this in strictness is only true of those corporations in which the board of trustees or directors are themselves incorporated and are the corporation, which we have already seen[30] is often the case. In ordinary business corporations the powers of the board of directors, as we shall presently see, fall far short of being coequal with the powers of the corporation. It is hence better said that "the directors, in the absence of restrictions in the charter or by-laws, have all the authority of the corporation itself in the conduct of its ordinary business."[31]

b. Directors Cannot Act in Excess of Powers Granted to Corporation. This principle is obvious, and it is not necessary to enlarge upon it.[32]

3. EFFECT OF BY-LAWS LIMITING THEIR POWERS. As we have seen when treating of by-laws[33] it is competent for the body of shareholders (or where they possess the power by virtue of an express grant), for the directors themselves to establish by-laws restricting the powers of the directors so as to make them less than the powers which they might exercise under the charter or governing statute.[34]

4. DIRECTORS CANNOT ENLARGE THEIR POWERS BY ESTABLISHING BY-LAWS. Where an express power has been conferred upon the directors of a corporation to enact by-laws, it seems that they cannot so exercise the power as to enlarge their own powers, and to that extent encroach upon the powers of the shareholders.[35] Nor can they, through the instrumentality of a by-law, seize to themselves a power, such as that of assessing the shareholders, which has been vested in the shareholders by statute.[36] Nor will a by-law established by the directors under the authority of a statute be so construed as to override the law of the land.[37]

5. SHAREHOLDERS CANNOT ACT FOR CORPORATION. Speaking generally, in the absence of statutory authority, the shareholders cannot act for the corporation, either individually or collectively. By virtue of being shareholders they have no agency for the corporation, and cannot bind it, either by their acts, declarations, or admissions.[38] The directors as already seen[39] are not in a strict sense agents

may validate their unauthorized acts under the principle of ratification or estoppel.

29. Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Union Turnpike Road Co. *v.* Jenkins, 1 Cai. (N. Y.) 381; Leavitt *v.* Oxford, etc., Silver Min. Co., 3 Utah 265, 1 Pac. 356; Whitwell *v.* Warner, 20 Vt. 425.

30. See *supra*, I, A, 6.

31. Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159, 169, per Redfield, C. J. See also Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311; Stevens *v.* Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

32. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 29, 9 Am. Dec. 111; Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 63, 7 Am. Dec. 194; Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229.

33. See *supra*, V.

34. A pertinent illustration of this statement will be found in Union Mut. F. Ins. Co. *v.* Kerser, 32 N. H. 313, 64 Am. Dec. 375. See to the same effect Sullivan *v.* Triunfo Gold, etc., Min. Co., 29 Cal. 585; Campbell *v.* Merchants', etc., Mut. F. Ins. Co., 37 N. H. 35, 41, 72 Am. Dec. 324.

35. Curtis *v.* McCullough, 3 Nev. 202.

36. *Ex p.* Winsor, 30 Fed. Cas. No. 17,884, 3 Story 411. See also Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579.

37. For example a by-law of a banking corporation touching discounts will not be so construed as to override a statute against usury. Seneca County Bank *v.* Lamb, 26 Barb. (N. Y.) 595.

38. *California.*— Shay *v.* Tuolumne Water Co., 6 Cal. 73.

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565.

Indiana.— Harris *v.* Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372.

Louisiana.— German Evangelical Congregation *v.* Pressler, 14 La. Ann. 799.

Michigan.— Finley Shoe, etc., Co. *v.* Kurtz, 34 Mich. 89.

New York.— McCullough *v.* Moss, 5 Den. 567; Union Turnpike Road Co. *v.* Jenkins, 1 Cai. 381.

Pennsylvania.— Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256, 14 Am. Dec. 681; Com. *v.* St. Mary's Church Roman Catholic Soc., 6 Serg. & R. 508.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552.

39. See *supra*, IX, C, 1.

of the shareholders; the shareholders cannot therefore instruct or direct the directors with regard to any course of ordinary business action.[40] They cannot join another person to the board of directors and compel the directors to act in conjunction with one who is not a member of their board.[41] Where the charter and by-laws vest the power to borrow in the directors, if the shareholders vote to purchase certain property and rights, and to issue bonds therefor, the directors may refuse to carry out the arrangement.[42] Exceptions have been admitted to this rule, founded on the obvious conception that the shareholders of a corporation are the ultimate constituency, in other words the corporation itself. Thus where the inspectors appointed by the directors at a corporate election refused to act, it was held that an emergency had arisen which authorized the shareholders to appoint inspectors to act in their places.[43] Formal action is often dispensed with, even in the most important matters, where all the members of the corporation, including the shareholders and directors, are present and concur, although there is no formal vote either of the shareholders or of the directors. Such an informal concurrence has been held to validate a mortgage of the property of the corporation.[44] And so it has been held that a formal resolution at a shareholders' meeting, authorizing the president of the corporation to execute a deed conveying all the property of the corporation, is sufficient authority for such a conveyance.[45] So a ratification may take place by the acquiescence of the whole body of shareholders, validating an unlawful act of the directors or other corporate agents.[46] On the one hand we find a learned opinion in which it is held that the shareholders of a corporation have no power as such to authorize the sale of the corporate property, or to sell the same, either when collectively assembled in a shareholders' meeting or when acting individually; but that the power to sell and convey can be conferred only by the board of directors or trustees when assembled and acting as a board.[47] On the other hand we find holdings to the effect that the power to alien the property of the corporation, excluding sales made in the ordinary course of its business, lies in the shareholders and not in the directors.[48]

40. See the remarks of Kennedy, J., in Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223, 246. See also State *v.* State Bank, 6 La. 745; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Dayton, etc., R. Co. *v.* Hatch, 1 Disn. (Ohio) 84, 12 Ohio Dec. (Reprint) 501; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. But see Scott *v.* Eagle Fire Co., 7 Paige (N. Y.) 198.

41. Charlestown Boot, etc., Co. *v.* Dunsmore, 60 N. H. 85.

42. Cann *v.* Eakins, 23 Nova Scotia 475.

43. Matter of Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361, 364, per Mason, J. So it was held that a majority of the shareholders of a turnpike company assembled in shareholders' meeting might authorize directors to execute a promissory note of the company; and consequently if a note had been executed by the directors without such authority a subsequent resolution adopted by a majority of the shareholders, levying an assessment to pay the note, was a ratification, and made it the note of the company. Forbes *v.* San Rafael Turnpike Co., 50 Cal. 340.

44. Eureka Iron, etc., Works *v.* Bresnahan, 60 Mich. 332, 27 N. W. 524.

45. But it is to be noted that no board of directors had been elected for three years. Burr *v.* McDonald, 3 Gratt. (Va.) 215.

46. For a striking example see Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265, 51 Fed. 309, 2 C. C. A. 174 [*affirming* 47 Fed. 15]. And see *infra*, XV, B, 7, a, (I) *et seq.*

47. Gashwiler *v.* Willis, 33 Cal. 11, 91 Am. Dec. 607. That the power to sell real estate is vested in the directors and not in the shareholders, and that the directors may delegate the power, see Texas Consol. Compress, etc., Assoc. *v.* Dublin Compress, etc., Co., (Tex. Civ. App. 1896) 38 S. W. 404.

48. See *infra*, IX, C, 13, a *et seq.*

Acts deemed effective.— It has been held that a conveyance authorized at a meeting at which all the shareholders are present and sign a written consent to the proceedings on the record, pursuant to a statute, is as effective as if authorized by the directors, there being in fact but one beneficial shareholder and no board of directors. Manhattan Brass Co. *v.* Webster Glass, etc., Co., 37 Mo. App. 145, where the sole shareholder transferred one share of stock each to two dummies to make up the three shareholders required to constitute a joint-stock corporation under the statutes of Missouri. That an assignment of insurance policies by the president of a corporation after a loss, made to secure a debt, was valid, where there were no shareholders except those who were directors, and they assented to the assignment, although it was not formally authorized, see Lemars Shoe Co. *v.* Lemars Shoe Mfg. Co., 89 Ill. App. 245. Cir-

6. DIRECTORS HAVE NO COMMON-LAW POWERS. Except in those cases where, either by the terms of the statute under which the incorporation has taken place or in judicial theory, the directors are the body that is incorporated, and hence the corporation itself, and with other possible exceptions, it may be said that they have no common-law powers, but are in theory of law the agents of the corporation and the trustees of the shareholders, and can only act for and bind the corporation within such limits and in such modes as the charter or other governing statute or valid by-laws or the acts of the members, expressed in pursuance of statutory authority, authorizes it to do.[49] They are not therefore to be deemed special agents, but as already seen the American conception is that their office is generally that of general or managing agents.[50] Nor does this theory exclude the conclusion that they possess certain implied powers, that is to say, powers implied from the nature of their offices, and the usages of business, upon the possession of which the public may safely act, in the absence of notice to the contrary.

7. DIRECTORS CANNOT PERFORM CONSTITUENT ACTS. The directors are merely the managers of the property and business of the corporation, and cannot therefore perform constituent acts, by which expression is meant acts which involve fundamental changes in the constitution of the corporation.[51] They can make no change with reference to the nominal capital of the company[52] or to membership, without the consent of the shareholders; for this would have the effect of making the shareholders members of a different corporation from that which they had consented to join. It would be a breach of the organic compact which the members have made with each other. "It would change the relative influence, control and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter."[53] The fact that the charter in terms allows the corporation at its pleasure to increase its capital stock from time to time, and vests all the powers of the corporation in the board of directors has been held not to change this rule.[54] For the same reasons the directors have no power to reduce the capital of the corporation of which they are the governing body.[55] But according to some opinions they may, in the absence of statutory provision, direct a purchase by the corporation of its own stock, and may hold it unextinguished and reissue the same.[56] Neither can they, in corporations organized under a principle other than that of having a joint stock, admit new members, unless the power to do so is expressly conferred.[57] So in those corporations where the offices involve a franchise, the directors or trustees have no power of amotion. That resides alone in the corporation.[58] Unless thereto authorized by

cumstances under which the directors of a railroad corporation can extend the funds of the company in the construction of a passenger station in a state other than that in which the railroad company was created. Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363.

49. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180; Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311; Ridley *v.* Plymouth, etc., Grinding, etc., Co., 2 Exch. 711, 12 Jur. 542, 17 L. J. Exch. 252.

50. See *supra*, IX, C, 1.

51. Stark *v.* Burke, 9 La. Ann. 341.

52. See *supra*, VII, A, 2, a.

53. Gill *v.* Balis, 72 Mo. 424, 434; Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902.

54. Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902. See also Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347.

55. Hartridge *v.* Rockwell, R. M. Charlt. (Ga.) 260; Percy *v.* Millaudon, 3 La. 568.

56. Columbus City Bank *v.* Bruce, 17 N. Y. 507; Taylor *v.* Miami Exporting Co., 6 Ohio 176.

57. Thus under the fourth and fifth sections of the act incorporating the Philadelphia Savings Institution, the directors had not the power to elect members, but only to provide for their election. Com. *v.* Gill, 3 Whart. (Pa.) 228.

58. Power of amotion (including that of suspension) cannot be delegated to a board of directors. State *v.* Chamber of Commerce, 20 Wis. 68.

Power to issue preferred stock when authorized by legislature.— That the directors thereto authorized by the legislature, by an act which the shareholders have accepted, may issue preferred stock notwithstanding

the legislature, the directors of a corporation have no authority to apply to the legislature for an enlargement of the powers conferred upon the company by its charter.[59]

8. What Directors Cannot Do With Respect to Capital Stock of Company. This subject is more fully considered elsewhere,[60] but it may be stated here that directors have no power to cancel any part of a subscription to the capital stock of the company without the consent of the shareholders;[61] to make certificates purporting to represent shares of the capital stock which have not in fact been subscribed for, and put on the market as stock, and to sell them below par;[62] or, as a part of a fraudulent device to increase the capital stock in pretended pursuance of statutory authority, to issue bonds of the corporation convertible into stock.[63]

9. Directors Cannot Make, Alter, or Amend By-Laws. The directors of a corporation cannot make, alter, or amend its by-laws, unless thereto empowered by charter or statute; although as we have seen[64] numerous statutes have been enacted conferring upon them that power.[65] But if the governing statute gives them that power they may exercise it, although it is not conferred by the articles of incorporation.[66]

10. A Few Things Which Directors Cannot Do. A partial list of things which directors of private corporations cannot do is as follows: Consent to the act of an officer in converting funds of the corporation to his own use;[67] issue accommodation paper;[68] execute a lease which practically divests the corporation of all its

the opposition of individual shareholders see Curry *v.* Scott, 54 Pa. St. 270.

59. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579; State *v.* Adams, 44 Mo. 570; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. Hence it has been held that a resolve of the legislature upon an application of the directors, made without authority from the company, giving power to the company to raise an additional assessment on the shareholders, for the purpose of paying the debts of the company, is inoperative. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579. So the president and directors of a corporation cannot accept an amended charter, the effect of which would be to deprive certain shareholders of their rights as such. Boisdere *v.* Citizens' Bank, 9 La. 506, 29 Am. Dec. 453. But see Dayton, etc., R. Co. *v.* Hatch, 1 Disn. (Ohio) 84, 12 Ohio Dec. (Reprint) 501. Nor can the directors accomplish such results by indirect means, having no power to accomplish them directly. State *v.* McCullough, 3 Nev. 202. They cannot for example force an increase of the capital stock of the company by an agreement with an employee to pay for his services in stock, when none remains unissued. Finley Shoe, etc., Co. *v.* Kurtz, 34 Mich. 89.

60. See *supra*, VI, L, 2, c, (I) *et seq.*

61. Gathright *v.* Oil City Land, etc., Co., 56 S. W. 163, 21 Ky. L. Rep. 1657.

62. Fisk *v.* Chicago, etc., R. Co., 53 Barb. 513, 36 How. Pr. (N. Y.) 20. See also Sturges *v.* Stetson, 3 Phila. (Pa.) 304, 15 Leg. Int. (Pa.) 404.

63. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637. See also N. Y. Sess. Laws (1850), c. 140, § 28, subs. 10; Sturges *v.* Stetson, 3 Phila. (Pa.) 304, 15 Leg. Int. (Pa.) 404.

64. See *supra*, V, B, 3, b.

65. North Milwaukee Town Site Co. No. 2 *v.* Bishop, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174.

66. Houdeck *v.* Merchants', etc., Ins. Co., 102 Iowa 303, 71 N. W. 354.

By-laws enacted by the directors or trustees, acting within the scope of the powers conferred upon them by the charter, become the law of the corporation, and bind the shareholders and the trustees themselves. Burden *v.* Burden, 159 N. Y. 287, 54 N. E. 17 [*affirming* 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499].

A charter power to make such by-laws as shall appear needful and proper in regard to the management and disposition of the stock, property, estate, and effects of the corporation does not authorize the passage of a by-law fixing the time for the annual meeting of the shareholders for the election of directors; but the power to pass such a by-law resides in the shareholders only. Busby *v.* Montreal Bank, N. Brunsw. Eq. 62.

Where the directors have the power to make and enforce a particular rule or regulation, such a regulation is not of course invalid from the mere circumstance that it is called a by-law, and that no power to make by-laws has been expressly given by the charter. It was so held where the directors of a merchants' exchange established a by-law regulating the use of the exchange rooms. Albers *v.* Merchants' Exchange, 39 Mo. App. 583, where the court considered the validity of a by-law of an incorporated merchants' exchange, declaring the rooms open for business during certain hours daily, and prohibiting smoking therein during such hours.

67. I. X. L. Pressed-Brick Co. *v.* Schoeneich, 65 Mo. App. 283.

68. Hutchinson *v.* Sutton Mfg. Co., 57 Fed. 998.

property;[69] or delegate all their powers of management to an executive committee of their number.[70]

11. WHAT ACTS REQUIRE VOTE OF DIRECTORS. The following acts have been held of such solemnity and importance as to require, in order to their validity, a vote of the directors: A mortgage of the property of the corporation as security for a loan;[71] an assignment of all the property of the corporation for the benefit of its creditors;[72] and the giving of notice of the termination of a contract entered into by the corporation whereby it agreed to pay royalties for the right to manufacture under a patent.[73]

12. WHAT ACTS DO NOT REQUIRE VOTE OF DIRECTORS. The following acts are not of sufficient solemnity or importance to require a vote of the directors: The making, by a mercantile or manufacturing corporation, of ordinary contracts — those made by correspondence by the proper agent or manager,[74] or by its regular corresponding secretary;[75] the assignment of an account by its secretary and general manager;[76] the borrowing of money by the corporation, no resolution being entered on the minutes;[77] the institution of a proceeding to enforce a statutory lien against a shareholder for a past-due indebtedness to the corporation;[78] the chartering of vessels necessary to carry on the ordinary business of a steamship company in transporting passengers and freight;[79] and the institution of a proceeding to condemn lands by a water-supply company.[80]

13. DIRECTORS CANNOT SELL OUT CORPORATE ASSETS AND BUSINESS — a. In General. The directors of a corporation cannot, unless thereto authorized by the shareholders, put an end to its business and defeat the objects of its creation by selling out *en masse* all its property and good-will,[81] or any portion of its real estate necessary

69. Mercantile Library Hall Co. *v.* Pittsburgh Library Assoc., 173 Pa. St. 30, 33 Atl. 744, 37 Wkly. Notes Cas. (Pa.) 533.

70. Tempel *v.* Dodge, 89 Tex. 69, 32 S. W. 514 [*rehearing denied* in 33 S. W. 222].

As to the powers of executive committees see *infra*, IX, D, 5, a *et seq.*

Directors of a public corporation cannot maintain a suit to contest the validity of a lien made by the corporation upon property vested in it for public use, the right of action, if any, being in the state. Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599, 30 L. R. A. 747.

71. St. Joseph State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519, 48 N. E. 82 [*affirming* 68 Ill. App. 25, where the power is conceded to the president of a corporation to secure its debts by making a mortgage upon some of its property; but where he professes to act in pursuance of a resolution of the board of directors, the resolution must be valid, or his act will not be good as against creditors]; Currie *v.* Bowman, 25 Oreg. 364, 35 Pac. 848.

72. Norton *v.* Alabama Nat. Bank, 102 Ala. 420, 14 So. 872; Webb *v.* Midway Lumber Co., 68 Mo. App. 546.

73. Skinner *v.* Walter A. Wood Mowing, etc., Mach. Co., 20 N. Y. Suppl. 251, 47 N. Y. St. 506.

An assignment for creditors by a corporation, in pursuance of an order of three of the six directors, is invalid, where the statute requires a majority of the whole board to make a quorum. Webb *v.* Midway Lumber Co., 68 Mo. App. 546.

A resolution adopted by less than two thirds of the directors of a corporation, confirming a mortgage previously executed in pursuance of a resolution which was invalid under Ill. Rev. Stat. c. 32, § 20, because the meeting of the board was held outside the state without the authority of two thirds of the directors, or authorizing a new mortgage, does not effect an attachment lien acquired upon the property in the meantime, and such lien takes precedence of the mortgage. St. Joseph State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519, 48 N. E. 82 [*affirming* 68 Ill. App. 25, and *citing* Trumbull *v.* Union Trust Co., 33 Ill. App. 319; Stein *v.* La Dow, 13 Minn. 412; McKeag *v.* Collins, 87 Mo. 164; Holland *v.* Drake, 29 Ohio St. 441; Coleman *v.* Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253].

74. Scofield *v.* Parlin, etc., Co., 61 Fed. 804, 10 C. C. A. 83.

75. Hall *v.* Herter, 90 Hun (N. Y.) 280, 35 N. Y. Suppl. 769, 70 N. Y. St. 273.

76. Tuller *v.* Arnold, 98 Cal. 522, 33 Pac. 445. See also Greig *v.* Riordan, 99 Cal. 316, 33 Pac. 913.

77. Yolo Bank *v.* Weaver, (Cal. 1892) 31 Pac. 160.

78. Elliott *v.* Sibley, 101 Ala. 344, 13 So. 500.

79. Prentice *v.* U. S., etc., Steamship Co., 58 Fed. 702.

80. Kountze *v.* Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252 [*affirmed* in 58 N. J. L. 695, 34 Atl. 1099].

81. Rollins *v.* Cray, 33 Me. 132; Abbott *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578, 21 How. Pr. (N. Y.) 193; Chicago City R. Co. *v.* Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Colman *v.* Eastern Counties R. Co., 10 Beav. 1.

for the transaction of its customary business;[82] lease its entire property for a period of nine hundred and ninety-nine years;[83] or grant an option to purchase its entire works at any time within twenty years.[84] But they may, it has been held, do this in order to raise money to pay the debts of the corporation where its affairs are so desperate that it cannot continue its business;[85] or they may it seems transfer all its property to another corporation, with the assent of a large majority of the shareholders, in order to prevent a total loss.[86] And of course they have the power to alien the entire property of the corporation where the power is conferred upon them by the charter or governing statute, in express language or by necessary implication.[87]

b. May Transfer Corporate Property in Ordinary Course of Business. But they may transfer corporate property in the ordinary course of business, and may appoint agents for that purpose, even one of their own number, as to assign or transfer a note belonging to the corporation.[88]

c. May Alien Corporate Real Estate in Course of Business. But this is not at all incompatible with the implication of power in the directors of a corporation to alien the real estate of the corporation in the ordinary course of its business.[89] For example the directors of a mining corporation, organized with power to acquire and hold mining lands and other real property, and to mine and dispose of mineral and other products thereof, may lease its property for a fixed rental for a period of five years.[90] If under the charter the directors possess all the powers which the corporation itself possesses, not incompatible with the by-laws, they may mortgage its lands to secure its bonds, where the by-laws permit this to be done.[91]

d. May Pledge, Mortgage, and Convey Corporate Property to Secure Debts. In general it may be stated that as an incident to the authority of the directors to contract debts and obligations in the course of the ordinary business of the corporation, they have authority to pledge and convey the real or personal estate of the corporation as security for the payment of the same.[92]

82. Rollins *v.* Cray, 33 Me. 132.

83. Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103.

84. Clay *v.* Rufford, 5 De G. & S. 768, 19 Eng. L. & Eq. 350.

85. Ashurst's Appeal, 60 Pa. St. 290. See also Sheldon Hat Blocking Co. *v.* Eickmeyer Hat Blocking Co., 56 How. Pr. (N. Y.) 70.

86. People *v.* Ballard, 3 N. Y. Suppl. 845.

87. As was the case with the charter of the St. Louis Gaslight Company. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69.

88. Cooper *v.* Curtis, 30 Me. 488; Stevens *v.* Hill, 29 Me. 133; Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59; Northampton Bank *v.* Pepoon, 11 Mass. 288; Spear *v.* Ladd, 11 Mass. 94.

Might execute a release, under the old rule, and qualify an interested witness. Lewis *v.* Eastern Bank, 32 Me. 90.

When the assent of a banking corporation that a note may be sued on in its corporate name may be inferred from the acts of its officers, without a formal vote of its directors. Lime Rock Bank *v.* Macomber, 29 Me. 564.

89. See a valuable note on this subject in 59 Am. Rep. 466.

90. Hennessy *v.* Muhleman, 40 N. Y. App. Div. 175, 57 N. Y. Suppl. 854 [*reversing* 27 Misc. (N. Y.) 232, 57 N. Y. Suppl. 114].

Statutory power which authorizes the directors of a railroad company to sell a portion of its right of way in satisfaction of a mortgage debt. Donner *v.* Dayton, etc., R. Co., 1 Cinc. Super. Ct. 130.

91. Hendee *v.* Pinkerton, 14 Allen (Mass.) 381. *Compare* Tyrrell *v.* Washburn, 6 Allen (Mass.) 466. But it has been held that authority given to a single director to make contracts for the sale of the lands of the corporation does not authorize him to convey them. Green *v.* Hugo, 81 Tex. 452, 17 S. W. 79, 26 Am. St. Rep. 824.

92. *Maine.*—Augusta Bank *v.* Hamblet, 35 Me. 491.

Massachusetts.— Hendee *v.* Pinkerton, 14 Allen 381; Sargent *v.* Webster, 13 Metc. 497, 46 Am. Dec. 743; Burrill *v.* Nahant Bank, 2 Metc. 163, 35 Am. Dec. 395.

Michigan.— Commissioners Bank *v.* Brest Bank, Harr. Ch. 106.

New Hampshire.— Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Hoyt *v.* Thompson, 19 N. Y. 207; Jackson *v.* Brown, 5 Wend. 590.

Pennsylvania.— Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

Tennessee.— *In re* New Memphis Gaslight Co., 105 Tenn. 268, 60 S. W. 206.

Vermont.— Miller *v.* Rutland, etc., Co., 36 Vt. 452.

e. May Assign All Assets of Corporation For Benefit of Its Creditors. There is much authority for the conclusion that the directors of an insolvent corporation may, without the consent of its shareholders, make an assignment in good faith of all the assets of the corporation to a trustee for the payment of its debts;[93] and it has been held that they may do this without the assent, or against the expressed dissent, of the shareholders.[94] But as the exercise of this power generally has the effect of putting an end to the corporation, its existence in the directors is denied by some courts.[95] This is especially true where the governing statute provides a different mode for winding up an insolvent corporation and liquidating its debts, the statutory mode being exclusive;[96] and it has been so held in view of a statute providing for the voluntary dissolution of the corporation by the action of its shareholders.[97]

14. May Borrow Money For Ordinary Corporate Purposes — a. In General. The directors of a corporation may, according to the American view of their powers,[98] borrow money to be used in carrying on the ordinary business of the corporation, and may make or indorse the necessary instruments to that end.[99] Where a general power on the part of the directors to borrow for the corporation thus exists, one who lends money to it, upon their application, in good faith, will not be charged with knowledge of, or responsibility for, any breach of trust on their part in the application of it to the use of the corporation.[1] Nor will the corporation be allowed, while keeping the money, to set up a want of power on the part of its directors to borrow it, or that it was after being borrowed put to unauthorized uses.[2]

b. Power to Borrow Includes Power to Secure Debt. A general power in the directors to borrow money for the use of the corporation includes the power to secure the debt thus created, in any appropriate mode, as by assigning bonds and mortgages owned by the corporation[3] or by mortgaging the corporate property.[4]

93. *Maryland.*— Merrick *v.* Metropolis Bank, 8 Gill 59.

Michigan.— Boynton *v.* Roe, 114 Mich. 401, 72 N. W. 257.

Pennsylvania.— Dana *v.* Bank U. S., 5 Watts & S. 223.

South Dakota.— Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706.

Wisconsin.— Goetz *v.* Knie, 103 Wis. 366, 79 N. W. 401.

94. Hutchinson *v.* Green, 91 Mo. 367, 1 S. W. 853. But see De Camp *v.* Alward, 52 Ind. 468; Boynton *v.* Roe, 114 Mich. 401, 72 N. W. 257; Commissioners Bank *v.* Brest, Bank, Harr. Ch. (Mich.) 106.

95. Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

96. Commissioners Bank *v.* Brest Bank, Harr. Ch. (Mich.) 106.

97. Kyle *v.* Wagner, 45 W. Va. 349, 32 S. E. 213.

Whether directors may assign corporate property to other trustees for lawful purposes.— There is a holding to the effect that they can. Ashhurst's Appeal, 60 Pa. St. 290. There is another holding conceding the power but holding that the exercise of it will be subjected to a rigid scrutiny. Ogden *v.* Murray, 39 N. Y. 202. The clear view would seem to be that they have no such power unless the statute or other governing instrument gives it.

98. The English rule is the contrary. Chambers *v.* Manchester, etc., R. Co., 5 B. & S. 588, 10 Jur. N. S. 700, 33 L. J. Q. B. 268, 117 E. C. L. 588; Burmester *v.* Norris, 6 Exch. 796, 21 L. J. Exch. 43, 8 Eng. L. & Eq. 487.

99. Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59; Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; Fleckner *v.* U. S. Bank, 9 Wheat. (U. S.) 338, 5 L. ed. 631.

They may do this notwithstanding a resolution of the shareholders that "no further assessments shall be made except by direction." Shickell *v.* Berryville Land, etc., Co., 99 Va. 88, 3 Va. Supreme Ct. 45, 37 S. E. 813.

1. North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845; Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

2. North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

There are statutes requiring the assent of shareholders of a given value. 5 Thompson Corp. § 6172 *et seq.* And see *infra,* XVIII, B, 1, n, (IV), (A) *et seq.*

As to the mode in which this power is exercised by the directors see also 5 Thompson Corp. § 6175; and *infra,* XVIII, B, 2, a, (I) *et seq.*

As to this power under the general banking law of New York see Leavitt *v.* Yates, 4 Edw. (N. Y.) 134.

3 North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

4. That the power to borrow money car-

15. May Make and Transfer Negotiable Paper. According to the American doctrine the directors of any business corporation have the power to make, accept, or assign negotiable paper, in the course of the ordinary business of the corporation;[5] and this power has been conceded to the trustees of other corporations, such as a society for the erection of a monument;[6] and of course it belongs to the directors of banking corporations.[7]

16. May Employ Ministerial Agents. It is manifestly a part of the mere business powers of the directors of a business corporation to employ mere ministerial agents and servants to transact the business and perform the work of the corporation. But they cannot appoint corporate officers in perpetuity, at a stated salary, as for example a vice-president.[8] Nor can they employ a general manager for a fixed period, for example by the year, under by-laws which hold that all officers of the corporation shall hold office during the pleasure of the board of directors.[9]

17. May Pay Wages in Advance. The directors of a manufacturing corporation have the power, in the absence of some express restraint, to make an advance in the payment of wages to an agent of the corporation; and for this purpose they may empower the agent to use the credit of the company.[10]

18. May Fix Salaries of Corporate Officers. In the absence of any prohibition in charter, statute, or by-law, the directors may fix the salaries of ministerial officers of the corporation.[11]

19. Cannot Dispose of Shares of Corporation Below Par. Unless thereto authorized by statute or charter, the directors of a corporation cannot dispose of the shares of its corporate stock at less than par; nor can they accomplish such a result indirectly by executing a bond to a stock-broker for a sum largely in excess of the consideration for which it was executed, and by permitting the obligee in the bond to convert it into stock of the nominal value of the sum named in the bond.[12]

20. Cannot Levy Assessments Until Whole Number of Shares Subscribed. Unless the governing statute, or some other valid governing instrument otherwise provides,[13] the general doctrine is, that until all the capital which it is intended to raise is subscribed for, the corporation is merely inchoate,[14] and the subscriptions of

ries with it a power on the part of the corporation to mortgage its property to secure the debt see *infra*, XVIII, B, 1, a.

5. Tripp *v.* Swanzey Paper Co., 13 Pick. (Mass.) 291. Here again the English is contrary to the American law. Dickinson *v.* Valpy, 10 B. & C. 128, 8 L. J. K. B. O. S. 51, 5 M. & R. 126, 21 E. C. L. 63; Harmer *v.* Steele, 4 Exch. 1, 19 L. J. Exch. 34. *Compare* Thompson *v.* Wesleyan Newspaper Assoc., 8 C. B. 849, 19 L. J. C. P. 114, 65 E. C. L. 849.

6. Hayward *v.* Pilgrim Soc., 21 Pick. (Mass.) 270. See also First Baptist Church *v.* Caughey, 85 Pa. St. 271.

7. Stevens *v.* Hill, 29 Me. 133. See also Northampton Bank *v.* Pepoon, 11 Mass. 288.

Single director no such power without special authority. Lawrence *v.* Gebhard, 41 Barb. (N. Y.) 575.

Power of directors to guarantee bonds of another company. Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488.

When they assume the debt of a third person.— Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144.

8. West *v.* Camden, 135 U. S. 507, 10 S. Ct. 838, 34 L. ed. 254.

9. Fowler *v.* Great Southern Telephone, etc., Co., 104 La. 751, 29 So. 271.

10. Tripp *v.* Swanzey Paper Co., 13 Pick. (Mass.) 291.

11. Waite *v.* Windham County Min. Co., 37 Vt. 608.

12. Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 3 Phila. 304, 1 Biss. 246. See also Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 513, 36 How. Pr. (N. Y.) 20. That directors of a joint-stock corporation have no authority under the Manitoba Joint-Stock Companies Incorporation Act to issue paid-up stock below par without the authority of a special general meeting of shareholders see North-West Electric Co. *v.* Walsh, 29 Can. Supreme Ct. 33.

13. Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157.

14. *California.*— Santa Cruz R. Co. *v.* Schwartz, 53 Cal. 106.

Illinois.— People *v.* National Sav. Bank, 129 Ill. 618, 22 N. E. 288; Allman *v.* Havana, etc., R. Co., 88 Ill. 521.

Maine.—Rockland, etc., Steamboat Co. *v.* Sewall, 78 Me. 167, 3 Atl. 181.

Massachusetts.—People's Ferry Co. *v.* Balch, 8 Gray 303.

Minnesota.— Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716.

the shareholders are conditional merely, a mere proposition to contribute a certain amount to make up the total sum agreed to be raised.[15] Where this doctrine prevails, unless the charter, governing statute, or some other valid instrument provides that the corporate life shall be deemed to be in existence before this stated amount of capital has been subscribed for, and authorizes it to commence business before this event, the directors have no power to launch it upon the business for which it was created, or to make contracts or incur liabilities in furtherance of the corporate enterprise;[16] and hence no power to levy an assessment upon the shares.[17]

21. Cannot Give Away Assets of Corporation. Directors have no power, by giving away the assets of the corporation, to deprive it of the means of accomplishing the purpose for which it was created.[18] But they may do the next thing to giving away the corporate assets by ratifying a debt of the corporation which has been barred by the statute of limitations.[19]

22. Cannot Use Funds of Corporation in Purchasing Its Own Shares. They cannot use the funds of the corporation in purchasing the shares of its members, thereby distributing its tangible assets among its members and advancing its insolvency and dissolution.[20]

23. Cannot Release Shareholders — a. In General. For the same reason they cannot release subscribers to the capital stock of the corporation, unless the corporation received an adequate consideration therefor.[21]

b. But May Make Bona Fide Compromises. But may make in the exercise of their best judgment and acting in good faith *bona fide* compromises of disputed claims, and may settle pending actions.[22]

24. May Conduct Corporate but Not Private Litigation at Corporate Expense. The directors of a corporation may, unless restrained by some governing instrument, prosecute or defend any litigation of the corporation at the corporate expense; but they cannot fritter away its funds in litigation in respect to their own individual rights in the corporation.[23] To prosecute and defend actions for the corporation is not only a power but a duty of the directors; and if they fail or refuse to perform it, the shareholders will be allowed in equity to do so, under conditions hereafter stated.[24]

Missouri.— Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481.

New Hampshire.— Contoocook Valley R. Co. *v.* Barker, 32 N. H. 363.

New York.— Bray *v.* Farwell, 81 N. Y. 600 [*overruling* it seems Rensselaer, etc., Plank Road Co. *v.* Wetzel, 21 Barb. 56].

15. Temple *v.* Lemon, 112 Ill. 51; Hale *v.* Sanborn, 16 Nehr. 1, 20 N. W. 97. *Compare* Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257; Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340.

The general statutes of Minnesota abrogate this rule.— Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716.

16. Allman *v.* Havana, etc., R. Co., 88 Ill. 521; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23.

17. Allman *v.* Havana, etc., R. Co., 88 Ill. 521; Stoneham Branch R. Co. *v.* Gould, 2 Gray (Mass.) 277; Worcester, etc., R. Co. *v.* Hinds, 8 Cush. (Mass.) 110; Cabot, etc., Bridge *v.* Chapin, 6 Cush. (Mass.) 50; Lexington, etc., R. Co. *v.* Chandler, 13 Metc. (Mass.) 311; Central Turnpike Corp. *v.* Valentine, 10 Pick. (Mass.) 142; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23; New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390, 64 Am. Dec. 300. See also *supra*, VI, H, 14, a.

18. Frankfort Bank *v.* Johnson, 24 Me. 490; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29. Cannot therefore issue its shares at less than par. Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 3 Phila. (Pa.) 304, 1 Biss. 246.

19. Leavitt *v.* Oxford, etc., Silver Min. Co., 3 Utah 265, 1 Pac. 356.

20. Bedford R. Co. *v.* Bowser, 48 Pa. St. 29. See also Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Matter of Cameron's Coalbrook Steam Coal, etc., Co., 5 De G. M. & G. 284, 24 L. J. Ch. 130, 2 Wkly. Rep. 448, 54 Eng. Ch. 226.

21. Braddock Electric R. Co. *v.* Bily, 11 Pa. Super. Ct. 144.

22. Donahoe *v.* Mariposa Land, etc., Co., 66 Cal. 317, 5 Pac. 495.

23. Harbison *v.* Hartford First Presb. Soc., 46 Conn. 529, 33 Am. Rep. 34.

24. See *infra*, IX, N, 1, a.

A contumacious resignation by officers of a company cannot prevent the company from filing a petition in bankruptcy, it has been held, if a majority of shareholders authorize it to be done. Davis *v.* Railroad Co., 7 Fed. Cas. No. 3,638, 1 Woods 661.

25. May Not Express Corporate Willingness to Become a Bankrupt. Where the governing statute provides that a petition for the commencement of insolvency proceedings may be signed by an officer duly authorized by a majority of directors present and voting at a meeting called for that purpose, the directors have no power by virtue of their general authority to manage and conduct the business of the corporation to express the corporate willingness to become a bankrupt.[25]

26. Effect of Ultra Vires Acts of Directors. The law on this subject cannot be stated in a paragraph, and it is therefore reserved for treatment in a subsequent section.[26] If the thing done by the directors is not only *ultra vires*, but prohibited by positive law, no one participating in it with knowledge can acquire any rights in respect of it. Thus one who with knowledge advances money to the directors of a mining company to enable them to declare a fictitious dividend in the face of a prohibitory statute can have no remedy against the company for such advance.[27] Acts of directors of corporations which are *ultra vires* in the sense of being beyond the power delegated to or by the directors, but not in the sense of being beyond the power of the corporation by reason of positive illegality, are often made good by ratification or cured by estoppel, when necessary to preserve the rights of third parties, as will appear later.[28]

27. When May Act in Another State. While the directors of a corporation cannot, unless thereto empowered by charter or statute, meet in another state for the purpose of performing constituent acts, yet they may act in another state in or about any matter which pertains to their powers as agents of the corporation in the conduct of its business, such as to give notes and mortgages to secure the same.[29] In the absence of statutory or other restraint, it is within the scope of their powers to extend the business of the corporation into another state.[30]

28. Their Power as to Dividends. The discretionary power of declaring and paying dividends generally resides, in the case of business corporations, with the directors; and as we shall hereafter see[31] statutes exist making them liable to creditors for declaring and paying unlawful dividends; and in the absence of such statutes judicial decisions are not wanting holding them so liable.[32] Where the charter provides that dividends may be declared "after the close of the fiscal year," the directors cannot declare dividends on the common stock before the close of the fiscal year.[33]

29. May Lease Corporate Property. The directors of a mining company may lease the property of the company for a period of five years at a fixed rental,[34] and the trustees of a secret society may lease its lodge room to another society for one night in each week.[35]

25. *In re* Bates Mach. Co., 91 Fed. 625.

26. See *infra*, XVII, F, 1, a.

27. Davis *v.* Flagstaff Silver Min. Co., 2 Utah 74. In so far as the case of Colman *v.* Eastern Counties R. Co., 10 Beav. 1, is opposed to this proposition it is unsound and ought not to be followed.

Loss of power by loss of time.—It seems that an express power conferred on the governing body of a corporation to do an act is not lost by the mere lapse of time, at least within the period of the statute of limitations. Hayward *v.* Pilgrim Soc., 21 Pick. (Mass.) 270.

28. See *infra*, XV; XIV.

29. Reichwald *v.* Commercial Hotel Co., 106 Ill. 439.

30. Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559.

31. See *infra*, IX, P, 9, a *et seq.*

32. Evans *v.* Coventry, 2 Jur. N. S. 557, 25 L. J. Ch. 489, 4 Wkly. Rep. 466 [on appeal, 8 De G. M. & G. 835, 57 Eng. Ch. 645]. See also *In re* National Funds Assur. Co., 10 Ch. D. 118, 48 L. J. Ch. 163, 39 L. T. Rep. N. S. 420, 27 Wkly. Rep. 302. *Compare* Hallett *v.* Dowdall, 18 Q. B. 2, 16 Jur. 462, 21 L. J. Q. B. 98, 83 E. C. L. 2; *In re* Mercantile Trading Co., L. R. 4 Ch. 475, 20 L. T. Rep. N. S. 502, 17 Wkly. Rep. 654.

33. Marquand *v.* Federal Steel Co., 95 Fed. 725.

Statutory provision under which the directors cannot select the days upon which dividends upon preferred stock shall be declared and paid. Marquand *v.* Federal Steel Co., 95 Fed. 725.

34. Hennessy *v.* Muhleman, 40 N. Y. App. Div. 175, 57 N. Y. Suppl. 854 [*reversing* 27 Misc. (N. Y.) 232, 57 N. Y. Suppl. 114].

35. Philip *v.* Aurora Lodge, 87 Ind. 505.

May authorize the shareholders to pay

30. MAY CREATE NEW DEBTS TO PAY OFF OLD ONES. It is obviously within the scope of the ordinary business powers of the directors of a corporation to create a new corporate debt to pay off an old one, whenever in their opinion it becomes necessary or expedient so to do.[36]

31. NEED NOT SIGN THEIR NAMES TO CORPORATE CONTRACTS. The directors of a corporation, in executing the corporate contracts, need not sign their names thereto, although to do so will not vitiate the contract.[37] As seen hereafter[38] the customary and proper way is, in cases where the nature of proposed contract is such as to require this solemnity, for the directors to pass a resolution directing the proper ministerial officers of the corporation, usually the president and secretary, to execute the required contract.

32. THEIR POWERS UNDER SHAREHOLDERS' RESOLUTION PLACING CONTROL AND MANAGEMENT IN THEIR HANDS. A shareholders' resolution that "it is not deemed necessary at this meeting to adopt by-laws, for the reason that the articles of incorporation provide that the control and management of the corporation shall be in the hands of the board of directors" has been held to leave the entire control of the corporate business with the directory.[39]

33. THEIR POWERS UNDER OTHER INSTRUMENTS. Where the shareholders authorize the issue of bonds to retire a former bond issue, to pay a debt for betterments, and to construct further improvements, and provide by resolution that such bonds shall be subject to the control of the board of directors, to be used for the purposes specified, the directors may pledge such bonds as security for existing and future indebtedness for the purposes contemplated in the resolution.[40]

34. THEIR CONTRACTS NOT VOIDABLE BECAUSE OF MERE ERRORS OF JUDGMENT. The contracts of directors and other officers of corporations will not be set aside in equity, as being in breach of their official trust, because of mere errors of judgment.[41]

35. RIGHT OF DIRECTORS TO INSPECT BOOKS AND RECORDS. Every director has a right to inspect the books and records of the corporation, in order to ascertain what the corporation is doing, and the majority of the board cannot lawfully exclude a minority from this right.[42]

D. Delegation of Their Powers by Directors — 1. GENERAL RULE THAT DIRECTORS CANNOT DELEGATE DISCRETIONARY POWERS. The directors of a corporation cannot as a general rule delegate their discretionary powers to one or more of their number, unless (1) the charter, governing statute, by-law, or other valid governing custom empowers them so to do; or (2) there is an instrument permitting them so to do of such public notoriety that persons contracting with the corporation may be presumed to have knowledge of it.[43]

debts due from the directors to the corporation by transferring to the creditors shares held by the directors in the corporation. Taylor *v.* Miami Exporting Co., 6 Ohio 176.

36. Hayward *v.* Pilgrim Soc., 21 Pick. (Mass.) 270.

37. Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256. See also McDonough *v.* Templeman, 1 Harr. & J. (Md.) 156, 2 Am. Dec. 510.

38. See *infra*, XII, A, 2.

39. Reichwald *v.* Commercial Hotel Co., 106 Ill. 439, 447.

Instruments under which three directors had power to draw checks and apply the money thereby raised. *Ex p.* Johnson, 31 Eng. L. & Eq. 430.

40. *In re* New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206.

41. Arapahoe Cattle, etc., Co. *v.* Stevens, 13 Colo. 534, 22 Pac. 823 (agreement to pay a third party five thousand dollars in shares of the stock of the corporation for procuring for it a loan of fifteen thousand dollars to help it through an emergency); Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483 (excessive rent agreed to be paid).

42. Stone *v.* Kellogg, 62 Ill. App. 444.

43. Among the cases affirming the general doctrine that directors cannot delegate their discretionary powers are the following:

Maine.— Female Orphan Asylum *v.* Johnson, 43 Me. 180; York, etc., R. Co. *v.* Ritchie, 40 Me. 425.

Massachusetts.— Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Tippets *v.* Walker, 4 Mass. 595.

New Hampshire.— Manchester, etc., R. Co. *v.* Fisk, 33 N. H. 297; Gillis *v.* Bailey, 21 N. H. 149; Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Caldwell *v.* Mutual Reserve

2. Rule Where Directors Are Deemed to Be Corporation. Under some systems the directors or trustees and not the shareholders or members are deemed to be the body that is incorporated, that is to say, the corporation. Where this theory prevails, the directors or trustees are the original possessors of the powers of the corporation; and consequently it has been held that they may delegate such power to others without violating the maxim, *Delegata potestas non potest delegari.* Under this theory it has been held, but in opposition to other judicial authority, that a board of bank directors may delegate an authority to a committee of their own members to alien or mortgage real estate of the corporation, and that such an authority necessarily implies the further authority to execute suitable instruments, using the corporate seal for that purpose.[44]

3. What Powers May Not Be Delegated by Directors. The general rule is that the power to alien the real property of a corporation in any manner except in the ordinary course of business, whether by sale, mortgage, or lease, is a discretionary power which the directors of the corporation cannot delegate to another;[45] and this is so of the power to allot the unsubscribed shares of the corporation, which power has been delegated in the board of directors; and so of the power of making assessments upon shares of the capital stock.[46]

4. May Delegate Ministerial Duties — a. In General. Directors may, however, delegate to one or more of their number, or to particular ministerial officers of the corporation, or to agents other than such officers, the power to perform acts which are ministerial in their nature;[47] and where, in the exercise of their discretionary powers, directors have determined upon a particular course of action they may delegate the performance of the act to other officers of the corporation, or to agents, such as the ministerial duty of conducting a sale of corporate property which has been authorized by the shareholders.[48]

Fund L. Assoc., 53 N. Y. App. Div. 245, 65 N. Y. Suppl. 826; Lyon *v.* Jerome, 26 Wend. 485, 37 Am. Dec. 271.

England.— *In re* County Palatine Loan, etc., Co., L. R. 9 Ch. 691, 43 L. J. Ch. 588, 31 L. T. Rep. N. S. 52, 22 Wkly. Rep. 697; *In re* London, etc., Bank, L. R. 3 Ch. 651, 37 L. J. Ch. 905, 19 L. T. Rep. N. S. 193, 16 Wkly. Rep. 1003; *Ex p.* Howard, L. R. 1 Ch. 561, 14 L. T. Rep. N. S. 742, 14 Wkly. Rep. 992; Rex *v.* Gravesend, 2 B. & C. 602, 4 D. & R. 117, 2 L. J. K. B. O. S. 94, 9 E. C. L. 264; Cook *v.* Ward, 2 C. P. D. 255, 36 L. T. Rep. N. S. 893, 25 Wkly. Rep. 593.

44. Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395. See also *Ex p.* Conway, 4 Ark. 302; Whitney *v.* Union Trust Co., 65 N. Y. 576; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223; Burr *v.* McDonald, 3 Gratt. (Va.) 215.

45. Gillis *v.* Bailey, 21 N. H. 149.

46. Pike *v.* Bangor, etc., R. Co., 68 Me. 445; Silver Hook Road *v.* Greene, 12 R. I. 164.

Cases are found which ignore or attempt to evade this principle, such as Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536; *In re* County Palatine Loan, etc., Co., L. R. 9 Ch. 691, 43 L. J. Ch. 588, 31 L. T. Rep. N. S. 52, 22 Wkly. Rep. 697; *In re* London, etc., Bank, L. R. 3 Ch. 651, 37 L. J. Ch. 905, 19 L. T. Rep. N. S. 193, 16 Wkly. Rep. 1003; *Ex p.* Howard, L. R. 1 Ch. 561, 14 L. T. Rep. N. S. 742, 14 Wkly. Rep. 992; Cook *v.* Ward, 2 C. P. D. 255, 36 L. T. Rep. N. S. 893, 25 Wkly. Rep. 593.

The power to delegate the power of making assessments is often conferred by statute, as in England under the Companies Act of 1862 (*In re* Taurine Co., 25 Ch. D. 118, 53 L. J. Ch. 271, 49 L. T. Rep. N. S. 514, 32 Wkly. Rep. 129), and under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16 (see Totterdell *v.* Fareham Blue Brick, etc., Co., L. R. 1 C. P. 674, 12 Jur. N. S. 901, 35 L. J. C. P. 278, 14 Wkly. Rep. 919; D'Arcy *v.* Tamar, etc., R. Co., L. R. 2 Exch. 158, 4 H. & C. 463, 21 Jur. N. S. 548, 36 L. J. Exch. 37, 14 Wkly. Rep. 968), and where the power of delegation exists its exercise will under particular circumstances be presumed (*In re* Barned's Banking Co., L. R. 3 Ch. 105, 37 L. J. Ch. 81, 17 L. T. Rep. N. S. 269, 16 Wkly. Rep. 193; Totterdell *v.* Fareham Blue Brick, etc., Co., L. R. 1 C. P. 674, 12 Jur. N. S. 901, 35 L. J. C. P. 278, 14 Wkly. Rep. 919; *In re* Tavistock Ironworks Co., L. R. 4 Eq. 233, 36 L. J. Ch. 616, 16 L. T. Rep. N. S. 824, 15 Wkly. Rep. 1007; Lindley Comp. L. (5th ed.) 156, 329, 338).

47. Stevens *v.* Hill, 29 Me. 133; Folger *v.* Chase, 18 Pick. (Mass.) 63; Northampton Bank *v.* Pepoon, 11 Mass. 288; Spear *v.* Ladd, 11 Mass. 94; Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

48. Patterson *v.* Portland Smelting Works, 35 Oreg. 96, 56 Pac. 407.

b. May Appoint Subordinate Agents to Perform Ministerial Acts. Directors may of course appoint subordinate agents and clothe them with power to perform ministerial acts so as to bind the corporation.[49] They may constitute one of their own number an agent of the corporation for the transaction of a particular piece of business, or for the performance of a particular ministerial act, so as to bind the corporation by the act of such agent done within the scope of the authority thus conferred upon him.[50]

5. May Exercise What Powers Through an Executive Committee — a. In General. It must be concluded from the foregoing that the directors of a corporation can vest the performance of merely ministerial duties in a committee of their own members, usually called the executive committee.[51] The executive committee of the directors of a boom company may, however, exercise the powers of the directors in fixing the tolls to be exacted from owners of logs for driving them down a river, that being a matter of ordinary business, like the price to be asked for any commodity or service which a corporation may have for sale.[52] The executive committee of a corporation, which is authorized by the board of directors to "make the necessary arrangements" for securing the transfer of a certain patent right, may bind the corporation by a contract for such transfer, without further action by the board.[53] A committee empowered by the directors of a corporation to negotiate for purchasers and to sell an issue of bonds have power to employ a broker for such sale; but they cannot in the absence of special authority authorize a broker to secure a purchaser at less than par.[54] On the other hand the general rule being that the directors cannot delegate their discretionary powers to an executive committee of their members,[55] it seems plain that such a committee may not mortgage the land of the company to raise money to pay current expenses.[56] In like manner a duty which is imposed by statute upon the president and directors such as, in the case of a railroad company, the duty of locating the line of the railroad, cannot be delegated to a committee of their number.[57] The power of an

Whether bank directors may delegate the power to make discounts see Percy *v.* Millaudon, 3 La. 568, 3 Mart. N. S. (La.) 68. See also Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497; Manderson *v.* Commercial Bank, 28 Pa. St. 379.

49. See *supra*, IX, D, 4, a; Branch Bank *v.* Collins, 7 Ala. 95.

50. Merrick *v.* Reynolds Engine, etc., Co., 101 Mass. 381.

51. Berks, etc., Turnpike Road *v.* Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402. But a decision to the effect that an executive committee of a railroad company had the power to grant to another railroad company a right to a joint use of its bridge across an interstate river for a period of nine hundred and ninety-nine years (Union Pac. R. Co. *v.* Chicago, etc., R. Co., 51 Fed. 309, 2 C. C. A. 174) seems to be an untenable and extravagant application of this doctrine.

Statutes, such as the New York Banking Law of 1838, authorize banking associations to divide their business into several departments in charge of separate committees of directors (3 Thompson Corp. § 3952, note 2; Leavitt *v.* Blatchford, 5 Barb. (N. Y.) 9; Palmer *v.* Yates, 3 Sandf. (N. Y.) 137. But see Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333), but banking corporations lie outside of the scope of this article.

52. Black River Imp. Co. *v.* Holway, 85 Wis. 344, 55 N. W. 418.

53. Andres *v.* Fry, 113 Cal. 124, 45 Pac. 534.

54. East Cleveland R. Co. *v.* Everett, 15 Ohio Cir. Ct. 181, 8 Ohio Cir. Dec. 210.

55. Tempel *v.* Dodge, 89 Tex. 69, 32 S. W. 514 [*rehearing denied* in 33 S. W. 222].

56. The superior court of Cincinnati have held that a provision of the constitution of a corporation for the appointment of an executive committee of the board of directors, to have charge of the management and business affairs of the company, with power to make investments and generally to discharge the duties of the board, but not to incur debts except for current expenses unless especially authorized, does not empower such committee to mortgage the realty of the company to pay current expenses. Ohio Valley Nat. Bank *v.* Walton Architectural Iron Co., 11 Ohio Dec. (Reprint) 904, 30 Cinc. L. Bul. 382.

57. Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615.

Presumption as to power of directors.— There is a decision to the effect that the power of the directors of a corporation, in the particular case a turnpike company, to enter into a contract, will not be presumed, but that it must appear that the corporation had conferred upon them such power of delegation (Tippets *v.* Walker, 4 Mass. 595); but this case cannot be regarded as stating a general principle of law.

Power of committee to allot shares.— An

executive committee of a board of directors to make contracts binding upon the corporation would seem to depend upon two considerations: (1) The nature of the contract, whether it is a contract of such a nature that the board of directors could delegate the power to make it; (2) whether they have delegated such power to the executive committee.[58]

b. Power of Committee of Directors With Respect to Litigation. A committee consisting of a president, secretary, and treasurer, duly authorized to collect all outstanding amounts due the corporation, may institute a suit for this purpose in the name of the corporation, without further authority from the board of directors.[59]

c. Quorum of Such Committee, Which Is Necessary to Validate Action. It is not clear that there is any settled rule of law as to whether all of the committee of directors in whose hands a particular matter has been placed must join in order to give valid action with reference to it[60] or whether a majority may decide and act, provided that all meet and consult.[61] The solution of the question would seem to depend somewhat upon the nature of the act. If it is purely ministerial,

executive committee of directors cannot, at least without the authorization or ratification of the whole board, allot the shares of the company so as to admit to the rights of a shareholder therein one who was not a purchaser in good faith and for full value. Ryder *v.* Bushwick R. Co., 134 N. Y. 83, 31 N. E. 251, 45 N. Y. St. 388.

58. It has been held that a contract within the powers of a corporation, signed and attested by the proper officers, approved by the executive committee vested *ad interim* with all the powers of the board, under authority of a delegation of such powers from the directors, to make which they were empowered by by-laws authorized by the charter and approved by two thirds of all the shareholders being all present at a regular meeting, is fully authorized, duly executed, and binding. Chicago, etc., R. Co. *v.* Union Pac. R. Co., 47 Fed. 15. It has been held that a power to manage *ad interim* and "to do all the acts necessary for the prosperity of the society in the intervals of the meeting of the board" does not empower such a committee of the trustees of an agricultural society to purchase real estate. Tracy *v.* Guthrie County Agricultural Soc., 47 Iowa 27.

Misleading analogies.— The analogy of the contracting powers of New England town committees should be dismissed as misleading. For cases showing those powers see Simonds *v.* Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41. And see Damon *v.* Granby, 2 Pick. (Mass.) 345. But see Hayward *v.* Pilgrim Soc., 21 Pick. (Mass.) 270; Kupfer *v.* South Parish, 12 Mass. 185. The same may be said of the analogy drawn from the powers of building committees of church societies who are selected from the members and not necessarily from the board of trustees, as to which see Damon *v.* Granby, 2 Pick. (Mass.) 345; Sawyer *v.* Methodist Episcopal Soc., 18 Vt. 405.

Banking corporations.— That the president and cashier of a bank and the "financial committee" of its board of directors have no power to mortgage its real estate see Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728. A decision of the supreme judicial court of Massachusetts, voiced by the eminent Chief Justice Shaw, to the effect that the directors of a banking corporation are the corporation and do not exercise powers conferred by delegation of the shareholders, but powers derived from the law, and that they can consequently delegate to a committee of themselves the power to mortgage the real estate of the corporation to secure its debts (Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395) is anomalous and untenable. That if the directors have the power thus to delegate to a committee of their number the power to convey real estate of the corporation, this delegation will carry with it the power to execute a suitable instrument of conveyance, and to affix the corporate seal thereto. Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395. The reason is that a delegation of the power to do a thing necessarily delegates the power to employ the means by which that thing is to be done. See for example Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665. The execution of the necessary written instruments to effectuate the powers thus possessed by the committee of directors being a mere ministerial act, the performance of the act may without doubt be delegated by the committee to an attorney in fact or subagent. E. g., to indorse certain negotiable paper. Sheridan Electric Light Co. *v.* Chatham Nat. Bank, 52 Hun (N. Y.) 575, 5 N. Y. Suppl. 529, 24 N. Y. St. 622.

Articles of incorporation under which such a committee had no power to purchase real estate see Tracy *v.* Guthrie County Agricultural Soc., 47 Iowa 27.

59. St. Louis Domicile, etc., Assoc. *v.* Augustin, 2 Mo. App. 123.

Their authority to submit a controversy to the decision of referees was conclusively presumed in Fryeburg Canal *v.* Frye, 5 Me. 38.

Standing committee to act as arbitrators of disputes between the members, award valid, although rendered orally. Murdock *v.* Blesdell, 106 Mass. 370.

60. That all must join see Corn Exch. Bank *v.* Cumberland Coal Co., 1 Bosw. (N. Y.) 436.

61. Leonard *v.* Darlington, 6 Cal. 123.

a mere business detail, then practical convenience and general usage unite in supporting the conclusion that a majority may act and bind the corporation,[62] although clearly no valid act can be done by a minority.[63]

d. Ultra Vires Acts of Committee Made Good by Ratification or Estoppel. *Ultra vires* acts of committees of corporations may be made good by ratification or estoppel as in other cases.[64]

e. Corporation Bound by Acts of Such Committee Within Their Apparent Authority. As in case of other agents, a secret or unknown limitation upon the authority of a committee of the directors of the corporation, imposed by the shareholders, will not control an apparent authority given by the board of directors, within the scope of their general authority.[65]

f. Personal Liability of Members of Such Committees. Members of the executive committee of corporations are personally liable, on the footing of directors and trustees, for losses happening through their mismanagement.[66]

g. Power of Executive Committee to Confer Permanent and Supreme Control Upon Single Officer. Such an executive committee cannot confer permanent and supreme control of the corporation upon a single officer.[67]

E. Mode of Action of Directors — 1. Directors Must Act Together as a Board — a. In General. We may settle down with confidence upon this principle, that in all matters involving the exercise of what might be termed a legislative or judicial discretion, and which the directors cannot therefore delegate to others, as elsewhere shown,[68] they can bind the corporation only by acting together as a board.[69] A majority of them cannot undertake to act in their individual names

62. State *v.* Jersey City, 27 N. J. L. 493. And see Junkins *v.* Doughty Falls Union School Dist., 39 Me. 220; Union Bridge Co. *v.* Troy, etc., R. Co., 7 Lans. (N. Y.) 240.

63. McNeil *v.* Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559.

64. That this ratification may be made by the shareholders without formal action of the directors see Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174 (*affirming* 47 Fed. 15)]. Status of government directors of Union Pacific R. Co. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265. See also *infra*, XV, B, 7, a, (I) *et seq.*

When this ratification is predicated upon acquiescence in what has been done by such a committee, the ratifying body must as in other cases have had knowledge of the essential facts. McNeil *v.* Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559.

When a contract of an executive committee may be repudiated by the corporation upon discovering that the officers who negotiated it had a secret interest in it notwithstanding the lapse of a long time. Wardell *v.* Union Pac. R. Co., 29 Fed. Cas. No. 17,164, 4 Dill. 330. That the corporation cannot disaffirm the unauthorized acts of such a committee and at the same time keep the benefit it has derived from it see Sheridan Electric Light Co. *v.* Chatham Nat. Bank, 52 Hun (N. Y.) 575, 5 N. Y. Suppl. 529, 24 N. Y. St. 622.

That a ratification by the corporation of the acts of such a committee is equivalent to a precedent authorization and cures defects in the original appointment of the committee see Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 2 Alb. Pr. N. S. (N. Y.) 254, 32 How. Pr. (N. Y.) 335.

65. McNeil *v.* Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559.

66. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

67. See in confirmation and illustration of this proposition Queen *v.* Second Ave. R. Co., 35 N. Y. Super. Ct. 154, 44 How. Pr. (N. Y.) 281. See also Auburn Academy *v.* Strong, 1 Hopk. (N. Y.) 278; Flagstaff Silver Min. Co. *v.* Patrick, 2 Utah 304.

68. See *supra*, IX, D, 1.

69. *Indiana.*— Junction R. Co. *v.* Reeve, 15 Ind. 236.

Iowa.— Herrington *v.* Liston Dist. Tp., 47 Iowa 11.

Kansas.— Mincer *v.* Reno County School Dist. No. 31, 27 Kan. 253; Aikman *v.* Butler County School Dist. No. 16, 27 Kan. 129; Anderson County Com'rs *v.* Paola, etc., R. Co., 20 Kan. 534; Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302.

New Hampshire.— Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207. It has been held competent evidence, that is, sufficient presumptive proof, for a stranger, of the concurrence of a quorum of a board of directors of a corporation, to show that they assented separately. Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

New Jersey.— Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Schumm *v.* Seymour, 24 N. J. Eq. 143.

New York.— Keeler *v.* Frost, 22 Barb. 400.

Ohio.— McCortle *v.* Bates, 29 Ohio St. 419, 23 Am. Rep. 758.

for the board itself, and no act can be done affecting the ownership of property, except by a resolution of the board when regularly constituted and sitting in consultation.[70]

b. Individual Directors Have No Authority as Such — (I) *In General.* The board of directors to whom the authority to bind the corporation is committed is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together as a body.[71] Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation.[72] And this is equally the rule, although the director who assumes to do so may own a majority of the shares.[73]

(II) *But May Be Agents by Special Appointment.* But this is entirely compatible with the conclusion that a single director may, with the knowledge of the board of directors, and independently of his duties as director, act as agent of the corporation, so that it will be bound by his acts in the course of the business conducted by him.[74]

c. Separate Assent of Majority Not Binding. The separate assent of a majority of the board, obtained when they are not regularly convened and acting

Pennsylvania.— Stoystown, etc., Turnpike Road Co. *v.* Craver, 45 Pa. St. 386.

England.— *In re* Marseilles Extension R. Co., L. R. 7 Ch. 161, 41 L. J. Ch. 345, 25 L. T. Rep. N. S. 858, 20 Wkly. Rep. 254.

70. Ross *v.* Crockett, 14 La. Ann. 811; Constant *v.* St. Albans Church, 4 Daly (N. Y.) 305; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186. It has been held that a deed signed by every member of a board of directors, but not in pursuance of any resolution of the signers as a board, will not pass the legal title of the corporation. Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261. Nor can an act, invalid as against the corporation, be ratified "by individual consent of a majority of the board." Ft. Scott First Nat. Bank *v.* Drake, 35 Kan. 564, 11 Pac. 445, 57 Am. Rep. 193.

71. *Georgia.*— Spinks *v.* Athens Sav. Bank, 108 Ga. 376, 33 S. E. 1003.

Indiana.— Allemong *v.* Simmons, 124 Ind. 199, 23 N. E. 768.

Missouri.— Barcus *v.* Hannibal, etc., Plank-road Co., 26 Mo. 102.

New York.— Filon *v.* Miller Brewing Co., 15 N. Y. Suppl. 57, 38 N. Y. St. 602.

Pennsylvania.— Gaynor *v.* Williamsport, etc., R. Co., 189 Pa. St. 5, 41 Atl. 978, 43 Wkly. Notes Cas. 321.

Vermont.—Waite *v.* Windham County Min. Co., 36 Vt. 18. *Compare* Woodbury Granite Co. *v.* Mulliken, 66 Vt. 465, 30 Atl. 28.

Washington.— Cascade F. & M. Ins. Co. *v.* Journal Pub. Co., 1 Wash. 452, 25 Pac. 331.

West Virginia.— Limer *v.* Traders Co., 44 W. Va. 175, 28 S. E. 730.

Wisconsin.— Milwaukee Brick, etc., Co. *v.* Schoknecbt, 108 Wis. 457, 84 N. W. 838.

United States.— Addison *v.* Pacific Coast Milling Co., 79 Fed. 459.

72. *California.*— Healdsburg Bank *v.* Bailhache, 65 Cal. 327, 4 Pac. 106.

Connecticut.— Hartford Bank *v.* Hart, 3 Day 491, 3 Am. Dec. 274.

Massachusetts.— Kupfer *v.* Augusta South Parish, 12 Mass. 185.

Michigan.— Lockwood *v.* Thunder Day River Boom Co., 42 Mich. 536, 4 N. W. 292; Doyle *v.* Mizmer, 42 Mich. 332, 3 N. W. 968.

Minnesota.— Browning *v.* Hinkle, 48 Minn. 544, 51 N. W. 605, 31 Am. St. Rep. 691.

Mississippi.— Shackleford *v.* New Orleans, etc., R. Co., 37 Miss. 202; Harper *v.* Calhoun, 7 How. 203.

New York.— National Bank *v.* Norton, 1 Hill 572.

Tennessee.— Deaderick *v.* Wilson, 8 Baxt. 108.

Wisconsin.— Chicago, etc., R. Co. *v.* James, 22 Wis. 194.

Illustrations.— Thus a trustee of an insurance company is not, unless specially charged by the board of trustees with the duty of communicating to a policy-holder its decision as to whether the company proposes to pay a loss, authorized to bind the company by his declaration in that regard. Cascade F. & M. Ins. Co. *v.* Journal Pub. Co., 1 Wash. 452, 25 Pac. 331. And a single director cannot bind the corporation by his declarations, or put a construction on its contracts. Hartford Bridge Co. *v.* Granger, 4 Conn. 142.

73. Allemong *v.* Simmons, 124 Ind. 199, 23 N. E. 768.

As to the power of individual shareholders to bind the corporation by their acts see Gordon *v.* Swan, 43 Cal. 564; Donoghue *v.* Indiana, etc., R. Co., 87 Mich. 13, 49 N. W. 512; American Preservers' Trust *v.* Taylor Mfg. Co., 46 Fed. 152; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812. That the declarations of individual shareholders do not bind the corporation see Mitchell *v.* Rome R. Co., 17 Ga. 574; Canal Bank *v.* Holland, 5 La. Ann. 363.

74. National Security Bank *v.* Cushman, 121 Mass. 490; Holmes *v.* Kansas City Bd. of Trade, 81 Mo. 137; Goodwin *v.* Union Screw Co., 34 N. H. 378.

together as a board, is not binding on the corporation, in the absence of a subsequent ratification; since when they are not consulting as a board they are regarded as acting privately and unofficially.[75]

2. DIRECTORS CANNOT VOTE BY PROXY. A director cannot delegate the performance of his discretionary duties, which imply trust and confidence, to a proxy, but he must attend the meetings of the board and act in person. For stronger reasons a proxy to vote at a shareholders' meeting will confer no authority to vote at a directors' meeting.[76]

3. QUORUM OF BOARD OF DIRECTORS — a. Majority of All Directors Constitutes Quorum. The rule of the common law is that in the execution of a power or trust which is private in its nature, such as one created by a deed or a will, all the persons upon whom the power or trust is conferred must join in executing it; but in the case of the execution of a power or trust which is public in its nature then, in order to prevent injury to the public, one may act without the other; for instance, if the other be deaf, interested, or absent.[77] The power or trust committed to the directors or trustees of corporations, whether public or private, is deemed to be of a public nature, within the meaning of this rule. The rule of the common law is that whereas, in the case of an indefinite body, such as a municipal corporation, a majority of those who assemble for a given purpose, e. g., at a corporate election, is competent to act so as to bind the whole,[78] yet, in case of a body composed of a definite number of persons, such as the directorate of a corporation, a majority of all is necessary to constitute a quorum that can act so as to bind the corporation, in the absence of a different rule prescribed by charter, statute, by-law, or other governing instrument.[79]

75. Butler *v.* Cornwall Iron Co., 22 Conn. 335; Hamlin *v.* Union Brass Co., 68 N. H. 292, 44 Atl. 385; Woodbury Granite Co. *v.* Mulliken, 66 Vt. 465, 30 Atl. 28; D'Arcy *v.* Tamar, etc., R. Co., L. R. 2 Exch. 158, 4 H. & C. 463, 21 Jur. N. S. 548, 36 L. J. Exch. 37, 14 Wkly. Rep. 968. See also Bosanquet *v.* Shortridge, 4 Exch. 699, 14 Jur. 71, 19 L. J. Exch. 221. *Compare* Monroe Mercantile Co. *v.* Arnold, 108 Ga. 449, 34 S. E. 176; Peirce *v.* Morse-Oliver Bldg. Co., 94 Me. 406, 47 Atl. 914; *In re* County L. Assur. Co., L. R. 5 Ch. 288, 39 L. J. Ch. 471, 22 L. T. Rep. N. S. 537, 18 Wkly. Rep. 390; *In re* Bonelli's Tel. Co., L. R. 12 Eq. 246, 40 L. J. Ch. 567, 25 L. T. Rep. N. S. 526, 19 Wkly. Rep. 1022. So the individual declarations of four of the five directors were held not to estop the corporation. Cannon River Manufacturers' Assoc. *v.* Rogers, 51 Minn. 388, 53 N. W. 759.

76. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun (N. Y.) 561, 14 N. Y. Suppl. 16, 36 N. Y. St. 923.

77. Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *In re* Chad's Ford Turnpike Road, 5 Binn. (Pa.) 481, 485 (opinion by Tilghman, C. J.); Coke Litt. 181*b*.

78. *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; Rex *v.* Varlo, Cowp. 248, 5 Dane Abr. 150.

79. *Maine.*— Cram *v.* Bangor House Proprietary, 12 Me. 354.

Massachusetts.— Atty.-Gen. *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251.

Missouri.— St. Louis Colonization Assoc. *v.* Hennessy, 11 Mo. App. 555. *Compare* Calumet Paper Co. *v.* Haskell Show Printing Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425 [*overruling* Eppright *v.* Nickerson, 78 Mo. 482, and *citing* Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58]; Hax *v.* R. T. Davis Mill Co., 39 Mo. App. 453.

New Hampshire.— Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. *Compare* Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207, assessment by majority of board valid.

New Jersey.— Wells *v.* Rahway White Rubber Co., 19 N. J. Eq. 402.

Virginia.— Booker *v.* Young, 12 Gratt. 303. *Compare* Broughton *v.* Jones, 120 Mich. 462, 79 N. W. 691; *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525 [*followed* in People *v.* Walker, 23 Barb. (N. Y.) 304, 2 Abb. Pr. (N. Y.) 421].

That a majority constitutes a quorum in the absence of a statute or valid regulation providing otherwise see Cram *v.* Bangor House Proprietary, 12 Me. 354; St. Louis Colonization Assoc. *v.* Hennessy, 11 Mo. App. 555; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207. Therefore a special meeting of the directors of a bank having five directors, at which there are present but two directors and another person whose resignation as director has been accepted at a previous regular meeting of the board, was without authority to act as the board of directors. Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788. A statute which declares that at all regular meetings of the directors a majority of those present shall be competent to decide on all business does not authorize a minority to act. A majority of all is necessary to constitute a regular meeting. *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

By statute in Pennsylvania a majority of

b. This Means a Quorum of Qualified Directors. This means a quorum of directors who are qualified to act upon the business which comes before the meeting. If one director, whose presence is necessary to constitute the quorum, or whose vote is necessary to constitute a majority of the quorum upon a given resolution, is disqualified by reason of his personal interest therein, then the act done is invalid.[80]

c. Acts at Board Meeting Without Quorum Voidable Unless Ratified, Etc. It follows that resolutions taken at a meeting of directors at which a legal quorum is not present are voidable at the election of the corporation, or of any one entitled to represent it, in the absence of a ratification or of circumstances of estoppel.[81] Even if it is admitted that the directors may bind the corporation where they act separately,[82] yet the consent of several members of a board of directors, acting

the whole number of directors is necessary to constitute a quorum. A by-law which fixes the number of directors at six, and provides that three of them shall constitute a quorum, is hence invalid. Curry *v.* Claysville Cemetery Assoc., 5 Pa. Super. Ct. 289, 40 Wkly. Notes Cas. (Pa.) 536.

Effect of change in number constituting quorum.— An amendment to a by-law of a corporation, merely changing the number necessary to constitute a quorum of the board of directors, does not alter another by-law requiring a vote of two thirds of the directors to remove or suspend an officer of the company. Stockton *v.* Harmon, 32 Fla. 312, 13 So. 833.

Where the exercise of corporate acts is vested in a select body, an act done by the persons composing that body, in a meeting of all the corporators, or in union with other like bodies, parts of the corporation, is not a valid corporate act. Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Leonard *v.* Lent, 43 Wis. 83; Sun Prairie M. E. Church *v.* Sherman, 36 Wis. 404.

Majority of each integral part.— If a corporation consists of several definite integral parts, for example the two houses of the common council of a municipal corporation, there must be present a majority of each integral part, in order to constitute a quorum and to bind the whole. *Ex p.* Rogers, 7 Cow. (N. Y.) 526 and note; *In re* St. Mary's Church, 7 Serg. & R. (Pa.) 517; Rex *v.* Devonshire, 1 B. & C. 609, 3 D. & R. 83, 25 Rev. Rep. 523, 8 E. C. L. 257; Rex *v.* Buller, 8 East 389; Rex *v.* Thornton, 4 East 294; Rex *v.* Morris, 4 East 17; Rex *v.* Miller, 6 T. R. 268, 3 Rev. Rep. 172; Rex *v.* Bellringer, 4 T. R. 810. Later American cases do not, however, adhere so strictly to the English rule. See Beck *v.* Hanscom, 29 N. H. 213; People *v.* Whiteside, 23 Wend. 9 [*reversed* in 26 Wend. (N. Y.) 634]; *Ex p.* Humphrey, 10 Wend. (N. Y.) 612. In Christ Church *v.* Pope, 8 Gray (Mass.) 140, the vestry of a religious society was held entitled to transact business in the absence of both wardens, a majority of all their members being present, although it had been voted at several annual meetings that one warden and four vestrymen constitute a quorum for the transaction of business.

Effect of interest of one director necessary to quorum.— Where the statute declares that a majority of the directors shall constitute a quorum, the passage of a resolution ratifying the payment of compensation to one of the directors for services outside his duty as a director was not invalidated by the fact that he was present when the vote was taken, although his presence was necessary to constitute the quorum, where the resolution was passed without his vote. Bassett *v.* Fairchild, (Cal. 1900) 61 Pac. 791 [*affirmed* in 132 Cal. 637, 64 Pac. 1082, *citing* San Diego, etc., R. Co. *v.* Pacific Beach Co., 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788; Wickersham *v.* Crittenden, 110 Cal. 332, 42 Pac. 893; Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049; Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260, and *distinguishing* Miner *v.* Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412].

This means a "visible quorum," that is to say, a quorum of the directors actually present, and not merely a quorum of those who vote. Mercantile Library Hall Co. *v.* Pittsburgh Library Assoc., 25 Pittsb. Leg. J. N. S. 345.

Quorum under peculiar articles of association where the shareholders were divided into classes. Hemans *v.* Hotchkiss Ordnance Co., [1899] 1 Ch. 115, 68 L. J. Ch. 99, 79 L. T. Rep. N. S. 681, 6 Manson 52, 47 Wkly. Rep. 276.

80. Curtin *v.* Salmon River Hydraulic Gold Min., etc., Co., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132 (mortgage on corporate property made to one who constituted one of the quorum); Wheelwright *v.* St. Louis, etc., Canal Transp. Co., 56 Fed. 164. Contrary to this there is a holding to the effect that where by force of statute two directors were ineligible by reason of not being shareholders, a resolution passed at a directors' meeting at which only two of the three remaining directors who were qualified were present was valid because authorized by a majority of those who were legal directors. Silsby *v.* Strong, 38 Oreg. 36, 62 Pac. 633.

81. Coryell *v.* New Hope Delaware Bridge Co., 9 N. J. Eq. 457; *Ex p.* Morrison, 1 De Gex 539, 11 Jur. 719, 16 L. J. Bankr. 11, 5 R. & Can. Cas. 224.

82. See *infra*, IX, F, 7.

separately, and not shown to constitute a quorum, will not constitute a valid acceptance of a proposal made to the company, so as to render it a complete contract and binding upon the party making the offer.[83] Nor can a contract made by the board be changed by less than a quorum of the board.[84]

d. Effect of Disqualification of Director Necessary to Make Up Quorum. On principle and authority, the fact that one of the directors whose presence is necessary to make up the quorum has become disqualified, but nevertheless participates in the business of the meeting, will not render the resolutions passed or acts done or authorized at the meeting invalid, unless the disqualification has been adjudged or declared, so as to exclude him from the directorate; since otherwise he is still a director *de facto*. For example he may be related to the member whose expulsion is under consideration, in case of a social club;[85] he may be an alien, and hence under the charter of a city disqualified for membership in its board of aldermen;[86] he may be a non-resident of the state in which the corporation was organized, and may have gone into such state, and removed there for only a brief period, to attend a meeting at which a resolution to mortgage the property of the company was passed;[87] or he may have ceased to be a holder of shares in a joint-stock corporation, thereby becoming disqualified for the office of director.[88] But the acts done by a quorum to the completion of which his presence was necessary will nevertheless be valid; and this is especially so where the rights of an innocent third person, e. g., a mortgagee of the corporation are concerned.[89]

e. Rule in Case of Unfilled Vacancies. It seems that if there be unfilled vacancies in the board, the quorum is a majority of the entire board, as it would be constituted if all the vacancies were filled, and not a majority of the board as it remains with the vacancies unfilled.[90]

f. Quorum Where Directorate Has Been Enlarged by Consolidation With Another Corporation. Where a consolidation between two corporations takes place by one of them absorbing the other,[91] the quorum of directors is the quorum required by the law of the dominant corporation.[92]

g. By-Law Fixing Quorum at Less Than Majority. Under a charter enacting that the powers of the corporation should be exercised by a board of twenty-three directors, it was held that a by-law established by the board of directors fixing the quorum of directors at five, or in the absence of the president at seven, was a good by-law, so as to make a pledge or assignment of the principal part of the assets of the corporation to a creditor by a quorum consisting of less than a majority of the board valid.[93]

h. Whether Ex-Officio Directors Form Part of Quorum. Persons who are members of the board of directors by virtue of holding some other office are directors, and directors *de jure*, and not mere ornaments or figure-heads; they are therefore to be counted in determining the number to make up a quorum.[94]

83. Junction R. Co. *v.* Reeve, 15 Ind. 236.

84. Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426.

85. Loubat *v.* Le Roy, 15 Abb. N. Cas. (N. Y.) 1.

86. Satterlee *v.* San Francisco, 23 Cal. 314.

87. San Antonio St. R. Co. *v.* Adams, 87 Tex. 125, 26 S. W. 1040 [*reversing* (Tex. Civ. App. 1894) 25 S. W. 639].

88. Kuser *v.* Wright, 52 N. J. Eq. 825, 31 Atl. 397.

89. Kuser *v.* Wright, 52 N. J. Eq. 825, 31 Atl. 397. But under a statute providing that "the directors shall not be less than three in number, if a board be constituted of three directors, and one of them ceases to be a director for any reason whatever, the two remaining cannot authorize a mortgage on property of the corporation, such as will give a priority over general creditors. The reason is not that there is not a quorum, but that there is not a lawfully constituted board from which a quorum can be made. Wright *v.* Trenton First Nat. Bank, 52 N. J. Eq. 392, 28 Atl. 719.

90. See in support of this Rex *v.* Devonshire, 1 B. & C. 609, 3 D. & R. 83, 25 Rev. Rep. 523, 8 E. C. L. 257.

91. See *supra*, III, E, 3.

92. Lane *v.* Brainerd, 30 Conn. 565.

93. Hoyt *v.* Thompson, 5 N. Y. 320, a doubtful holding.

94. Kent County Agricultural Soc. *v.* Houseman, 81 Mich. 609, 46 N. W. 15. *Contra*, that *ex-officio* directors are not necessarily a part of the quorum see Miller *v.* Chance, 3 Edw. (N. Y.) 399.

i. Majority of Assembled Quorum Can Act. When this quorum is lawfully assembled, a majority of its members may act, so as to bind the corporation, unless the charter, the governing statute, or other valid governing instrument prescribes a different rule.[95]

4. Number That Can Act in Merely Ministerial Matters. A less number of directors than a quorum of the board can act by delegation in matters which are merely ministerial.[96] In such a case, if the resolution making the delegation does not prescribe what shall be a quorum of the committee, it has been held that, although unanimity of all the members may not be necessary to the validity of their action, yet they must all be present at the meeting at which the action is taken, and that they have no power to appoint other members of the committee, either in addition to, or to fill a vacancy in, the committee.[97] According to American opinion the power delegated to the committee must be executed by a majority; since to permit it to be executed by less than a majority would be tantamount to a delegation of authority which the law does not permit.[98]

95. *Connecticut.*— Wadhams *v.* Litchfield, etc., Turnpike Co., 10 Conn. 416; New Haven Sav. Bank *v.* Davis, 8 Conn. 191.

Iowa.— Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516.

Maine.— Adams *v.* Hill, 16 Me. 215; Cram *v.* Bangor House Proprietary, 12 Me. 354; Trott *v.* Warren, 11 Me. 227; Pejepscot Proprietors *v.* Cushman, 2 Me. 94.

Massachusetts.— Sargent *v.* Webster, 13 Metc. 497, 46 Am. Dec. 743; Damon *v.* Granby, 2 Pick. 345; Kupfer *v.* Augusta South Parish, 12 Mass. 185.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

Missouri.— Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260; Hax *v.* R. T. Davis Mill Co., 39 Mo. App. 453.

New Hampshire.— Keyser *v.* Sunapee Dist. No. 8, 35 N. H. 477; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey.— Wells *v.* Rahway White Rubber Co., 19 N. J. Eq. 402.

New York.— *In re* Union Ins. Co., 22 Wend. 591.

Virginia.— Booker *v.* Young, 12 Gratt. 303.

England.— Atty.-Gen. *v.* Davy, 2 Atk. 212, West t. Hardw. 121, 26 Eng. Reprint 531; Blacket *v.* Blizard, 9 B. & C. 851, 8 L. J. K. B. O. S. 103, 4 M. & R. 641, 17 E. C. L. 377; Rex *v.* Whitaker, 9 B. & C. 648, 7 L. J. K. B. O. S. 332, 17 E. C. L. 291; Cortis *v.* Kent Water Works Co., 7 B. & C. 314, 5 L. J. M. C. O. S. 106, 14 E. C. L. 145; Rex *v.* Bower, 1 B. & C. 492, 2 D. & R. 761, 1 L. J. K. B. O. S. 174, 8 E. C. L. 209; Cook *v.* Loveland, 2 B. & P. 31, 5 Rev. Rep. 533; Grindley *v.* Barker, 1 B. & P. 229, 4 Rev. Rep. 787; Rex *v.* Monday, Cowp. 530; Withnell *v.* Gartham, 1 Esp. 322, 6 T. R. 388, 3 Rev. Rep. 218; Howbeach Coal Co. *v.* Teague, 5 H. & N. 151, 29 L. J. Exch. 137; Rex *v.* Miller, 6 T. R. 268, 3 Rev. Rep. 172; Rex *v.* Bellringer, 4 T. R. 810; Rex *v.* Beeston, 3 T. R. 592.

In English law it seems that where the governing instrument prescribes the minimum number of directors by which the business of the company shall be conducted, the language is mandatory, so that less than that minimum number cannot perform an act to which the concurrence of the directors is essential. *In re* Alma Spinning Co., 16 Ch. D. 681, 50 L. J. Ch. 167, 43 L. T. Rep. N. S. 620, 29 Wkly. Rep. 133, where the articles of a company provided that "the business of the company shall be conducted by not less than" a specific number of directors, and it was held that a forfeiture of shares declared by a less number was invalid. *Compare* Kirk *v.* Bell, 16 Q. B. 290, 71 E. C. L. 290; Thames-Haven Dock, etc., Co. *v.* Rose, 2 Dowl. N. S. 104, 4 M. & G. 552, 12 L. J. C. P. 90, 3 R. & Can. Cas. 177, 5 Scott N. R. 524, 43 E. C. L. 287. Sir Nathaniel Lindley states the English rule to be that "if the affairs of a company are intrusted to the management of not less than a fixed number of directors it is *prima facie* not bound by the acts of a fewer number." 1 Lindley Comp. L. (5th ed.) 155 [*citing* Kirk *v.* Bell, 16 Q. B. 290, 71 E. C. L. 290; *In re* Marseilles Extension R. Co., L. R. 7 Ch. 161, 41 L. J. Ch. 345, 25 L. T. Rep. N. S. 858, 20 Wkly. Rep. 254; *In re* London, etc., Bank, L. R. 3 Ch. 651, 37 L. J. Ch. 905, 19 L. T. Rep. N. S. 193, 16 Wkly. Rep. 1003; *Ex p.* Howard, L. R. 1 Ch. 561, 14 L. T. Rep. N. S. 742, 14 Wkly. Rep. 992; Holt's Case, 22 Beav. 48; Moody *v.* London, etc., R. Co., 1 B. & S. 290, 31 L. J. Q. B. 54, 9 Wkly. Rep. 780, 101 E. C. L. 290; Card *v.* Garr, 1 C. B. N. S. 197, 26 L. J. C. P. 113, 87 E. C. L. 197; Matter of Royal British Bank, 3 De G. & J. 387, 5 Jur. N. S. 205, 28 L. J. Ch. 257, 7 Wkly. Rep. 217, 60 Eng. Ch. 301; Ridley *v.* Plymouth, etc., Grinding, etc., Co., 2 Exch. 711, 12 Jur. 542, 17 L. J. Exch. 252; Brown *v.* Andrew, 13 Jur. 938, 18 L. J. Q. B. 153].

96. See *supra*, IX, D, 4, a.

97. *In re* Liverpool Household Stores Assoc., 59 L. J. Ch. 616, 62 L. T. Rep. N. S. 873, 2 Meg. 217.

98. Howard *v.* Marine Industrial School, 78 Me. 230, 3 Atl. 657; Curtis *v.* Portland, 59 Me. 483; Portland Female Orphan Asylum *v.* Johnson, 43 Me. 180; Hanson *v.* Dexter, 36 Me. 516; Adams *v.* Hill, 16 Me. 215; Damon

5. Acts of Directorate Composed of Excessive Number. The action of the directorate of a corporate body composed of a greater number than that allowed by the charter is none the less valid and binding, if the shareholders do not complain, but acquiesce.[99]

6. Directors No Power to Exclude Some of Their Number. The shareholders have the right to have the business of the corporation controlled by the whole board of directors which they have lawfully elected; hence it is not competent for a majority of the board to exclude from its sittings a minority, or even a single member;[1] and we have seen that directors cannot remove each other.[2]

7. Presumption in Favor of Regular Action of Board. The general presumption of right-acting which attends public officers and public bodies extends to the action of boards of directors of private corporations, so that the regularity of the action of such bodies is presumed until the contrary is made to appear. This principle carries with it the presumption, in the absence of proof to the contrary, that a particular act is the act of a majority of the board;[3] that a particular director who was present at the time when a resolution was adopted assented to it;[4] that the meeting of the board at which a given resolution was passed was regularly convened;[5] that due notice of the meeting at which the action was taken was given, for example, when a quorum was present; that a proper notice was sent to all,[6] especially where the minutes of the corporation recited that notice was given, but did not state in what manner it was given;[7] that an officer of a corporation was chosen by ballot, where that mode of election was required, and the record did not specify by what mode he was chosen;[8] that, where unanimity was required to make an order, which was entered of record, such unanimity existed, although the fact did not appear of record;[9] that where the charter required that two thirds should be assembled for the transaction of business, two thirds did assemble, the record being silent on the subject, and it not having been the custom to state in the record the number that did assemble;[10] that, in the silence of the record, the meeting was held at the place prescribed by the by-laws;[11] that the first meeting of a corporation had been regularly called, the question arising after a lapse of twenty years, where it did not appear how it was called;[12] and that the clerk of a corporation who was present when a vote approving his election was passed, and who himself recorded the vote, accepted the office.[13]

8. Acts Done by Less Than Quorum Made Good by Ratification. Acts done by less than a quorum of the directors may be made good by a ratification by the quorum,[14] by estoppel after a performance,[15] or by an affirmation by the corpo-

v. Granby, 2 Pick. (Mass.) 345; Kupfer *v.* Augusta South Parish, 12 Mass. 185.

99. Hax *v.* R. F. Davis Mill Co., 39 Mo. App. 453.

1. State *v.* Ohio, etc., R. Co., 6 Ohio Cir. Ct. 412.

2. See *supra*, IX, A, 10, b.

3. Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203, per Parker, C. J.

4. Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78, although if it be constituent, such as a proposition for a consolidation with another corporation which requires the assent of the shareholders, the assent of the particular director, as a director, does not estop him from dissenting as a shareholder.

5. Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Chouteau Ins. Co. *v.* Holmes, 68 Mo. 601, 30 Am. Rep. 807.

6. Wells *v.* Rodgers, 60 Mich. 525, 27 N. W. 671.

7. Granger *v.* Original Empire Mill, etc., Co., 59 Cal. 678. *Compare* Harding *v.* Vandewater, 40 Cal. 77.

8. Blanchard *v.* Dow, 32 Me. 557.

9. Lexington *v.* Headley, 5 Bush (Ky.) 508.

10. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

11. McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

12. Society of Middlesex Husbandmen, etc., Soc. *v.* Davis, 3 Metc. (Mass.) 133.

13. Delano *v.* Smith Charities, 138 Mass. 63.

14. Hanson *v.* Dexter, 36 Me. 516; Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252. *Contra*, Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58.

15. Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, Woolw. 400, opinion by Mr. Justice Miller.

ration, as by bringing an action to enforce it.[16] But as a body which has no power to act has no power to ratify, if action is taken at a quorum, one of whose members is a party in interest, it is not ratified at a subsequent meeting, where the same quorum is present, by the passage of a mere motion approving the minutes.[17]

9. POWER OF QUORUM TO CONTRACT WITH THEIR OWN MEMBERS. While it is clear that a member of a corporation is not incapacitated by the circumstance of being a member from entering into valid contracts with the corporate body,[18] yet where a bare quorum is assembled, no contract can be made with a member of that quorum, because such a contract requires his concurrence, and he cannot be on both sides of the same contract. As to that contract he is not a director, but is a stranger; and when he steps out of the bare quorum and assumes the attitude of a stranger the quorum is broken.[19] Where on the other hand a majority of the directors vote in favor of a resolution in which one member of the board has a personal interest, the resolution is not invalid by reason of that personal interest.[20]

10. PLACE OF PRESIDENT IN QUORUM. As already seen, persons who are members of the directorate *ex officio*, that is to say, by virtue of holding some other office in the corporation, are directors *de jure*, and are to be counted as such in making up the quorum.[21] This principle applies where the president is under the charter entitled to all the powers and privileges of a director.[22] But while this is true, it is not necessary that the president of the corporation should be present at a meeting of the board of directors at which a given resolution is passed, in order for it to be valid, and this, although the board is designated as "the president and directors."[23]

11. WHEN DIRECTORS TAKE SENSE OF SHAREHOLDERS. Many constituent acts, such as increasing or reducing the capital stock, essentially changing the purposes for which the corporation has been formed, putting an end to its existence as a corporation, or, in the case of a railroad company, leasing its road and properties;[24] or aliening the property necessary to its continued existence as a corporation,[25] require the assent of the shareholders, lawfully expressed in a corporate meeting. But this is not so where the trustees, and not the members, are the body which has been incorporated, in which latter case action taken at a meeting of the members will not be regarded as a corporate act.[26]

12. MAJORITY CAN ACT ONLY AT MEETING DULY ASSEMBLED. This majority which constitutes the quorum can act only at a meeting regularly assembled; that is to

16. Sutton First Parish *v.* Cole, 3 Pick. (Mass.) 232.

17. R. T. Davis Mill Co. *v.* Bennett, 39 Mo. App. 460.

18. Gilmore *v.* Pope, 5 Mass. 491; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39; Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75 (per Gibson, C. J.); Berks, etc., Turnpike Road *v.* Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402; Angell & A. Corp. § 233; 1 Kyd Corp. 180.

19. See upon this subject Miner *v.* Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Van Hook *v.* Somerville Mfg. Co., 5 N. J. Eq. 137.

For a case not within the rule, where six disinterested directors out of a board of eleven, voted for a resolution preferring four members of the board as creditors of the corporation see Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260. For another case where the by-laws provided that the president and two directors should constitute a quorum, and a sale to the president of the property of the corporation at a meeting at which only the president and two directors were present was held valid, see Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516. These last decisions rest upon doubtful grounds, since incapacitated directors ought not to be counted in making up a quorum *quoad* a particular transaction, any more than a mere stranger ought to be. See *supra*, IX, E, 3, b.

20. Porter *v.* Lassen County Land, etc., Co., 127 Cal. 261, 59 Pac. 563.

21. See *supra*, IX, E, 3, h.

22. State Bank *v.* Ruff, 7 Gill & J. (Md.) 448; Glens Falls Paper Co. *v.* White, 18 Hun (N. Y.) 214.

23. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

24. Martin *v.* Continental Pass. R. Co., 14 Phila. (Pa.) 10, 37 Leg. Int. (Pa.) 132.

25. See *supra*, IX, C, 13, a *et seq.*

26. It was so held, although a majority of the trustees were present and concurred. Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

say, if it is a stated meeting, or if it is a special meeting, upon due notice.[27] In general the mere accidental assembling of a majority of persons who are directors of a corporation does not constitute a legal board;[28] and the acts of directors at a meeting irregularly called, as where notice of the meeting is not given to some of the directors, is not binding upon the corporation unless ratified.[29] A majority must have been duly assembled, and then a majority of those who are assembled can act for the whole.[30]

13. When Record Need Not Affirmatively Show Notice to All Members. On a principle already considered[31] it has been held that where a quorum are present at a meeting of directors the presumption is that the proper notice was sent to all.[32]

F. Meetings of Directors — 1. Principles Governing This Subject. The principles governing the meetings of directors are in general the same as those governing corporate meetings generally, which have already been specially considered.[33] The governing principle is that no valid corporate action can be taken by the board of directors at a special meeting unless it has been duly assembled, in the absence of unanimous consent, or of a subsequent ratification.[34] If therefore a majority of the directors meet at an unusual time and place without notifying all the members of the board, the acts which take place at the meeting will be void.[35] The rule yields to the further principle that where there is a custom of the directors to hold meetings for the transaction of business at a certain time and place, special notice of such meetings is not necessary in order to validate such business transacted thereat.[36] It yields to the further principle that where

27. Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. *Compare* Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

28. Hillyer *v.* Overman Silver Min. Co., 6 Nev. 51; Hoyt *v.* Bridgewater Copper Min. Co., 6 N. J. Eq. 253; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186, 229. *Contra*, Barcus *v.* Hannibal, etc., Plankroad Co., 26 Mo. 102; State *v.* Smith, 48 Vt. 266; Waite *v.* Windham County Min. Co., 37 Vt. 608; Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159.

29. Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99; Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75.

30. Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253. See also Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457. For a case where it was held that a mortgage was void for want of compliance with the principle of the above text see Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

That "a majority vote of the directors" means a majority of a quorum duly assembled see Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260.

Effect of director changing his mind.—That a majority of three directors ought not to proceed to execute a deed of trust preferring certain creditors, although the other director who owned a majority of the stock has voted for its execution, where they have reason to believe that he has changed his mind and is opposed to such action, see State *v.* Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321.

31. See *supra*, IX, E, 7.

32. Wells *v.* Rodgers, 60 Mich. 525, 27 N. W. 671. There is a seemingly unsound decision to the effect that where a quorum of the directors of a bank meet and unite in any determination, the corporation is bound, whether the absent directors were notified or not. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207. To the same effect see Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

Effect of a provision in the articles of incorporation that no objection shall be made to the validity of any vote, except at the meeting at which such vote shall be tendered, or at an adjourned meeting, etc., upon the question of impeaching a resolution to wind up. Wall *v.* London, etc., Assets Corp., [1899] 1 Ch. 550, 68 L. J. Ch. 248, 80 L. T. Rep. N. S. 70, 6 Manson 312.

33. See *supra*, IV.

34. Smith *v.* Dorn, 96 Cal. 73, 30 Pac. 1024; Thompson *v.* Williams, 76 Cal. 153, 18 Pac. 153, 9 Am. St. Rep. 187; San Buenaventura Commercial Min., etc., Co. *v.* Vassault, 50 Cal. 534 (general meeting); Reilly *v.* Oglebay, 25 W. Va. 36. For instance if the governing statute provides that the meeting shall be called by the president if there be one, and if not, by two directors, then if there is a president two directors cannot call a meeting. Nor will the refusal of the president to make the call take such a case out of the rule, at least unless an abuse of such discretion is shown. Smith *v.* Dorn, 96 Cal. 73, 30 Pac. 1024.

35. Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 116 N. C. 827, 21 S. E. 948.

36. For example a regular custom pursued for a number of years, for the directors of a bank to hold a meeting at the banking-house

a meeting is regularly assembled, but adjourns to a future time and place, special notice of the adjourned meeting is not necessary, since the fact and record of the adjournment give such notice.[37]

2. PLACE OF HOLDING MEETINGS OF DIRECTORS. In the absence of statutory authorization for a different course, no valid meeting of directors can be held outside the state under whose legislation the corporation has been created.[38] But statutes exist changing this rule, and authorizing directors to hold meetings beyond the limits of the state.[39] With respect to this question a sound distinction exists between corporate meetings for the performance of constituent acts which, in the absence of a statutory authorization, can be held only within the state under whose legislation the corporation has been created, and mere acts of business or ministerial acts, with respect to which the directors are deemed to be mere agents of the corporation. As a corporation can perform such acts in a state other than that of its creation, there is no sound reason why its directors cannot go into such state for the purpose of performing them.[40] They may for example meet in another state to appoint a secretary,[41] or to confer power upon an agent to execute a deed;[42] and in such cases their minutes may be used as evidence of their acts, even though their meeting may have been held outside of the chartering state.[43] With regard to the proper place for holding meetings of directors inside the state, it has been held that the office of the president or secretary will be presumed to be a proper place when the corporation has no other regular place of business.[44] The principal office of the corporation is clearly such a place, and this is where its shareholders and directors usually meet, where it elects its officers, and where it conducts its financial operations.[45] If the charter fails to designate the place of the chief office of the corporation, and no place has been designated by vote of the shareholders or by resolution of the directors, then the place can be implied and established from the acts of the shareholders and directors.[46] A

during business hours whenever a sufficient number are present, is notice to each director of a meeting to be held within the business hours of the bank whenever a sufficient number assemble, and enables those assembled, the same being a quorum, to proceed, in the absence of some restraining provision in some statute or governing instrument. American Exch. Nat. Bank *v.* Spokane Falls First Nat. Bank, 82 Fed. 961, 27 C. C. A. 274 [*citing* Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Waite *v.* Windham County Min. Co., 37 Vt. 608; Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159].

37. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa 455, 72 N. W. 657. But unless the meeting at which the adjournment took place had been properly notified, the adjourned meeting is irregular and the acts performed thereat are not valid. Whitehead *v.* Hamilton Rubber Co., 52 N. J. Eq. 78, 27 Atl. 897, holding that an assignment of the accounts of a corporation to its president as collateral security for his indorsement upon its notes cannot be made at an adjourned meeting, where no notice is given to the directors that such business would be transacted, either in the call for the meeting which was adjourned, or at such adjourned meeting, if one of the directors is absent.

38. St. Joseph State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519, 48 N. E. 82 [*affirming* 68 Ill. App. 43; and *citing* McKeag *v.* Collins, 87 Mo. 164; Hoyt *v.* Thompson, 5 N. Y. 320; Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 116 N. C. 827, 21 S. E. 948]; Place *v.* People, 87 Ill. App. 527.

39. Colo. Anno. Stat. 493; Singer *v.* Salt Lake City Copper Mfg. Co., 17 Utah 143, 53 Pac. 1024, 70 Am. St. Rep. 773.

40. Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, 86 Am. Dec. 128.

41. McCall *v.* Byram Mfg. Co., 6 Conn. 428.

42. Arms *v.* Conant, 36 Vt. 744.

43. Wood Hydraulic Hose Min. Co. *v.* King, 45 Ga. 34.

When shareholder estopped from objecting that the meeting was held outside the proper jurisdiction, by reason of having attended previous meetings in the same place without objection. Wood *v.* Boney, (N. J. 1891) 21 Atl. 574.

44. Troy Min. Co. *v.* White, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 549.

45. Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31.

Power to change principal office.—The general officers of a railroad company, who find it convenient for the despatch of business to change their offices to some other point on the line, cannot thereby change the principal office of the company from the place at which it has been established by the shareholders and directors. Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31.

46. Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31 [*citing* Jossey *v.* Georgia, etc., R. Co., 102 Ga. 706, 28 S. E.

by-law requiring the regular meetings of the directors to be held at the general office of the corporation does not prevent the holding of special meetings at any place which would be lawful in the absence of such a restriction.[47]

3. NOTICE OF MEETINGS OF DIRECTORS — a. In General. The rule applicable to corporate meetings generally[48] is applicable to directors' meetings, that where the meeting is a stated or annual meeting,[49] the time and place of which is fixed by some by-law or other governing instrument, no special notice of it to the directors is necessary, but that where it is a special or called meeting all the members must be invited to it.[50] It should be added that, with reference to the notice to be given of shareholders' and directors' meetings, the provisions of the by-laws[51] and articles of incorporation[52] must yield to the governing statute where they conflict, as in other cases. This rule yields to the exception that in case of regular or stated meetings which are required by the governing statute, articles, or by-laws, to be held at a stated time and place, no special notice is required, since the law of the corporation is notice,[53] always provided that the law of the corporation, namely, its charter, governing statute, by-laws, or settled usage, does not require the giving of notice, even in a case of regular or stated meetings.[54] The right of all the directors to notice is founded on the right of being present for the purpose of consultation, of which

273; Dade Coal Co. *v.* Haslett, 83 Ga. 549, 10 S. E. 435].

47. Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187 [*affirming* 60 Ill. App. 179].

Void statute.— Statute under which the election of president of an Illinois corporation held at a directors' meeting in Arizona was void. Starr & C. Stat. Ill. (1896), c. 73, § 6; Place *v.* People, 87 Ill. App. 527.

48. Merritt *v.* Farris, 22 Ill. 303; People *v.* Batchelor, 22 N. Y. 128; State *v.* Bonnell, 35 Ohio St. 10; Warner *v.* Mower, 11 Vt. 385. See also *supra*, IV, D, 2.

49. In some states notice of stated or annual meetings is required. San Buenaventura Commercial Min., etc., Co. *v.* Vassault, 50 Cal. 534.

50. Vaught *v.* Ohio County Fair Co., 49 S. W. 426, 20 Ky. L. Rep. 1471; Whitehead *v.* Hamilton Rubber Co., 52 N. J. Eq. 78, 27 Atl. 897.

Waiver of right to notice.— It is almost needless to suggest that a minority of directors cannot waive this right. Hill *v.* Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223; Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 116 N. C. 827, 21 S. E. 948. And see 3 Am. St. Rep. 69 note, and the following cases there cited:

California.— Harding *v.* Vandewater, 40 Cal. 77.

Michigan.— Doyle *v.* Mizner, 42 Mich. 332, 3 N. W. 968.

New Jersey.—State *v.* Ferguson, 31 N. J. L. 107.

Pennsylvania.— Pike County *v.* Rowland, 94 Pa. St. 238; Kersey Oil Co. *v.* Oil Creek, etc., R. Co., 12 Phila. 374, 34 Leg. Int. 362.

United States.— Farwell *v.* Houghton Copper Works, 8 Fed. 66.

England.— D'Arcy *v.* Tamar, etc., R. Co., L. R. 2 Exch. 158, 4 H. & C. 463, 21 Jur. N. S. 548, 36 L. J. Exch. 37, 13 L. T. Rep. N. S. 626, 14 Wkly. Rep. 968.

That it is competent for the directors to disregard a by-law established by themselves, prescribing the mode of assembling meetings of directors, so far as third persons are concerned, so that the corporation cannot set up such an irregularity as against third person, see Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, Woolw. 400.

51. Singer *v.* Salt Lake City Copper Mfg. Co., 17 Utah 143, 53 Pac. 1024, 70 Am. St. Rep. 773 [*citing* Little Rock Bank *v.* McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. Rep. 60; Simon *v.* Sevier Assoc., 54 Ark. 58, 14 S. W. 1101; Harding *v.* Vandewater, 40 Cal. 77; Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99; Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302; Wiggin *v.* First Freewill Baptist Church, 8 Metc. (Mass.) 301; Doyle *v.* Mizner, 42 Mich. 332, 3 N. W. 968, and *disapproving* Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Merchants' Nat. Bank *v.* Pomeroy Flour Co., 41 Ohio St. 552; Doernbecher *v.* Columbia City Lumber Co., 21 Oreg. 573, 28 Pac. 899, 28 Am. St. Rep. 766; Farwell *v.* Houghton Copper Works, 8 Fed. 66].

52. Charter Gas Engine Co. *v.* Charter, 47 Ill. App. 36.

53. Republican Mountain Silver Mines *v.* Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776.

54. See *supra*, note 49.

Emergency excuses notice.— It has been held that the fact that the minority of the directors of a corporation were not notified of a meeting at which a resolution authorizing the publishing of a letter declaring insolvency and a willingness to become bankrupt was passed will not render the act invalid, if the meeting was held at the usual place and in the usual manner, and for a long time past the absent directors had neglected to attend meetings and were promoting suits against the corporation in another state. *In re* Marine Mach., etc., Co., 91 Fed. 630.

right a minority cannot be arbitrarily deprived by a majority.[55] But while all the members must be notified, in order to the validity of the transactions had at the meeting, it is not necessary that all should be present, but it will be sufficient if a quorum assemble.[56] It follows that proceedings at a special meeting held by a bare majority of the members of a board, without notice to the other members, are void, although all those present voted in favor of the action taken, and the result would have been the same had the other members been present.[57] But all this proceeds upon the assumption that it is practicable to give notice; and it has accordingly been held that the action of the majority is not invalidated because absent directors, out of the state, failed to receive notice of the meeting.[58]

b. Certainty in Stating Object of Meeting. Where the meeting is convened for a special object, that object must be stated, and with reasonable certainty, and the transaction of business which does not come within the description will be voidable.[59] Where the meeting is special, and the notice does not specify the business to be transacted, it will be a good meeting for the transaction of ordinary business.[60] On the other hand a general notice of a directors' meeting, not specifying the business to be transacted, is all that is necessary to establish the transaction of the ordinary business affairs of the corporation.[61] Nor does the rule requiring the purposes of the meeting to be stated in the notice apply to an adjourned meeting, to be held at the call of the president, to hear the report of a committee appointed upon the business for which the original meeting was called.[62]

c. Time Which Must Be Allowed Between Notice and Meeting. It has been held that in the absence of a by-law or custom to the contrary, at least one full

55. Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

56. Story *v.* Furman, 25 N. Y. 214.

57. Doernbecher *v.* Columbia City Lumber Co., 21 Oreg. 573, 28 Pac. 899, 28 Am. St. Rep. 766.

58. Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64. See also Halifax Sugar Refining Co. *v.* Francklyn, 59 L. J. Ch. 591, 62 L. T. Rep. N. S. 563.

Personal notice necessary.— There is a holding to the effect that in the absence of a statute, by-law, or other governing instrument prescribing the manner in which notice shall be given personal notice is necessary, and that it will not be sufficient to leave a copy of a written notice at the usual place of residence of a director. Little Rock Bank *v.* McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. Rep. 60.

59. Hill *v.* Rich Hill Min. Co., 119 Mo. 9, 24 S. W. 223; Mercantile Library Hall Co. *v.* Pittsburgh Library Assoc., 173 Pa. St. 30, 33 Atl. 744, 37 Wkly. Notes Cas. (Pa.) 533. The necessity of stating in the notice the business to be transacted at the meeting may, under some governing statutes, arise even in the case of meetings for the election of directors, as where it is attempted to amend by-laws at such a meeting. Mutual F. Ins. Co. *v.* Farquhar, 86 Md. 668, 39 Atl. 527 [*citing* Kent *v.* Quicksilver Min. Co., 78 N. Y. 159; Com. *v.* Lancaster, 5 Watts (Pa.) 152]. For an illustration of this see Tiessen *v.* Henderson, [1899] 1 Ch. 861, 68 L. J. Ch. 353, 80 L. T. Rep. N. S. 483, 6 Manson 340, 47 Wkly. Rep. 459.

Additional notice of meeting, and of another meeting to be held afterward, when not bad. Alexander *v.* Simpson, 43 Ch. D. 139, 59 L. J. Ch. 137, 61 L. T. Rep. N. S. 708, 1 Meg. 457, 38 Wkly. Rep. 161 [*distinguished* in Tiessen *v.* Henderson, [1899] 1 Ch. 861, 68 L. J. Ch. 353, 80 L. T. Rep. N. S. 483, 6 Manson 340, 47 Wkly. Rep. 459].

Notice of an intention to adopt a by-law, when necessary to the validity of the by-law. Mutual F. Ins. Co. *v.* Farquhar, 86 Md. 668, 39 Atl. 527.

60. New Haven Sav. Bank *v.* Davis, 8 Conn. 191, doubtfully holding that the giving of a mortgage on real estate of the corporation to secure a debt is an ordinary transaction.

61. *In re* Argus, 138 N. Y. 557, 34 N. E. 388, 53 N. Y. St. 270.

That the execution of a mortgage is not such extraordinary business as is required to be stated in a notice of a meeting of the directors convened for that purpose was held in Ashley Wire Co. *v.* Illinois Steel Co., 60 Ill. App. 179 [*affirmed* in 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187].

62. Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187 [*affirming* 60 Ill. App. 179].

In England the directors of a company can, at any meeting of the board, deal with all affairs of the company then requiring attention, whether ordinary or not; and previous notice of the special business to be transacted is not a necessary condition of the proceedings being valid. They can for instance appoint a director, appoint solicitors and bankers, and accept an offer for the use of offices. La Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. 788, 74 L. T. Rep. N. S. 441.

day's notice should be given of a directors' meeting. Therefore a notice for a special meeting of the board of managers of a corporation is *prima facie* insufficient in time, where it calls for a meeting at four o'clock of the day succeeding that upon which it is mailed to the members, and there is no evidence that any director received the notice until the morning of the day appointed for the meeting.[63]

d. Notice of Adjourned Meetings Must Be Given. Adjourned meetings are special meetings, and members not present when the adjournment took place must be notified. Where a regular meeting of the directors of a corporation, from which some of the members are absent, is adjourned to a future day, the hour of which is not fixed, the meeting, held on the day to which the adjournment was had, is a special meeting, of which notice is required to be given to the absentees at the regular meeting; and when no such notice is given, no act requiring the concurrence of a majority of the quorum can be done in such a case. An assessment levied at the adjourned meeting, in the absence of the former absentees, is a nullity.[64]

4. Informalities in Assembling Meeting Cured. As in the case of general meetings of corporations,[65] so in the case of meetings of directors, the want of notice or of other formalities or requisities to the assembling of a valid meeting is cured where all the directors meet and without dissent proceed to act upon the business which is brought before the meeting.[66]

5. Conduct of Meeting. It has been held that a shareholder who has never been elected a director of the corporation cannot act as president *pro tempore* at a directors' meeting.[67]

6. Presumption That Directors' Meetings Were Regularly Called. Where meetings of a legally constituted board of directors have been held, at which business has been transacted pursuant to the purposes for which the corporation was organized, it will be presumed that such meetings were regularly called and

63. Mercantile Library Hall Co. *v.* Pittsburg Library Assoc., 173 Pa. St. 30, 33 Atl. 744, 37 Wkly. Notes Cas. (Pa.) 533.

64. Thompson *v.* Williams, 76 Cal. 153, 18 Pac. 153, 9 Am. St. Rep. 187.

Power of minority to adjourn.—It has been held that a minority of the directors of a railroad company, although legally assembled, pursuant to call, cannot lawfully adjourn the meeting to a place fifty miles distant. State *v.* Smith, 48 Vt. 266.

As to adjourned meetings see *supra*, IV, C, 3.

65. See *supra*, IV, D, 9.

So held under a statute which, although mandatory, had no negative words, in Troy Min. Co. *v.* White, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 549. See also Jones *v.* Milton, etc., Turnpike Co., 7 Ind. 547; Lord *v.* Anoka, 36 Minn. 176, 30 N. W. 550; State *v.* Smith, 22 Minn. 218.

Action taken at a meeting of trustees, where all are present, valid, although not formally expressed. Whitehead *v.* O'Sullivan, 12 Misc. (N. Y.) 577, 33 N. Y. Suppl. 1098, 67 N. Y. St. 801.

66. National City Bank *v.* Johnston, 133 Cal. 185, 60 Pac. 776. See Stobo *v.* Davis Provision Co., 54 Ill. App. 440; Broughton *v.* Jones, 120 Mich. 462, 79 N. W. 691; Minneapolis Times Co. *v.* Nimocks, 53 Minn. 381, 55 N. W. 546. See also Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Suppl. 906 [*citing* Leavitt *v.* Yates, 4 Edw. (N. Y.) 134].

When promissory note authorized at meeting assembled without notice is invalid in hands of one not a *bona fide* holder. Close *v.* Potter, 5 Misc. (N. Y.) 543, 25 N. Y. Suppl. 972. But this is not so where two of the three directors composing the board went into the presence of the third, who was sick, and forced a meeting upon him, although there was a by-law authorizing the holding of a meeting without notice when the three directors were present. State *v.* Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321. *Compare*, however, Stobo *v.* Davis Provision Co., 54 Ill. App. 440.

Notice good, although signed with a rubber stamp.—Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187 [*affirming* 60 Ill. App. 179].

Notice may be sent by mail, when. Stockton Combined Harvester, etc., Works *v.* Houser, 109 Cal. 1, 10, 41 Pac. 809.

67. Benson *v.* Keller, 37 Oreg. 120, 60 Pac. 918.

At a general meeting of an English company, the chairman, supported by a vote of the majority, can stop the debate after the resolutions have been reasonably discussed. Wall *v.* London, etc., Assets Corp., [1898] 2 Ch. D. 469, 67 L. J. Ch. 596, 79 L. T. Rep. N. S. 249, 47 Wkly. Rep. 219.

held for the transaction of such business, and the burden of proof rests upon one who maintains the contrary.[68]

7. These Principles Varied by Corporate Usage. The foregoing rules, like many other rules respecting the mode of corporate action, may be overcome by proof of a contrary habit or usage of acting on the part of the directors. Thus if the directors adopt a practice of giving their separate assent to the execution of contracts by their agents it will have the same force as if done by a regular meeting of the board; otherwise the public could not deal with the corporation in safety.[69] So it has been held that where the articles of association of a company do not prescribe the number of directors required to constitute a quorum, the number who usually act in conducting the business of the company will constitute a quorum.[70] So where it was proved that claims against a corporation were approved by a majority of the board of directors, in accordance with the customary usage of the board in such cases, this was held sufficient proof of approval, in the absence of a law or by-law restricting the directors to a different mode.[71]

G. Obligations of Directors as Fiduciaries — 1. Directors Are Trustees For Shareholders. The directors of a corporation occupy a fiduciary relation toward the shareholders and are treated by courts of equity as trustees for them.[72]

2. Bound to Act With Utmost Good Faith. Directors are bound to exercise nothing short of the *uberrima fides* of the civil law. They must not in any degree allow their official conduct to be swayed by their private interest, unless that interest is the interest which they have in the good of the company in com-

68. Singer *v.* Salt Lake Copper Mfg. Co., 17 Utah 143, 53 Pac. 1024, 70 Am. St. Rep. 773.

There is no presumption that the meeting was a special one, or that the directors were not duly notified of it. Barrell *v.* Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

69. Bank of Middlebury *v.* Rutland, etc., R. Co., 30 Vt. 159. A later case in Vermont advances the untenable proposition that a formal meeting of the directors of a corporation is not necessary in order to enable them to do any act which is within their corporate powers. Waite *v.* Eindham County Min. Co., 37 Vt. 608.

70. Lane *v.* Brainerd, 30 Conn. 565; *In re* Tavistock Ironworks Co., L. R. 4 Eq. 233, 36 L. J. Ch. 616, 16 L. T. Rep. N. S. 824, 15 Wkly. Rep. 1007. So where the words of a charter are doubtful. Rex *v.* Varlo, Cowp. 248.

71. Longmont Supply Ditch Co. *v.* Coffman, 11 Colo. 551, 19 Pac. 508.

72. *California.*— Bradbury *v.* Barnes, 19 Cal. 120.

Kansas.— Hale *v.* Republican River Bridge Co., 8 Kan. 466.

Missouri.— Chouteau *v.* Allen, 70 Mo. 290.

New York.— Bliss *v.* Matteson, 45 N. Y. 22, 52 Barb. 335; Robertson *v.* Bullions, 11 N. Y. 243; Butts *v.* Wood, 38 Barb. 181 [*affirmed* in 37 N. Y. 317]; Karnes *v.* Rochester, etc., R. Co., 4 Abb. Pr. N. S. 107; Cunningham *v.* Pell, 5 Paige 607; Robinson *v.* Smith, 3 Paige 222, 24 Am. Dec. 212; Verplanck *v.* Mercantile Ins. Co., 2 Paige 438, 1 Edw. 84; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. 371; Scott *v.* Depeyster, 1 Edw. 513.

Pennsylvania.— Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628.

Tennessee.— Lane *v.* West Tennessee Bank, 9 Heisk. 419.

Wisconsin.— Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433.

United States.— Koehler *v.* Black River Falls Iron Co., 2 Black 715, 17 L. ed. 339; Corbett *v.* Woodward, 6 Fed. Cas. No. 3,223, 5 Sawy. 403.

England.— Imperial Mercantile Credit Assoc. *v.* Coleman, L. R. 6 H. L. 189, 42 L. J. Ch. 644, 29 L. T. Rep. N. S. 1, 21 Wkly. Rep. 696; *In re* Anglo-Greek Steam Nav., etc., Co., 35 Beav. 399, 12 Jur. 323, 14 L. T. Rep. N. S. 120, 14 Wkly. Rep. 624; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711; Williams *v.* Page, 24 Beav. 654, 4 Jur. N. S. 102, 27 L. J. Ch. 425; *In re* Cameron's Coalbrook, etc., R. Co., 18 Beav. 339; York, etc., R. Co. *v.* Hudson, 16 Beav. 485, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 19 Eng. L. & Eq. 361; Albion Steel, etc., Co. *v.* Martin, 1 Ch. D. 580, 45 L. J. Ch. 173, 33 L. T. Rep. N. S. 660, 24 Wkly. Rep. 134; Ernest *v.* Croysdill, 2 De G. F. & J. 175, 63 Eng. Ch. 137; Matter of Cameron's Coalbrook Steam Coal, etc., Co., 5 De G. M. & G. 284, 24 L. J. Ch. 130, 2 Wkly. Rep. 448, 54 Eng. Ch. 226; Aberdeen R. Co. *v.* Blakie, 2 Eq. 1281, 1 Macq. 461, 1 Paterson Sc. App. 391, 1 Paton App. Cas. 119, 26 Sc. Jur. 628; Benson *v.* Heathorn, 1 Y. & Coll. Ch. 326, 20 Eng. Ch. 326.

See also Cumberland Coal, etc., Co. *v.* Parish, 42 Md. 598 (where it is said that they are agents for the shareholders); Parsons *v.* Hayes, 14 Abb. N. Cas. (N. Y.) 419

mon with all the other shareholders. This principle is asserted and illustrated by judicial decisions almost without number.[73] This duty results from the nature of their employment, and without any stipulation to that effect.[74] Their private interest must yield to their official duty whenever those interests are conflicting.[75] They must neither exercise their trust for their own private exclusive benefit, nor for the benefit of third persons. They cannot on the one hand give away the property of the corporation[76] or release its securities[77] or, on the other, take to themselves advantages not common to all the shareholders. And any arrangement by them with a contractor with the corporation by which they are to share in the profits of the contract must be confirmed by the shareholders.[78] And where a director, by means of his power as such, secures to himself any advantage over other shareholders or creditors, equity will treat the transaction as void or charge him as trustee for the benefit of the injured parties; nor can such director, as to such parties, claim to have acted in ignorance of what it was his duty to know concerning the conduct and condition of the affairs of the corporation.[79] And an agreement of a director to use his vote and influence to the disadvantage of the corporation, and in the interest and for the benefit of third persons, is an immoral and corrupt agreement and will not be enforced.[80] Being the agents of the corporation, if they exercise their functions for the purpose of injuring its interests and alienating its property, they are personally liable for the loss occasioned thereby;[81] and, being trustees of the corporate assets for its shareholders, whenever they have to divide those assets among the shareholders they must give to each his proportionate share.[82]

3. In What Sense Trustees For Creditors of Corporation. Until insolvency exists or is foreseen, the directors of a corporation sustain no fiduciary relation to creditors, but are merely the agents of the corporation, acting for their own principal.[83] They can be regarded as trustees for the creditors of the corporation only to the extent that the assets of a corporation are a trust fund for its creditors, under principles elsewhere considered.[84] To the extent to which the assets of a corporation may be regarded as a trust fund for its creditors,[85] the directors are undoubtedly the trustees of those assets for the creditors of the corporation.[86]

(where it is said that they are trustees for the corporation).

As to the sense in which they may be regarded as agents see *supra*, IX, C, 1.

President of corporation to whom the shareholders intrusts their shares for sale is bound to account for secret profits as a quasi-trustee. Mulvane *v.* O'Brien, 58 Kan. 463, 49 Pac. 607.

73. *Alabama.*— Perry *v.* Tuskaloosa Cotton-Seed Oil Mill Co., 93 Ala. 364, 9 So. 217.

Illinois.— Bestor *v.* Wathen, 60 Ill. 138.

Iowa.—Blair Town Lot, etc., Co. *v.* Walker, 50 Iowa 376.

New York.— Blake *v.* Buffalo Creek R. Co., 56 N. Y. 485; Leavitt *v.* Yates, 4 Edw. 134.

United States.— Koehler *v.* Black River Falls Iron Co., 2 Black 715, 17 L. ed. 339.

74. Cumberland Coal, etc., Co. *v.* Parish, 42 Md. 598; Benson *v.* Heathorn, 1 Y. & Coll. Ch. 326, 20 Eng. Ch. 326.

75. *In re* Cameron's Coalbrook, etc., R. Co., 18 Beav. 339.

76. Union Bank *v.* Jones, 4 La. Ann. 236.

77. Gallery *v.* National Exch. Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149.

78. Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

79. Corbett *v.* Woodward, 6 Fed. Cas. No. 3,223, 5 Sawy. 403.

80. Attaway *v.* St. Louis Third Nat. Bank, 93 Mo. 485, 5 S. W. 16.

81. Atty.-Gen. *v.* Wilson, Cr. & Ph. 1, 4 Jur. 1174, 10 L. J. Ch. 53.

82. Hale *v.* Republican River Bridge Co., 8 Kan. 466. Therefore a resolution of the shareholders, placing certain shares at the disposal of the directors, does not mean at their disposal for their personal benefit, but for the benefit of the company; and they must account as trustees for the disposition which they may have made of them. York, etc., R. Co. *v.* Hudson, 16 Beav. 485, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 19 Eng. L. & Eq. 361.

83. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662.

84. See *supra*, VIII, B, 1 *et seq.*

85. See for a treatment of this subject *in entiro* 2 Thompson Corp. § 2951 *et seq.*

86. Richards *v.* New Hampshire Ins. Co., 43 N. H. 263; Bliss *v.* Matteson, 45 N. Y. 22; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Cunningham *v.* Pell, 5 Paige (N. Y.) 607; Jackson *v.* Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492. That the president of a gravel-road company borrowing money on duly authorized assessments against abutting lands, who collects the assessments on the faith of which the loans were obtained,

Modern judicial statements tend to qualify this doctrine, but the directors are said to be trustees of the creditors "to a considerable degree,"[87] or "in a certain sense."[88] It is also said, speaking of bank directors, that they are not trustees in a technical sense, but that their relation to the corporation is rather that of an agent to his principal, when viewed with reference to the rights of creditors.[89] The so-called "trust-fund doctrine" does not seem to have found a foothold in England with respect to business corporations, but in one case in that country it was distinctly denied.[90] The modern tendency is to restrain the doctrine to the case of insolvent corporations; and the difficulty of holding directors to the contrary relations of agents for the corporation and fiduciaries of its creditors at once suggests itself to the mind.[91] Excluding such corporations as savings-banks, mutual insurance companies, and mutual benefit societies, the general view unquestionably is that in the absence of statutes making a different rule the directors of a corporation are not personally liable to its creditors.[92]

4. To What Extent Trustees For General Public. The directors of corporations created for the performance of public duties, such as railway companies, are also in a qualified sense trustees of their powers for the general public as well as for their shareholders; and hence a contract by which they are to receive a private gain for the exercise of their powers, in a matter wherein the public have an interest, such as the matter of locating a line of railroad or a railway station, is contrary to public policy, and is essentially immoral and corrupt in its tendencies; and consequently no such contract can be enforced in a court of justice.[93]

5. Bound to Exercise Their Powers For Benefit of Corporation Only — a. In General. Directors of a corporation are bound to the exercise of the utmost good faith to the end of conserving its property and furthering its interests and the objects for which it was created. Any action on their part tending to the impairment of corporate rights, the sacrifice of corporate interests, the retardation of the objects of the corporation, and *a fortiori* the destruction of the corporation itself, will be regarded as a flagrant breach of trust on the part of the directors engaged therein.[94]

holds the funds as a trustee for the lenders, and is personally responsible to them for any diversion thereof, see Pugh *v.* Miller, 126 Ind. 189, 25 N. E. 1040.

87. Jackson *v.* Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492.

88. Bliss *v.* Matteson, 45 N. Y. 22.

89. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662.

90. *In re* Wincham Shipbuilding, etc., Co., 9 Ch. D. 322, 48 L. J. Ch. 48, 38 L. T. Rep. N. S. 659, 26 Wkly. Rep. 823.

The American doctrine appears to have been adopted from the English doctrine that the property of a charitable corporation is a trust fund, and that the court of chancery has jurisdiction over its custodians as trustees. See Green's Brice's Ultra Vires (2d ed.) 50, and the American note; also Atty.-Gen. *v.* Aspinall, 1 Jur. 812, 7 L. J. Ch. 51, 2 Myl. & C. 613, 14 Eng. Ch. 613. The doctrine was first announced in this country by Story, J., in a case at circuit, in 1824. Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308. He professes to found it on the doctrine of an earlier English chancery case (Curson *v.* African Co., 1 Vern. 121), but an examination of that case will show that it discloses no adequate basis for the doctrine.

91. Smith *v.* Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690.

92. Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Fusz *v.* Spaunhorst, 67 Mo. 256; Winter *v.* Baker, 34 How. Pr. (N. Y.) 183; Zinn *v.* Mendel, 9 W. Va. 580.

93. St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592, 22 Am. Rep. 122; Linder *v.* Carpenter, 62 Ill. 309; Bestor *v.* Wathen, 60 Ill. 138; Fuller *v.* Dame, 18 Pick. (Mass.) 472; Holladay *v.* Patterson, 5 Oreg. 177; Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 9 S. Ct. 402, 32 L. ed. 819.

94. *California.*— Wright *v.* Oroville Gold, etc., Min. Co., 40 Cal. 20.

Louisiana.— State *v.* Citizens' Sav. Bank, 31 La. Ann. 836.

Massachusetts.— Peabody *v.* Flint, 6 Allen 52.

Michigan.— Hart *v.* Brockway, 57 Mich. 189; Bank Com'rs *v.* Brest Bank, Harr. Ch. 106.

New Jersey.— Hilles *v.* Parrish, 14 N. J. Eq. 380.

New York.— Taylor *v.* Earle, 8 Hun 1; Frothingham *v.* Barney, 6 Hun 366; Gray *v.* New York, etc., Steamship Co., 3 Hun 383; Copeland *v.* Citizens' Gas Light Co., 61 Barb. 60; Abbot *v.* American Hard Rubber Co., 33 Barb. 578; Conro *v.* Port Henry Iron Co., 12 Barb. 27; Gross *v.* Sackett, 2 Bosw. 617; Brouwer *v.* Hill, 1 Sandf. 629;

b. Cannot Deal at Once For Themselves and For Corporation. Directors will not be allowed to assume double relations, dealing for themselves and for the corporation at the same time; but they will be compelled to account to the corporation or to its legal representative for any secret profits which they may have made by such dealing.[95]

c. Cannot Create Any Relation Making Their Personal Interests Antagonistic to Those of Corporation. Directors will not be permitted to create any relation between themselves and the corporation, or its property, which will make their personal interests antagonistic to that of the corporation.[96]

d. Cannot Vote Upon Questions Affecting Their Private Interest. A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest any more than a judge can sit in his own case; and any resolution passed at a meeting of the directors at which a director having a personal interest in the matter voted will be voidable at the instance of the corporation or the shareholders, without regard to its fairness, provided the vote of such director was necessary to the result.[97] Thus as we shall hereafter see[98] if the directors of a company vote themselves a salary or compensation for managing its affairs, they may be compelled to account in equity for the money so misappropriated, although a resolution passed with the aid of such a disqualified vote is good as respects the rights of third persons dealing with the corporation in good faith;[99] and it seems that it is good as against all parties, until challenged and set aside, and that it will not be set aside by reason of the disqualified vote alone, in the absence of any allegation or proof of bad faith.[1]

Brouwer *v.* Appleby, 1 Sandf. 158; Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. 419; Paine *v.* Irwin, 59 How. Pr. 316; Sheldon Hat Blocking Co. *v.* Eickmeyer Hat Blocking Co., 56 How. Pr. 70; Ward *v.* Sea Ins. Co., 7 Paige 294.

Pennsylvania.— Bedford R. Co. *v.* Bowser, 48 Pa. St. 29.

South Carolina.— Smith *v.* Smith, 3 Desauss. 557.

Vermont.— Stevens *v.* Willard, 43 Vt. 692.

United States.— *In re* Lady Bryan Min. Co., 14 Fed. Cas. No. 7,978, 1 Sawy. 349.

England.— Ward *v.* Attornies Soc., 1 Coll. 370, 28 Eng. Ch. 370.

95. Ward *v.* Davidson, 89 Mo. 445, 1 S. W. 846 (per Black, J.); Wardell *v.* Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509. It has been held that they will not be allowed to set off the indebtedness of the corporation to them for their fees or compensation, against their liability as subscribers for its shares, and thereby get rid of their liability as shareholders. *In re* European Cent. R. Co., L. R. 13 Eq. 255, 41 Eng. Ch. 251, 26 L. T. Rep. N. S. 92.

96. Attaway *v.* St. Louis Third Nat. Bank, 93 Mo. 485 [*reversing* 15 Mo. App. 578]; Brewster *v.* Stratman, 4 Mo. App. 41. As to the effect of directors becoming interested adversely to the corporation see Cook *v.* Sherman, 20 Fed. 167, 4 McCrary 20, where there is an extensive note. See further as to the governing principle Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 388; Keller *v.* Leib, 1 Penr. & W. (Pa.) 220; Galbraith *v.* Elder, 8 Watts (Pa.) 81; Walley *v.* Whalley, 1 Vern. 484. A director must therefore refund to the company commissions and brokerage fees which he receives as ship's husband in dealing with the company. Benson *v.* Heathorn, 1 Y. & Coll. Ch. 326, 20 Eng. Ch. 326. And the treasurer of the corporation will not be allowed to buy up a claim against it, and use it as a basis of enforcing the statutory liability of a director. Hill *v.* Frazier, 22 Pa. St. 320.

Illustrations of this principle, showing when and when it does not apply.— Keokuk Northern Line Packet Co. *v.* Davidson, 95 Mo. 467, 8 S. W. 545; Jackson *v.* Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492; Drury *v.* Milwaukee, etc., R. Co., 7 Wall. (U. S.) 299, 19 L. ed. 40. The fact that one is president of a corporation, and therefore a director, does not prevent him from doing that which the corporation has lost its ability to do, even if continued in existence. Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140. And see Hannerty *v.* Standard Theatre Co., 109 Mo. 297, 19 S. W. 82.

97. Graves *v.* Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665; Smith *v.* Los Angeles Immigration, etc., Assoc., 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53; Chamberlain *v.* Pacific Wool-Growing Co., 54 Cal. 103.

98. See *infra*, IX, Q, 7.

99. Baird *v.* Washington Bank, 11 Serg. & R. (Pa.) 411.

1. Leavitt *v.* Oxford, etc., Silver Min. Co., 3 Utah 265, 1 Pac. 356. Moreover directors who are themselves wrong-doers or the partisans of the wrong-doer are disqualified from acting as the representatives of the corporation, in any litigation for the correction of the wrong which they are alleged to have committed or approved. Knoop *v.* Bohmrich, 49 N. J. Eq. 82, 23 Atl. 118.

e. Cannot Act For Corporation and For Opposing Interest. Contracts made by directors who at the same time represent an opposing interest, generally where the other contracting party is a corporation in which they are also directors,[2] are not void *ab initio*, but are voidable in a proper proceeding taken for that purpose, by the corporation, its shareholders, or its creditors.[3] They will not be specifically performed against the objection of the injured corporation, or of any other party having a standing to object, so long as they remain *in fieri*.[4] Any proceeding to rescind such a contract must be taken in time, and before the rights of innocent third parties have supervened.[5] It seems that while a court of equity will scrutinize such contracts and set them aside on the least appearance of unfairness, yet this will not be done upon the mere fact being shown that the directors of the corporation were so situated with reference to the action which their votes in the directorate caused to be taken that the transaction inured to their personal benefit, where it was also shown to be plainly beneficial to the corporation.[6]

6. Cannot Secure to Themselves an Advantage Not Common to All Shareholders. Directors, who are also creditors of the corporation, will not be permitted to raise money by a mortgage of the property of the corporation, to pay off debts due by the corporation to themselves, without providing for the discharge of other debts, thus securing to themselves an advantage not common to all the shareholders.[7]

7. Engagements Contrary to Duty Voidable. An engagement by a person who is a director or other officer of a corporation, by which he agrees to do a thing which is or may become injurious to the shareholders or to a majority of them, is an agreement contrary to the duty involved in his trust, and is voidable.[8]

8. Not Allowed to Make Profit Out of Their Trust — a. In General. Such being the position of directors, equity will not allow them to make a profit out

2. As to which see *infra*, IX, J, 1, a *et seq.*

3. See *infra*, IX, J, 6 *et seq.*

4. Charter Gas Engine, etc., Co. *v.* Charter, 47 Ill. App. 36; Davis Provision Co. *v.* Fowler, 20 N. Y. App. Div. 626, 47 N. Y. Suppl. 205. As where the president of a corporation assumes to make a contract for it, for the purchase of goods from another corporation, of which he is also president. Michigan Slate Co. *v.* Iron Range, etc., R. Co., 101 Mich. 14, 59 N. W. 646.

5. Genesee Valley, etc., R. Co. *v.* Retsof Min. Co., 15 Misc. (N. Y.) 187, 36 N. Y. Suppl. 896, 72 N. Y. St. 231.

6. Of this a good illustration is afforded by Bucksport, etc., R. Co. *v.* Edinburgh, etc., Redwood Co., 68 Fed. 972, 16 C. C. A. 74.

7. Koehler *v.* Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. ed. 339. See also Farmers', etc., Bank *v.* Downey, 53 Cal. 466, 31 Am. Rep. 62; Stratton *v.* Allen, 16 N. J. Eq. 229; Van Hook *v.* Somerville Mfg. Co., 5 N. J. Eq. 137; Matter of Cameron's Coalbrook Steam Coal, etc., Co., 5 De G. M. & G. 284, 24 L. J. Ch. 130, 2 Wkly. Rep. 448, 54 Eng. Ch. 226. *Compare* Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Smith *v.* Lansing, 22 N. Y. 520.

8. *Maryland.*— Davis *v.* Gemmell, 70 Md. 356, 17 Atl. 259.

Massachusetts.— Woodruff *v.* Wentworth, 133 Mass. 309; Guernsey *v.* Cook, 120 Mass. 501; Fuller *v.* Dame, 18 Pick. 472.

Missouri.— Attaway *v.* St. Louis Third Nat. Bank, 93 Mo. 485, 5 S. W. 16.

New York.— Bliss *v.* Matteson, 45 N. Y. 22.

United States.— Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 9 S. Ct. 402, 32 L. ed. 819; Wardell *v.* Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509.

Illustrations of this principle.— This principle condemned an agreement by which a corporation, on purchasing the business of a partnership, bribed one of the partners, by entering into a personal contract with him to retain him as vice-president of the new corporation, organized to take over the business, at a salary of five thousand dollars a year. West *v.* Camden, 135 U. S. 507, 10 S. Ct. 838, 34 L. ed. 254. It condemned an agreement made by a majority of the directors of a corporation among themselves, privately and unofficially, that they should be paid a percentage upon all the money raised upon the credit of a bond of indemnity, signed by them, against the future indebtedness of the corporation. Butler *v.* Cornwall Iron Co., 22 Conn. 335. It prevented a director who had given an ordinary bond and mortgage to the corporation as security for a loan made by it to him from setting up, as a defense to the foreclosure of the mortgage, that, by a secret parol agreement between him and the other directors, the loan had been repaid by reason of his shares of stock in the corporation having been fully paid up. Pangborn *v.* Citizens' Bldg. Assoc., 35 N. J. Eq. 341.

of their trust; and equity will, at the suit of the corporation or of the shareholders, relieve against any arrangement by which they attempt so to do.[9]

b. Must Account to Corporation For Secret Profits Acquired Through Breach of Trust. As in the case of other trustees,[10] directors of corporations must account to their corporation, or to its lawful representative, for all profits which they have secretly made through breaches of their official trust.[11] This principle

9. *Maine.*— European, etc., Co. *v.* Poor, 59 Me. 277.

Massachusetts.— Parker *v.* Nickerson, 112 Mass. 195.

Missouri.— Keokuk Northern Line Packet Co. *v.* Davidson, 95 Mo. 467, 8 S. W. 545.

New Jersey.— Redmond *v.* Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418.

New York.— Blake *v.* Buffalo Creek R. Co., 56 N. Y. 485; Bain *v.* Brown, 56 N. Y. 285; Butts *v.* Wood, 37 N. Y. 317; Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. 553.

Oregon.— Schetter *v.* Southern Oregon Co., 19 Oreg. 192, 24 Pac. 25.

Pennsylvania.— Keystone Surgical Supply Mfg. Co. *v.* Bate, 187 Pa. St. 460, 41 Atl. 299.

Rhode Island.— Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

United States.— West Virginia Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328; Koehler *v.* Black River Falls Iron Co., 2 Black 715, 17 L. ed. 339.

England.— Parker *v.* McKenna, L. R. 10 Ch. 96, 44 L. J. Ch. 425, 31 L. T. Rep. N. S. 739, 23 Wkly. Rep. 271; *In re* International Contract Co., L. R. 6 Ch. 525; Madrid Bank *v.* Pelly, L. R. 7 Eq. 442, 21 L. T. Rep. N. S. 13; Imperial Mercantile Credit Assoc. *v.* Coleman, L. R. 6 H. L. 189, 42 L. J. Ch. 644, 29 L. T. Rep. N. S. 1, 21 Wkly. Rep. 696 [*reversing* L. R. 6 Ch. 558, 40 L. J. Ch. 262, 24 L. T. Rep. N. S. 290, 19 Wkly. Rep. 481]; Gaskell *v.* Chambers, 26 Beav. 360, 5 Jur. N. S. 52, 28 L. J. Ch. 385; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711; *In re* Cameron's Coalbrook, etc., R. Co., 18 Beav. 339; York, etc., R. Co. *v.* Hudson, 16 Beav. 485, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 19 Eng. L. & Eq. 361.

Procuring corporate contract and reletting it at a higher price.— In the application of this doctrine, it is well held to be a fraudulent breach of trust for a director and a member of a building committee of a corporation to secure a contract for the construction of a building for the corporation at a price greater than a third person had offered to take it, and to sublet it to the latter without revealing the transaction to the corporation; and the corporation has the election to rescind, or to waive the right to rescind, and pay the actual cost of the work to be performed. Keystone Surgical Supply Mfg. Co. *v.* Bate, 187 Pa. St. 460, 41 Atl. 299.

The rule as applicable to trustees generally is stated and illustrated in the following cases: Michoud *v.* Girod, 4 How. (U. S.) 503, 11 L. ed. 1076; Kimber *v.* Barber, L. R. 8 Ch. 56, 27 L. T. Rep. N. S. 526, 21 Wkly. Rep. 65; Tennant *v.* Trenchard, L. R. 4 Ch. 537, 38 L. J. Ch. 169, 20 L. T. Rep. N. S. 856; Bentley *v.* Craven, 18 Beav. 75; Gillett *v.* Peppercorne, 3 Beav. 78, 43 Eng. Ch. 78; Hamilton *v.* Wright, 9 Cl. & F. 111, 8 Eng. Reprint 357; Blisset *v.* Daniel, 1 Eq. 484, 10 Hare 493, 18 Jur. 122, 1 Wkly. Rep. 529, 44 Eng. Ch. 478; Tyrrell *v.* London Bank, 10 H. L. Cas. 26, 8 Jur. N. S. 849, 31 L. J. Ch. 369, 6 L. T. Rep. N. S. 1, 10 Wkly. Rep. 359 [*affirming* 27 Beav. 273]; Bowes *v.* Toronto, 11 Moore P. C. 463, 14 Eng. Reprint 770; Fawcett *v.* Whitehouse, 4 L. J. Ch. O. S. 64, 8 L. J. Ch. O. S. 50, 1 Russ. & M. 132, 5 Eng. Ch. 132; Hichens *v.* Congreve, 1 Russ. & M. 150 note, 5 Eng. Ch. 150; *Ex p.* James, 8 Ves. Jr. 327, 7 Rev. Rep. 76. This is an application of the general principle that an agent cannot speculate out of his agency, and that what he gains by such speculation belongs to his principal, and in the case of a trustee to the trust fund. Tobey *v.* Robinson, 99 Ill. 222; Atlee *v.* Fink, 75 Mo. 100, 42 Am. Rep. 385; Jacobus *v.* Munn, 37 N. J. Eq. 48; Bliss *v.* Matteson, 45 N. Y. 22. See also in affirmation of the principle Fuller *v.* Dame, 18 Pick. (Mass.) 472; Spinks *v.* Davis, 32 Miss. 152.

10. Perry Trusts, § 427 *et seq.*; Michoud *v.* Girod, 4 How. (U. S.) 503, 11 L. ed. 1076; Kimber *v.* Barber, L. R. 8 Ch. 56, 27 L. T. Rep. N. S. 526, 21 Wkly. Rep. 65; Tennant *v.* Trenchard, L. R. 4 Ch. 537, 38 L. J. Ch. 169, 20 L. T. Rep. N. S. 856; Bentley *v.* Craven, 18 Beav. 75; Gillett *v.* Peppercorne, 3 Beav. 78, 43 Eng. Ch. 78; Hamilton *v.* Wright, 9 Cl. & F. 111, 8 Eng. Reprint 357; Blisset *v.* Daniel, 1 Eq. 484, 10 Hare 493, 18 Jur. 122, 1 Wkly. Rep. 529, 44 Eng. Ch. 478; Fawcett *v.* Whitehouse, 4 L. J. Ch. O. S. 64, 8 L. J. Ch. O. S. 50, 1 Russ. & M. 132, 5 Eng. Ch. 132; Hichens *v.* Congreve, 1 Russ. & M. 150 note, 5 Eng. Ch. 150; *Ex p.* James, 8 Ves. Jr. 337, 7 Rev. Rep. 76.

11. *Alabama.*— Perry *v.* Tuskaloosa Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 So. 217.

Kansas.— Thomas *v.* Sweet, 37 Kan. 183, 14 Pac. 545.

Maine.— European, etc., R. Co. *v.* Poor, 59 Me. 277.

Massachusetts.— Parker *v.* Nickerson, 112 Mass. 195.

Missouri.— Keokuk Northern Line Packet Co. *v.* Davidson, 95 Mo. 467, 8 S. W. 545; Ward *v.* Davidson, 89 Mo. 445, 1 S. W. 846.

New Jersey.— Redmond *v.* Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418.

New York.— Redhead *v.* Parkway Driving Club, 148 N. Y. 471, 42 N. E. 1047 [*affirming* 7 Misc. 275, 27 N. Y. Suppl. 887, 58 N. Y. St. 534]; Barnes *v.* Brown, 80 N. Y. 527;

requires the contracting officers of the corporation to account to the corporation for any commissions which they have received from the other contracting party;[12] or for any rebate which he may have received from the purchase-price of property sold to the corporation, as a member of the purchasing committee of the corporation, although he is also a member of a firm of real-estate brokers, and may be accountable to his firm for such rebate as commissions;[13] or for indemnification money paid to him by the promoter of the corporation to secure him against loss in purchasing the shares necessary to qualify him as a director thereof — which money belongs to the corporation.[14] Nor do the vermiculations by which the unfaithful officer endeavors to conceal the real nature of the transaction have any other effect than to show his guilty *scienter*, and thus furnish evidence against him.[15]

c. Such Contracts Inure to Benefit of Corporation or May Be Repudiated by It. A contract by which a director uses his official power and influence to his own personal advantage, or to the advantage of third persons, and to the disadvantage of the corporation, is immoral and corrupt, in the sense that it will not be judicially enforced;[16] but it will be relieved against, at the suit of the corporation or of its shareholders, under principles hereafter explained; or it will, at the election of

Blake *v.* Buffalo Creek R. Co., 56 N. Y. 485; Butts *v.* Wood, 37 N. Y. 317; Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. 553.

Pennsylvania.— Bird Coal, etc., Co. *v.* Humes, 157 Pa. St. 278, 27 Atl. 750, 33 Wkly. Notes Cas. 174, 37 Am. St. Rep. 727.

Rhode Island.— Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9.

England.— Parker *v.* McKenna, L. R. 10 Ch. 96, 44 L. J. Ch. 425, 31 L. T. Rep. N. S. 739, 23 Wkly. Rep. 271; *In re* International Contract Co., L. R. 6 Ch. 525; Madrid Bank *v.* Pelly, L. R. 7 Eq. 442, 21 L. T. Rep. N. S. 13; Imperial Mercantile Credit Assoc. *v.* Coleman, L. R. 6 H. L. 189, 42 L. J. Ch. 644, 29 L. T. Rep. N. S. 1, 21 Wkly. Rep. 696 [*reversing* L. R. 6 Ch. 558, 40 L. J. Ch. 262, 22 L. T. Rep. N. S. 357, 24 L. T. Rep. N. S. 290, 18 Wkly. Rep. 570, 19 Wkly. Rep. 481]; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711; York, etc., R. Co. *v.* Hudson, 16 Beav. 485, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 19 Eng. L. & Eq. 361; *In re* Cameron's Coalbrook, etc., R. Co., 10 Beav. 339.

Illustrations of the doctrine of the above text may be found in the following among many other cases:

California.—Farmers', etc., Bank *v.* Downey, 53 Cal. 466, 31 Am. Rep. 62.

Kentucky.— Widrig *v.* Newport St. R. Co., 82 Ky. 511.

Missouri.— Keokuk Northern Line Packet Co. *v.* Davidson, 95 Mo. 467, 8 S. W. 545; Ward *v.* Davidson, 89 Mo. 445, 1 S. W. 846.

New Jersey.— Redmond *v.* Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418.

New York.— Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046, 36 N. Y. St. 500, 22 Am. St. Rep. 816, 12 L. R. A. 473 [*reversing* 54 Hun 339, 7 N. Y. Suppl. 535, 27 N. Y. St. 98]; St. James's Church *v.* Church of Redeemer, 45 Barb. 356.

Pennsylvania.— Simons *v.* Vulcan Oil, etc., Min. Co., 61 Pa. St. 202, 100 Am. Dec. 628; McElhenny's Appeal, 61 Pa. St. 188; Beeson *v.* Beeson, 9 Pa. St. 279.

South Carolina.— Palmetto Lumber Co. *v.* Risley, 25 S. C. 309.

England.— Madrid Bank *v.* Pelly, L. R. 7 Eq. 442, 21 L. T. Rep. N. S. 13; Imperial Mercantile Credit Assoc. *v.* Coleman, L. R. 6 H. L. 189, 42 L. J. Ch. 644, 29 L. T. Rep. N. S. 1, 21 Wkly. Rep. 696; Gaskell *v.* Chambers, 26 Beav. 360, 5 Jur. N. S. 52, 28 L. J. Ch. 385; York, etc., R. Co. *v.* Hudson, 16 Beav. 485, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 19 Eng. L. & Eq. 361; *In re* Brighton Brewery Co., 37 L. J. Ch. 278, 16 Wkly. Rep. 472; *Ex p.* Hill, 32 L. J. Ch. 154, 7 L. T. Rep. N. S. 656, 1 New Rep. 148; Bowes *v.* Toronto, 11 Moore P. C. 463, 14 Eng. Reprint 770. See also Benson *v.* Heathorn, 1 Y. & Coll. Ch. 326, 20 Eng. Ch. 326.

12. Jameson *v.* Coldwell, 25 Oreg. 199, 35 Pac. 245.

13. Redhead *v.* Parkway Driving Club, 148 N. Y. 471, 42 N. E. 1047 [*affirming* 7 Misc. (N. Y.) 275, 27 N. Y. Suppl. 887, 58 N. Y. St. 887].

14. *In re* North Australian Territory Co., [1892] 1 Ch. 322, 61 L. J. Ch. 129, 65 L. T. Rep. N. S. 800, 40 Wkly. Rep. 212 [*following In re* Canadian Oil Works Corp., L. R. 10 Ch. 593, 44 L. J. Ch. 721, 33 L. T. Rep. N. S. 466, 24 Wkly. Rep. 191; *In re* Caerphilly Colliery Co., 5 Ch. D. 336, 46 L. J. Ch. 339, 25 Wkly. Rep. 618, and *distinguishing* Cavendish Bentinck *v.* Fenn, 12 App. Cas. 652, 57 L. J. Ch. 552, 57 L. T. Rep. N. S. 773, 36 Wkly. Rep. 441].

15. See for illustration Rutland Electric Light Co. *v.* Bates, 68 Vt. 579, 35 Atl. 480, 54 Am. St. Rep. 904.

16. Attaway *v.* St. Louis Third Nat. Bank, 93 Mo. 485, 5 S. W. 16. If a director opposes a transaction pending between his corporation and third persons, and the latter buy him off and give their note to him as the price of his treachery, he cannot on grounds of public policy recover on the note. Kauffman *v.* Keiper, 5 Pa. Dist. 620, 18 Pa. Co. Ct. 181.

the corporation, inure to its benefit.[17] It is therefore said to be either void, or to inure to the benefit of the corporation.[18] If therefore a director acting for himself proposes to the corporation a contract, from the execution of which the director will derive a secret profit, that profit belongs to the company at its election.[19]

d. Directors Have Power to Enter Into Open and Fair Contracts With Corporation. Directors are not disabled from entering into contracts with the corporation, provided there be enough directors on the other side of the contract to make a quorum, and provided the contract is open, fair, and honest. The rule under consideration prohibits a director from acquiring secret profits through contracts made with or for the corporation, but does not prohibit contracts with the corporation, where there has been a full and fair disclosure of his interest in the contract.[20] For example it has been held that the shareholders and directors of a manufacturing corporation, who, with their own money and on their own credit and risk, erect new works, may make a profit thereon upon the sale to such corporation of such works, and are not accountable therefor, especially where the transaction is advantageous to the corporation, has been ratified by a unanimous vote at a shareholders' meeting, and an opportunity is given the shareholders to rescind, with full knowledge of all the facts; and where opportunity was also given to the corporation to erect such works before their construction was undertaken by the directors.[21]

e. Rule Applies to Secret and Not to Open Profits. Such contracts will be scrutinized in equity, and will be set aside if not made in the utmost fairness and good faith.[22] So far from being void *ab initio*, such contracts are good as against third persons, who are not in a position to set up the rights of the corporation by way of defense against them.[23] The rule is specially applicable where, although the director received a profit out of the transaction, the contract was made in good faith, was not improvident, had been performed, and the corporation had received the benefit of its performance, under which circumstances it has been

17. Sargent *v.* Kansas Midland R. Co., 48 Kan. 672, 29 Pac. 1063.

18. Sargent *v.* Kansas Midland R. Co., 48 Kan. 672, 29 Pac. 1063.

19. Imperial Mercantile Credit Assoc. *v.* Coleman, L. R. 6 H. L. 189, 42 L. J. Ch. 644, 29 L. T. Rep. N. S. 1, 21 Wkly. Rep. 696. Obviously a director receiving from his company shares of stock for which he has paid nothing will be compelled to account to the company for his profits on the sale thereof. Parker *v.* McKenna, L. R. 10 Ch. 96, 44 L. J. Ch. 425, 31 L. T. Rep. N. S. 739, 23 Wkly. Rep. 271; York, etc., R. Co. *v.* Hudson, 16 Beav. 485, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 19 Eng. L. & Eq. 361. Or he will be compelled to pay the value of the shares, if retained by him, as where qualification shares are allotted to a director at the expense of the company. *In re* Canadian Oil Works Corp., L. R. 10 Ch. 593, 44 L. J. Ch. 721, 33 L. T. Rep. N. S. 466, 24 Wkly. Rep. 191; *In re* Western of Canada Oil, etc., Co., L. R. 20 Eq. 580; *In re* Diamond Fuel Co., 13 Ch. D. 169, 49 L. J. Ch. 301, 41 L. T. Rep. 717, 28 Wkly. Rep. 309. The directors of a company secretly receiving a bonus for the performance of their duties will be compelled to yield it up to their company. General Exch. Bank *v.* Horner, L. R. 9 Eq. 480, 39 L. J. Ch. 393, 22 L. T. Rep. N. S. 693, 18 Wkly. Rep. 414; Madrid Bank *v.* Pelly, L. R. 7 Eq. 442, 21 L. T. Rep. N. S. 13; Gaskell *v.* Chambers, 26 Beav. 360, 5 Jur. N. S. 52, 28 L. J. Ch. 385. See also Maxwell *v.* Port Tennant Patent Steam Fuel, etc., Co., 24 Beav. 495.

The same rule has been applied to the solicitor and engineer of a corporation, acting as its contracting agents. Hedges *v.* Paquett, 3 Oreg. 77; Mann *v.* Edinburgh Northern Tramways Co., [1893] A. C. 69, 57 J. P. 245, 62 L. J. P. C. 74, 68 L. T. Rep. N. S. 96, 1 Reports 86.

20. See Cavendish Bentinck *v.* Fenn, 12 App. Cas. 652, 57 L. J. Ch. 552, 57 L. T. Rep. N. S. 773, 36 Wkly. Rep. 441. *Compare* Hedges *v.* Paquett, 3 Oreg. 77; Robison *v.* McCracken, 52 Fed. 726 [*affirmed* in 57 Fed. 375, 6 C. C. A. 400]; Kaye *v.* Croydon Tramways Co., [1898] 1 Ch. 358, 67 L. J. Ch. 222, 78 L. T. Rep. N. S. 237, 46 Wkly. Rep. 405.

21. Broughton *v.* Jones, 120 Mich. 462, 79 N. W. 691; Barr *v.* Pittsburgh Plate-Glass Co., 57 Fed. 86, 6 C. C. A. 260 [*affirming* 51 Fed. 33]. *Compare* U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Browne *v.* U. S. Board, etc., Co., 20 Ohio Cir. Ct. 351, 11 Ohio Cir. Dec. 102 [*reversing* 6 Ohio N. P. 254].

22. Singer *v.* Salt Lake Copper Mfg. Co., 17 Utah 143, 53 Pac. 1024, 70 Am. St. Rep. 773.

23. Klein *v.* Funk, 82 Minn. 3, 84 N. W. 460.

held that it could not be undone by a receiver subsequently appointed for the corporation.[24]

f. Such Contracts May Be Made Good by Ratification. A corporation may waive the breach of trust and make good the contract by ratification or adoption as in other cases.[25] But as in other cases it must ratify it as a whole, and cannot ratify it in part and reject it in part.[26] Such a ratification may be a ratification by all the shareholders other than the director, between whom and the corporation the contract was made.[27]

g. Rule Subject to Maxim That He Who Seeks Equity Must Do Equity. The rule under consideration does not extend so far as to work an entire confiscation of the property of the unfaithful director, which he may have attempted to sell to his corporation at an advance over its cost to him, so as to derive a secret profit therefrom; but in the accounting which takes place under the principle the director will be compelled to yield to the corporation the secret profit, but will be allowed a credit for the property sold to the corporation at its real value.[28] But it is said to be a general rule of equity that fraud or any gross misconduct on the part of the salvors in connection with the property saved will work forfeiture of the salvage. Applying this principle, where a director advanced money to redeem the bonds of the company from a pledge, and charged the money to the company and received its notes therefor, and then attempted to levy upon and sell the bonds, and himself become the purchaser of them at a nominal sum, thus gaining an unconscionable advantage over the other bondholders, it was held that no allowance should be made to him for the money thus advanced by him.[29]

h. Must Account For Bribes Given to Influence Their Official Action. Gifts, gratuities, or bribes given to a director or to influence his official action must be accounted for by him and surrendered to the company.[30] If the directors of a

24. Ft. Payne Rolling Mill *v.* Hill, 174 Mass. 224, 54 N. E. 532.

An illustration of the doctrine of the text may be found in Wright *v.* Knoxville Livery, etc., Co., (Tenn. Ch. App. 1900) 59 S. W. 677. The presumption of invalidity of a note of a corporation, made by an officer thereof to himself as payee, is overcome by evidence that it was not made for the personal use of the officer, but for the exclusive benefit of the corporation. Africa *v.* Duluth News-Tribune Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424. A contract between a director of a railroad and one who has undertaken to construct the road for its bonds, entered into after the construction contract has become binding and the bonds are delivered, by which the director is to share in the profits of the undertaking, does not make him a purchaser of the bonds of the railroad, within the meaning of a statute making a sale of railroad bonds, either directly or indirectly, to its directors for less than par void. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155 [*rehearing denied* in 96 Fed. 784, 37 C. C. A. 587 (*modifying* 82 Fed. 642, 86 Fed. 929)].

25. Hannerty *v.* Standard Theater Co., 109 Mo. 297, 19 S. W. 82; Larwill *v.* Burke, 19 Ohio Cir. Ct. 513, 10 Ohio Cir. Dec. 605; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711. See also Trapp *v.* Fidelity Nat. Bank, 101 Ky. 485, 41 S. W. 577, 43 S. W. 470, 19 Ky. L. Rep. 1114.

26. Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711.

27. For example leases made by a corporation to a director holding all but one per cent of its capital stock, ratified by the other shareholders, who were all directors, would not be set aside at the instance of a receiver appointed in foreclosure proceedings, not representing creditors. Tyler *v.* Hamilton, 62 Fed. 187.

Rights of a director whose executory contract with the corporation has been adopted by its receiver under the direction of the court appointing him, and afterward by order of the court abandoned and abrogated because unfair and burdensome. Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 33 S. E. 125.

28. Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711, per Sir John Romilly, M. R.

For an application of the principle that he who seeks equity must do equity, in an analogous case, where a contract had been for the building of a railroad, between the railroad company and a construction company, in which two of the contractors of the railroad company were shareholders, see Thomas *v.* Brownville, etc., R. Co., 109 U. S. 522, 3 S. Ct. 315, 27 L. ed. 1018 [*reversing* on this point 2 Fed. 877, 1 McCrary 392]. The same principle was applied in Wardell *v.* Union Pac. R. Co., 29 Fed. Cas. No. 17,164, 4 Dill. 330 [*affirmed* in 103 U. S. 651, 26 L. ed. 509].

29. Washburn *v.* Green, 133 U. S. 30, 10 S. Ct. 280, 33 L. ed. 516.

30. Metropolitan Bank *v.* Heiron, 5 Ex. D. 319, 43 L. T. Rep. N. S. 676, 29 Wkly. Rep. 373, and other cases cited below.

corporation receive a sum of money as a bribe for the doing of a certain act which may or may not be prejudicial to their company, they are trustees in equity of the fund so corruptly received, and the company may also proceed against them for the damages it has thereby suffered. Although such an agreement is voidable,[31] there is no doubt that both remedies are open to it. The corporation may proceed against them at law or in equity for damages for the breach of trust.[32]

9. Not Chargeable With Profits Made by Third Party Out of Their Trust Relation. It has been held, however, that this rule does not extend so far as to charge the unfaithful director with profits which a third party, in the particular case, his partner in another business, has been able to make out of his trust relation;[33] but the better opinion seems to be that he is chargeable with all that he himself made, and with all that another person received through him in consequence of his breach of trust.

10. Cannot Buy Shares From Company and Resell at Profit Without Surrendering Profit to Company. Upon the principle that the same person cannot be both buyer and seller, and that a trustee cannot purchase at his own sale, it has been held that a director will not be permitted, even with the consent of the body of the corporation, to buy in the shares of the corporation from an allottee of them who is unable to perform his contract of purchase, and then resell them at an advance and retain the profit thus made, but that he must surrender the profit to the company.[34]

11. But May Purchase Shares of Another Shareholder. A director in a corporation does not sustain such a trust relation to an individual shareholder as will prevent him, in the absence of actual fraud, such as a combination to depress the price of the shares for the purpose of buying them in, from purchasing the shares of another shareholder in the corporation.[35]

12. Cannot Employ Funds of Company to Buy in Its Own Shares. As a corporation has no power to buy in its own shares, and thereby distribute its capital among its shareholders in advance of its creditors, and to the possible prejudice of future creditors,[36] *a fortiori* if the directors of the company expend the funds of the company in this way, they are guilty of a breach of trust, and a court of equity will compel them to make good the moneys so expended;[37] and in the

31. Bliss *v.* Matteson, 45 N. Y. 22, opinion by Grover, J.

32. Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628.

Apt illustrations of this principle will also be found in the following cases: Bent *v.* Priest, 10 Mo. App. 543 [*affirmed* in 86 Mo. 475]; Eden *v.* Ridsdales Railway Lamp, etc., Co., 23 Q. B. D. 368, 58 L. J. Q. B. 579, 61 L. T. Rep. N. S. 444, 38 Wkly. Rep. 55; *In re* West Jewel Tin Min. Co., 10 Ch. D. 579, 48 L. J. Ch. 425, 40 L. T. Rep. N. S. 43, 27 Wkly. Rep. 310; Gaskell *v.* Chambers, 26 Beav. 360, 5 Jur. N. S. 52, 28 L. J. Ch. 385; Metropolitan Bank *v.* Heiron, 5 Ex. D. 319, 43 L. T. Rep. N. S. 676, 29 Wkly. Rep. 373. *Compare* Bent *v.* Lewis, 15 Mo. App. 40, 578. This last case was reversed by the supreme court in 88 Mo. 462, but the principles upon which the intermediate appellate court proceeded, and which were announced in Bent *v.* Priest, 10 Mo. App. 543, were adhered to.

33. Bent *v.* Priest, 10 Mo. App. 543 [*affirmed* in 86 Mo. 475].

34. Parker *v.* McKenna, L. R. 10 Ch. 96, 44 L. J. Ch. 425, 31 L. T. Rep. N. S. 739, 23 Wkly. Rep. 271.

35. Tippecanoe County *v.* Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Carpenter *v.* Danforth, 52 Barb. (N. Y.) 581; Stark *v.* Soule, 9 N. Y. St. 555; Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108.

Necessity of purchasing director disclosing facts affecting value.— There is a seemingly unsound and unjust decision to the effect that the directors of a corporation may purchase the shares of other shareholders without disclosing to them facts within the peculiar knowledge of the directors, which have come to their knowledge in their official capacities, which facts affect the value of the shares. Tippecanoe County *v.* Reynolds, 44 Ind. 509, 15 Am. Rep. 245, Downey, C. J., dissenting. As to the principle which requires a disclosure of the facts by the purchaser to the seller in such case see Walsham *v.* Stainton, 1 De G. J. & S. 678, 9 Jur. N. S. 1261, 33 L. J. Ch. 68, 9 L. T. Rep. N. S. 357, 3 New Rep. 56, 12 Wkly. Rep. 63, 66 Eng. Ch. 527. That this principle would not apply in a case where the seller of the shares is himself a director and consequently has the same means of knowledge as the purchaser see Perry *v.* Pearson, 135 Ill. 218, 25 N. E. 636.

36. See *supra*, VI, L, 2, e.

37. Hodgkinson *v.* National Live Stock Ins. Co., 26 Beav. 473.

event of the insolvency of the company they will be so chargeable at the suit of the creditors.[38]

13. Selling Their Own Property to Company — a. In General. If a director who is the concealed owner of property sells it to the company, he will be compelled in equity to account to the company or to its representative for the profits which have accrued to him.[39]

b. Buying Property For Themselves, and Selling It to Corporation at Profit. On the same principle if directors buy property for themselves and then resell it to the corporation at a profit, in other words buy it of themselves in their character of directors for the company, they will be compelled to account to the company for that profit.[40]

14. Defrauding Corporation by Colluding With Its Promoters. It would be impracticable to trace in an article where brevity must be kept in view, the various and ingenious schemes of fraud disclosed by the cases under this head. A common form of fraud has been for the promoters of a corporation to procure a number of gentlemen of standing in the community, who agree to act as directors, provided they are indemnified against any responsibility as shareholders. For this purpose the requisite number of "qualification shares" is issued to each of these gentlemen, and they thereby become the pliant and superserviceable tools of the promoters, who through them sell to the corporation property which the promoters have acquired, at a great advance over its value; or who issue shares of the corporation to the promoters in exchange for property transferred by them to it, at a gross undervaluation of the shares or overvaluation of the property which shares the promoters unload upon the innocent public, pocket the gains, and, when the bubble bursts, leave their dupes in the lurch. Courts of equity untangle such transactions as best they can. One of their methods is to put the unfaithful directors upon the list of contributories, and to compel them to pay for the qualification shares which have been placed in their names, and which they hold themselves out to the public as really owning, precisely as though the promoters had not paid for those shares.[41]

38. Evans *v.* Coventry, 2 Jur. N. S. 557, 25 L. J. Ch. 489, 4 Wkly. Rep. 466, 8 De G. M. & G. 835, 57 Eng. Ch. 645.

39. Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711. *Compare* Ladywell Min. Co. *v.* Brookes, 35 Ch. D. 400, 56 L. J. Ch. 684, 56 L. T. Rep. N. S. 677, 35 Wkly. Rep. 785. If the owners of property who organize a corporation to work it and convey it to the corporation are personally indebted for the purchase of it by means of promissory notes which are not secured by any lien upon the property, and one of the owners afterward takes up the notes, he cannot make the money so expended a claim against the corporation. Ruby Chief Min., etc., Co. *v.* Gurley, 17 Colo. 199, 29 Pac. 668.

40. *Illinois.*— Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

Massachusetts.— Parker *v.* Nickerson, 112 Mass. 195.

New York.— East New York, etc., R. Co. *v.* Elmore, 53 N. Y. 624, treasurer buying shares of the company at a discount, and attempting to offset them at par against his liability to the company for moneys of the company in his hands.

Oregon.— Stanley *v.* Luse, 36 Oreg. 25, 58 Pac. 75, holding that a purchase of property for a corporation by its directors is voidable *in toto* if any part of the transaction is attended with fraud, either express or constructive, by reason of the personal interest of the directors in the property and their failure to disclose it.

Pennsylvania.— Danville, etc., R. Co. *v.* Kase, (1898) 39 Atl. 301, 41 Wkly. Notes Cas. 411.

Wisconsin.— Spaulding *v.* North Milwaukee Town Site Co., 106 Wis. 481, 81 N. W. 1064.

England.—Benson *v.* Heathorn, 1 Y. & Coll. Ch. 326, 20 Eng. Ch. 326.

But there is a seemingly untenable decision that a sale of real property by a director to the corporation will not be set aside on the ground of fraud, although the valuation placed on the premises by the vendor was known by him to be excessive, when opportunity for inquiry was afforded, and the contract was not made solely upon the representations of the vendor director. Stetson *v.* Northern Invest. Co., 104 Iowa 393, 73 N. W. 869. Plainly, in view of the extreme good faith demanded of a director, it is not enough that the other party to the transaction had an opportunity for inquiry; the corporation had a right to rely absolutely upon its representatives, even though there may have been other inducements.

41. *In re* Western of Canada Oil, etc., Co., L. R. 20 Eq. 580, is an excellent illustration. See also Eden *v.* Ridsdales Railway Lamp,

15. Buying Up Claims Against Company at Discount, and Proving Them Against Company For Full Amount — a. In General. There is a questionable decision to the effect that trustees or directors of a corporation, while it continues to be a going concern, are not by virtue of their offices precluded from buying its bonds or other lawful obligations at a discount, with the right to enforce them against the company for their full amount.[42] The vice of this decision is that it allows directors to assume positions antagonistic to their company, which as already seen is contrary to the rule of equity.[43] Clearly this will not be allowed by an officer of the corporation, who at the time is in practical control of it, and who therefore is substantially both buyer and seller, and who conceals the intended sale from the board of managers.[44] And beyond question a director of an insolvent corporation will not be allowed to buy up its debentures at a discount, and prove them against the corporation as a creditor for their face value.[45] The directors buying up the securities of the corporation for such a purpose are chargeable with knowledge of the circumstances under which they were issued.[46] In such a case the director has no claim against the company beyond the amount expended by him in making the purchase;[47] and he must account in equity to the shareholders for the profits which he thus makes out of the transaction.[48] The rule has no application to a case where the trust relation of the directors has wholly terminated,

etc., Co., 23 Q. B. D. 368, 58 L. J. Q. B. 579, 61 L. T. Rep. N. S. 444, 38 Wkly. Rep. 55.

Incorporating a partnership, and turning over to a director partnership money in payment of a debt to director, when not permitted. Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046, 36 N. Y. St. 500, 22 Am. St. Rep. 816 [*reversed* in 54 Hun (N. Y.) 339, 7 N. Y. Suppl. 535, 27 N. Y. St. 98].

For other such schemes where the directors have been charged in equity on the ground of breach of trust see *In re* Canadian Oil Works Corp., L. R. 10 Ch. 593, 44 L. J. Ch. 721, 33 L. T. Rep. N. S. 466, 24 Wkly. Rep. 191; *In re* Disdri, L. R. 11 Eq. 242, 40 L. J. Ch. 246, 23 L. T. Rep. N. S. 694, 19 Wkly. Rep. 175; *In re* Englefield Colliery Co., 8 Ch. D. 388, 38 L. T. Rep. N. S. 112; *In re* Caerphilly Colliery Co., 5 Ch. D. 336, 46 L. J. Ch. 339, 25 Wkly. Rep. 618; *In re* British Provident L., etc., Assoc., 5 Ch. D. 306, 46 L. J. Ch. 360, 36 L. T. Rep. N. S. 329, 25 Wkly. Rep. 476; *In re* Nowak Consols Tin Min. Co., 2 Ch. D. 1, 45 L. J. Ch. 148, 33 L. T. Rep. N. S. 517, 24 Wkly. Rep. 49. *Compare In re* Anglo-Noravian Hungarian Junction R. Co., L. R. 8 Ch. 768, 42 L. J. Ch. 857; *In re* La Maucha Irr., etc., Co., L. R. 8 Ch. 548, 42 L. J. Ch. 465, 28 L. T. Rep. N. S. 652, 21 Wkly. Rep. 518; *In re* Australian Direct Steam Nav. Co., 3 Ch. D. 661 [*affirmed* in 5 Ch. D. 70].

42. Seymour *v.* Spring Forest Cemetery Assoc., 144 N. Y. 333, 39 N. E. 365, 63 N. Y. St. 672, 26 L. R. A. 859.

43. See *supra*, IX, G, 5, c.

44. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

45. Bulkley *v.* Whitcomb, 121 N. Y. 107, 24 N. E. 13, 30 N. Y. St. 569; *In re* Imperial Land Co., 4 Ch. D. 566, 46 L. J. Ch. 235.

46. *In re* Imperial Land Co., 4 Ch. D. 566, 46 L. J. Ch. 235.

47. Bulkley *v.* Whitcomb, 121 N. Y. 107, 24 N. E. 13.

48. Thomas *v.* Sweet, 37 Kan. 183, 14 Pac. 545; Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286. See also Lingle *v.* National Ins. Co., 45 Mo. 109.

Execution in favor of officer enjoined.— So where the president of a corporation bought up a small claim against it, and took valuable property of the company in part payment, it was held that he should be enjoined from levying an execution for the balance. Brewster *v.* Stratman, 4 Mo. App. 41.

It has been laid down that the officers of a corporation cannot purchase any claim against, or interest in, the company, except in trust for the shareholders, after a resolution has been adopted by themselves, as managers, directing one of their company to purchase for the benefit of the company. Kimmell *v.* Geeting, 2 Grant (Pa.) 125.

Doctrine that director may buy notes of corporation and mortgage thereby secured.— According to one holding an officer and director of a corporation may buy and assert against it its valid promissory notes and mortgages, given by it, upon its property, as liens in their full integrity. Forest Glen Brick, etc., Co. *v.* Gade, 55 Ill. App. 181.

Transferring claims against the corporation to a stranger.— If an officer of a corporation has a valid claim against it, his official relation to it does not prevent him from dealing with his claim as any other person might deal with the same species of property. He may transfer it to a stranger; and he is not restrained from doing this by a statute which declares that it shall not be lawful for a corporation to assign or transfer its property to one of its officers or shareholders in payment of debts, or make any transfer in contemplation of insolvency, and make such acts void. Jefferson County Nat. Bank *v.* Townley, 159 N. Y. 490, 54 N. E. 74 [*reversing* 92 Hun (N. Y.) 172, 38 N. Y. Suppl. 584, 74 N. Y. St. 212].

as where there has been an assignment of the assets of the corporation for the benefit of its creditors and a sale of the entire assets.[49]

b. View That They May Recover Amount Expended in Such Purchases. It seems that equity relieves against such transactions only to the extent of forfeiting the profit which the unfaithful directors have made, and does not confiscate the securities which the directors have thus bought up.[50]

16. Cannot Deal For Themselves With Corporate Property — a. In General. In general a director cannot deal in his own behalf in respect of the corporate property, or in respect of any matters involving the exercise of his duties as a director.[51] He cannot purchase the property for himself at an unfair valuation, and take a conveyance for his own benefit; and what he cannot in this respect do for himself he cannot do for another.[52] A quorum of directors therefore cannot engage in a scheme to sell the entire property of the corporation (except its real estate) and transfer to the purchasers the whole business of the corporation, without and against the consent of the other directors and the shareholders.[53]

b. Cannot Pay or Secure Individual Debts With Corporate Property or Credit. For the directors or contracting officers of a corporation to divert its property, or

49. Hammond's Appeal, 123 Pa. St. 503, 16 Atl. 419, 23 Wkly. Notes Cas. 59.

50. See for illustration Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Lingle *v.* National Ins. Co., 45 Mo. 109. *Compare* Bulkley *v.* Whitcomb, 121 N. Y. 107, 24 N. E. 13, 30 N. Y. St. 569.

51. *Connecticut.*—Alford *v.* Miller, 32 Conn. 543.

Indiana.— Port *v.* Russell, 36 Ind. 60, 10 Am. Rep. 5; Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

Maine.— European, etc., R. Co. *v.* Poor, 59 Me. 277.

Massachusetts.— Fuller *v.* Dame, 18 Pick. 472.

Michigan.— Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477.

New Jersey.— Redmond *v.* Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418.

New York.— Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Coleman *v.* Second Ave. R. Co., 38 N. Y. 201, 48 Barb. 371; Western R. Co. *v.* Bayne, 11 Hun 166; Gray *v.* New York, etc., Steamship Co., 3 Hun 383; Risley *v.* Indianapolis, etc., R. Co., 1 Hun 202; Barton *v.* Port Jackson, etc., R. Co., 17 Barb. 397; Blatchford *v.* Ross, 5 Abb. Pr. N. S. 434.

Pennsylvania.— Kimmell *v.* Geeting, 2 Grant 125.

Wisconsin.—Pickett *v.* Wiota School Dist., 25 Wis. 551, 3 Am. Rep. 105.

Compare Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144.

52. Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140; Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. (N. Y.) 553; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. (N. Y.) 468. *Compare* Smith *v.* Lansing, 22 N. Y. 520.

53. Abbot *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578, 21 How. Pr. (N. Y.) 193 [*affirming* 11 Abb. Pr. (N. Y.) 204, 20 How. Pr. (N. Y.) 199]. See also Rollins *v.* Clay, 33 Me. 132; Bank Com'rs *v.* Brest Bank, Harr. Ch. (Mich.) 106; Kean *v.* Johnson, 9 N. J. Eq. 401; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Hartford, etc., R. Co. *v.* Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; Ward *v.* Sea Ins. Co., 17 Paige (N. Y.) 294. See also San Francisco, etc., R. Co. *v.* Bee, 48 Cal. 398; San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106; Hoffman Steam Coal Co. *v.* Cumberland Coal, etc., Co., 16 Md. 456, 77 Am. Dec. 311; St. James's Church *v.* Church of the Redeemer, 45 Barb. (N. Y.) 356; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433.

Illustrations of the above principle would exhibit many devices and twistifications of fraud, but would scarcely make the rule plainer. See especially Davis *v.* Rock Creek Lumber, etc., Co., 55 Cal. 359, 36 Am. Rep. 40 (president of corporation purchased its debts, caused them to be assigned to a partnership of which he was a member, and then, as president of the corporation, executed a mortgage to the partnership to secure the debts); Abbot *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578, 11 Abb. Pr. (N. Y.) 204, 20 How. Pr. (N. Y.) 199, 21 How. Pr. 193 (where four directors transferred the properties and rights of the corporation to a partnership, who immediately transferred them to a new company, of which three of the directors thus named were directors). For further illustrations see the following cases:

California.— Wilbur *v.* Lynde, 49 Cal. 290, 19 Am. Rep. 645.

Connecticut.— Alford *v.* Miller, 32 Conn. 543.

New Jersey.— Raleigh *v.* Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1.

Wisconsin.— Pickett *v.* Wiota School Dist., 25 Wis. 551, 3 Am. Rep. 105, case of school directors.

United States.— Mahoney Min. Co. *v.* Bennett, 16 Fed. Cas. No. 8,969, 5 Sawy. 141.

pledge its credit to the payment or securing of their individual debts, is a fraud and breach of trust toward the corporation and its shareholders,[54] and a fraud as to its creditors.[55] Such transactions will be annulled in any appropriate proceeding, without regard to the form which they may have taken, saving of course the rights of innocent third persons.[56] The principle extends so far as to prevent an officer of a corporation from paying a debt owing him by the corporation out of property to him by the directors for any purpose.[57] Nor does it make any difference that the debt for which the money was thus raised by the officer was due by him to the corporation, since it is equally the payment of his own debt out of the corporate funds.[58] Such a misappropriation of the corporate funds stands, as regards its creditors, on the footing of a fraudulent conveyance, and is subject to the rule that if a part of the consideration of the transaction was fraudulent and corrupt, the whole will be treated as void.[59] But it seems that such a contract ought to be enforced against the corporation in so far as the corporation has received the benefit of it.[60] Nor is it any excuse for such a diversion of corporate assets that the purpose of the transaction was to keep alive and going a firm composed of members of the corporation, and that it was to the advantage of the corporation to have the firm remain in existence.[61] It is not a violation of this principle for the directors of a corporation to authorize the execution of a mortgage of property of the corporation at the instance and demand of a creditor, upon the assets of the corporation, to secure a *bona fide* indebtedness of the corporation,

54. *Colorado.*— Nix *v.* Miller, 26 Colo. 203, 57 Pac. 1084.

Kentucky.— Main Jellico Mountain Coal Co. *v.* Lotspeich, 20 S. W. 377, 14 Ky. L. Rep. 595.

New York.— Close *v.* Potter, 5 Misc. 543, 25 N. Y. Suppl. 972.

Ohio.— Greenville Gas Co. *v.* Reis, 54 Ohio St. 549, 44 N. E. 271.

Wyoming.— Durlacher *v.* Frazer, 8 Wyo. 58, 55 Pac. 306.

United States.— Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. 797, 19 C. C. A. 118.

55. National Tube Works Co. *v.* Ring Refrigerating, etc., Co., 118 Mo. 365, 22 S. W. 947; Nevitt *v.* Albany First Nat. Bank, 91 Hun (N. Y.) 43, 36 N. Y. Suppl. 294, 71 N. Y. St. 376; Greenville Gas Co. *v.* Reis, 54 Ohio St. 549, 44 N. E. 271.

56. Circumstances under which the taker of the bond of a corporation issued to secure the individual debts of its officers was not deemed an innocent purchaser. Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. 797, 19 C. C. A. 118.

57. Thus where the directors indorsed to the president a bond of the corporation to sell for its benefit, and he converted it to his own use, in payment of a debt due him from the corporation, a suit in equity by a shareholder was sustained to compel him, and a purchaser of it with notice, to surrender it for cancellation. Greenville Gas Co. *v.* Reis, 54 Ohio St. 549, 44 N. E. 271.

58. Thus a mortgage given by a corporation to secure money borrowed by one of its officers to pay a debt due it from him is fraudulent as to its creditors, although such money was actually paid to the corporation. National Tube Works Co. *v.* Ring Refrigerating, etc., Co., 118 Mo. 365, 22 S. W. 947.

59. Thus if a part of an indebtedness secured by the mortgage of a corporation is the individual indebtedness of one of its officers, the entire mortgage is fraudulent as between the corporation and its creditors. National Tube Works Co. *v.* Ring Refrigerating, etc., Co., 118 Mo. 365, 22 S. W. 947.

60. Thus where a shareholder caused a note of the corporation secured by a mortgage of its property to be executed in part security for his own debt and in part for a debt due from the corporation, it was held the mortgage should stand as an equitable charge against the corporation to the extent of its own debt. Hatch *v.* Johnson Loan, etc., Co., 79 Fed. 828, holding further that a corporation, in an accounting with a bank, is not entitled to credit for an amount deposited in such a bank by an officer and director who owed the bank more than the amount of the deposit.

61. Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. 797, 19 C. C. A. 118. For stronger reasons a transaction by which assets of a corporation are appropriated to purposes of a single director is invalid, when his own vote in the directorate is necessary to carry a resolution to authorize or to ratify it. Gildersleeve *v.* Lester, 68 Hun (N. Y.) 532, 22 N. Y. Suppl. 1026, 52 N. Y. St. 559.

Whether capable of ratification.— According to one view such a giving away of the assets of a corporation is *ultra vires* in the sense of being unlawful as against the public, and hence incapable of ratification by the acquiescence of the shareholders. Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. 797, 19 C. C. A. 118. But this does not seem to be a sound view, since the public have no greater interest in the conservation of the assets of a trading corporation than of a trading partnership.

although the directors have previously given their individual notes for such indebtedness.[62]

c. Cannot Conduct Private Litigation at Corporate Expense. Directors cannot rightfully pay out the money of the corporation as an attorney's fee for their own defense against the suit of certain shareholders, which they are apprehensive will be brought to test the validity of their acts[63] or maintain at the corporate expense actions ostensibly brought for the protection of the corporation, but really for the purpose of requiring its officers to settle out of the corporate funds the individual liability of the directors.[64]

17. Directors Personally Liable For Breaches of Their Trust — a. In General. Directors of corporations are personally liable to surrender profits which have accrued to them, or to make good losses which have been inflicted upon the corporation through breaches of their trust, to the corporation itself;[65] or where the corporation will not sue, to its shareholders;[66] and in some cases to creditors and strangers.[67]

b. Measure of Liability. The general rule is that equity aims at compensation to those who are beneficially interested in the trust fund, the corporation, the shareholders, or the creditors; and that the court will hence mold its decree so as to reach this result, according to the varying circumstances of each case;[68] but that where the cashier of a bank converts the circulating notes of a bank to his own use, he is liable for their full nominal amount, and cannot avail himself of their depreciation.[69]

c. All Directors Liable Who Fraudulently Conspire Against Corporation. If the directors of a corporation conspire together for the conversion of its assets, each of the conspirators becomes liable, on a well-understood principle, for any act done by any one of them in furtherance of the common design.[70]

18. Rights of Third Persons in Cases of Breaches of Trust by Directors. Where third persons have actual notice that a corporate officer is assuming to deal in his own name with the corporate property, they of course deal with him with respect to such property at their peril.[71]

62. Milledgeville Banking Co. *v.* McIntyre Alliance Store, 98 Ga. 503, 25 S. E. 567.

63. Percy *v.* Millaudon, 3 La. 568, 8 Mart. N. S. (La.) 68.

64. Erie R. Co. *v.* Vanderbilt, 5 Hun (N. Y.) 123, holding that it is no defense to an action brought by the corporation against the directors for such a fraudulent dissipation of its property that the corporation is *in pari delicto*.

65. See *infra*, IX, N, 1, a *et seq.*

66. Perry *v.* Tuskaloosa Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 So. 217. See also *infra*, XI, B, 7.

67. See *infra*, IX, O, 5.

According to one theory, when directors transcend the scope of their powers they cease to act as directors and act as trustees of the corporate property and are liable as such. Larwill *v.* Burke, 19 Ohio Cir. Ct. 513, 10 Ohio Cir. Dec. 605.

Directors assenting to, or authorizing a mortgage of corporate property, chargeable with knowledge of its solvency or insolvency. Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624, 17 S. E. 968.

Director dealing with corporate property on his own account, chargeable with notice of action of the board as to such property, whether present or not at the meeting. Greenville Gas Co. *v.* Reis, 54 Ohio St. 549, 44 N. E. 271.

68. It has been held that a director of an insolvent corporation, who purchases its property upon execution sale for less than its value, is chargeable with the property or its value, and with the profits or interest accruing therefrom, as a trust fund for the benefit of the corporation, its creditors and shareholders (Tobin Canning Co. *v.* Fraser, 81 Tex. 407, 17 S. W. 25) and that directors of a corporation who sell to themselves its stock at one third of its par value are liable to the company and its creditors for the full value of the stock (Freeman *v.* Stine, 15 Phila. (Pa.) 37, 38 Leg. Int. (Pa.) 268). For another illustration in the case of a person employed to buy in stock of the corporation, for the purpose of consummating a sale of the corporate property, who buys it in his own name, see Young *v.* Toledo, etc., R. Co., 76 Mich. 485, 43 N. W. 632.

69. Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171. For a doubtful decision to the effect that where an officer of a bank fraudulently abstracts its funds and invests them in his own name a court of equity cannot declare him a trustee and indemnify the bank out of the investment see Pascoag Bank *v.* Hunt, 3 Edw. (N. Y.) 583.

70. Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 27 N. E. 487.

71. Davis *v.* Gemmell, 70 Md. 356, 17 Atl. 259.

19. DIRECTORS MAY ENTER INTO PERSONAL COVENANTS NOT TO ENGAGE IN COMPETING BUSINESS. The directors of a manufacturing corporation may, pending negotiations for its consolidation with another corporation, enter into personal covenants, for a fair consideration, not to engage in the same manufacture for a stated period.[72]

20. DIRECTOR-CREDITOR MAY ENFORCE CONSTITUTIONAL OR STATUTORY LIABILITY OF SHAREHOLDER. The fact that a creditor of a corporation is a director therein does not disbar him of the right to enforce the liability of a shareholder to creditors, created by a constitutional provision or statute; but it is said that in such cases the creditors must be held to strict proof of their debts and of their own good faith in the premises; for if their debts were the result of their own wrong or negligence, they cannot be permitted to impose a liability therefor upon innocent shareholders.[73]

21. AGREEMENTS AMONG DIRECTORS FOR DISTRIBUTION OF CORPORATE PROPERTY. The validity of arrangements by which the directors of a corporation distribute its assets among themselves will depend upon the circumstances of each case. If they are the only shareholders, and if there are no creditors, then no one has any standing to set aside what they have agreed to do with their own.[74] But if the directors thus dividing the property of the corporation among themselves do not comprise all the shareholders, and if there are no creditors, then the corporation can maintain a suitable action to set aside the deeds by which the arrangement has been consummated and to restore its right to the property. Such an arrangement is also voidable at the suit of individual shareholders where the corporation will not sue to set it aside.[75]

72. Bristol *v.* Scranton, 57 Fed. 70.

73. Janney *v.* Minneapolis Industrial Exposition, 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273.

74. White *v.* Boreing, 45 S. W. 242, 20 Ky. L. Rep. 210.

Condition of facts under which the official liquidator of a company recovered from the directors a capital sum distributed among the shareholders and the directors were held entitled to recover the sum back from the shareholders. Moxham *v.* Grant, [1900] 1 Q. B. 88, 69 L. J. Q. B. 97, 81 L. T. Rep. N. S. 431, 7 Manson 65, 48 Wkly. Rep. 130.

75. Barnes *v.* Lynch, 9 Okla. 11, 59 Pac. 995 [*affirmed* in 9 Okla. 156, 59 Pac. 999].

Various other breaches of trust against which relief has been granted.— Relief has been granted against breaches of trust committed by directors and other officers of corporations under the following circumstances: Where, in order to retain control of the majority of the shares, the directors issued new shares, and sold them to their relatives and friends for a small proportion of their par value, without giving the old shareholders an opportunity to subscribe therefor, the conclusion being that the issue was fraudulent and void as to the old shareholders, and that an injunction would go to restrain the new shareholders from voting with respect to such shares at the election of officers. Way *v.* American Grease Co., 60 N. J. Eq. 263, 47 Atl. 44. Where the president and others made defendants in a bill of equity unlawfully caused to be issued to themselves shares of stock of the corporation in excess of the legal issue of the capital stock entitled to vote at shareholders' meetings, with intent to appropriate the property of the corporation to their own use, and the corporation received no consideration for such shares, and defendants refused to deliver them up. Reno Oil Co. *v.* Culver, 33 Misc. (N. Y.) 717, 68 N. Y. Suppl. 303 [*reversed* in 60 N. Y. App. Div. 129, 69 N. Y. Suppl. 969]. Where the directors sold shares of the stock of the corporation at less than par, and used it to embark the corporation in business outside that specified in the articles of agreement, and this, although the shares had been transferred to the corporation by its promoters as a gift. Kimball *v.* New England Roller Grate Co., 69 N. H. 485, 45 Atl. 253. Where the directors of a company have no power to issue shares at a discount, but nevertheless do allow a discount upon shares issued, because of a stipulated service, which shares are subsequently sold by the allottee to *bona fide* purchasers for profit, with the conclusion that the directors are liable to the company for the discount allowed upon the shares, but not liable beyond the discount in the absence of a fraud against the company, or other damage resulting to it. Hirsche *v.* Sims, [1894] A. C. 654, 64 L. J. P. C. 1, 71 L. T. Rep. N. S. 357, 11 Reports 303. A statute preventing corporations from interposing the defense of usury will not prevent a corporation or its shareholders from obtaining relief against an equitable and usurious contract, where one of its managers, voting to make the contract, has a personal interest therein. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

Circumstances under which directors have not been held liable for breaches of trust.—

H. Directors Preferring Themselves as Creditors — 1. Cannot Prefer Themselves as Creditors — a. In General. The assets of an insolvent corporation being a trust fund for creditors, which necessarily means for all the creditors, the directors in charge of such assets stand in the position of trustees for the creditors,[76] and cannot so deal with them as to prefer themselves as creditors, for any past indebtedness of the corporation in favor of such directors, unless at the time when such past indebtedness was created it was agreed that they should be so preferred.[77]

Where the directors of a *de facto* corporation who are guilty of negligence or bad faith fail to set up as a defense against the foreclosure of a mortgage the illegality of the company. Farmers' Loan, etc., Co. *v.* Toledo, etc., R. Co., 67 Fed. 49. Where a contract was drafted by the counsel of a corporation for purchase of property by it, but before it was presented to the directors for adoption the consideration named therein was increased, and this in the absence of counsel, by the officers and the other contracting party, this of itself not showing that the fraud was perpetrated on the corporation. Sutton *v.* Dudley, 193 Pa. St. 194, 44 Atl. 438.

76. Kittel *v.* Augusta, etc., R. Co., 65 Fed. 859.

77. *Alabama.*— Anderson *v.* Bullock County Bank, 122 Ala. 275, 25 So. 523; Berney Nat. Bank *v.* Guyon, 111 Ala. 491, 20 So. 520; Goodyear Rubber Co. *v.* George D. Scott Co., 96 Ala. 439, 11 So. 370.

Georgia.— Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624, 17 S. E. 968.

Illinois.— Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265 [*affirming* 53 Ill. App. 314, ingenious scheme to prefer the president, who resigns and takes a mortgage upon all the assets of a corporation — kind of relief pointed out]; Gottlieb *v.* Miller, 154 Ill. 44, 39 N. E. 992 [*reversing* in part 47 Ill. App. 588]; Mayr *v.* Hodge, etc., Co., 78 Ill. App. 556; Atwater *v.* American Exch. Nat. Bank, 40 Ill. App. 501; Neufeld *v.* Moll, 37 Ill. App. 535 (director obtaining such a preference required to *pro rata* with other creditors).

Louisiana.— Brashear *v.* Alexandria Cooperage Co., 50 La. Ann. 587, 23 So. 540.

Minnesota.— Taylor *v.* Mitchell, 80 Minn. 492, 83 N. W. 418.

Mississippi.— Love Mfg. Co. *v.* Queen City Mfg. Co., 74 Miss. 290, 20 So. 146.

Nebraska.— Reynolds *v.* Smith, 60 Nebr. 197, 82 N. W. 627 (cannot prefer a creditor of one of its officers and shareholders); M. A. Seeds Dry-Plate Co. *v.* Heyn Photo-Supply Co., 57 Nebr. 214, 77 N. W. 660 (holding that a preference cannot be given by an insolvent corporation to one who is its director, secretary, and treasurer); Stough *v.* Ponca Mill Co., 54 Nebr. 500, 74 N. W. 868; Wyman *v.* Williams, 52 Nebr. 833, 73 N. W. 285 [*rehearing denied* in 53 Nebr. 670, 74 N. W. 48, rendering void an agreement by the directors of an insolvent insurance company, at the time an assessment is levied for the payment of its debts, that sums loaned the corporation by members of the board of directors shall be applied to cancel their assessments]; Ingwersen *v.* Edgecombe, 42 Nebr. 740, 60 N. W. 1032.

New Jersey.— Gray *v.* Taylor, (Err. & App. 1899) 44 Atl. 668 [*affirming* (Ch. 1897) 38 Atl. 951]; Savage *v.* Miller, 56 N. J. Eq. 437, 39 Atl. 665 [*reversing* 56 N. J. Eq. 432, 36 Atl. 578]; Montgomery *v.* Phillips, 53 N. J. Eq. 203, 31 Atl. 622.

New York.— Queen *v.* Weaver, 38 N. Y. App. Div. 628, 56 N. Y. Suppl. 998.

North Carolina.— Hill *v.* Pioneer Lumber Co., 113 N. C. 173, 18 S. E. 107, 37 Am. St. Rep. 621, 21 L. R. A. 560.

Ohio.— Ford *v.* Lamson, 17 Ohio Cir. Ct. 539, 9 Ohio Cir. Dec. 374.

Oregon.— Craig *v.* California Vineyard Co., 30 Oreg. 43, 46 Pac. 421.

Pennsylvania.— Hill *v.* Standard Tel. Mfg. Co., 198 Pa. St. 446, 48 Atl. 432; Finch Mfg. Co. *v.* Stirling Co., 187 Pa. St. 596, 41 Atl. 294, 43 Wkly. Notes Cas. 113 (although the president and director thus preferred owned with his son nine tenths of the stock of the debtor corporation, and did not vote to accept the proposition of the latter); Moller *v.* Keystone Fibre Co., 187 Pa. St. 553, 41 Atl. 478; Hill *v.* Standard Telephone Mfg. Co., 9 Pa. Dist. 445, 24 Pa. Co. Ct. 278, 16 Montg. Co. Rep. 203 (director of an insolvent corporation cannot obtain a preference over other creditors, unless he shows special circumstances indicating that such a preference is just and equitable); Charles Beck Paper Co. *v.* Bates Paper Co., 7 Pa. Dist. 477; Chester Twist Drill, etc., Co. *v.* Wetherill, 7 Del. Co. Rep. 390.

Tennessee.— Levins *v.* W. O. Peeples Grocery Co., (Ch. App. 1896) 38 S. W. 733, transfer by the officers and directors to the principal shareholder, president, and active manager, of all the cash and available assets of real and personal property owned by him, but not in condition for use, to enable him to use the corporate assets to pay his individual debts to the corporation, or the debts of those whom it suits his purpose to prefer, is fraudulent.

Utah.— W. P. Noble Mercantile Co. *v.* Mt. Pleasant Equitable Co-operative Inst., 12 Utah 213, 42 Pac. 869.

West Virginia.— Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803, assignment of notes and accounts to directors and shareholders to secure an indebtedness to them presumptively invalid, and will be set

b. But May Make Present or Future Advances to Corporation and Take Security Therefor. The directors of a corporation may lend money to the corporation, and may take a present security for *bona fide* advances made by them to it,

aside as fraudulent, in the absence of proof that it was not only free from fraud, but at a fair and reasonable price.

Wisconsin.— Rowe *v.* Leuthold, 101 Wis. 242, 77 N. W. 153 (corporate officer cannot so prefer himself by executing to his wife, without consideration, a mortgage of corporate property); Hinz *v.* Van Dusen, 95 Wis. 503, 70 N. W. 657.

United States.— Kittel *v.* Augusta, etc., R. Co., 78 Fed. 855 (director selling corporate property under execution, upon a judgment in his own favor, required to divide the nroceeds of the sale ratably with another creditor); Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. 496, 11 C. C. A. 320.

See 12 Cent. Dig. tit. "Corporations," § 2170.

The directors of an insolvent corporation cannot, by making a deed of assignment, prefer the claim of one shareholder of the corporation over that of another. W. P. Noble Mercantile Co. *v.* Mt. Pleasant Equitable Co-operative Inst., 12 Utah 213, 42 Pac. 869.

Preferring creditor who has loaned money to an officer of the corporation.— A preference by the directors of an insolvent corporation, of one not himself a creditor of the corporation, but who had loaned money to one of its officers, who had in turn loaned it to the corporation, is fraudulent and avoids the whole assignment. W. P. Noble Mercantile Co. *v.* Mt. Pleasant Equitable Co-operative Inst., 12 Utah 213, 42 Pac. 869.

Schemes of preference which have been avoided.—The following schemes of preference have been avoided: An agreement between the directors of a bank, which had caused another corporation to be formed to operate a cotton mill belonging to the bank, which cotton mill had been transferred to the new corporation, that the amount subscribed by the directors of the bank to the shares of the new corporation should be first repaid from the proceeds of the sale of the mill, which sale was to be made by the new company. Butler *v.* Cockrill, 73 Fed. 945, 20 C. C. A. 122. A claim of preference by the directors of a corporation over a creditor who had secured the retention of the assets of the corporation, by representing to the creditor that a claim upon which the directors were liable would not be allowed to have a preference over the claim of such creditor. Rickerson Roller Mill Co. *v.* Farrell Foundry, etc., Co., 75 Fed. 554, 23 C. C. A. 302. An arrangement whereby the charter members of a corporation turned over a policy of insurance on the property of the company, after a loss had occurred, and after the corporation had become insolvent, as collateral security, to creditors of a firm, whose assets were transferred to the corporation in exchange for its capital stock and bonds, because it had promised its creditors at the time of pledging some of the bonds as security for the debt that it would insure the property of the corporation to protect the bonds, where the promise was not executed, but the insurance was taken out for the benefit of the corporation. Bristol, Bank, etc., Co. *v.* Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228. A mortgage given to secure a previously executed note of the corporation, in which it was stipulated that the payee should be protected in the event of the failure of the corporation, where the contract was not made through the duly authorized body of the corporation empowered to make such negotiations. Monroe Mercantile Co. *v.* Arnold, 108 Ga. 449, 34 S. E. 176. An agreement to apply assessments made upon the unpaid subscriptions to the capital stock of an insurance company, which assessment was authorized by a vote of the board of directors to the amounts advanced by such directors individually, for the settlement of losses sustained, and for which they held the notes of the corporation. Wyman *v.* Williams, 52 Nebr. 833, 73 N. W. 285 [*rehearing denied* in 53 Nebr. 670, 74 N. W. 48]. A preference given by the directors of an insolvent corporation to a person to whom a note made by the corporation in favor of one of its directors had been transferred without any new consideration. Savage *v.* Miller, 56 N. J. Eq. 437, 39 Atl. 665 [*reversing* 56 N. J. Eq. 432, 36 Atl. 578].

Construction of a New York statute prohibiting corporations from preferring creditors.— A statute in New York (N. Y. Laws (1890), c. 564, § 48) prohibits a corporation from making assignments of its property to its officers. For a construction of this statute see Worthington *v.* Pfister Bookbinding Co., 3 Misc. (N. Y.) 418, 23 N. Y. Suppl. 295, 52 N. Y. St. 448. Another statute of the same state (N. Y. Laws (1892), c. 688, § 48) prohibits an insolvent corporation or any of its officers from conveying its property to its members, except for its full value in cash, and from making any assignment of its property preferring creditors. For construction of this statute see O'Brien *v.* East River Bridge Co., 161 N. Y. 539, 56 N. E. 74, 48 L. R. A. 122 [*reversing* 36 N. Y. App. Div. 171, 55 N. Y. Suppl. 206, holding that a director in a bank who is also a director in another corporation, which kept its account with the bank, might convey to such other corporation information of the impending insolvency of the bank, and that such corporation might, without violating the statute, draw out its deposits, although on the same day that the bank closed]; Munzinger *v.* United Press, 52 N. Y. App. Div. 338, 65 N. Y. Suppl. 194 (holding that certain indebtedness of the corporation was not an obligation within the meaning of the statute and that an assignment of all its property by the corporation to a director with no preference except labor claims was not within the statute); Linder-

which will have the result of giving them a priority over other creditors.[78] Turning the proposition around, a corporation, while solvent, may borrow money of an officer or director, and give a mortgage on its property to secure the payment thereof, and the transaction, although viewed with suspicion by a court of equity, will be upheld if it is fair and free from fraud.[79]

2. Contrary Doctrine That Directors May Prefer Themselves as Creditors of Corporation. In two or three American jurisdictions the contrary and regrettable doctrine obtains that the directors may use the knowledge which they possess of its impending insolvency, so as to prefer or secure themselves as its creditors, to the disadvantage and postponement of its general creditors.[80]

3. Middle Doctrine That Directors May Prefer Themselves as Creditors Where Transaction Is Fair, Etc. Some decisions have put forward the doctrine that such a preference is *prima facie* fraudulent and void and will be so declared unless it be shown that the preference was not only free from fraud, but was in itself under the circumstances both fair and reasonable.[81]

man *v.* Hastings Card, etc., Co., 38 N. Y. App. Div. 488, 56 N. Y. Suppl. 456 (holding that an assignment to a director for the benefit of creditors is not within the statute).

78. *Colorado.*— St. Joe, etc., Min. Co. *v.* Aspen First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055 [motion to dismiss appeal *denied* in 24 Colo. 537, 52 Pac. 678].

Illinois.— Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265 [*affirming* 53 Ill. App. 314, may give valid securities to its directors, where it is a going concern and doing a large business, for money loaned in good faith to enable it to carry out the purposes of incorporation, although in fact insolvent at the time]; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 665, 26 N. E. 640, 25 Am. St. Rep. 401; Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291.

Iowa.— Hallam *v.* Indianola Hotel Co., 56 Iowa 178, 9 N. W. 111.

Kentucky.— Osborne *v.* Marks, 21 S. W. 101, 14 Ky. L. Rep. 606.

Michigan.— Ten Eyck *v.* Pontiac, etc., R. Co., 34 Mich. 226, 41 N. W. 905, 16 Am. St. Rep. 633, 3 L. R. A. 378.

New York.— Converse *v.* Sharpe, 161 N. Y. 571, 56 N. E. 69 [*affirming* 37 N. Y. App. Div. 399, 56 N. Y. Suppl. 1080]; New York Bank Com'rs *v.* St. Lawrence Bank, 8 Barb. 436.

United States.— Sanford Fork, etc., Co. *v.* Howe, etc., Co., 157 U. S. 312, 15 S. Ct. 621, 39 L. ed. 713; Washburn *v.* Green, 133 U. S. 30, 10 S. Ct. 280, 33 L. ed. 516; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328.

See 12 Cent. Dig. tit. "Corporations," § 1367.

79. Jones *v.* Hale, 32 Oreg. 465, 52 Pac. 311.

80. *Alabama.*— Corey *v.* Wadsworth, 118 Ala. 488, 25 So. 503, 44 L. R. A. 766.

Arkansas.— Worthen *v.* Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50.

Connecticut.— Smith *v.* Skeary, 47 Conn. 47.

Iowa.— Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461; Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516.

Michigan.— Lucas *v.* Friant, 111 Mich. 426, 69 N. W. 735; Keeney *v.* Converse, 99 Mich. 316, 58 N. W. 325 (case where an unsuccessful attack was made by a shareholder upon a mortgage of corporate property made to a director); Doyle *v.* Leitelt, 97 Mich. 298, 56 N. W. 553; Montreal Bank *v.* J. E. Potts Salt, etc., Co., 90 Mich. 345, 51 N. W. 512.

Missouri.— State *v.* Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321; Schufeldt *v.* Smith, 131 Mo. 280, 31 S. W. 1039, 52 Am. St. Rep. 628, 29 L. R. A. 830.

South Carolina.— Central R., etc., Co. *v.* Claghorn, Speers Eq. 545.

Utah.— Wells *v.* Scott, 18 Utah 127, 55 Pac. 81, where the indebtedness arose from a loan of money to the corporation, which received the benefit of every dollar thereof.

Vermont.— Whitewell *v.* Warner, 20 Vt. 425.

Wisconsin.— South Bend Chilled Plow Co. *v.* George C. Cribb Co., 97 Wis. 230, 72 N. W. 749, out of line it seems with the other Wisconsin cases.

United States.— Childs *v.* N. B. Carlstein Co., 76 Fed. 86; Brown *v.* Grand Rapids Parlor Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817; Gould *v.* Little Rock, etc., R. Co., 52 Fed. 680.

England.— *In re* Wincham Shipbuilding, etc., Co., 9 Ch. D. 329, 47 L. J. Ch. 868, 38 L. T. Rep. N. S. 660, 26 Wkly. Rep. 824.

See 12 Cent. Dig. tit. "Corporations," § 2170.

81. Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265 [*affirming* 53 Ill. App. 314]; Schufeldt *v.* Smith, 131 Mo. 280, 31 S. W. 1039, 52 Am. St. Rep. 628, 29 L. R. A. 830 (must show that all their secured claims are honest and justly due to them); Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620.

A mortgage executed by an insolvent corporation to secure creditors is not invalid because of the influence of one of the directors

4. May Prefer Creditors of Corporation, Although Such Preference May Inure to Benefit of Directors Who Are Liable as Sureties, Guarantors, Etc. Another class of holdings is to the effect that the directors of a corporation may use or charge its assets in preferring particular creditors of the corporation, although the directors themselves, or some of them, or some of the other officers of the corporation, may be collaterally liable as sureties or guarantors of the corporation, in favor of the creditors so preferred, so that the operation of the preference may be to exonerate such directors or officers.[82]

5. May Not Prefer Creditors Where Making of Such Preferences Would Inure to Benefit of Directors Who Are Liable as Guarantors, Sureties, Etc. The directors of a corporation which is insolvent, or at the point of insolvency, cannot employ or charge its assets in any manner, for the purpose of indemnifying its directors against liability as a surety for it, any more than it could give them a direct preference in the case of an actual antecedent indebtedness from it to them.[83] The directors of a corporation cannot indemnify, against an existing liability, a cosurety of a fellow-director; since the indemnity of one surety inures by operation of law to the benefit of the others; and hence this violates the principle that directors cannot prefer themselves as creditors out of the corporate assets.[84]

6. Remedies Against Directors Obtaining Unlawful Preferences Over Other Creditors. A director who obtains an unlawful preference over other creditors of the corporation will be held to account in equity as a trustee, of the money or property which he has received, for all the creditors of the company.[85] But the fact that he has obtained such a preference will not be a defense to his action against the corporation, on a contract authorized by the directors, but is only

who voted therefor, and whose wife's debt was secured thereby. Miller *v.* Savage, 60 N. J. Eq. 204, 46 Atl. 632.

82. *Georgia.*—Rylander *v.* Sheffield, 108 Ga. 111, 34 S. E. 348 (directors who are guarantors of the payment of a note of the corporation given for borrowed money, secured by a mortgage on its property, owe no duty to the shareholders, when the loan matures, to enter into an agreement with the lender to extend the loan on terms requiring such directors to be bound as guarantors); Atlas Tack Co. *v.* Macon Hardware Co., 101 Ga. 391, 29 S. E. 27 (assignment of chose in action made in good faith to secure creditors, and not for the purpose of saving a director, liable as surety, from loss, not void).

Illinois.— Rockford Wholesale Grocery Co. *v.* Standard Grocery, etc., Co., 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205 [*affirming* 74 Ill. App. 317].

Indiana.— Levering *v.* Bimel, 146 Ind. 545, 45 N. E. 775; Henderson *v.* Indiana Trust Co., 143 Ind. 561, 40 N. E. 516.

New Jersey.— Savage *v.* Miller, 56 N. J. Eq. 437, 39 Atl. 665 [*reversing* 56 N. J. Eq. 432, 36 Atl. 578].

North Carolina.— Washington First Nat. Bank *v.* Eureka Lumber Co., 123 N. C. 24, 31 S. E. 348.

Pennsylvania.— Creighton *v.* Scranton Lace Curtain Mfg. Co., 191 Pa. St. 231, 43 Atl. 134, 44 Wkly. Notes Cas. 233, pledge of goods by a corporation for contemporaneous or future advances valid, although pledgee was a director.

Utah.— Wells *v.* Scott, 18 Utah 127, 55 Pac. 81.

United States.— Sanford Fork, etc., Co. *v.* Howe, etc., Co., 157 U. S. 312, 15 S. Ct. 621, 39 L. ed. 713; *In re* Freights of The Kate, 63 Fed. 707 (especially where the original transaction was not for the personal benefit of the officers); Gould *v.* Little Rock, etc., R. Co., 52 Fed. 680.

The fact that the creditor is related to one or more of the directors or officers will not make any difference if the circumstances are such that a valid security may lawfully be given as a preference to a creditor of an insolvent corporation. Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265 [*affirming* 53 Ill. App. 314].

Estoppel of shareholder to object.—A shareholder who, in his character of director, had voted at a regular meeting of directors at which a majority were present, in favor of a resolution to mortgage the property of the corporation, was estopped from complaining that the resolution was not regularly adopted, because one of the other directors who voted in favor of it was indorser upon paper secured by the mortgage, and because two other directors so voting had indemnified the former from liability as indorser. Lucas *v.* Friant, 111 Mich. 426, 69 N. W. 735.

83. Tillson *v.* Downing, 45 Nebr. 549, 63 N. W. 836; Gray *v.* Taylor (N. J. Ch. 1897) 38 Atl. 951 [*affirmed* in (N. J. Err. & App. 1899) 44 Atl. 668].

84. Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624, 17 S. E. 968.

85. Hill *v.* Standard Telephone Mfg. Co., 9 Pa. Dist. 445, 24 Pa. Co. Ct. 278, 16 Montg. Co. Rep. 203.

available to defeat an execution of judgment in such an action, by the satisfaction of which a preference would be acquired by him.[86]

7. Directors Gain Priority by Action or by Attachment. Under a conception that the assets of a corporation are not a trust fund for its creditors so long as it continues to be a going concern, although in fact it is insolvent in a general sense, it has been held that while it continues to be a going concern directors may avail themselves of their superior knowledge of its actual condition, so as to secure a preference over other creditors by suing it and attaching its property.[87] A son who has succeeded his father as director of a corporation and who was also administrator of his father's estate, to which the corporation was indebted, may properly, upon learning that the corporation has been sued by a creditor, institute suit against it as administrator, and the judgment recovered will not be postponed to the claims of other creditors, where the administrator took no advantage of his position as director to obtain a preference.[88]

8. Directors May Share With Other Creditors in Distribution of Corporate Assets. There being nothing *per se* in the relation of a director to his corporation which prevents him from becoming a creditor of the corporation, it follows that if the company is indebted to him for money which he has advanced to it in good faith, he may, upon its becoming insolvent, share in the distribution of its assets with the other creditors.[89]

I. Contracts Between Directors and Corporation — 1. Directors May Contract With Corporation in Good Faith. There is no sound principle of law or equity which prohibits one or more of the directors of a corporation from entering into contracts and dealings with the corporation, provided they act in good faith, and provided there be a quorum of other directors on the other side of the contract, so that the vote of the interested director is not necessary to the adoption of the measure; and even in the latter case the contract is good at law. In theory of law there are still two contracting parties, the corporation on the one hand and the individuals who formed the opposite party to the contract on the other. In other words a director is not debarred, by reason of his office, from entering into a contract with the corporation, but the contract is subject to the principle that where he appears on both sides of it, it will be closely scrutinized in equity, and set aside unless made in that entire good faith which the law demands of this species of fiduciary.[90] Even where the majority of the share-

86. Welling *v.* Ivoryd Mfg. Co., 162 N. Y. 599, 57 N. E. 1128 [*affirming* 15 N. Y. App. Div. 116, 44 N. Y. Suppl. 374].

87. A. B. Frank Co. *v.* Berwind, (Tex. Civ. App. 1898) 47 S. W. 68). Much to the same effect see Hill *v.* Knickerbocker Electric Light, etc., Co., 18 N. Y. Suppl. 813, 45 N. Y. St. 761.

88. Nebraska Nat. Bank *v.* Clark, 58 Nebr. 183, 78 N. W. 527.

Postponement of directors who permit corporation to become indebted in excess of limit prescribed by articles of incorporation.— Directors who permitted the corporation to become indebted in excess of the limit prescribed by its articles were postponed to other creditors, who had no notice of the financial condition of the corporation at the time when their debts were created. Gunther *v.* Baskett Coal Co., 107 Ky. 44, 52 S. W. 931, 21 Ky. L. Rep. 655.

State of the evidence under which claims of the directors will not be disallowed upon distribution of the assets of the corporation under an assignment for the benefit of creditors, upon the ground that they permitted an indebtedness in excess of the amount of the capital stock paid in, and never paid in such excess. *In re* Trevose Model Brick Mfg. Co.'s Assigned Estate, 159 Pa. St. 496, 28 Atl. 1023.

89. Hooven Mercantile Co. *v.* Evans Min. Co., 193 Pa. St. 28, 44 Atl. 277. When a person whose name appeared on the books as director of an insolvent corporation, but who never "lifted" his share certificate, which had been given to him as collateral security, and never knew that he was elected a director, would not be charged with the unpaid value of his shares, but participated as a general creditor in the distribution of the proceeds of the corporate assets on execution. Vallee *v.* Elizabethtown Electric Light Co., 18 Lanc. L. Rev. 65.

90. Cases which uphold the principle that directors may contract with the corporation if fairly done are as follows:

California.— Kellerman *v.* Maier, 116 Cal. 416, 48 Pac. 377; Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

Connecticut.— Smith *v.* Skeary, 47 Conn. 47.

holders are personally interested in a contract which they have authorized on behalf of the corporation, this does not render the contract void *per se*; it is still good at law, although voidable in equity in case of any fraud or unfairness at the suit of the corporation, or of shareholders suing in its behalf.[91] And so where a mortgaged deed of trust is executed by a corporation it is not a valid objection to it that it is made to a director in the corporation, since it is made to secure bonds which are purchased by others, and the director is the nominal, and not the beneficiary, grantee. Such a case, it is said, does not fall within the principle sometimes declared that a deed executed by the grantee as agent for the grantor is void as to all the world.[92] There are authorities which go to the length of holding that a contract in which some of the directors are interested on both sides is void in such a sense that it will not be enforced in a court of justice.[93] But the weight of authority probably is that such contracts are merely presumptively invalid, and that the burden of showing that they are entirely fair is upon those claiming under them; and that they will be subjected by courts of equity to the severest scrutiny and set aside unless all appearance of bad faith is removed by the evidence.[94]

2. View That Director Cannot Contract With Company. Some of the courts, however, take the broad and unqualified view that a director cannot be allowed

Illinois.— Louisville, etc., R. Co. *v.* Carson, 51 Ill. App. 552; Matson *v.* Alley, 41 Ill. App. 72 [*affirmed* on other grounds in 141 Ill. 284, 31 N. E. 419].

Massachusetts.— Nye *v.* Storer, 168 Mass. 53, 46 N. E. 402; Warren *v.* Para Rubber Shoe Co., 166 Mass. 97, 44 N. E. 112.

Michigan.— German-American Seminary *v.* Kiefer, 43 Mich. 105, 4 N. W. 636.

Missouri.— Foster *v.* Belcher's Sugar Refining Co., 118 Mo. 238, 24 S. W. 63.

Nevada.— Bassett *v.* Monte Cristo Gold, etc., Min. Co., 15 Nev. 293.

New York.— Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 26 N. E. 145, 34 N. Y. St. 743; Barnes *v.* Brown, 80 N. Y. 527 [*reversing* 11 Hun 315]; Nathan *v.* Whitehill, 67 Hun 398, 22 N. Y. Suppl. 63, 51 N. Y. St. 457; Kearns *v.* New York, etc., Ferry Co., 17 Misc. 272, 40 N. Y. Suppl. 366 [*affirmed* in 19 Misc. 19, 42 N. Y. Suppl. 771]; Strobel *v.* Brownell, 16 Misc. 657, 40 N. Y. Suppl. 702; Wile, etc., Co. *v.* Rochester, etc., Land Co., 4 Misc. 570, 25 N. Y. Suppl. 794. See also Duncomb *v.* New York, etc., R. Co., 22 Hun 133.

Utah.— Armstrong *v.* Cache Valley Land, etc., Co., 14 Utah 450, 48 Pac. 690.

United States.— Leavenworth County *v.* Chicago, etc., R. Co., 134 U. S. 688, 10 S. Ct. 708, 33 L. ed. 1064; Illinois Pneumatic Gas Co. *v.* Berry, 113 U. S. 322, 5 S. Ct. 525, 28 L. ed. 1003; Barr *v.* Pittsburgh Plate-Glass Co., 57 Fed. 86, 6 C. C. A. 260 [*affirming* 51 Fed. 33]; Symmes *v.* Union Trust Co., 60 Fed. 830; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

Cases asserting the principle that a corporation may contract with its own shareholders are the following: Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129; Hennighausen *v.* Tischer, 50 Md. 583.

An agent of a corporation may deal with it fairly of course when it is represented in the transaction by other agents. Matson *v.* Alley, 41 Ill. App. 72 [*affirmed* on other grounds in 141 Ill. 284, 31 N. E. 419].

91. Bassett *v.* Monte Cristo Gold, etc., Min. Co., 15 Nev. 293.

92. Bassett *v.* Monte Cristo Gold, etc., Min. Co., 15 Nev. 293.

93. See for instance Thomas *v.* Brownville, etc., R. Co., 2 Fed. 877, 1 McCrary 392, and note that this decision was affirmed on this point, although reversed in another, in 109 U. S. 522, 3 S. Ct. 315, 27 L. ed. 1018. See also Miner *v.* Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Jackson *v.* McLean, 36 Fed. 213.

94. Gardner *v.* Butler, 30 N. J. Eq. 702; Skinner *v.* Smith, 134 N. Y. 240, 31 N. E. 911, 47 N. Y. St. 528 [*affirming* 56 Hun (N. Y.) 437, 10 N. Y. Suppl. 81, 31 N. Y. St. 448]; Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 26 N. E. 145, 34 N. Y. St. 743; Welch *v.* Importers', etc., Bank, 122 N. Y. 177, 25 N. E. 269, 33 N. Y. St. 452; Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 8 N. E. 355; Barnes *v.* Brown, 80 N. Y. 527 [*reversing* 11 Hun (N. Y.) 315]; Risley *v.* Indianapolis, etc., R. Co., 62 N. Y. 240 [*reversing* 1 Hun (N. Y.) 202, 4 Thomps. & C. (N. Y.) 13]; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 13 S. Ct. 170, 36 L. ed. 1079; Wardell *v.* Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509 [*affirming* 29 Fed. Cas. No. 17,164, 4 Dill. 339]; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483. That unfaithful trustees who have appropriated all the profits of the enterprise to themselves will subject the company — it being a mere trading corporation — to a winding-up in equity see Fougeray *v.* Cord, 50 N. J. Eq. 185, 24 Atl. 499; and *compare* 4 Thompson Corp. § 4443. That an officer of a corporation cannot as against its creditor have a remedy on a corrupt contract see Cole *v.* Mullerton Iron Co., 59 Hun (N. Y.) 217, 13 N. Y. Suppl. 851, 38 N. Y. St. 34.

to make and take contracts with the company of which he is a director.[95] The reason is that already stated, that the relation between the director and the corporation is that of trustee and *cestui que trust*,[96] and the law will not allow a trustee for his own private advantage to do that which may place him in a position in which his interest is antagonistic to that of the beneficiaries in the trust.[97] Under this rule no question can be raised as to the fairness or unfairness of the transaction, and the director so acting will not be heard if he attempts to show that it was fair and advantageous to the corporation.[98]

3. SECOND VIEW THAT SUCH CONTRACTS ARE NOT VOID BUT VOIDABLE. Another and perhaps a more practicable view, and the one which generally prevails in the American courts, is that a contract between a corporation and its officers is not void *per se*, but is merely voidable at the option of the corporation or its representative, provided the option is exercised within a reasonable time under all the circumstances of the case.[99] But perhaps there is no essential difference between

95. *Indiana.*— Port *v.* Russell, 36 Ind. 60, 10 Am. Rep. 5.

New York.—Coleman *v.* Second Ave. R. Co., 38 N. Y. 201; Butts *v.* Wood, 37 N. Y. 317; Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192.

Wisconsin.— Haywood *v.* Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184.

United States.— Thomas *v.* Brownsville, etc., R. Co., 2 Fed. 877, 1 McCrary 392 [*reversed* in 109 U. S. 522, 3 S. Ct. 315, 27 L. ed. 1018].

England.— Aberdeen R. Co. *v.* Blakie, 2 Eq. 1281, 1 Macq. 461, 1 Paterson Sc. App. 391, 1 Paton App. Cas. 119, 26 Sc. Jur. 628.

96. Butts *v.* Wood, 37 N. Y. 317.

97. *California.*— Wilbur *v.* Lynde, 49 Cal. 290, 19 Am. Rep. 645; Andrews *v.* Pratt, 44 Cal. 309; San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106.

Maryland.— Hoffman Steam Coal Co. *v.* Cumberland Coal, etc., Co., 16 Md. 456, 77 Am. Dec. 311.

New York.— Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. 553.

Wisconsin.— Pickett *v.* Wiota School Dist., 25 Wis. 551, 3 Am. Rep. 105.

United States.— Michoud *v.* Girod, 4 How. 503, 11 L. ed. 1076.

England.— Aberdeen R. Co. *v.* Blakie, 2 Eq. 1281, 1 Macq. 461, 1 Paterson Sc. App. 391, 1 Paton App. Cas. 119, 26 Sc. Jur. 628, per Lord Cranworth.

The principle may be tersely stated to be that one who undertakes in a given matter to act for another cannot in the same matter act for himself. Dutton *v.* Willner, 52 N. Y. 312; Forbes *v.* Halsey, 26 N. Y. 53. The leading American case on the subject is Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192, where the subject is discussed with great learning by Davies, J. The rule applies to all persons standing in relations of trust which involve duties inconsistent with such persons dealing with the trust property as their own. Ten Eyck *v.* Craig, 62 N. Y. 406; Wager *v.* Reid, 3 Thomps. & C. (N. Y.) 332. See Lingke *v.* Wilkinson, 57 N. Y. 445; Rockford, etc., R. Co. *v.* Boody, 56 N. Y. 456.

98. Aberdeen R. Co. *v.* Blakie, 2 Eq. 1281, 1 Macq. 461, 1 Paterson Sc. App. 391, 1 Paton App. Cas. 119, 26 Sc. Jur. 628. This decision did not turn upon the construction of any act of parliament, but was based upon the general principles applied by courts of equity to the relations of trustee and *cestui que trust*. See also Flanagan *v.* Great Western R. Co., L. R. 7 Eq. 116, 38 L. J. Ch. 117. Similar observations will be found in Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. (N. Y.) 553, opinion by Davies, J. [*quoted* with approbation in Pickett *v.* Wiota School Dist., 25 Wis. 551, 3 Am. Rep. 105. See also Whichcote *v.* Lawrence, 3 Ves. Jr. 740].

In conformity with this principle it has been held that a note made by a corporation to its trustees is against public policy and void. Wilbur *v.* Lynde, 49 Cal. 290, 19 Am. Rep. 645. Nor can the directors and officers of a corporation make a mortgage to themselves. Haywood *v.* Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184. The court cited in support of the general doctrine European, etc., R. Co. *v.* Poor, 59 Me. 277; Butts *v.* Wood, 38 Barb. (N. Y.) 181; Scott *v.* Depeyster, 1 Edw. (N. Y.) 513; Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 84; Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433; *In re* Taylor Orphan Asylum, 36 Wis. 534; Pickett *v.* Wiota School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105; Koehler *v.* Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. ed. 339; Corbett *v.* Woodward, 6 Fed. Cas. No. 3,223, 5 Sawy. 403; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711; York, etc., R. Co. *v.* Hudson, 16 Beav. 485, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 19 Eng. L. & Eq. 361.

99. Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505; Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 8 N. E. 355; Budd *v.* Walla Walla Printing, etc., Co., 2 Wash. Terr. 347, 7 Pac. 896; Leavenworth County *v.* Chicago, etc., R. Co., 134 U. S. 688, 10 S. Ct. 708, 33 L. ed. 1064; Pneumatic Gas Co. *v.* Berry, 113 U. S. 322, 5 S. Ct. 525, 23 L. ed. 1003; Thomas *v.* Brownville, etc., Pac. R. Co., 109 U. S. 522, 3 S. Ct. 315, 27 L. ed. 1018 [*reversing* 2 Fed. 877, 1 McCreary 392]; West Virginia Twin-Lick Oil Co. *v.* Marbury, 91

this view and the former; for under this view it is considered that no consideration of its apparent or intrinsic fairness will induce a court either of law or equity to enforce it against the resisting *cestui que trust.* Such a contract is, however, valid and enforceable as to others.[1] But it may be repudiated by the company at the instance of a shareholder.[2]

4. Such Contracts Presumptively Valid and Burden on Challenging Party. The rule seems to be that such contracts are presumptively valid, and will stand until overthrown in a proper proceeding by the corporation, its shareholders, or its creditors, and that the burden of showing their unfairness rests upon the challenging party.[3] "If, therefore, nothing is done in avoidance, the transaction remains. If knowledge and opportunity concur, whereupon to move, delay, if unreasonable, or attended by retention and enjoyment of the results of the transaction, may be deemed equivalent to an adoption and ratification of that which before was the subject for action, in repudiation of any obligation."[4]

5. Third View That Validity of Such Contracts Depends Upon Their Nature and Terms. A third view is that the validity of such a contract depends very much upon its nature and terms and the circumstances under which it is made,[5] and that it will be enforced when shown to have been made for the benefit of the corporation, and when it is just; although it will be more closely scrutinized than ordinary contracts.[6]

6. Such Contracts Closely Scrutinized. Those courts which concede that a valid contract may be made between a director and his corporation nevertheless unite on the principle, founded on grounds too obvious to require statement, that such contracts will always be regarded with great jealousy and suspicion, and will be subject to the closest scrutiny.[7] Such transactions, it has been said, are viewed with greater odium than a dealing between an ordinary trustee and his beneficiary.[8]

U. S. 587, 23 L. ed. 328; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483; Meeker *v.* Winthrop Iron Co., 17 Fed. 48.

1. Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505.

2. Gardner *v.* Butler, 30 N. J. Eq. 702.

3. This seems to be a reasonable deduction from Genesee Valley, etc., R. Co. *v.* Retsof Min. Co., 15 Misc. (N. Y.) 187, 36 N. Y. Suppl. 896, 72 N. Y. St. 231.

4. Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 275, 34 N. E. 743, per Gray, J.

For cases where such contracts have been avoided see Hill *v.* Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223 (specific performance refused); Gerry *v.* Bismarck Bank, 19 Mont. 191, 47 Pac. 810 (transaction steeped in fraud); Sage *v.* Culver, 147 N. Y. 241, 41 N. E. 513 [*affirming* 71 Hun (N. Y.) 42, 24 N. Y. Suppl. 514, 54 N. Y. St. 297, where the case was presented by a demurrer to a petition in equity]; Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 8 N. E. 355; Gildersleeve *v.* Lester, 68 Hun (N. Y.) 532, 22 N. Y. Suppl. 1026, 52 N. Y. St. 559 (transfer of corporate property to a trustee voidable at suit of creditor); Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62 (director voting himself back pay).

5. *Kansas.*— Thomas *v.* Sweet, 37 Kan. 183, 14 Pac. 545.

Pennsylvania.—Hammond's Appeal, 123 Pa. St. 503, 16 Atl. 419; Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

South Carolina.— Georgia Cent. R., etc., Co. *v.* Claghorn, 1 Speers Eq. 545.

Vermont.— Rogers *v.* Danby Universalist Soc., 19 Vt. 187.

United States.— Hubbard *v.* New York, etc., Invest. Co., 14 Fed. 675.

6. Hallam *v.* Indianola Hotel Co., 56 Iowa 178, 9 N. W. 111; Combination Trust Co. *v.* Weed, 2 Fed. 24. See also Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461. Under this rule it has been held that a deed by a manufacturing corporation to secure the individual indebtedness of its president is not *ultra vires* where the corporation was itself indebted to him in like amount. Bank *v.* Pomeroy Flour Co., 41 Ohio St. 552. Other cases in which such transactions have been upheld. Hancock *v.* Holbrook, 40 La. Ann. 53, 3 So. 351; Stewart *v.* St. Louis, etc., R. Co., 41 Fed. 736. On the other hand an agreement between a corporation by its board of directors on the one hand, and one or more of such directors on the other, will be set aside if injurious and oppressive to the company, even though the company was represented by a majority of disinterested directors. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

7. Couyngham's Appeal, 57 Pa. St. 474; Trust Co. *v.* Weed, 14 Phila. (Pa.) 422, 37 Leg. Int. (Pa.) 166.

8. Chouteau *v.* Allen, 70 Mo. 290, 338, per Sherwood, C. J., where, in view of this rule, the directors of a railroad company having

7. Such Contracts Upheld in Equity When Fair and Honest. Such contracts will be upheld in equity when fair and honest.[9] For instance a director who has in good faith loaned his money to the corporation to assist it in accomplishing its proper and necessary corporate purposes has a valid claim against the corporation for reimbursement.[10] So a contract between a trustee of a corporation and the board of which he is a member, fixing his salary, is not void, but voidable only at the election of the corporation.[11] So the trustees of a corporation may employ any of their number to perform proper and necessary services for the corporation, outside the duties of his office, and may bind the corporation by an agreement in advance to pay him a reasonable compensation for such services.[12] So a corporation cannot defend an action brought by its president to recover the salary agreed to be paid him as president, on the ground that as a member of the board of directors he voted for the resolution fixing his salary, where his vote was not necessary to pass the resolution, and where the services were actually performed under the contract for six months with full knowledge of the corporation.[13]

8. Such Contracts Valid as to Innocent Third Persons. Such contracts are valid as to third parties who acquire rights under them; nor can they be repudiated by the corporation after the rights of innocent third parties have supervened.[14]

9. Such Contracts Valid When Made With Unanimous Consent. On a principle which runs through this whole subject, such contracts are valid when made by unanimous consent, that is, where all the members of the corporation consent to it;[15] and a subsequent ratification will be equivalent to a prior or contemporaneous consent.[16]

10. Voidable When Majority of Directors Constitute Other Contracting Party. Where the directors who assume to make a contract between the corporation and themselves as individuals constitute a majority of the board the contract will not be binding upon the corporation.[17] The principle is that a disinterested majority of the directors is necessary to a contract with a corporation, through the action of the board, and that a contract is invalid if the vote of an interested member of the board was necessary to make it, whether the directors acted in good faith or not.[18]

11. Such Contracts Validated by Ratification. Such a contract is capable of being ratified by the lawful action of the board of directors expressed by a vote taken by a disinterested quorum.[19] So too it may be ratified by the body of the

pledged to each other nearly a million dollars in the bonds of the company, to secure an indebtedness of less than four per cent of their nominal value, the court had no difficulty in holding the transaction to be an actual fraud upon the corporation and its shareholders.

9. Strobel *v.* Brownell, 16 Misc. (N. Y.) 657, 40 N. Y. Suppl. 702; Barr *v.* Pittsburgh Plate-Glass Co., 57 Fed. 86, 6 C. C. A. 260.

10. Foster *v.* Belcher's Sugar Refining Co., 118 Mo. 238, 24 S. W. 63.

11. Kearns *v.* New York, etc., Ferry Co., 19 Misc. (N. Y.) 19, 42 N. Y. Suppl. 771 [*affirming* 17 Misc. (N. Y.) 272, 40 N. Y. Suppl. 366].

12. Symmes *v.* Union Trust Co., 60 Fed. 830.

13. Kearns *v.* New York, etc., Ferry Co., 17 Misc. (N. Y.) 272, 40 N. Y. Suppl. 366 [*affirmed* in 19 Misc. (N. Y.) 19, 42 N. Y. Suppl. 771].

14. Wile, etc., Co. *v.* Rochester, etc., Land Co., 4 Misc. (N. Y.) 570, 25 N. Y. Suppl. 794.

15. Batelle *v.* Northwestern Cement, etc., Co., 37 Minn. 89, 33 N. W. 327. See for illustration Welch *v.* Importers', etc., Nat. Bank, 122 N. Y. 177, 33 N. Y. St. 452, 25 N. E. 269.

16. See *infra*, XV, D, 1.

In illustration of this principle it has been held that where there was no deception or fraud practised, a sale by a director of property to a corporation, which is formally approved by the board of directors and ratified by all the shareholders, will not be held invalid because the sale was made for a sum greatly in excess of the cost of the property to the director. Stewart *v.* St. Louis, etc., R. Co., 41 Fed. 736. Another illustration of the principle, where the property of a failing corporation was sold to some of its trustees, will be found in Skinner *v.* Smith, 134 N. Y. 240, 31 N. E. 911, 47 N. Y. St. 528 [*affirming* 56 Hun (N. Y.) 437, 10 N. Y. Suppl. 81, 31 N. Y. St. 448].

17. Coleman *v.* Second Ave. R. Co., 38 N. Y. 201.

18. Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

19. Louisville, etc., R. Co. *v.* Carson, 51 Ill. App. 552.

shareholders;[20] but as in the case of other voidable contracts[21] it cannot be ratified in part and rejected in part.[22]

12. Director Cannot Be Secret Partner With Third Person, in Contract Between Third Person and Corporation. Moreover a director cannot make, on behalf of the corporation, a contract with a third party, and through a secret understanding between himself and such third party be a partner in the contract with such third party or otherwise derive a profit from it. This follows from the rule already stated,[23] which prevents a director from acquiring an interest adverse to the corporation.[24] A director can neither make a contract on behalf of the company in which he reserves a private interest, nor can he subseqnently become interested in its execution with a view to participate in the profits of the contract. Either act will render the contract void, at the election of the *cestui que trust*.[25] Statutes have been enacted in several of the states prohibiting corporate officers from being interested in corporate contracts.[26]

13. Director May Recover at Law on Contract With Corporation. So far from a contract between the director and the corporation being void *ab initio*, the law is that in the absence of fraud such a contract is enforceable in an action at law. Thus if a director enters into a contract with his corporation, whereby he is to do something for the corporation for a reward, and executes the contract, he is entitled to sue the corporation on the contract, and recover the agreed price.[27] Nor is any reason perceived why a director should not be allowed to recover on an implied assumpsit, and to the extent of any value which he may fairly have rendered the company outside of his duties as director. Thus it has been held that where a corporation uses a patented invention belonging to one of its directors, the director is not precluded from claiming compensation therefor, by reason of the mere fact that he is a director.[28]

14. General Doctrine That Directors May Lend to Corporation and Take Security. The only just and practicable doctrine is that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor, but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith.[29] So where advances are made by a director on an agreement that they

20. Nye *v.* Storer, 168 Mass. 53, 46 N. E. 402; Steinway *v.* Steinway, 2 N. Y. App. Div. 301, 37 N. Y. Suppl. 742, 73 N. Y. St. 418.

21. See *infra*, XV, A, 5.

22. Armstrong *v.* Cache Valley Land, etc., Co., 14 Utah 450, 48 Pac. 690.

23. See *supra*, IX, G, 5, c.

24. European, etc., R. Co. *v.* Poor, 59 Me. 277 (opinion by Appleton, J.); Thomas *v.* Brownsville, etc., R. Co., 2 Fed. 877, 1 McCrary 392; Wardell *v.* Union Pac. R. Co., 28 Fed. Cas. No. 17,164, 4 Dill. 330; *In re* West Jewel Tin Min. Co., 10 Ch. D. 579, 48 L. J. Ch. 425, 40 L. T. Rep. N. S. 43, 27 Wkly. Rep. 310.

25. Gilman, etc., R. Co. *v.* Kelly, 77 Ill. 426.

Other applications of this principle will be found in Port *v.* Russell, 36 Ind. 60, 10 Am. Rep. 5; Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477; Great Luxemburg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711; York, etc., R. Co. *v.* Hudson, 16 Beav. 199, 22 L. J. Ch. 529, 1 Wkly. Rep. 187, 510, 19 Eng. L. & Eq. 361.

26. 2 N. Y. Rev. Stat. (Banks & Bros. (6th ed.) 1876), p. 400, § 9; Brightly Purd. Dig. Pa. (1873), p. 334, § 95; Wyo. Laws (1889), p. 256, § 58. So in England. 8 & 9 Vict. c. 16, construed in *Re* Waterloo L., etc., Assur. Co., 33 Beav. 204.

Waiver of statutory provision.—It has been held that neither the directors nor the shareholders of a corporation can waive the provisions of a statute forbidding the directors from participating in the benefits of a contract for building a railroad. Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barb. (N. Y.) 397. See also Bartlett *v.* Athenæum L. Soc., 37 Eng. L. & Eq. 187. But this is doubtful.

27. Ward *v.* Polk, 70 Ind. 309.

28. Deane *v.* Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321.

29. *California.*— Farmers', etc., Bank *v.* Downey, 53 Cal. 466, 31 Am. Rep. 62.

Illinois.— Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Merrick *v.* Peru Coal Co., 61 Ill. 472; Rokker *v.* J. W. Butter Paper Co., 88 Ill. App. 278.

Iowa.— Hallam *v.* Indianola Hotel Co., 56 Iowa 178, 9 N. W. 111.

Kansas.— Baker *v.* Harpster, 42 Kan. 511, 22 Pac. 415.

shall be secured, the other directors may carry out the agreement by causing the proper instrument to be executed;[30] and a court of equity will give effect to such an agreement under proper conditions.[31] So it has been held that in order to enable a manufacturing corporation to pay its debts and thus continue its business, its directors may guarantee payment of its note made to its own order, and take as security for their liability its mortgage of all its property.[32] But in such a case it has been well observed that the obligation of the director who lends the money and takes the security to candor and fair dealing is increased in the precise degree that his representative character has given him power and control, derived from the confidence reposed in him.[33] And all such arrangements are jealously scrutinized in equity, and are summarily set aside where fraud supervenes.[34] Nor will such an agreement be enforced beyond what is right. As to an excessive interest stipulated for, and as to an amount included therein beyond what was actually parted with, it will not be enforced.[35]

15. Are Entitled to Indemnity Against Bona Fide Expenses and Advances. As in the case of other trustees, if the directors of a corporation *bona fide* and necessarily advance their own money to save the properties of the corporation, they will be entitled to indemnity therefor out of the funds of the company,[36] and in preference to the right to dividends of the holders of preferred stock.[37] Nor can moneys so refunded by the corporation to directors in repayment of their *bona fide* advances be recovered by a creditor of the corporation whose debt was not due and payable at the time.[38]

16. May Purchase From Corporation — a. In General. The principle which upholds contracts when fairly made, between a corporation and its directors or other officers, allows them under like conditions to purchase property from the

Kentucky.— McMurtry *v.* Montgomery Masonic Temple Co., 86 Ky. 206, 5 S. W. 570, 9 Ky. L. Rep. 541.

Massachusetts.— Ward *v.* Salem St. R. Co., 108 Mass. 332; Hayward *v.* Pilgrim Soc., 21 Pick. 270.

Missouri.— Johnson *v.* Cottingham Ironing Mach. Co., 8 Mo. App. 575.

Nebraska.— Gorder *v.* Plattsmouth Canning Co., 36 Nebr. 548, 54 N. W. 830.

New Jersey.— Stratton *v.* Allen, 16 N. J. Eq. 229.

New York.— Duncomb *v.* New York, etc., R. Co., 88 N. Y. 1; Bank Com'rs *v.* St. Lawrence Bank, 7 N. Y. 513 [*reversing* 8 Barb. 436]; Kinsman *v.* Fisk, 83 Hun 494, 31 N. Y. Suppl. 1045, 65 N. Y. St. 75; Rider *v.* Union India Rubber Co., 5 Bosw. 85.

Tennessee.— *In re* New Memphis Gas Light Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880.

Vermont.— Sawyer *v.* Royalton M. E. Soc., 18 Vt. 405; Geer *v.* Richmond Tenth School Dist., 6 Vt. 76.

United States.— Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

England.— Bluck *v.* Mallalue, 27 Beav. 398, 5 Jur. N. S. 1018, 7 Wkly. Rep. 303.

There is a valuable note on this subject in 19 Am. & Eng. Corp. Cas. 121, and another in 17 Am. St. Rep. 291.

30. Baker *v.* Harpster, 42 Kan. 511, 22 Pac. 415.

31. Wasatch Min. Co. *v.* Jennings, 5 Utah 243, 15 Pac. 65.

32. Hopson *v.* Ætna Axle, etc., Co., 50 Conn. 597. That directors may become guarantors for the corporation see Taylor County Ct. *v.* Baltimore, etc., R. Co., 35 Fed. 161.

33. Addison *v.* Lewis, 75 Va. 701.

34. Graves *v.* Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665; Duncomb *v.* New York, etc., R. Co., 22 Hun (N. Y.) 133; Washburn *v.* Green, 133 U. S. 30, 10 S. Ct. 280, 33 L. ed. 516.

35. Sutter St. R. Co. *v.* Baum, 66 Cal. 44, 4 Pac. 916.

Circumstances under which a director attempting an unconscionable advantage over other bondholders will not be entitled to equitable salvage. Washburn *v.* Green, 133 U. S. 30, 10 S. Ct. 280, 33 L. ed. 516.

Circumstances under which a director who is a prior mortgagee does not waive his priority of lien by accepting payment in advance, and does not satisfy or release his prior lien by reason of accepting bonds of the corporation and returning them, when he finds that he is unable to sell them for the corporation. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

36. Matter of Joint-Stock Co.'s Winding-up Act, 4 De G. M. & G. 19, 27 Eng. L. & Eq. 158, 53 Eng. Ch. 16. *Compare* Hutchinson *v.* Sidney, 28 Eng. L. & Eq. 472.

37. Brown *v.* Mechanics', etc., Nat. Bank, 12 N. Y. Suppl. 861, 35 N. Y. St. 665, circumstances under which the president of the corporation is entitled to be protected against deficiency after the foreclosure of the mortgage.

38. Holt *v.* Bennett, 146 Mass. 437, 16 N. E. 5.

corporation.[39] Such purchases are not void at law,[40] but are voidable in equity,[41] under a rule which casts upon the director the burden of sustaining the transaction by showing that it was proper, fair, made in good faith, and for an adequate consideration.[42] Or to express it differently it must be shown that the sale was necessary, that the property was bought by the purchasing director in open market, at a fair price, in good faith, and without any undue advantage over the corporation.[43] If the purchasing director is not guilty of any fraud or concealment, and pays full value for the property, and if it is the intention of the other directors to sell it to him, equity will uphold the sale.[44] As such a sale is good at law, in the absence of fraud, the validity of it cannot be questioned by the attaching creditor, and it is not invalid where it has been subsequently ratified and confirmed by the entire board.[45]

b. Circumstances Under Which Corporation or Shareholders Are Entitled to Avoid Such Purchases. According to one theory a purchase of corporate property by directors is voidable by the corporation, or by its legal representative, at mere option.[46] But the sound view does not seem to go further than to hold that the presumption of law is against the validity of such a purchase and that when it is challenged, the purchasing directors have the burden of defending it and of showing its fairness affirmatively.[47]

c. Circumstances Under Which Such Purchases Are Not Voidable. A director is guilty of no breach of trust or violation of duty, by reason of advancing his own money to the corporation, on the best terms it can get from other people, as for example where the corporation has put its debentures on the market and sold them at a discount, because they will not bring par, and a director purchases them at market rates.[48]

d. May Enforce Such Security Like Any Other Creditor. Such a security being valid, the director who has taken it may enforce it in like manner as any other creditor might.[49]

17. Cannot in General Purchase Corporate Property at Judicial Sales — a. Statement of Rule. A director cannot in general be upheld in purchasing the

39. Hartridge *v.* Rockwell, R. M. Charlt. (Ga.) 260; Beach *v.* Miller, 23 Ill. App. 151.

40. Ryan *v.* Williams, 100 Fed. 172.

41. Little Rock, etc., R. Co. *v.* Page, 35 Ark. 304.

42. Ryan *v.* Williams, 100 Fed. 172.

43. Crescent City Brewing Co. *v.* Flanner, 44 La. Ann. 22, 10 So. 384.

Necessity of the sale must not have been created by the mismanagement of the board, otherwise the sale will be set aside. Crescent City Brewing Co. *v.* Flanner, 44 La. Ann. 22, 10 So. 384.

44. Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516.

45. Crymble *v.* Mulvaney, 21 Colo. 203, 40 Pac. 499.

Circumstances under which a director of an insolvent corporation cannot impeach the validity of the sale of corporate property to himself. Clapp *v.* Allen, 20 Ind. App. 263, 50 N. E. 587.

46. Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433.

47. Ashurst's Appeal, 60 Pa. St. 290. See also Reilly *v.* Oglebay, 25 W. Va. 36; Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433.

48. *In re* Compagnie Générale De Bellegarde, 4 Ch. D. 470, 35 L. T. Rep. N. S. 900, 25 Wkly. Rep. 299. For a questionable case, upholding an assignment to a director of a corporation, of an option held by the corporation, for the purchase of property of which the corporation had a sale, by means of which option the director was enabled to purchase the fee, see Hannerty *v.* Standard Theatre Co., 109 Mo. 297, 19 S. W. 82. For circumstances under which a director of a railroad company purchased from its contractor certain ties which had been cut by the company, and which were deposited at the place agreed upon, and an instalment by the company paid thereon, and the ties could not be taken in execution by a creditor of the company, because the legal title had passed to the company from the director, see Cornell *v.* Clark, 104 N. Y. 451, 10 N. E. 888.

49. For example the directors of a private corporation who, with the knowledge and assent of the shareholders, become guarantors of a debt created by the corporation for a loan secured by mortgage on the property of the corporation, and who pay the debt at maturity and take the transfer of the mortgage, may enforce the mortgage by foreclosure and sale of the mortgaged property to secure the amount of the debt paid by them, notwithstanding the corporation is solvent, and able, if granted indulgence, to finally pay off the debt from its income, and that the value of the property is largely in excess of the debt, and that the directors oc-

property of the corporation at a public or other judicial sale;[50] since the effect of this is to draw him into a position antagonistic to that of the company, which as already seen[51] is not allowed. If he purchases its property upon an execution sale for less than its value he may be charged with the property or its value, and with the profits accruing from the purchase, as a trust fund for the benefit of the corporation, its creditors, and its shareholders.[52] The extent of the rule is that a director purchases subject to the right of the corporation to disaffirm and demand a resale, and that in order to have the sale disaffirmed the corporation need not show actual fraud or prejudice.[53] On the one hand, such a transaction is presumptively not *bona fide*; on the other, it is voidable only at the election and instance of a party in interest.[54] Whenever such a purchase is drawn in question in a direct proceeding in equity, the presumption of law is against its validity, and it devolves upon the purchasing director to establish its good faith and show that the sale produced the full value of the property.[55] One reason assigned for the rule is that for a director to appear as a bidder at a judicial sale of the property of the company would naturally have the effect to prevent bidding.[56]

b. Such Purchases Not Void, but Voidable. Such purchases are not wholly void. They are good in law, and operate to pass the legal title;[57] but they are voidable in equity on the least appearance of unfairness.[58]

c. Director Purchasing Corporate Property For Himself Holds It as Trustee For Company. The directors or other officers of a corporation who thus become the purchasers of its property hold it as trustees for the corporation.[59]

cupy fiduciary relations to the shareholders. Rylander *v.* Sheffield, 108 Ga. 111, 34 S. E. 348.

50. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468; Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824; Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. (N. Y.) 553; *Re* Iron Clay Brick Mfg. Co., 19 Ont. 113.

Under Cal. Civ. Code, § 2228, which requires the highest good faith from a trustee toward his beneficiary, and under section 2230, which prohibits the trustee from taking part in any transaction adverse to the beneficiary, the secretary of a corporation, who is also its general manager, and to whom all its affairs are committed, is guilty of a fraud against the corporation in secretly purchasing its property in his own name at execution and tax-sales. San Francisco Water Co. *v.* Pattee, 86 Cal. 623, 25 Pac. 135.

51. See *supra*, IX, G, 5, c.

52. Sebring *v.* Joanna Heights Assoc., 2 Pa. Dist. 629; Tobin Canning Co. *v.* Fraser, 81 Tex. 407, 17 S. W. 25; Victor Gold, etc., Min. Co. *v.* National Bank of Republic, 15 Utah 391, 49 Pac. 826; *Re* Iron Clay Brick Mfg. Co., 19 Ont. 113, 120. Property of the corporation thus purchased by a director at less than its value may be applied to the discharge of a claim held by him against the corporation. Tobin Canning Co. *v.* Fraser, 81 Tex. 407, 17 S. W. 25.

Sale set aside.— Circumstances under which a sale of all the assets of a corporation on foreclosure of a mortgage to its directors will be set aside. Goddard *v.* Fishel-Schlichten Importing Co., 9 Colo. App. 306, 48 Pac. 279. *Compare* the following cases:

Alabama.— Pickett *v.* Pipkin, 64 Ala. 520.

Georgia.— Ellis *v.* Pullman, 95 Ga. 445, 22 S. E. 568; Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40.

Illinois.—Atlas Nat. Bank *v.* More, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274.

Michigan.— Sweet *v.* Converse, 88 Mich. 1, 49 N. W. 899.

New York.— Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307.

West Virginia.— Sweeny *v.* Wheeling Grape Sugar Refining Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88.

53. Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595. See also European, etc., R. Co. *v.* Poor, 59 Me. 277, where the rule and the reasons for it are stated at length by Appleton, C. J.

54. Jones *v.* Arkansas Mechanical, etc., Co., 38 Ark. 17, under the facts of which case a creditor successfully challenged it.

55. Wilkinson *v.* Bauerle, 41 N. J. Eq. 635, 7 Atl. 514.

56. *Re* Iron Clay Brick Mfg. Co., 19 Ont. 113.

That a secret purchase by the secretary and general manager of a corporation of corporate property at judicial sale is a fraud on the corporation, under Cal. Civ. Code, §§ 2228, 2230, see San Francisco Water Co. *v.* Pattee, 86 Cal. 623, 25 Pac. 135.

57. Saltmarsh *v.* Spaulding, 147 Mass. 224, 17 N. E. 316.

58. Hannerty *v.* Standard Theatre Co., 109 Mo. 297, 19 S. W. 82.

59. *Illinois.*— Hoffman *v.* Reichert, 31 Ill. App. 558, but he can recover what he expended upon it.

Missouri.— McAllen *v.* Woodcock, 60 Mo. 174; Brewster *v.* Stratman, 4 Mo. App. 41 (detailing the proceedings to be had against him).

d. When May Purchase Corporate Property at Judicial Sale. In order to avail himself of the security which he may have taken for *bona fide* advances made to the corporation, a director may purchase its property at a sale under the deed of trust, by which he is secured, or other judicial or public sale.[60] So a director who has interests to protect may purchase corporate property at a public sale made by an assignee or receiver, under an order of court and subject to its approval.[61] Thus a judgment creditor of a corporation has the right to sell its property under his execution, although he may be a director.[62] Another view is that such purchases are presumptively invalid, but that they will be sustained where the officer

New Jersey.— Raleigh *v.* Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1.

New York.— Robinson *v.* Jewett, 116 N. Y. 40, 22 N. E. 224, 26 N. Y. St. 384 (same doctrine in case where a director purchases for himself property not belonging to the company, but which it is his duty to acquire for the company); Buffalo, etc., R. Co. *v.* Lampson, 47 Barb. 533 (in case a director purchases with the corporate money and takes title in his own name a trust instantly results in favor of the corporation).

South Carolina.— Palmetto Lumber Co. *v.* Risley, 25 S. C. 309.

For further illustration see a case where certain directors acquired for themselves certain patent rights, which they ought to have acquired for the company. Averill *v.* Barber, 2 Silv. Supreme (N. Y.) 40, 6 N. Y. Suppl. 255, 25 N. Y. St. 194. For other circumstances under which such purchases have been held voidable see the following cases:

California.— San Francisco Water Co. *v.* Pattee, 86 Cal. 623, 25 Pac. 135.

Kentucky.— Covington, etc., R. Co. *v.* Bowler, 9 Bush 468.

Louisiana.— Crescent City Brewing Co. *v.* Flanner, 44 La. Ann. 22, 10 So. 384.

New Jersey.— Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

New York.— Welch *v.* Woodruff, 3 N. Y. Suppl. 622, 20 N. Y. St. 840.

Texas.— Green *v.* Hugo, 81 Tex. 452, 17 S. W. 79, 26 Am. St. Rep. 824.

60. *Arkansas.*— Searcy *v.* Yarnell, 47 Ark. 269, 1 S. W. 319, several directors of a railroad corporation selling its property to one who has been a director, but who resigns in order to make the purchase — transaction sustained.

New York.— Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Preston *v.* Loughran, 58 Hun 210, 12 N. Y. Suppl. 313, 34 N. Y. St. 391.

Oregon.— Patterson *v.* Portland Smelting Works, 35 Oreg. 96, 56 Pac. 407.

Pennsylvania.— Watts' Appeal, 78 Pa. St. 370, directors of land company purchasing corporate lands at fair prices and paying in corporate bonds — transaction sustained.

Tennessee.— *In re* New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 88.

Texas.— College Park Electric Belt Line *v.* Ide, 15 Tex. Civ. App. 273, 40 S. W. 64.

United States.— West Virginia Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328.

England.— Weir *v.* Barnett, 3 Ex. D. 32, 26 Wkly. Rep. 147.

61. Janney *v.* Minneapolis Industrial Exposition, 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273.

62. Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595.

The leading case on this subject is West Virginia Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328, where it appeared that certain directors advanced money to rescue the corporation from hopeless embarrassment, taking the mortgage as their security, which mortgage they foreclosed and bought the property at foreclosure sale, and reorganized the corporation and put it on its feet, and the other shareholders who had stood aloof were not allowed to maintain a bill to redeem or to be admitted to a share in the new company. Another very apt illustration is furnished by the case of Harts *v.* Brown, 97 Ill. 226, where a corporation being insolvent and without means to discharge an indebtedness for which its property was sold under a judicial sale or to redeem the property so sold, its directors, after giving all the shareholders an opportunity of making advances to relieve the company from embarrassment, which opportunity they refused to embrace, purchased the indebtedness and then acquired title to the corporate property by selling it under a deed of trust given to secure such indebtedness — the conclusion being that the other shareholders had no right to complain.

A mere shareholder may so purchase.— Shareholders, being ordinarily not in a fiduciary relation with the corporation but entitled to deal with it at arm's length (Culbertson *v.* Wabash Nav. Co., 6 Fed. Cas. No. 3,464, 4 McLean 544, 547. See also Gilmore *v.* Pope, 5 Mass. 491; Willoughby *v.* Comstock, 3 Hill (N. Y.) 389; Ely *v.* Sprague, Clarke (N. Y.) 351; Berks, etc., Turnpike R. Co. *v.* Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402), may purchase the property of the corporation at a judicial sale, and if there is no fraud in the sale will not be obliged to account to the other shareholders for the profits, although the purchase may have been made at much less than the value of the property (Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103).

making them shows that he has paid full value for the property purchased by him at such sale.[63]

18. Such Contracts Voidable at Election of Shareholders. The right to avoid such a contract is ordinarily a right of the corporation; but it is also the right of its shareholders, or a minority of them, where the corporation upon request refuses to act.[64]

19. When Such Contracts Voidable at Suit of Creditors or Their Representative. It cannot be doubted that circumstances may arise where it will also be the right of its creditors, to be exercised through a receiver, assignee, or other trustee appointed to administer the corporate assets for their benefit.[65] Where the president of a corporation, authorized by the vote of its directors to make an assignment of its property for the benefit of its creditors, executed the assignment to himself as assignee, it was held that the assignment was voidable at the election of the corporation, but not on the application of creditors to remove him and appoint a suitable assignee in his stead.[66]

20. Principles on Which Courts of Equity Grant Relief Against Such Purchases. Unless the director thus purchasing the property of the corporation has acted with such turpitude as to put him in the category of a trustee *ex maleficio*, on the contract being rescinded, he will be allowed to keep, or will have restored to him, what he has actually expended.[67] Expressed differently the property will be restored to the corporation on condition of putting the purchaser *in statu quo*.[68]

21. When Equity Will Wind Up Corporation. Contrary to the general rule that equity has no jurisdiction to dissolve and wind up a corporation, exceptional decisions are noted in the case of manufacturing and trading companies where, on account of the company falling irretrievably under the control of directors bent on swindling their coadventurers, courts of equity have laid the ax at the root of the tree and granted relief to the minority shareholders in the form of winding up the company, stating an account against the unfaithful directors or managers, paying its debts, and distributing its assets.[69]

63. Horbach *v.* Marsh, 37 Nebr. 22, 55 N. W. 286.

That an officer so purchasing is guilty of constructive fraud merely and will not be compelled to surrender the property except upon reimbursement see Sebring *v.* Joanna Heights Assoc., 2 Pa. Dist. 629.

That such a purchase will be upheld when made in perfect good faith see Osborne *v.* Monks, 21 S. W. 101, 14 Ky. L. Rep. 606.

That such a sale will not be set aside at the instance of the corporation after acquiescence and recognition see Rutgers Female College *v.* Tallman, 2 Misc. (N. Y.) 561, 24 N. Y. Suppl. 771; *In re* New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 88 (such purchase not set aside, since if shareholders thereby injured, purchasing directors become personally liable to them).

64. Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

65. "The vote cast by him did not render the proceedings void, but merely voidable at the instance of the corporation, its directors, stockholders or creditors." Van Wyck, C. J., in Keans *v.* New York, etc., Ferry Co., 17 Misc. (N. Y.) 272, 273, 40 N. Y. Suppl. 366.

66. Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75 [*reversing* 89 Hun (N. Y.) 159, 35 N. Y. Suppl. 17, 69 N. Y. St. 213].

67. See for instance San Francisco Water Co. *v.* Pattee, 86 Cal. 623, 25 Pac. 135.

68. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468. In one case a director of a joint-stock company who at a judicial sale purchased property belonging to the company to satisfy his own liens against it was required to account for the price realized by him on a subsequent sale, although he paid its full value at the time of the purchase. *Re* Iron Clay Brick Mfg. Co., 19 Ont. 113. See also Averill *v.* Barber, 2 Silv. Supreme (N. Y.) 40, 6 N. Y. Suppl. 255, 25 N. Y. St. 194; Tobin Canning Co. *v.* Fraser, 81 Tex. 407, 17 S. W. 25 (property purchased by director at execution sale, at less than its value, applied in the discharge of a claim held by him against the corporation, at its true value, and he accountable for the balance). Where the secretary of a corporation, who was also its general manager, had secretly procured an adverse title to the company's property, by purchasing it in his own name at a judicial sale, he was decreed to make restitution on payment of his expenditures being made to him, and it was held that he was not entitled to have his unpaid salary paid to him prior to such restitution, but that in respect of that he stood on a common level with other creditors. San Francisco Water Co. *v.* Pattee, 86 Cal. 623, 25 Pac. 135.

69. Miner *v.* Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Fougeray *v.* Cord, 50 N. J. Eq. 185, 27 Atl. 499.

That this doctrine does not apply after the

J. Contracts Between Corporations Having Common Directors — 1. **Such Contracts Not Absolutely Void** — a. **In General.** The mere fact that some, a majority or all of the directors or contracting officers of two corporations are common to both does not make a contract between the two corporations absolutely void or incapable of ratification.[70]

b. Such Contracts Good at Law. Such contracts are valid at law,[71] the reason being that in theory of law the contracting parties are the artificial persons and not the directors.

c. Such Contracts Subject to Scrutiny. The most that can be said, upon the current of modern authority, against such contracts is that they will be subjected to a severe judicial scrutiny when properly challenged in a court of equity, and will be set aside on the least appearance of unfairness.[72] On the other hand if, upon such scrutiny, it appears that there has been no abuse of the trust relations, but that the contract is fair, it will stand.[73]

2. **Rule Where All or Majority of Directors of One Corporation Are Directors in Other.** One view of this subject is that where all or a majority of the directors of either corporation are directors in the other the contract made between the two corporations will be presumptively invalid in equity, on the theory of a want of contracting parties, so that it may be avoided by either corporation at the

company has gone into liquidation, for then the trust relation has ceased, see *Re* Mabou Coal, etc., Co., 27 Nova Scotia 305 [*following In re* Alexandra Hall Co., [1867] Wkly. Notes 67]. So held in Chatham Nat. Bank *v.* McKeen, 24 Can. Supreme Ct. 348.

70. *California.*— Smith *v.* Ferries, etc., R. Co., (1897) 51 Pac. 710 (not void as against public policy, but capable of ratification by the shareholders); San Diego, etc., R. Co. *v.* Pacific Beach Co., 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788; San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839 (the fact of one officer of each corporation being appointed a trustee to carry out an arrangement between them does not make the contract *ultra vires*); Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98.

Indiana.— Evansville Public Hall Co. *v.* Bank of Commerce, 144 Ind. 34, 42 N. E. 1097.

Louisiana.— Leathers *v.* Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661.

New York.— Hart *v.* Ogdensburg, etc., R. Co., 89 Hun 316, 35 N. Y. Suppl. 566, 70 N. Y. St. 226; Langan *v.* Francklyn, 20 N. Y. Suppl. 404.

Ohio.— Larwill *v.* Burke, 19 Ohio Cir. Ct. 449, will not be set aside after years of acquiescence.

Pennsylvania.— Mercantile Library Hall Co. *v.* Pittsburg Library Assoc., 173 Pa. St. 30, 33 Atl. 744, 37 Wkly. Notes Cas. 533.

Tennessee.— *In re* New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 88, not void, in the absence of fraud, because a director in one corporation is an officer in the other.

Wisconsin.— Pratt *v.* Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84, contract between a firm and a corporation not invalid because a member of the firm was a promoter of, and superintendent in, the corporation, which succeeded the firm.

United States.— Nashua, etc., Corp. *v.* Boston, etc., Corp., 136 U. S. 356, 34 L. ed. 363; Gasquet *v.* Fidelity Trust, etc., Co., 75 Fed. 343, 21 C. C. A. 382; Coe *v.* East, etc., R. Co., 52 Fed. 531.

See 12 Cent. Dig. tit. "Corporations," §§ 1363, 1364.

That such a contract, like others of the same nature, is validated by the unanimous consent of the shareholders of the two contracting corporations see Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 34 N. Y. St. 743, 26 N. E. 145. And that although voidable it may be ratified by them see Coe *v.* East, etc., R. Co., 52 Fed. 531.

The principle of the text is illustrated in the case where the members of a partnership firm incorporate themselves and their business, and as individuals convey to the corporation the property which they hold as a partnership, the same persons being thus on both sides of the contract. Such transactions, which take place every day, are always upheld when not in fraud of future shareholders or of creditors. St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 633, 15 Pac. 544.

The doctrine of the above text also carries with it the conclusion that the fact that the same person is president of two corporations does not of itself invalidate dealings between them (Leathers *v.* Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661), especially as to a third party to the contract (McComb *v.* Barcelona Apartment Assoc., 134 N. Y. 598, 31 N. E. 613, 45 N. Y. St. 784).

71. Combs *v.* New Albany Nat. Bank, 68 Ill. App. 483; Alpha Mills *v.* Watertown Steam-Engine Co., 116 N. C. 797, 21 S. E. 917.

72. Cases where they were so challenged and set aside.— Bear River Valley Orchard Co. *v.* Hanley, 15 Utah 506, 50 Pac. 611; Hutchinson *v.* Sutton Mfg. Co., 57 Fed. 998.

73. Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98.

instance of a shareholder of either, without regard to the question whether it is detrimental to either, and no matter how open and seemingly fair it may be.[74] But as this doctrine operates wholly to disable two corporations from contracting with each other, when the power to do so might be highly beneficial, or even necessary to either or both of them, it will be found that it has not been generally adopted, but that judicial opinion favors the view that such contracts are not void unless shown to be unfair, although as already stated they will be subject to close scrutiny.[75]

3. Such Contracts Presumptively Invalid — Burden of Proof. Another view is that a contract between two corporations, effected by the votes of directors who are common to both, is presumptively invalid and can only be sustained by an affirmative showing of fairness and good faith.[76]

4. Rule Where There Is Quorum in Each Directorate Who Are Not Members of Other — a. In General. Upon the foregoing premises a contract is not presumptively invalid or voidable without proof of fraud, from the mere fact that some of the persons assisting to make it, and taking part in the performance of its conditions, and in the acceptance of performance, are officers in both corporations, and represent both to the extent of their respective powers.[77] No presumption of illegality or unfairness in transactions between two corporations arises from the mere fact that a portion less than a quorum of the board of directors in the one constituted a part of the board of directors in the other at the same time, and participated in the dealings between the two; but it is only when their dealings are shown to be affected with fraud or with breach of trust, or are prejudicial to one or the other of them, that they will be set aside.[78] Stated in another way, if a contract is entered into between two corporations, some of the directors of one of which are also directors of the other, the contract will not be voidable, in the absence of fraud or breach of trust, if there is a quorum of directors in both corporations who are not rendered incompetent to act by reason of being directors in both.[79]

b. View That Such Contracts Are Voidable For That Reason Alone. An opposing view is that contracts entered into between two corporations in which some, although not a majority, of the directors are common to both, are voidable for that reason alone, even in the absence of a showing of fraud or bad faith, since the consenting directors should be able to consult with the full board, whose allegiance to their own corporation is clear and undivided.[80] Accordingly it has been held that a contract between a railroad company and a construction company is void in the sense that it cannot be made the foundation for equitable relief, when any of the directors of the railroad company are members of the

74. O'Conner Min., etc., Co. *v.* Coosa Furnace Co., 95 Ala. 614, 10 So. 290, 36 Am. St. Rep. 251 note. And see extended note to Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291.

75. Schumacher *v.* Edward P. Allis Co., 70 Ill. App. 556; Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62 (promissory note, issued for salary of president for previous five years, void where his own vote was necessary to the making of the contract). That a director cannot cast a necessary vote for himself for an office, or to pay himself his salary as an officer, see Martin *v.* Santa Cruz Water-Storage Co., (Ariz. 1894) 36 Pac. 36. See also Gerry *v.* Bismarck Bank, 19 Mont. 191, 47 Pac. 810, corporation induced to buy a mine owned by its president and another where the transaction was steeped in fraud and was set aside.

76. German Nat. Bank *v.* Hastings First Nat. Bank, 55 Nebr. 86, 75 N. W. 531. See also Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899.

77. Griffin *v.* Inman, 57 Ga. 370.

78. Booth *v.* Robinson, 55 Md. 419. See also Coleman *v.* Second Ave. R. Co., 38 N. Y. 201; Butts *v.* Wood, 37 N. Y. 317; U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Flagg *v.* Manhattan R. Co., 10 Fed. 413.

79. U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380. See also Booth *v.* Robinson, 55 Md. 419; Flagg *v.* Manhattan R. Co., 10 Fed. 413, 20 Blatchf. 142.

80. Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103; Bill *v.* Western Union Tel. Co., 16 Fed. 14.

construction company; and that the fact of long acquiescence on the part of the shareholders of the railroad company makes no difference.[81]

5. Such Contracts Validated by Acquiescence and Ratification. Such contracts being valid at law, and only voidable in equity, even where a majority of the directors of both companies are affected by this dual relation, may become valid by acquiescence and lapse of time, on the theory of a ratification; since the majority of the corporation, seeking to disaffirm, possess implied power to restrain and control the action of the minority, and if the contract is voidable at the option of the company, the majority have full power to express the company's election if they see fit so to do.[82]

6. Such Transaction Voidable at Suit of Shareholders. Where a majority of the directors of the contracting corporations are the same in both corporations, on clear grounds, the transaction, if unfair, may be set aside at the suit of the non-consenting shareholders of either of the corporations, provided the directors of the corporation whose non-consenting shareholders complain will not after request institute the proper proceeding to this end.[83]

7. Whether Such Contracts Voidable by Creditors. It has been held that the transfer of the property of a corporation to one of its trustees, under a resolution passed and ratified by his own vote, is voidable at the instance of the corporation or its creditors.[84] But as to creditors it seems to stand on the footing of a fraudulent conveyance; so that although the transaction took place between corporations represented by the same persons as directors, yet if accepted by each corpo-

81. Thomas *v.* Brownville, etc., R. Co., 109 U. S. 522, 3 S. Ct. 315, 27 L. ed. 1018 [*affirming* on this point 2 Fed. 887, 1 McCrary 392, where it appeared that the directors of the railroad company received a pecuniary consideration for the contract]. See also Barr *v.* New York, etc., R. Co., 52 Hun (N. Y.) 555, 5 N. Y. Suppl. 623 (where one of these "Credit Mobilier" arrangements was set aside); Bunnel *v.* Empire Laundry Machinery Co., 1 Silv. Supreme (N. Y.) 511, 5 N. Y. Suppl. 591, 24 N. Y. St. 675.

Contract voidable where sole contracting agent is officer in both corporations.— Following out the principle that an agent cannot act in a double and antagonistic capacity, in which his personal interests are opposed to that of his principal (Stevenson *v.* Bay City, 26 Mich. 44, 46), it has been well held that where a note is made by the directors of one corporation as individuals, and transferred to another corporation, but one of the makers who figures as payee and indorser is the president of both corporations, the latter cannot consent to any arrangement releasing or impairing the individual liability of himself or his co-directors (Gallery *v.* National Exch. Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149).

Contract made by corporate agent employed by the other contracting party — When valid.— Illustrated by the case of an insurance policy (Northrup *v.* Germania F. Ins. Co., 48 Wis. 420, 4 N. W. 350, 33 Am. Rep. 815) or corporate director or officer made trustee in a corporate mortgage (Ellis *v.* Boston, etc., R. Co., 107 Mass. 1), although he joined in executing the deed (Bassett *v.* Monte Cristo Gold, etc., Min. Co., 15 Nev. 293).

No objection that constituent members were same in both corporations.— Corporations may also contract with each other, although the constituent members, that is, the shareholders, are the same in both corporations. Canal Bridge *v.* Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170.

That a corporation and a shareholder may contract with each other as strangers see Hill *v.* Manchester, etc., Waterworks Co., 5 B. & Ad. 866, 3 L. J. K. B. 19, 2 N. & M. 573, 27 E. C. L. 364. *Compare* Longley *v.* Longley Stage Line Co., 23 Me. 39; American Bank *v.* Baker, 4 Metc. (Mass.) 164.

82. U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380. To this principle see Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328.

That such contracts may be ratified by the shareholders see Leavenworth County *v.* Chicago, etc., R. Co., 134 U. S. 688, 10 S. Ct. 708, 33 L. ed. 1064 [*affirming* 25 Fed. 219]; Illinois Pneumatic Gas Co. *v.* Berry, 113 U. S. 322, 5 S. Ct. 525, 28 L. ed. 1003; Coe *v.* Alabama East, etc., R. Co., 52 Fed. 531. *Compare* Thomas *v.* Brownville, etc., R. Co., 109 U. S. 522, 3 S. Ct. 315, 27 L. ed. 1018 [*affirming* in part 2 Fed. 877, 1 McCrary 392]. And see *infra*, XV, B, 7, a, (II), (F), (1).

83. Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899. That an executory contract between corporations having common directors is voidable by either corporation, but not at the instance of an individual shareholder (Burden *v.* Burden, 159 N. Y. 287, 54 N. E. 17 [*affirming* 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499]), is a proposition that cannot be affirmed on principle.

84. Gildersleeve *v.* Lester, 68 Hun (N. Y.) 532, 22 N. Y. Suppl. 1026, 52 N. Y. St. 559.

ration, and by the shareholders of each, it cannot be set aside by creditors, without showing fraud or unfair dealing.[85]

K. Ratification by Corporation of Breaches of Trust by Directors — **1. Ratification by Shareholders.** The true principle is that, unless such a transaction falls within the prohibition of a statute or of a rule of common law, so that the act done is *malum prohibitum*, or against public policy, in which case it cannot be ratified,[86] it is voidable, either at the election of the corporation acting through its directors[87] and officers, or at the election of shareholders, under principles hereafter considered.[88] With this exception it is capable either of disaffirmance or of ratification.[89] In dealing with this subject it must be kept in mind that what the corporation itself cannot do it cannot ratify.[90]

2. What Will Amount to Such Ratification. If the corporation or the shareholders wish to disaffirm the transaction, this must be done within a reasonable time, accompanied ordinarily by an offer to put the trustee or trustees *in statu quo*.[91] The meaning is that laches, that is to say, an unreasonable delay in disaffirming after knowledge, especially where new rights have been acquired, will be tantamount to a ratification.[92] On the principle that an acceptance of the benefits accruing from an illegal transaction, with knowledge of the nature of the transaction, is tantamount to a ratification,[93] shareholders who have assented to an illegal employment of the corporate funds by receiving their shares of the profits

85. O'Conner Min., etc., Co. *v.* Coosa Furnace Co., 95 Ala. 614, 10 So. 290, 36 Am. St. Rep. 251.

86. Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barb. (N. Y.) 397; Bartlett *v.* Athenæum L. Soc., 37 Eng. L. & Eq. 187.

87. Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Chouteau *v.* Allen, 70 Mo. 290; Hoyle *v.* Pittsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595. But see Wilbur *v.* Lynde, 49 Cal. 290, 19 Am. Rep. 645; San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106.

88. See *infra*, XV, B, 7, a, (II), (F), (1).

89. See *infra*, XV, A, 1, a.

90. Durkee *v.* People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340 [*affirming* 53 Ill. App. 396]. As for example a purchase of its own shares. Bundy *v.* Jackson, 24 Fed. 628.

91. Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228; U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Ashurst's Appeal, 60 Pa. St. 290; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328. See also the following cases:

Kentucky.— Vaught *v.* Ohio County Fair Co., 49 S. W. 426, 20 Ky. L. Rep. 1471.

Missouri.— Mayer *v.* Old, 57 Mo. App. 639.

Nebraska.— German Nat. Bank *v.* Hastings First Nat. Bank, 59 Nebr. 7, 80 N. W. 48.

Pennsylvania.— Nicholas *v.* Putnam Mach. Co., 7 Northam. Co. Rep. 137.

England.— Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, 68 L. J. Ch. 699, 81 L. T. Rep. N. S. 334, 48 Wkly. Rep. 74.

Illustrations.— Unauthorized contract entered into by president of corporation, validated by evidence that he reported it to the board and that they took no action, but permitted the parties to proceed with its execution. Henry *v.* Colorado Land, etc., Co., 10 Colo. App. 14, 51 Pac. 90. Irregular assignment for benefit of creditors ratified by trustees therein taking possession and holding for thirteen months, without dissent by the corporation or its directors. Silsby *v.* Strong, 38 Oreg. 36, 62 Pac. 633. That one purchasing stock in a corporation, after mismanagement by its officers has been long acquiesced in by the shareholders, has no standing in court to complain thereof see Erny *v.* G. W. Schmidt Co., 197 Pa. St. 475, 47 Atl. 877. Corporation cannot repudiate transaction whereby the directors, authorized to negotiate loan, secretly advance the money themselves, and have such loan canceled and discharged, without refunding the money actually received under it and expended for its benefit. Bensiek *v.* Thomas, 66 Fed. 104, 13 C. C. A. 457.

92. Alexander *v.* Culbertson Irr., etc., Co., 61 Nebr. 333, 85 N. W. 283; Johnston *v.* Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 N. W. 383; Rich *v.* Lincoln State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382; Jenkins *v.* John Good Cordage, etc., Co., 56 N. Y. App. Div. 573, 68 N. Y. Suppl. 239; Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157. For another instance of ratification by acquiescence and non-action see Moller *v.* Keystone Fibre Co., 187 Pa. St. 553, 41 Atl. 478.

93. See *infra*, XV, C, 2, e.

Illustrations.— Thus a pledge of corporate property is ratified by the corporation receiving and using for the corporate benefit the loan secured thereby. Prentiss Tool, etc., Co. *v.* Godchaux, 66 Fed. 234, 13 C. C. A. 420. A lease with power to confess judgment is ratified by directors authorizing the payment of a year's rent in advance. Independent Brewing Assoc. *v.* Powers, 80 Ill. App. 471.

Ratification complete when all the shareholders execute a full, complete, and perfect act of ratification. Robinson Mineral Spring Co. *v.* De Bautte, 50 La. Ann. 1281, 23 So. 865.

accruing therefrom, cannot charge the directors personally with a loss resulting from such investment.[94]

3. What Acts Will Not Amount to Such Ratification. Speaking briefly the following acts do not amount to such a ratification: The act of a board of directors who have conspired to defraud the corporation by bartering away its assets for their private gain, in assuming to accept on behalf of the corporation an equivalent for such assets, this not concluding the shareholders or their representative from showing that no equivalent was actually received;[95] the additional concurrence of a third officer, in the particular case the cashier of a bank, in a transaction whereby two other officers — the president and a director — had conspired to defraud the corporation;[96] the action of a meeting of shareholders at which no one is present but the *de facto* officer by whom the illegal act was done, the other shareholders being absent in consequence of the issuance of an injunction against holding the election, which was the chief object of the meeting;[97] an attempted ratification, by resolution or otherwise, of a sale of property of an insolvent corporation to another corporation, where two of the four directors of the selling corporation, present and acting, are likewise directors of the purchasing corporation;[98] and the act of shareholders of a street railway company, who have been induced by fraud to agree to consolidate their road with another, in consideration of stock and business in the new road, in attending meetings of the new corporation and voting thereat without knowledge of the fraud, or in agreeing to the issuance of receiver's certificates to protect the property while in charge of the court.[99]

4. Ratification by Formal Action of Directors. It is not at all necessary to a ratification, even by the board of directors, that there should have been a formal

Presumption of ratification arises from slight circumstances, where the act was clearly beneficial to the corporation. Pierce City Nat. Bank *v.* Hughlett, 84 Mo. App. 268.

94. Scott *v.* Depeyster, 1 Edw. (N. Y.) 513. But see Barr *v.* New York, etc., R. Co., 52 Hun (N. Y.) 555, 9 N. Y. Suppl. 623; Henry *v.* Jackson, 37 Vt. 431. When a knowledge of the transaction for the purposes of ratification by the corporation will be conclusively presumed. Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

Ratification by non-action of the shareholders on the theory of concurrent consent. Union Pac. R. Co. *v.* Credit Mobilier, 135 Mass. 367.

For circumstances which were held to amount to a confirmation or ratification, by the shareholders of a corporation, of a sale made by its directors, see Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. (N. Y.) 553. See also Great Western Turnpike Co. *v.* Shafer, 57 N. Y. App. Div. 331, 68 N. Y. Suppl. 5, ratification by corporation observing the terms of the contract for years.

Ratification by a mortgage authorized by less than a quorum of directors.—A mortgage was executed by a corporation when the number of its directors was reduced by a vacancy to less than that required by law. Subsequently, at meetings of full boards, the mortgagee was required to make further advances on the security of the mortgage, and a second mortgage was directed, by a resolution expressly recognizing the validity of the previous one. It was held sufficient to constitute a ratification of the previous mortgage. Porter *v.* Lassen County Land, etc., Co., 127 Cal. 261, 59 Pac. 563.

95. Guild *v.* Parker, 43 N. J. L. 430.

96. Rhodes *v.* Webb, 24 Minn. 292.

97. Morris *v.* Stevens, 178 Pa. St. 563, 36 Atl. 151, 39 Wkly. Notes Cas. (Pa.) 370.

98. German Nat. Bank *v.* Hastings First Nat. Bank, 55 Nebr. 86, 75 N. W. 531.

99. Old Colony Trust Co. *v.* Dubuque Light, etc., Co., 89 Fed. 794.

Other instances where there was no ratification are to be found in the following cases:

California.— Curtin *v.* Salmon River Hydraulic Gold Min., etc., Co., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132, holding, under statutes, that the action of two thirds of the shareholders in signing what purported to be a ratifying instrument of a mortgage did not render it valid.

Missouri.— Calumet Paper Co. *v.* Haskell Show Printing Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425, holding that an assignment for creditors, void because executed without authority by a minority of the directors, cannot be ratified by the board acting severally.

New Jersey.— Kelsey *v.* New England St. R. Co., 60 N. J. Eq. 230, 46 Atl. 1059, circumstances under which a sale of corporate stock subject to ratification was not deemed to have been ratified.

New York.— Caldwell *v.* Mutual Reserve Fund L. Assoc., 53 N. Y. App. Div. 245, 65 N. Y. Suppl. 826, circumstances under which no ratification of the invalid act of the president was shown.

Ohio.— East Cleveland R. Co. *v.* Everett, 19 Ohio Cir. Ct. 205, 10 Ohio Cir. Dec. 493, holding that knowledge of two of the directors does not bring home knowledge to the board or work a ratification by the board.

resolution;[1] but it may arise in consequence of the acquiescence of other directors and shareholders.[2] But there must be a body competent to ratify, and a ratification evidenced in some sufficient manner. A meeting of a board of directors, held without notice to one of its members, at which there is not a quorum of qualified directors present, cannot, it has been held, ratify an unauthorized act of one of the officers of the corporation.[3] Where a mortgage was authorized by less than a lawful quorum of the board, by reason of a vacancy in the board, but the vacancy being filled, the mortgage was ratified by the whole board, it was held that it thereby became valid.[4] While as already seen[5] a director cannot vote in a board meeting upon a proposition in which he is interested in a different way from the shareholders in general, yet it has been held that if a contract is made with him by the directors, and a meeting of the shareholders is called to consider the question of ratifying it, he may vote at such meeting of the shareholders.[6]

5. Corporation Cannot Condone Fraud of Director Without Unanimous Consent of Shareholders. The corporation cannot condone the fraud of a director or officer, by which the assets of the corporation have been misappropriated, except by unanimous consent of the shareholders; otherwise a majority, or a director who might control a majority vote in the corporation, might rob and despoil it with impunity.[7] On the contrary the shareholders have a standing in equity to undo such transactions and to restore to the corporation or to its representative what it has lost thereby.[8]

L. General View of Liability of Directors Outside of Statutes — 1. Status of Directors at Law. At law the directors of a corporation are regarded as the agents of the corporate body merely, which corporate body is an artificial, intangible body, distinct from the aggregate body of the shareholders.[9] The shareholders, not being in privity with them in theory of courts of law, can enforce no remedies against them, either individually or collectively, except such remedies as may be given by statute.[10] From this statement it is apparent that in courts of law a corporation may in general enforce against its unfaithful directors those

1. Henry *v.* Colorado Land, etc., Co., 10 Colo. App. 14, 51 Pac. 90 (board informed of the transaction while sitting as a board, and took no action to interfere with the execution of the contract); Louisville, etc., R. Co. *v.* Carson, 151 Ill. 444, 38 N. E. 140; Simmons *v.* Shaw, 172 Mass. 516, 52 N. E. 1087. Thus where the board, after full knowledge of the facts of a sale of property belonging to the corporation, agreed to receive payment of interest on a note which had been received in part settlement of the purchase-price, and extended the note, this effected a ratification of the sale as made. Poche *v.* New Orleans Home Invest. Co., 52 La. Ann. 1287, 27 So. 797.

2. Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176, *de facto* board, all of whom had resigned except one.

3. Cupit *v.* Park City Bank, 20 Utah 292, 58 Pac. 839, decision doubtful if there was a *de facto* board.

4. Porter *v.* Lassen County Land, etc., Co., 127 Cal. 261, 59 Pac. 563.

5. See *supra*, IX, E, 3, d.

6. North-West Transp. Co. *v.* Beatty, 12 App. Cas. 589, 56 L. J. P. C. 102, 57 L. T. Rep. N. S. 426, 36 Wkly. Rep. 647.

7. Hazard *v.* Durant, 11 R. I. 195 [*quoted* with approval in Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646].

That no majority of the shareholders, however large, can sanction a plain misappropriation of the funds of the corporation, but that the dissenting voice of a single shareholder will frustrate it, see Bagshaw *v.* Eastern Union R. Co., 7 Hare 114, 13 Jur. 602, 18 L. J. Ch. 193, 6 R. & Can. Cas. 152, 27 Eng. Ch. 114. See also Kent *v.* Quicksilver Min. Co., 78 N. Y. 159. *Compare supra*, I, K, 2, h.

8. For example a shareholder of a corporation has the right to disavow and have annulled a purchase by the directors for the corporation of property in which they are personally interested, where their relation to the property was not disclosed at or before the purchase, notwithstanding that there was no actual fraud and that the price was not excessive. Stanley *v.* Luse, 36 Oreg. 25, 58 Pac. 75. See further as to the standing of shareholders, or of a single shareholder, in equity, to undo such transactions. Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505; Gardner *v.* Butler, 30 N. J. Eq. 702; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328.

9. Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229.

10. Smith *v.* Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690.

remedies which a natural principal might in a court of law enforce against his unfaithful agents.[11]

2. STATUS OF DIRECTORS IN EQUITY. In courts of equity directors are viewed as trustees, either of the corporation looked at as an artificial body, or of the aggregate body of the shareholders.[12]

3. THEIR TWOFOLD LIABILITY FOR NONFEASANCE AND MISFEASANCE. Directors like other agents are liable to their principal, the corporation, or to its legal representative, for nonfeasance, or for the non-execution of the duties of their agency. They are also liable to strangers for misfeasance or positive wrong, and they may be so liable jointly with the corporation.[13]

4. JOINT LIABILITY OF DIRECTORS AND CORPORATION. It is familiar doctrine in the law of agency that for acts of misfeasance, that is, for wrongs or frauds committed by an agent in the course of his agency, to the injury of a third person, such person may maintain an action jointly against the agent and his principal, or he may proceed severally against either.[14] This doctrine applies in case of frauds committed by directors of corporations, in which case the person injured by the fraud may maintain a suit in equity to undo the wrong, making both the corporation and the director parties.[15] If on the other hand an officer of a corporation directs or authorizes a tort to be committed by a servant of the corporation he will be liable equally with the corporation therefor.[16] In case of an act to which the law ascribes the character of a tort, jointly committed by the directors and the corporation, if the party aggrieved waives the tort by accepting the corporation as his debtor, he thereby waives it as to the directors, so as to release them from liability.[17]

5. NOT IN GENERAL LIABLE TO CREDITORS FOR MERE NONFEASANCE. The directors of a corporation are not in general, in the absence of statutes making a different rule, liable to creditors of the corporation for squandering the assets through breaches of their trust; since this is regarded as nonfeasance and primarily as a wrong to the corporation merely.[18]

6. EXCEPTIONAL CASES WHERE DIRECTORS HAVE BEEN HELD LIABLE, OUTSIDE OF STATUTES, TO CREDITORS FOR BREACHES OF THEIR TRUST. A tendency is discovered in modern decisions to enlarge the doctrine of the preceding paragraph, although

11. See *infra*, IX, N, 1, a *et seq.*

12. Gaskell *v.* Chambers, 26 Beav. 360, 5 Jur. N. S. 52, 28 L. J. Ch. 385; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 839, 6 Wkly. Rep. 711.

13. Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Bruff *v.* Mali, 36 N. Y. 200; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Phelps *v.* Wait, 30 N. Y. 78; Suydam *v.* Moore, 8 Barb. (N. Y.) 358.

14. Hewett *v.* Swift, 3 Allen (Mass.) 420; Phelps *v.* Wait, 30 N. Y. 78; Montfort *v.* Hughes, 3 E. D. Smith (N. Y.) 591; Suydam *v.* Moore, 8 Barb. (N. Y.) 358; Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507. Some cases which make seeming exceptions to this rule were those in which the duty, the violation of which was laid as the foundation of the action, was owed by the agent to his principal and not to the plaintiff. Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503. Parsons *v.* Winchell, 5 Cush. (Mass.) 592, 52 Am. Dec. 745, denies the doctrine which is laid down in the above text.

15. *In re* Imperial Land Co., L. R. 10 Eq. 298, 39 L. J. Ch. 331, 22 L. T. Rep. N. S. 598, 18 Wkly. Rep. 661. It has been supposed that such an action would be in the nature of an action *ex contractu*, on the theory that an action for deceit does not lie against a corporation. Scotland Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145; New Brunswick, etc., R., etc., Co. *v.* Conybeare, 9 H. L. Cas. 711, 8 Jur. N. S. 575, 31 L. J. Ch. 297, 6 L. T. Rep. N. S. 109. But modern conceptions make this view doubtful.

16. Peck *v.* Cooper, 112 Ill. 192, 54 Am. Rep. 231.

17. Birdsell Mfg. Co. *v.* Oglevee, 187 Ill. 149, 58 N. E. 231 [*affirming* 87 Ill. App. 351, and *citing* Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 30 N. Y. St. 746, 18 Am. St. Rep. 803, 8 L. R. A. 216; Buckland *v.* Johnson, 15 C. B. 145, 2 C. L. R. 704, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145].

For analogies of the principle that directors are liable not only to the corporation for nonfeasance but to strangers for misfeasance see Harriman *v.* Stowe, 57 Mo. 93; Phelps *v.* Wait, 30 N. Y. 78; Montfort *v.* Hughes, 3 E. D. Smith (N. Y.) 591; Suydam *v.* Moore, 8 Barb. (N. Y.) 358; Lane *v.* Cotton, 1 Ld. Raym. 646, 12 Mod. 472, 4 Taunt. 628; Cary *v.* Webster, 1 Str. 480.

18. Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428.

sometimes with reluctance on the part of the judges.[19] On the theory that the assets of a corporation are a trust fund for its creditors,[20] it has been held that the creditors may hold a director of the debtor corporation liable for wasting assets which are intended to satisfy their claims, on the ground that he is guilty of a misapplication of trust funds, although his conduct has been approved by all the other shareholders and directors.[21]

7. Not Liable at Law to Shareholders Distributively. The general rule is that a shareholder suing for himself alone cannot maintain an action at law against a director to recover damages for malfeasance or misfeasance in the performance of his duties, in managing the corporate business, since the wrong done is in theory of law a wrong to the corporation, and not to the shareholders distributively.[22] Exceptions to this rule exist under some systems and theories. Thus it has been held that a shareholder is entitled to sue the directors for a misappropriation of funds, although he is not strictly a creditor of the corporation, since the liability of the directors to account exists independently of the statutes giving such actions to creditors.[23] So directors of a corporation have been held personally liable to a shareholder for the loss of the amount invested by him where the corporation has been rendered insolvent by their mismanagement.[24]

8. Liable to Shareholders For Wrongs Done to Them Personally. Shareholders being strangers to directors, in theory of law — and whether they are to be so regarded or not — it is clear that for direct wrongs in the nature of misfeasance the directors may be held accountable to the shareholders who have suffered thereby. If a shareholder pledges his shares as collateral security for a debt owing by him to a director, and thereafter the directors enter into a conspiracy to depreciate the price of the shares by using their power as directors, so as to be able to buy them in for less than their value, this is an individual wrong to the shareholder, and not merely a wrong to the corporation; and the shareholder is entitled to have the wrong redressed in a proper action.[25]

9. Innocent Directors Not Liable For Misprisions of Co-Directors — a. In General. Innocent directors are not liable for the misprisions of their co-directors, except where they were under the duty of finding out and knowing and preventing such misprisions;[26] and unless under evidence they are to be regarded as having assented to such misprisions.

b. Evidence of Assent to Such Misprisions. A director who was an original party to an unlawful scheme, whereby the funds of the company were dissipated, did not discharge himself from liability by showing that he afterward went in and

19. The decision of Romer, J., in Elkington *v.* Hürter, [1892] 2 Ch. 452, 61 L. J. Ch. 514, 66 L. T. Rep. N. S. 764, is submitted as a vindication of this statement. So is Plattsburgh First Nat. Bank *v.* Sowles, 46 Fed. 731. Bank directors not liable for erroneous representations as to solvency of bank made in good faith. Foster *v.* Gibson, 38 S. W. 144, 18 Ky. L. Rep. 716.

20. See *supra*, VIII, B, 1 *et seq.*

21. *In re* Brockway Mfg. Co., 89 Me. 121, 35 Atl. 1012, 56 Am. St. Rep. 401.

When directors liable to third persons for rendering shares of the corporation worthless.— It has been held that if the directors of a corporation personally enter into a contract with third persons for the rendering of services to the corporation, and the directors afterward render the shares worthless by placing a mortgage upon the property of the corporation and causing it to be sold out thereunder, they will be personally liable to the other contracting parties for the depreciation of the shares thereby produced. Kelly *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428.

22. Ackerman *v.* Halsey, 5 N. J. L. J. 154.

23. Cunningham *v.* Wechselberg, 105 Wis. 359, 81 N. W. 414.

24. Landis *v.* Sea Isle City Hotel Co., (N. J. Ch. 1895) 31 Atl. 755 [*affirmed* in 53 N. J. Eq. 654, 33 Atl. 964].

That in New York directors will not be suspended from office at the suit of a shareholder, but only at the suit of the attorney-general, see Whitman *v.* Holmes Pub. Co., 33 Misc. (N. Y.) 47, 68 N. Y. Suppl. 167.

25. Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50 [*citing* Spear *v.* Grant, 16 Mass. 9; Vose *v.* Grant, 15 Mass. 505; Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596; Walshan *v.* Stainton, 1 De G. J. & S. 678, 9 Jur. N. S. 1261, 33 L. J. Ch. 68, 9 L. T. Rep. N. S. 357, 3 New Rep. 56, 12 Wkly. Rep. 63, 66 Eng. Ch. 527; Harman *v.* Tappenden, 1 East 555, 3 Esp. 278, 6 Rev. 340].

26. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 41 Pac. 308.

protested against it, and did nothing more. He should have called his colleagues together, laid before them his protest in a formal manner, and demanded action upon it; and if necessary he should have filed a bill to restrain the illegal action. Where a director was not an original party to an unlawful scheme, but signed a check whereby the moneys of the company were disbursed in pursuance of it, he was held liable on the ground that he would not be heard to say that the signing of the check was a mere ministerial act. He ought to have known of the scheme, and his negligent ignorance fixed him with liability the same as actual knowledge. Mere passive negligence and ignorance have been held insufficient to charge a director, except for costs;[27] yet where a director presided as chairman at a meeting at which an *ultra vires* investment was ordered, and made a statement indicating that he took an active part in the transaction, he was held personally liable.[28]

10. What Knowledge Imputable to Directors and Officers. The directors of a corporation are conclusively chargeable with knowledge of the statute under which the corporation is organized and from which it derives its powers;[29] and indeed all persons who join a corporation are presumed to acquaint themselves with its constitution and by-laws.[30] Clearly an officer and shareholder of a corporation is by reason of his position *prima facie* chargeable with knowledge of the customs and usages of the corporation;[31] although it has been held that a director, and for stronger reasons a mere shareholder, is not chargeable, as matter of law, with actual knowledge of the business transactions of the corporation, or of the contents of its books and papers.[32] It seems to be a principle of the law that where several persons act jointly, whether in respect of their own business, or as agents for another, the knowledge acquired by one of them while so acting, with reference to the subject-matter of their joint action, will be imputed to all.[33]

11. Liability Several as Well as Joint. In cases of this kind where the liability arises from the wrongful act of the parties, each is liable for all the consequences; there is no right of contribution among them,[34] although the case against each is distinct, depending upon the evidence against him. It is not therefore necessary to make all the directors parties who may have more or less joined in the act complained of.[35]

12. Directors Not Necessarily Liable For Frauds of Subordinate Agents Appointed by Themselves. The reason supporting this principle is that the agent

27. Joint Stock Discount Co. *v.* Brown, L. R. 8 Eq. 381.

28. *In re* Lands Allotment Co., [1894] 1 Ch. 616.

Other cases illustrating this question of what acquiescence will charge a director for the misprisions of his fellows are: Watson *v.* Crandall, 7 Mo. App. 233 [*affirmed* in 78 Mo. 583]; Hornblower *v.* Crandall, 7 Mo. App. 220 [*affirmed* in 78 Mo. 581]; Arthur *v.* Griswold, 55 N. Y. 400; Ireland Land Credit Co. *v.* Fermoy, L. R. 5 Ch. 763, 39 L. J. Ch. 477, 23 L. T. Rep. N. S. 439, 18 Wkly. Rep. 1089 [*reversing* L. R. 8 Eq. 7, 20 L. T. Rep. N. S. 293, 17 Wkly. Rep. 562].

29. Van Etten *v.* Eaton, 19 Mich. 187, holding that therefore their failure to make and publish a report required by such statute is presumed to have been intentional.

30. Belleville Mut. Ins. Co. *v.* Van Winkle, 12 N. J. Eq. 333.

31. Fraylor *v.* Sonora Min. Co., 17 Cal. 594.

32. Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046, 36 N. Y. St. 500, 22 Am. St. Rep. 816, 12 L. R. A. 473; Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662. See *supra*, VI, F, 8; *infra*, XIII, A, 10.

It has been held that notice to a corporation is notice to its officers in respect to defects in the title to promissory notes transferred by the corporation to them. Nelson *v.* Wellington, 5 Bosw. (N. Y.) 178.

33. Lyman *v.* U. S. Bank, 12 How. (U. S.) 225, 13 L. ed. 965 [*affirming* 2 Fed. Cas. No. 924, 1 Blatchf. 297], where certain directors made a joint purchase, and the knowledge of some was imputed to all. *Compare* Perry *v.* Simpson Waterproof Mfg. Co., 37 Conn. 520.

34. Peck *v.* Ellis, 2 Johns. Ch. (N. Y.) 131; Spalding *v.* Oakes, 42 Vt. 343; Oakes *v.* Spaulding, 40 Vt. 347, 94 Am. Dec. 404; Merryweather *v.* Nixan, 8 T. R. 186, 16 Rev. Rep. 810. Unless the act which rendered the directors liable was not in itself illegal but merely *ultra vires*. Ashhurst *v.* Mason, L. R. 20 Eq. 225, 44 L. J. Ch. 337, 23 Wkly. Rep. 506.

As to contribution where the liability is statutory see *infra*, IX, P. 13, a.

35. Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y.) 130; Ireland Land Credit Co.

directly committing the wrong is the agent of the common principal, the corporation, and not the agent of the directors by whom he is appointed; and hence that the doctrine of *respondeat superior* does not in such cases apply to the director. This doctrine has been applied where the intermediate agent was a steward or manager of mines,[36] the president,[37] the general agent[38] of the corporation, the selectman of a town,[39] and the captain of a vessel.[40] But where the directors personally and knowingly derive a benefit from the fraud of the subagent they may be held liable on the ground that he thereby became in a sense their agent.[41]

13. Not Liable to Shareholders For Failing to Declare Dividends. In the absence of fraud directors are not liable to shareholders for failing to declare a dividend, this being a matter committed to their discretion, which when honestly and intelligently exercised will not be supervised by the courts.[42]

14. Not Liable For Honest Mistakes as to Extent of Their Powers. It seems to be the general rule that the directors of a corporation are not personally liable for taking a particular course of action in consequence of an honest mistake as to their powers,[43] as where a corporation organized to manufacture woodenware is engaged by its directors in the manufacture of sewing-machines.[44]

15. Not in General Liable For Acts of Corporation. The rule which exonerates an agent for responsibility for the acts done in behalf of his principal operates in favor of the directors of corporations.[45] But this as already seen leaves directors liable for trespasses and other affirmative torts committed by them against third persons, whether acting within or without the scope of their authority as directors.[46]

16. Not Personally Liable For Infringement of Patent. It has been held that a director of a corporation is not liable for its infringement of a patent from the mere fact that he assented to it; but he is so liable where the act was done by ministerial officers or agents of the corporation in obedience to his vote as director.[47]

v. Fermoy, L. R. 5 Ch. 763, 39 L. J. Ch. 477, 23 L. T. Rep. N. S. 439, 18 Wkly. Rep. 1089; Charitable Corp. *v.* Sutton, 2 Atk. 400, 9 Mod. 349, 26 Eng. Reprint 642; Atty.-Gen. *v.* Wilson, Cr. & Ph. 1, 10 L. J. Ch. 53, 4 Jur. 1174, 18 Eng. Ch. 1, 1 Jur. 890, 7 L. J. Ch. 76, 9 Sim. 30, 16 Eng. Ch. 30. *Compare* Consett *v.* Bell, 6 Jur. 869, 11 L. J. Ch. 401, 1 Y. & Coll. Ch. 569, 20 Eng. Ch. 569; Beadles *v.* Burch, 4 Jur. 189, 9 L. J. Ch. 57, 10 Sim. 332, 16 Eng. Ch. 332.

36. Stone *v.* Cartwright, 6 T. R. 411.

37. Hewitt *v.* Swift, 3 Allen (Mass.) 420.

38. Bath *v.* Caton, 37 Mich. 199.

39. Bacheller *v.* Pinkham, 68 Me. 253.

40. Nicholson *v.* Mouncey, 15 East 384, 13 Rev. Rep. 501. See also Wier *v.* Barnett, 3 Ex. D. 32, 26 Wkly. Rep. 147 [*affirmed* in 3 Ex. D. 238], directors not liable for fraudulent prospectus issued by brokers employed by the directors as agents of the company, to sell for account of the company certain of its debentures.

For an analogy in support of the doctrine that an intermediate agent is not liable for the torts of a subagent appointed by him, not directly authorized by the intermediate agent, see Hewett *v.* Swift, 3 Allen (Mass.) 420.

41. Weir *v.* Barnett, 3 Ex. D. 32, 26 Wkly. Rep. 147 [*affirmed* in 3 Ex. D. 238].

42. Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786; Excelsior Water, etc., Min. Co. *v.* Pierce, 90 Cal. 131, 27 Pac. 44.

43. Watts' Appeal, 78 Pa. St. 370; Hodges *v.* New England Screw Co., 3 R. I. 9; Seymour *v.* Spring Forest Cemetery Assoc., 4 N. Y. App. Div. 359, 38 N. Y. Suppl. 726, 74 N. Y. St. 245; *In re* Kingston Cotton Mill Co., [1896] 1 Ch. 331, 65 L. J. Ch. 290, 73 L. T. Rep. N. S. 745, 44 Wkly. Rep. 363 [*reversed* in [1896] 2 Ch. 279].

The doctrine is qualified and unsettled and some of the decisions seem to be contradictory, as will appear when discussing it in the liability of directors for negligence. See *infra*, IX, M, 1 *et seq.*

Carrying out the same idea it is held that "official misconduct" in a statute means something more than a mere misconception of rights by a trustee in a corporation, but that malfeasance is necessary, which means action with a corrupt intent. Stokes *v.* Stokes, 23 N. Y. App. Div. 552, 48 N. Y. Suppl. 722.

44. Bond *v.* Poe, 12 Ohio Cir. Ct. 281, 4 Ohio Cir. Dec. 10.

45. Fanning *v.* Osborne, 102 N. Y. 441, 7 N. E. 307; Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421; Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087; Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 23 L. R. A. 439.

46. See *supra*, IX, L, 3.

47. National Cash-Register Co. *v.* Leland, 94 Fed. 502, 37 C. C. A. 372.

17. Not in General Liable on Contracts of Corporation. As in the case of other agents, directors are not in general liable to make good the obligations assumed by contract with the corporation, unless they themselves have assumed such obligations by special promises founded on a good consideration.[48]

18. Liable For Debts Contracted Before Corporate Organization Completed. Men who contract debts, professing to act in behalf of a corporation which does not exist, or the organization of which is not advanced to the stage of a *de facto* corporation, are liable personally for those debts, on the theory of breach of warranty of agency, or on whatever other theory you like;[49] and there are statutes in affirmation of this rule.[50]

19. Directors of Foreign Corporation Not Individually Liable For Its Debts. Unless the local statute law makes a different rule, the directors of a foreign corporation doing business within the domestic state are clothed with the same immunity from personal liability for its debts as attends them in the state of the creation of the corporation; and this, although the domestic statutes do not give express permission for the foreign corporation to do business within the domestic state, since that permission is given by state comity. Nor does it make any difference that the directors sought to be made liable reside in the domestic state, or that the foreign corporation might have migrated, so to speak, and settled there for the purpose of its business.[51]

M. Liability of Directors For Negligence — 1. Directors May Be Liable For Negligence. Subject to the qualifications hereafter stated, the directors of a corporation are bound to administer its affairs according to the terms of its charter or governing statute, with diligence and in good faith; and if they fail in either respect they are liable to the party in interest who is injured by it, for a breach of trust, and may be made to account with him in a court of chancery.[52] It has been said that if they neglect to perform the acts which are within their authority, and which they ought to perform, neither a court of law nor of equity will allow them afterward to take advantage of their own neglect.[53] They are therefore liable affirmatively or negatively, to some extent at least, for losses happening through their negligence. Statutes have been enacted in confirmation of this principle.[54] Where they are so liable, even to creditors directly, for acts which reach the grade of positive misfeasance, it is no defense that their services were performed gratuitously.[55]

48. Drew *v.* Longwell, 81 Hun (N. Y.) 144, 30 N. Y. Suppl. 733, 62 N. Y. St. 697, not liable for services of an attorney employed in pursuance of a resolution of their board to conduct proceedings for dissolution.

Not liable because contracts with the corporation are informally made and because the business of the corporation is loosely done. Linkauf *v.* Lombard, 137 N. Y. 417, 33 N. E. 472, 51 N. Y. St. 63, 33 Am. St. Rep. 743, 20 L. R. A. 48.

49. Forbes *v.* Whittemore, 62 Ark. 229, 35 S. W. 223.

50. Loverin *v.* McLaughlin, 161 Ill. 417, 44 N. E. 99 [*affirming* 46 Ill. App. 373]; Greene *v.* Masten, 66 Ill. App. 345. Under Ill. Acts (1874), c. 32, §§ 4, 18, the directors of a corporation are liable to pay the debts contracted in behalf of the corporation where they assume to exercise corporate power without complying with the provisions of the statute as to the mode of organizing the corporation, or do so before all stock named is subscribed; and either of the delinquencies will make them liable. Loverin *v.* McLaughlin, 161 Ill. 417, 44 N. E. 99 [*affirming* 46 Ill. App. 373]. See also Rutherford *v.* Hill, 22 Oreg. 218, 29 Pac. 546, 29 Am. St. Rep. 596, 17 L. R. A. 549, and an extensive note.

The fact that a concurrence of a majority of the directors was not by formal resolution does not make such directors the less liable for materials purchased before the corporation came into existence. Edwards *v.* Armour Packing Co., 90 Ill. App. 333 [*affirmed* in 190 Ill. 467, 60 N. E. 807].

51. Boyington *v.* Van Etten, 62 Ark. 63, 35 S. W. 622.

52. St. Marys' Bank *v.* St. John, 25 Ala. 566; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624. *Compare* Winter *v.* Baker, 34 How. Pr. (N. Y.) 183; Patterson *v.* Baker, 34 How. Pr. (N. Y.) 180.

53. Bargate *v.* Shortridge, 5 H. L. Cas. 297, 24 L. J. Ch. 457.

54. See for example Ohio Rev. Stat. (1880), § 3314.

55. Michleson *v.* Pierce, 107 Wis. 85, 82 N. W. 707.

2. Distinction With Respect to Liability For Negligence Between Discretionary and Ministerial Acts. This distinction, which is strongly drawn with respect to the liability of public officers, applies perhaps with equal force with respect to the liability of directors. The meaning is that directors are not liable for damages accruing from acts done by them which rest in their sound discretion, unless they have exercised their discretionary powers with wilfulness or malice.[56] The two leading rules of this subject are: (1) Where directors are clothed with a discretion they are not responsible to the corporation for damages flowing from an exercise of this discretion, however erroneous their exercise of it may have been. (2) In respect to their ministerial duties they are not responsible to the corporation for anything short of gross negligence, non-attendance, and fraud, whereby frauds have been perpetrated or the property of the corporation embezzled or wasted.[57]

3. Not Liable For Mistakes of Judgment. As the directors impliedly stipulate with the shareholders to give no more than good faith and ordinary or reasonable care,[58] it follows that they are not liable for losses happening through mere mistakes of judgment, whether in respect of discretionary or of ministerial matters.[59] It has been said that they are not liable for mistakes of judgment, although so gross as to appear absurd, if honest and within the scope of their powers, especially when acting under the advice of counsel.[60] It has also been said that to render them liable the acts must be so grossly wrong as to warrant the imputation of fraud, or the want of the necessary knowledge for the performance of the duties assumed by them on accepting the agency.[61] Therefore no recovery can be had against the directors of a bank for losses sustained by mere errors of judgment in purchasing, under execution and foreclosure sales, in an attempt to save debts due the bank.[62] Nor can directors of a national bank be made liable for the debts of the bank, for an error or misstatement innocently made by him in a report of the condition of the bank;[63] for losses to the bank caused by declaring dividends based on an error of judgment as to the value of assets; for losses on loans and discounts made in good faith but resulting in loss;[64] for making investments on doubtful or insufficient security;[65] for the failure of a bank in which they deposited

56. Drew *v.* Coulton, 1 East 563 note; Harman *v.* Tappenden, 1 East 555, 3 Esp. 278, 6 Rev. Rep. 340 (involving the franchises of a member, where Lord Kenyon based his reasoning on the analogy of the non-liability of judges of elections for discretionary acts). On the same ground the insurance commissioner of a state is not personally liable for refusing to grant a company a license to do business, unless he acts corruptly, his action being judicial. State *v.* Thomas, 88 Tenn. 491, 12 S. W. 1034.

57. The leading case establishing this doctrine is Colt *v.* Woollaston, 2 P. Wms. 154, 24 Eng. Reprint 679, an able exposition of which is also found in Percy *v.* Millaudon, 8 Mart. N. S. (La.) 68, which is a case of high authority. It is quoted with approval in The Steamboat New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019; Story Bailm. § 173*a*; Wharton Negl. § 510. Henry *v.* Jackson, 37 Vt. 431, is also a good illustration of the rule stated in the text. To the same effect see Smith *v.* Prattville Mfg. Co., 29 Ala. 503; Neall *v.* Hill, 16 Cal. 145, 76 Am. Dec. 508.

58. See *infra*, IX, M, 4.

59. *Alabama.*— Smith *v.* Prattville Mfg. Co., 29 Ala. 503; Godbold *v.* Mobile Branch Bank, 11 Ala. 191, 46 Am. Dec. 211.

Pennsylvania.— Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684.

Rhode Island.— Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

United States.— Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Witters *v.* Sowles, 31 Fed. 1.

England.— Overend, etc., Co. *v.* Gibb, L. R. 5 H. L. 480, 42 L. J. Ch. 67 [*affirming* L. R. 4 Ch. 701, 39 L. J. Ch. 45, 21 L. T. Rep. N. S. 73]; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, 68 L. J. Ch. 699, 81 L. T. Rep. N. S. 334, 48 Wkly. Rep. 74; *In re* New Mashonaland Exploration Co., [1892] 3 Ch. 577.

60. Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684.

61. Godbold *v.* Mobile Branch Bank, 11 Ala. 191, 46 Am. Dec. 211.

62. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

63. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662.

64. Witters *v.* Sowles, 31 Fed. 1.

65. Williams *v.* Halliard, 38 N. J. Eq.

funds of the corporation in good faith and which was in good credit at the time;[66] or for failing to require their president to furnish a bond to secure the faithful discharge of his official duties.[67]

4. Bound to Exercise Ordinary Diligence. The measure of care, skill, and diligence which the law demands on the part of directors of corporations is, stated generally, the *deligens patrisfamilias* of the civil law, which means good business diligence, or such diligence as a reasonably prudent, careful, and skilful man exercises in the conduct of his own affairs, which care, skill, and diligence are generally designated by the use of the words "ordinary and reasonable care."[68] While as hereafter seen a class of decisions places the liability of directors under this head on a ground more favorable to them, by restraining it to cases of gross and habitual negligence, non-attendance, and inattention to their duties,[69] yet none of the decisions exacts more than reasonable business knowledge and skill, strict good faith, and a reasonable measure of care and diligence under the circumstances of the particular case.[70] This care is analogous to the care which the law demands from an ordinary bailee for hire.[71]

5. Such Negligence Judged by Standard of Good Business Diligence. Obviously the question of negligence or of due care in a board of directors of a corporation ought not to be judged by the cautious and hesitating standard of the legal schedule on the judicial bench; but it is a question depending in an imminent degree upon the facts and conditions of each particular case,[72] and it ought, if the course of the court will permit, to be submitted to a jury.[73]

373; Williams *v.* McDonald, 37 N. J. Eq. 409; North Hudson Mut. Bldg., etc., Assoc. *v.* Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57.

66. Stewart *v.* Lee Mut. F. Ins. Assoc., 64 Miss. 499, 1 So. 743.

67. Williams *v.* Halliard, 38 N. J. Eq. 373.

68. *Illinois.*— Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81 [*affirming* 17 Ill. App. 531].

Kentucky.— Louisville Sav. Bank *v.* Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488.

Maine.— Mutual Redemption Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470.

New Jersey.— Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775.

New York.— Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546; Scott *v.* Depeyster, 1 Edw. 513.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

Virginia.— Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84, 2 L. R. A. 534.

Wisconsin.— Killen *v.* Barnes, 106 Wis. 546, 82 N. W. 536.

United States.— Corbett *v.* Woodward, 6 Fed. Cas. No. 3,223, 5 Sawy. 403.

England.— Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, 68 L. J. Ch. 699, 81 L. T. Rep. N. S. 334, 48 Wkly. Rep. 74, good faith and such care as may be reasonably expected from them.

69. See *infra*, IX, M, 6.

70. Smith *v.* Prattville Mfg. Co., 29 Ala. 503; Godbold *v.* Mobile Branch Bank, 11 Ala. 191, 46 Am. Dec. 211; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9; Killen *v.* Barnes, 106 Wis. 546, 82 N. W. 536. *Compare* United Shakers Soc. *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731.

71. Such is the measure of liability imposed upon the secretary of a building association (Mowbray *v.* Antrim, 123 Ind. 24, 20 N. E. 858); upon an executor or administrator in respect to the investment of the estate (Norwood *v.* Harness, 98 Ind. 134, 49 Am. Rep. 739, and many cases there cited); upon the guardian of the estate of an infant (Slauter *v.* Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106; State *v.* Greensdale, 106 Ind. 364, 6 N. E. 926, 55 Am. Rep. 753); upon an attorney in respect of the custody of money collected for his client (Naltner *v.* Dolan, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61); and upon the directors of a bank (Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662).

It demands a reasonable conformity to the customs and methods in vogue among prudent bankers. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. That bank directors are trustees for the depositors as well as for the shareholders and are liable to the depositors for the non-exercise of ordinary care and diligence see Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81.

72. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

That it ought to be judged by the standard of business and financial men see the observations of Lord Hatherley, L. C., in Overend, etc., Co. *v.* Gibb, L. R. 5 H. L. 480, 494, 42 L. J. Ch. 67, explaining his judgment in a previous case, Turquand *v.* Marshall, L. R. 4 Ch. 376, 38 L. J. Ch. 639, 20 L. T. Rep. N. S. 766, 17 Wkly. Rep. 935.

73. This was done in Hedges *v.* Paquett, 3 Oreg. 77.

6. RESPONSIBLE FOR LOSSES HAPPENING THROUGH GROSS AND HABITUAL NEGLIGENCE, NON-ATTENDANCE, ETC. The directors of a corporation are personally liable to the corporation or to its representative for suffering the corporate funds or property to be wasted or lost by gross negligence or non-attention to their duties.[74] This makes them liable for losses happening through their want of a reasonable supervision of the affairs of the corporation, through their gross neglect of corporate duties, through their habitual non-attendance of meetings of the board, in other words for that gross and habitual negligence and non-attendance which is tantamount to the *crassa negligentia* of the civil law, and which is justly held to be a breach of the trust which they have assumed.[75]

7. LIABILITY FOR ACTS OF THEIR SUBORDINATES. As already seen[76] directors are not liable for the acts of the subordinate ministerial agents whom they appoint under the rule of *respondeat superior*; but it seems that where they delegate their discretionary duties to an agent of the corporation they make themselves liable for his negligence, as where the directors of a bank delegate to the cashier the exclusive charge of the matter of loans and discounts.[77] On the other hand, and it is assumed that this and what follows will apply *mutatis mutandis* to any species of business corporations, if the directors of a bank leave the custody, control, and management of its securities and property to a single officer, no matter how high may be his character and reputation, for a long space of time, without supervision, examination, or inquiry, they are guilty of negligence in the performance of their duty.[78] And although it is said to be proper for the managers of a savings-bank to define the duties of the bank officers, and, in order to

74. Nix *v.* Miller, 26 Colo. 203, 57 Pac. 1084 (director guilty of gross neglect or inattention whereby other directors wrongfully divert or misapply the corporate assets is accountable to a judgment creditor of the corporation as much as though he himself had participated in such wrongful acts); Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196, 44 N. W. 56; Hun *v.* Cary, 59 How. Pr. (N. Y.) 426 [*affirmed* in 82 N. Y. 65, 37 Am. Rep. 546]; Miesse *v.* Loren, 5 Ohio N. P. 307. *Compare* Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Ackerman *v.* Halsey, 37 N. J. Eq. 356; Brinckerhoff *v.* Bostwick, 105 N. Y. 567, 12 N. E. 58; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684.

75. Charitable Corp. *v.* Sutton, 2 Atk. 400, 9 Mod. 349, 26 Eng. Reprint 642, the leading case. See also Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625; Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Overend, etc., Co. *v.* Gibb, L. R. 5 H. L. 480, 42 L. J. Ch. 67; Evans *v.* Coventry, 8 De G. M. & G. 835, 2 Jur. N. S. 557, 25 L. J. Ch. 489, 4 Wkly. Rep. 466, 57 Eng. Ch. 645.

The rule seems to be the same under section 165 of the English Companies Act of 1862, which makes directors liable on the winding-up of a company, if it appears that they have been guilty of any misfeasance or breach of trust in relation to the company, the directors not being chargeable, under this statute, for negligence unless it reaches the grade of *crassa negligentia*, resulting in loss. *In re* Liverpool Household Stores Assoc., 59 L. J. Ch. 616, 62 L. T. Rep. N. S. 873, 2 Meg. 217. Other cases decided under this statute are: *In re* British Guardian L. Assur. Co., 14 Ch. D. 335, 49 L. J. Ch. 446, 28 Wkly. Rep. 945 (directors held liable for breach of trust); *In re* Forest of Dean Coal Min. Co., 10 Ch. D. 450, 40 L. T. Rep. N. S. 287, 27 Wkly. Rep. 594 (directors not liable on the ground of wilful default or misfeasance for failing to take steps to recover promotion money improperly paid); *In re* National Assur. Co., 10 Ch. D. 118, 48 L. J. Ch. 163, 39 L. T. Rep. N. S. 420, 27 Wkly. Rep. 302 (directors held liable for making payments to the shareholders out of the capital, the act being *ultra vires* and in breach of their trust). In one case the directors of an English company were held personally liable for losses owing to their negligence in not causing the business of the company to be stopped pursuant to a provision to that effect in the articles. Scotland Western Bank *v.* Baird [*cited* in Turquand *v.* Marshall, L. R. 4 Ch. 376, 381; Lindley Comp. L. (5th ed.) 373]. But where under similar circumstances the shareholders had sanctioned a continuance of the business, the directors were exonerated. Turquand *v.* Marshall, L. R. 4 Ch. 376, 38 L. J. Ch. 639, 20 L. T. Rep. N. S. 766, 17 Wkly. Rep. 935 [*reversing* L. R. 6 Eq. 112, 37 L. J. Ch. 582, 18 L. T. Rep. N. S. 385, 16 Wkly. Rep. 719]. See also Lethbridge *v.* Adams, L. R. 13 Eq. 547, 41 L. J. Ch. 710, 26 L. T. Rep. N. S. 147, 20 Wkly. Rep. 352.

76. See *supra*, IX, L, 12.

77. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

78. Ouderkirk *v.* Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875, 29 N. Y. St. 573, where the question was as to the liability of a bank for the loss of bonds deposited with it.

facilitate the transaction of business, to appoint small committees[79] to superintend such officers and dispose of ordinary routine work, they are not authorized to relax vigilance and rely entirely upon such officers and committees.[80] In judging of their liability, it must be kept in mind that they are not expected to devote all their time to the management of the corporation, but that the customary method in regard to such associations is to commit the active management and responsibility to the custody of the cashier and other agents to whom salaries are paid, and whose entire time is demanded in the discharge of their duties, the office of the directors being, in their character of part proprietors and mandataries, to superintend, direct, and control; and that the ground of their liability under the head of negligence and nonfeasance consists in their failure to exercise due diligence in this work of supervision and control; the question being judged according to the circumstances of each particular case.[81]

8. Liability For Negligent Ignorance. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge.[82] While the directors of a corporation may and must commit the details of its business to inferior officers this does not absolve them from the duty of maintaining a reasonable supervision; and if such inferior officers waste the assets of the corporation it is conceded that the directors cannot escape liability on the ground that they did not know of the wrong-doing, provided that it appear that their ignorance was the result of a want of that care which ordinarily prudent and diligent men would exercise under similar circumstances.[83] The true rule, disregard-

79. *Compare supra*, IX, D, 5, a, note 51.

80. Williams *v.* McKay, 46 N. J. Eq. 52, 18 Atl. 824.

81. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

Instances of non-liability under the foregoing rules: For overdrafts allowed by the cashier without knowledge of directors and in violation of instructions. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. For insolvency through discounting paper not properly secured, although indorsed by a wealthy director. Movius *v.* Lee, 30 Fed. 298 [*affirmed sub nom.* Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662]. For losses through frauds and forgeries of the secretary continued two or three years. Scott *v.* Depeyster, 1 Edw. (N. Y.) 513. For paying an excessive price for work done for the corporation in an emergency. Ward *v.* Davidson, 89 Mo. 445, 1 S. W. 846. For voting compensation to another director for extra services. Godbold *v.* Mobile Branch Bank, 11 Ala. 191, 46 Am. Dec. 211. For allowing debts due the corporation to become barred by the statute of limitations. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. For allowing the president of the corporation, it being a bank, to remain in its exclusive charge and management. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662. For not making any investigation for ninety days after becoming directors. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662. For failing to keep the property of the corporation insured. Charlestown Boot & Shoe Co. *v.* Dunsmore, 60 N. H. 85. For mistakes of judgment and mismanagement in making investments of the company's funds on doubtful and insufficient security, under the temptation of realizing for the company large profits at usurious rates of interest. Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684. For failing to take a new bond from their secretary upon his being reëlected, under the erroneous supposition that his old bond would continue good, and this although they took no legal advice. Vance *v.* Phœnix Ins. Co., 4 Lea (Tenn.) 385. For subscribing, in the name of the corporation, for shares of stock of another corporation. Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9. For failing to detect fraudulent entries made by the cashier, although extending over a period of nine years, and for allowing the same person to act as cashier, bookkeeper, and teller. Louisville Sav. Bank *v.* Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488, where the case arose, upon the merging of one bank into another, which permitted the president of the new bank to use the books of the old firm in making the transfer to a new set of books, the president being a defaulter, but unknown to the directors. For making a single purchase of United States bonds to enable the corporation to avoid taxation. McNab *v.* McNab, etc., Mfg. Co., 62 Hun (N. Y.) 18, 16 N. Y. Suppl. 448, 41 N. Y. St. 906.

82. Thompson Neg. (2d ed.) § 8.

83. *Illinois.*— Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81 [*affirming* 17 Ill. App. 531].

Maine.— Mutual Redemption Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470.

New Jersey.— Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Ackerman *v.* Halsey, 37 N. J. Eq. 356.

New York.— Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546.

ing casuistic distinctions as to degrees of care and negligence, holds directors liable for being ignorant of what they might have discovered by exercise of that good business diligence which the law imposes upon them.[84] Under this rule directors who by their negligence fail to discover false entries on the books, and fictitious mortgages, running through many years, have been held liable for the money secretly withdrawn and covered thereby; nor did the fact that managers of a savings-bank had no time or ability to perform their duties, or that they had no knowledge of unlawful loans and investments, relieve them of such liability.[85]

9. Whether Liable For Negligent Acts Which Are Ultra Vires — a. In General. The rule already adverted to,[86] which exonerates directors from responsibility for losses happening through mistakes of judgment and honest errors in exercising the discretionary power committed to them, applies in general only where they act within the scope of their powers. Where they assume to act outside the powers conferred upon the corporation, or outside the powers which the by-laws or other governing instruments have conferred upon them, then, for any losses happening in consequence of such action, their liability rests upon a higher ground than mere negligence; it rests upon the ground of an affirmative breach of trust.[87] While, as stated hereafter, there may be in many cases ground for exonerating them in consequence of mistakes of law, yet where the governing statute or the by-laws have made the rule of their duty plain, and they step outside of that rule and loss results, they are liable to make it good.[88] But the difficulty of knowing the law and being certain about its application to given cases is so great that the better view is that the rule that directors and other managing officers of corporations are not liable for losses happening through mistakes of judgment[89] extends to mistakes of law as well as to mistakes of fact.[90] If therefore the directors of a corporation, having acted in good faith and upon their best judgment for the interests of the corporation, do an act beyond the scope of their powers which has resulted in loss to the company,[91] as if they have invested its funds in a manner not authorized by the charter, they are not personally liable to the shareholders therefor.[92]

b. Cases Where Directors Have Been Held Liable For Negligent Ultra Vires Acts. In seeming opposition to what is stated in the preceding paragraph, it has

Tennessee.— Vance *v.* Phœnix Ins. Co., 4 Lea 385.

United States.— Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Mutual Bldg. Fund, etc., Bank *v.* Bosseiux, 3 Fed. 817, 4 Hughes 387; Corbett *v.* Woodward, 6 Fed. Cas. No. 3,223, 5 Sawy. 403.

84. Shea *v.* Mabry, 1 Lea (Tenn.) 319.

85. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

Decisions which fail to hold directors liable for negligent ignorance.— Regrettable decisions are met with, even in courts of the highest reputation and authority, which sanction principles which exonerate directors from personal responsibility for their negligent ignorance. Murray *v.* Nelson Lumber Co., 143 Mass. 250, 9 N. E. 634 (holding it error to instruct a jury that "all directors of a corporation are presumed to know what it is their duty to know, what they are able to know," etc.); Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 405, 30 Am. St. Rep. 718, 15 L. R. A. 305 (holding that the directors of a bank were not responsible for not knowing that the president, to the knowledge of the cashier, and with the coöperation of one or more clerks and subordinates, was engaged in gutting the bank in an oil speculation); Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625 (holding that directors are not personally liable for not knowing of overdrafts made by people of character and business integrity, some of them no doubt judges); Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662 (holding that a knowledge of all the affairs of the bank, or of what its books and papers would show, cannot be imputed to a director for the purpose of charging him with liability).

86. See *supra*, IX, M, 3.

87. Bargate *v.* Shortridge, 5 H. L. Cas. 297, 24 L. J. Ch. 457.

88. Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Citizens' Loan Assoc. *v.* Lyon, 29 N. J. Eq. 110; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546; Moses *v.* Ocoee Bank, 1 Lea (Tenn.) 398.

89. See *supra*, IX, M, 3.

90. Hodges *v.* New England Screw Co., 3 R. I. 9.

91. Watts' Appeal, 78 Pa. St. 370.

92. Scott *v.* Depeyster, 1 Edw. (N. Y.) 513.

been held that an erroneous belief by the managers of a savings-bank, not arising from misconstruction of the charter, as to the legality of certain unlawful investments and loans, does not relieve them from liability for resulting losses.[93] In line with this, it has been held that a director and member of the finance committee of a savings-bank, who acts with the president in investing its funds in mortgages on land not worth twice the amount, contrary to a prohibition in the bank's charter, is chargeable with the loss on the investment, even though he did not act fraudulently, and derived no benefit from the loan, the error not being a mere error of judgment or mistake in estimating the value of the property.[94] So the directors of a corporation incur a personal liability to it by voting for a resolution which they have no power, express or implied, to pass, authorizing the issue and negotiation of notes of the corporation, which are in effect void, where such notes are issued and come into the hands of *bona fide* purchasers for value.[95] But where an *ultra vires* act was the act of other directors or officers, and the directors sought to be charged did not participate in it, and were not guilty of negligence within the doctrine of a preceding section,[96] they are not liable for the losses so occasioned.[97]

10. Effect of Acquiescence on Part of Shareholders. Although the shareholders in a corporation are not bound to look into the management, and will not be held to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty,[98] yet if they do know how that the directors are managing its affairs, and that they are overstepping their granted powers, and if they stand by, look on, and make no objection, they will be held to have acquiesced in the same, and will be precluded from holding the directors,[99] and more especially a subordinate ministerial officer,[1] to a personal liability; and under similar facts it has been held that the state cannot maintain a statutory action to dissolve the corporation.[2] The rule is of course stronger where the shareholders affirmatively authorize the doing of the act which results in loss. Thus it has been held that the directors of a corporation are not chargeable with any loss which the cessation of business and a liquidation of the affairs of the corporation, in furtherance of a vote of a majority of the shareholders, may entail upon the minority of the shareholders.[3]

11. Liability of Directors For Each Other's Acts. The rule of diligence already spoken of would seem, on principle, to impose upon directors the obligation of keeping a reasonable watch upon each other as well as upon the subordinate ministerial officers of the corporation. Contrary to this it has been held that the directors of a bank, which had become insolvent by reason of the losses caused by the discounting from time to time of paper not properly secured, but indorsed by a director who was a man of wealth and the largest shareholder in the bank, and in whom the other directors had reason to place confidence, are not liable for the mere failure to discover the illegal transaction and to prevent the offending director from continuing therein.[4] So it has been held that the directors of such

93. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824; Dodd *v.* Wilkinson, 42 N. J. Eq. 647, 9 Atl. 685.

94. Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866 [*reversing* 37 N. J. Eq. 409].

95. Metropolitan El. R. Co. *v.* Kneeland, 120 N. Y. 134, 24 N. E. 381, 30 N. Y. St. 782, 17 Am. St. Rep. 619, 8 L. R. A. 253.

The advice of able counsel does not exonerate them. Pierson *v.* Cronk, 26 Abb. N. Cas. (N. Y.) 25, 13 N. Y. Suppl. 845.

96. See *supra*, IX, M, 6.

97. Movius *v.* Lee, 30 Fed. 298 [*affirmed sub nom.* Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662].

98. *In re* Agriculturist Cattle Ins. Co., L. R. 1 Ch. 161, 12 Jur. N. S. 79, 35 L. J. Ch. 296, 14 L. T. Rep. N. S. 468, 14 Wkly. Rep. 266.

99. Watts' Appeal, 78 Pa. St. 370; Henry *v.* Jackson, 37 Vt. 431. In such a case a by-law which the directors have overstepped is waived. Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049.

1. Holmes *v.* Willard, 125 N. Y. 75, 25 N. E. 1083, 34 N. Y. St. 455, 11 L. R. A. 170.

2. People *v.* Ballard, 3 N. Y. Suppl. 845.

3. Trisconi *v.* Winship, 43 La. Ann. 45, 9 So. 29, 26 Am. St. Rep. 175.

4. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662 [*affirming* Movius *v.* Lee, 30 Fed. 298, 24 Blatchf. 291].

a bank do not incur a common-law liability for inattention to their official duties in not preventing a hazardous, imprudent, and disastrous loan, if the loan was made by their associates without their knowledge, connivance, or participation.[5]

12. LIABILITY TO STRANGERS FOR PERSONAL INJURIES THROUGH THEIR NEGLIGENCE. As in the case of any other agent, the fact of their agency or official character does not shield the directors of a corporation from personal liability for damages visited upon third persons through their negligence, although the tort may also be a tort of the corporation; and the same rule applies with respect to liability for nuisances dangerous to the public.[6] But it would seem that where they act in violation of a positive statute they ought to be held to the liability of quasi-insurers. The opinion is also valuable in so far as it develops the principle that non-execution by directors of their duties toward the corporation may of itself amount to malfeasance as toward strangers.[7] Contrary to the foregoing is a holding to the effect that the regents of the University of California are not individually liable on the footing of negligence for an injury arising from the poles and wires of a telegraph and telephone line maintained by the corporation, because they are expressly declared by statute to be deemed public officers.[8]

N. Remedies of Corporation or Its Representative Against Unfaithful Directors — 1. CORPORATION MAY SUE ITS DIRECTORS EITHER AT LAW OR IN EQUITY — a. In General. A corporation may sue its directors to redress, or to recover damages for, wrongs inflicted by the directors upon the corporation[9] either at law[10] or in equity.[11] Where the ground of action is misfeasance or culpable

5. Witters *v.* Sowles, 31 Fed. 1, 24 Blatchf. 332. The writer submits that the foregoing decisions are unsound.

That a knowledge of and participation in prior illegal acts, such as the act which resulted in the loss, is admissible as an evidentiary fact to show that the directors sought to be charged had knowledge of the illegal act which resulted in the loss in the present case see Dodd *v.* Wilkinson, 42 N. J. Eq. 647, 9 Atl. 685.

Non-liability of ex-officio directors for each other's acts.— Not liable, in the absence of evidence of a joint participation in the illegal act, which is not to be presumed, but must be proved. North Hudson Mut. Bldg., etc., Assoc. *v.* Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57.

Application of these principles to banking corporations see Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662; Welles *v.* Graves, 41 Fed. 459.

Indictment of directors for negligent failure to perform their official duties, with the conclusion that a director is not liable who has not personally participated in the production of the events — failing to change the mode of heating railway cars and that a foreign corporation cannot be indicted, although its directors who participated in its unlawful acts may be. People *v.* Clark, 14 N. Y. Suppl. 642.

6. This principle was affirmed in the case of an injury accruing from the storing of giant powder in violation of law. Cameron *v.* Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L. R. A. 508 [*citing* Mayer *v.* Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433; Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Baird *v.* Shipman, 132 Ill. 16, 23 N. E. 384, 22 Am. St. Rep. 504, 7 L. R. A. 128; Delaney *v.* Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325; Jenne *v.* Sutton, 43 N. J. L. 257, 39 Am. Rep. 578; Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421], where the court held that it is the duty of the directors of a corporation dealing in explosives to exercise such reasonable supervision over the management of their company's business as will result in the observance of the utmost care on the part of the subordinates who direct or handle the explosives.

7. Cameron *v.* Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L. R. A. 508.

That a director who knows nothing of such a nuisance, and who would not have acquired knowledge of it by the exercise of reasonable care, and who has performed his duty of taking care, is not personally liable for the injury proceeding therefrom was held in the same case. Cameron *v.* Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L. R. A. 508.

8. Lundy *v.* Delmas, 104 Cal. 655, 38 Pac. 445, 26 L. R. A. 651.

Further as to personal liability of directors for negligence see note to Warner *v.* Penoyer, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761; also note to Robinson *v.* Hall, 62 Fed. 222, 12 C. C. A. 674.

9. Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365; Cross *v.* Sackett, 16 How. Pr. (N. Y.) 62; Denny *v.* Manhattan Co., 2 Den. (N. Y.) 115.

10. Mobile State Branch Bank *v.* Collins, 7 Ala. 95; Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y.) 130; Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202.

11. Indeed the corporation is in general

negligence, the corporation and not the shareholders is the proper party plaintiff,[12] although under some remedial systems the shareholders,[13] and often a creditor,[14] may maintain an action at law; and where the corporation is still under the control of the unfaithful directors, so that redress of grievances cannot be had by an action in its name, a shareholder may maintain a proceeding in equity, suing for himself and all the other shareholders, to protect the rights of the corporation, as trustee for its shareholders and creditors.[15]

b. Action Whether Legal or Equitable. Where legal and equitable remedies are blended into one system under the modern codes, the form of action by the corporation against its directors for misfeasance or culpable negligence may be legal or equitable according to the particular circumstances.[16] The proper remedy is said to be an action at law for damages, and not a bill in equity, where no accounting of the financial condition of the corporation is necessary to determine the extent of their liability.[17] The jurisdiction of courts of equity to compel unfaithful directors to account to the corporation or to its representative for frauds and breaches of trust has been well established since the time of Lord Hardwicke;[18] and unquestionably this is the proper forum in nearly all such cases,[19] although this statement does not exclude the jurisdiction of courts of law in cases appropriate for the exercise of that jurisdiction, the two remedies being often concurrent.[20]

2. Right of Action in Receiver, and Whether He Can Impeach Corporate Acts. The receiver of a corporation succeeds to the title of the corporation;[21] and whatever rights it might have asserted against its unfaithful directors he may assert against them.[22] A receiver of an insolvent national banking association for instance may enforce, for the benefit of shareholders, creditors, or depositors, any

the only party that can sue to redress injuries done to it, neither the shareholders nor the creditors having any right of action except under principles considered in another title. See *infra*, XI, B, 1, a *et seq.* See also the following cases:

Connecticut.— Allen *v.* Curtis, 26 Conn. 456.

Kentucky.— Jones *v.* Johnson, 10 Bush 649.

Maine.— Hodsdon *v.* Copeland, 16 Me. 314.

Massachusetts.— Smith *v.* Hurd, 12 Metc. 371, 46 Am. Dec. 690.

New Jersey.— Landis *v.* Sea Isle City Hotel Co., (Ch. 1895) 31 Atl. 755 [*affirmed* in 53 N. J. Eq. 654, 33 Atl. 964].

Texas.— Evans *v.* Brandon, 53 Tex. 56.

12. *Connecticut.*—Allen *v.* Curtis, 26 Conn. 456.

Massachusetts.— Peabody *v.* Flint, 6 Allen 52; Smith *v.* Hurd, 12 Metc. 371, 46 Am. Dec. 690.

Minnesota.— Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196, 44 N. W. 56.

Texas.— Evans *v.* Brandon, 53 Tex. 56.

England.— Atty.-Gen. *v.* Wilson, Cr. & Ph. 1, 4 Jur. 1174, 10 L. J. Ch. 53, 18 Eng. Ch. 1.

13. 3 Thompson Corp. § 4325, and statutes and cases cited.

14. United Shakers Soc. *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84, 2 L. R. A. 534. *Compare* Litchfield *v.* White, 3 Sandf. (N. Y.) 545; Mutual Bldg. Fund, etc., Bank *v.* Bosseiux, 3 Fed. 817, 4 Hughes 387.

That directors are liable to strangers for direct frauds and torts practised against them, such as issuing false prospectuses, making false representations, etc., will be shown *infra*, IX, O.

15. Craig *v.* Gregg, 83 Pa. St. 19; Evans *v.* Brandon, 53 Tex. 56. See also *infra*, XI, B, 1, a *et seq.*

16. Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196, 44 N. W. 56.

17. Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962; Stephens *v.* Overstolz, 43 Fed. 771.

An action against the president and treasurer of a corporation, seeking to charge them as ex-officio members of the board of directors for having usurped the powers of the board, etc., was treated in a code state as a suit in equity, and it was held error to treat it as an action at law, although both parties seem to have so understood it. North Hudson Mut. Bldg., etc., Assoc. *v.* Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57.

18. Bayless *v.* Orne, Freem. (Miss.) 161; Citizens' Loan Assoc. *v.* Lyon, 29 N. J. Eq. 110; Charitable Corp. *v.* Sutton, 2 Atk. 400, 9 Mod. 349, 26 Eng. Reprint 642; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Atty.-Gen. *v.* Wilson, Cr. Eng. Ch. 1.

19. Ellsworth Woolen Mfg. Co. *v.* Faunce, 79 Me. 440, 10 Atl. 250.

20. Mobile State Branch Bank *v.* Collins, 7 Ala. 95; Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y.) 130; Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628.

21. White *v.* Haight, 16 N. Y. 310; Curtis *v.* Leavitt, 15 N. Y. 9; Osgood *v.* Laytin, 48 Barb. (N. Y.) 463; Brouwer *v.* Hill, 1 Sandf. (N. Y.) 629; High Receivers, § 316.

22. That the receiver has refused to sue cannot be inferred from his opposition to an

liability of its directors for non-performance or negligent performance of their duties.[23] Doubt has arisen upon the question whether he can impeach corporate acts, or whether, his title being derivative, he can do anything except what his assignor, the corporation, could have done. The answer to this is that he is not in a strict sense the assignee of the corporation, but is the officer of a court of equity appointed to impound the assets of the corporation, and to administer them for the benefit of all parties interested in them; the United States or the state first to whom the corporation may be indebted for taxes or other public dues; next the lien or preferred creditors; next the general creditors; and finally the shareholders; standing, not as the representative of the corporation exclusively, but as the representative of all parties interested in its assets.[24] The better opinion is that like an assignee in bankruptcy,[25] he may disaffirm acts done by or in the name of the corporation which are illegal and in violation of the rights of its creditors. He may for example maintain an action to set aside illegal transfers made by the corporation of securities belonging to it.[26] He may maintain an action against the president of the corporation,[27] or against a director,[28] to recover corporate funds or securities which the latter has fraudulently abstracted.

3. Right of Action in Assignee For Creditors. The right of action against unfaithful directors for damages to the corporation, occasioned by their fraudulent misconduct, for example by their selling to the corporation its own stock, passes to an assignee appointed for the benefit of its creditors.[29]

4. Right of Action by Assignees or Trustees in Bankruptcy. An action against the directors of a corporation for losses happening to the corporation in consequence of their gross negligence and habitual inattention to their duties may be brought by an assignee or trustee in bankruptcy of the corporation, and is properly brought in equity;[30] and he may as the representative of the creditors contest the validity of the acts of the bankrupt corporation.[31]

order of court directing him to sue. Taylor *v.* Mitchell, 80 Minn. 492, 83 N. W. 418; Gifford *v.* Clapp, 44 N. Y. App. Div. 192, 60 N. Y. Suppl. 856.

23. Howe *v.* Barney, 45 Fed. 668; Movius *v.* Lee, 30 Fed. 298. Accordingly he may maintain an action at law against the directors of a national banking association to recover damages for making an excessive loan. Stephens *v.* Overstolz, 43 Fed. 771.

24. Talmage *v.* Pell, 7 N. Y. 328; Gillet *v.* Moody, 3 N. Y. 479; Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202.

25. See *infra*, IX, N, 4.

26. Gillet *v.* Moody, 3 N. Y. 479.

27. Butterworth *v.* O'Brien, 24 How. Pr. (N. Y.) 438.

28. Gillet *v.* Phillips, 13 N. Y. 114; Hayes *v.* Kenyon, 7 R. I. 136. But in Maine, unless the rule has been recently changed, the trustees appointed to wind up an insolvent corporation cannot sue for wrongs done by the officers to the injury of creditors; but such an action must be brought by the creditors themselves. Piscataqua F. & M. Ins. Co. *v.* Hill, 60 Me. 178. The general doctrine of the foregoing text has an analogy in the case of the official liquidator under the English Companies Acts, who can proceed against the directors for breaches of trust. See Madrid Bank *v.* Bayley, L. R. 2 Q. B. 37, 8 B. & S. 29, 36 L. J. Q. B. 15, 15 L. T. Rep. N. S. 292, 15 Wkly. Rep. 159; *In re* East of England Bank, L. R. 1 Eq. 219; *In re* Cardiff Sav. Bank, 45 Ch. D. 537, 59 L. J. Ch. 450, 62 L. T. Rep. N. S. 628, 2 Meg. 136, 38 Wkly. Rep. 571; *In re* National Funds Assur. Co., 10 Ch. D. 118, 48 L. J. Ch. 163, 39 L. T. Rep. N. S. 420, 27 Wkly. Rep. 302.

29. Hequembourg *v.* Edwards, 155 Mo. 514, 56 S. W. 490 [*reversing* (Mo. 1899) 50 S. W. 908]; Shultz *v.* Christman, 6 Mo. App. 338; Grocers' Nat. Bank *v.* Clark, 48 Barb. (N. Y.) 26.

Pendency of action by creditors prevents subsequent action by assignee.— The pendency of a suit in equity by creditors against the directors of an insolvent corporation, proceeding on the ground of negligence and mismanagement, will prevent such an assignee from maintaining a subsequent action at law in the name of the corporation against the directors for the same cause. Warner *v.* Hopkins, 111 Pa. St. 328, 2 Atl. 83, 56 Am. Rep. 266.

30. Mutual Bldg. Fund, etc., Bank *v.* Bosseiux, 3 Fed. 817, 4 Hughes 387.

31. Clerk's Office *v.* Cape Fear Bank, 66 N. C. 214, 8 Am. Rep. 506; Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731; Bradshaw *v.* Klein, 3 Fed. Cas. No. 1,790, 2 Biss. 20; Foster *v.* Hackley, 9 Fed. Cas. No. 4,971; *In re* Jaycox, 13 Fed. Cas. No. 7,237, 12 Blatchf. 209, 13 Fed. Cas. No. 7,238, 13 Blatchf. 70; *In re* Leland, 15 Fed. Cas. No. 8,234, 10 Blatchf. 503; McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,885, 3 McLean 185 [*affirmed* in 13 How. (U. S.) 151, 14 L. ed. 91]; *In re* Metzger, 17 Fed. Cas. No. 9,510; Upton *v.* Hansborough, 28 Fed. Cas. No.

5. WHETHER DIRECTORS LIABLE JOINTLY OR SEVERALLY. It has been held that in an action in equity by a receiver of a corporation against its directors to recover moneys fraudulently appropriated by them a decree may be entered against them jointly.[32] So under the modern codes an action in the nature of an action at law may be maintained against directors of a corporation jointly and severally, for the amount of losses resulting from their suffering the corporate funds or property to be wasted or lost by gross negligence or inattention to their duties.[33]

6. PLEADINGS IN SUCH ACTIONS. If the action is grounded on negligence, it is not a misjoinder of causes of action to allege several distinct acts of negligence; nor need such a complaint negative knowledge or acquiescence on the part of the shareholders.[34]

O. Liability of Directors, Outside of Statutes, to Strangers and to Creditors of Corporation — 1. NOT LIABLE AS PARTNERS OR ORIGINAL UNDERTAKERS. The general rule, subject to exceptions hereafter pointed out, is that the directors

16,801, 3 Biss. 417. He may for example impeach a simulated payment for shares of stock of the corporation, made by the device of exchanging checks, with the view of changing the character of the transaction from a share subscription to an ordinary debt. Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731. But where a corporation entered into the business of discounting commercial paper without authority of law, its assignee in bankruptcy could not recover the money which it had so parted with, by reason of the equitable estoppel which arose in favor of the other party. *In re* Jaycox, 13 Fed. Cas. No. 7,238, 13 Blatchf. 70. Neither could the assignee of a bankrupt corporation assert the rights of its creditors against its directors, under a statute making them liable for certain official defaults; since this liability was not in the nature of corporate assets. Bristol *v.* Sanford, 4 Fed. Cas. No. 1,893, 12 Blatchf. 341. But see Piscataqua F. & M. Ins. Co. *v.* Hill, 60 Me. 178; Gunkle's Appeal, 48 Pa. St. 13.

32. McCarty's Appeal, 110 Pa. St. 379, 4 Atl. 925.

33. Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196, 44 N. W. 56.

State of facts and theory under which a joint action at law could not be maintained against four directors, they constituting a minority of the board, and their liability being several. Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y. 130.

34. Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196, 44 N. W. 56.

For an example of a bill in equity brought by the assignees of a foreign corporation against resident directors for unlawfully misappropriating the funds of the corporation which was held not demurrable see Gindrat *v.* Dane, 10 Fed. Cas. No. 5,455, 4 Cliff. 260.

For a declaration, under the common-law system of pleading, against directors for losses through lending the corporate funds on insufficient security, which was bad on demurrer for not sufficiently specifying time, place, and circumstances, see Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y.) 130.

Certain defenses to such actions considered.— Delay on the part of the liquidator of the corporation no defense. Masonic, etc., Assur. Co. *v.* Sharpe, 10 R. & Corp. L. J. 292 [*affirmed* in [1892] 1 Ch. 154, 61 L. J. Ch. 193, 65 L. T. Rep. N. S. 806, 40 Wkly. Rep. 241]. Discharge in bankruptcy, the action being to recover unliquidated damages for a tort, no defense. Hun *v.* Cary, 59 How. Pr. (N. Y.) 426. Directors when so sued estopped to set up the defense that the money paid to them for the property was obtained by the corporation as the proceeds of an unlawful issue of its shares. Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149. Defense of the statute of limitations, with the conclusion that the statute begins to run against the officer of the corporation only from the time when the receiver acquires knowledge of the corrupt transaction. Bent *v.* Priest, 86 Mo. 475 [*affirming* 10 Mo. App. 543]. That the statute of limitations is available as defense to such actions see Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684. *Compare* Chouteau *v.* Allen, 70 Mo. 290; Keeton *v.* Keeton, 20 Mo. 530; Williams *v.* Halliard, 38 N. J. Eq. 373; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. That the statute of limitations does not run against a suit in equity by a receiver of a corporation to hold its directors liable for a misappropriation of its assets was held in Ellis *v.* Ward, 137 Ill. 509, 25 N. E. 530. And this seems to be the correct view if the premise is correct that the statute of limitations does not run in case of an express or direct trust, for such is clearly the status of directors.

California.— Farmers', etc., Bank *v.* Downey, 53 Cal. 466, 31 Am. Rep. 62.

Maine.— Mutual Redemption Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470.

Maryland.— Hoffman Steam Coal Co. *v.* Cumberland Coal, etc., Co., 16 Md. 456, 77 Am. Dec. 311.

New Hampshire.— Pearson *v.* Concord R. Corp., 62 N. H. 537, 13 Am. St. Rep. 590.

Pennsylvania.— Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628; Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128.

West Virginia.— Sweeny *v.* Grape Sugar Refining Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88, 89, and note.

of a corporation are not liable for its debts and undertakings although contracted or undertaken through their instrumentality.[35] This principle applies where the corporation exists *de facto*, although there may have been some defect or irregularity in its organization,[36] but not where there has been a failure to perform those conditions precedent which are necessary to bring the corporation into existence at all, such as the raising of the minimum amount of capital stock prescribed by charter before the corporation is entitled to commence business.[37] If the directors of an inchoate corporation enter upon the business for which the company is projected, and incur liabilities, and for any reason the company is never incorporated, such liabilities will be deemed their personal obligations, and they will be obliged to answer for them.[38]

2. Personally Liable Where Contract Does Not Show That It Was Made For Company. As more fully shown hereafter[39] directors of a corporation are held to be personally liable upon written obligations written or assumed by them unless the writing by its terms, or by necessary implication thereto, affirm that the corporation and not the directors was the party which it was intended to bind; and this rule has been held to apply where the stranger has dealt with the covenantor as trustee for the corporation.[40] But where the contract is dubious upon the question whether it was intended to bind the corporation or the directors the tendency of modern conceptions is to let in parol evidence to show what the fact really was.[41]

3. Personally Liable For Acts in Excess of Their Authority — a. In General. The rule which exonerates the director from personal liability for the contractual obligations of the corporation created through his instrumentality assumes that in creating them he was acting within the scope of his authority as its contracting officer or agent; for in that case it is what it was intended to be, the contract of the corporation.[42] If it is outside the scope of his authority then, according to a rule of the common law, he becomes personally liable not on the contract — but for damages for a breach of an implied warranty of authority to make it.[43]

Compare St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544, and many other cases.

35. Beeson *v.* Lang, 85 Pa. St. 197; Snyder *v.* Wiley, 59 Tex. 448.

36. Bartholomew *v.* Bentley, 1 Ohio St. 37. See also *supra*, I, L, 3, c, (II); VIII, C, 2, a *et seq.*

37. Farmers' Co-operative Trust Co. *v.* Floyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346.

38. Doubleday *v.* Muskett, 7 Bing. 110, 9 L. J. C. P. O. S. 35, 4 M. & P. 750, 20 E. C. L. 58.

Under peculiar circumstances the contracting officer or agent of the corporation may not be personally liable, yet the trustees may be. Thus the president of an incorporated social club was held not liable, individually, for debts of the club, although incurred by him as president. Sieger *v.* Culyer, 2 Abb. N. Cas. (N. Y.) 347 [*affirmed* in 67 N. Y. 601]. Liability of the trustees of a church to an innocent materialman. Tull *v.* South Kinston M. E. Church, 75 N. C. 424.

39. See *infra*, XII, H, 1 *et seq.*

40. *In re* International Contract Co., L. R. 6 Ch. 525.

41. See *infra*, XII, H, 9, a *et seq.*

Seemingly opposed to the doctrine of the text, it has been held that directors cannot be held liable upon a lease executed in the name of the corporation, by its president and cashier, under the rule that persons executing a written instrument describing themselves as agents may be held liable as though they had executed the instrument in their own names, rejecting the references to their agencies as a false description, where they had no power thus to bind the principal. McCormick *v.* Seeberger, 73 Ill. App. 87.

42. Taylor *v.* Williams, 17 B. Mon. (Ky.) 489.

43. Frost Mfg. Co. *v.* Foster, 76 Iowa 535, 41 N. W. 212 (officer of corporation signing a subscription paper in the name of the corporation but without authority and without giving information of his want of authority, becomes personally liable to contribute to others signing and incurring expenses on the faith of his subscription); Weeks *v.* Propert, L. R. 8 C. P. 427, 42 L. J. C. P. 129, 21 Wkly. Rep. 676 (the same conclusion where the borrowing powers of the company had been exhausted); Cherry *v.* Australasia Colonial Bank, L. R. 3 P. C. 24, 38 L. J. C. P. 49, 21 L. T. Rep. N. S. 356, 6 Moore P. C. N. S. 235, 17 Wkly. Rep. 1031, 16 Eng. Reprint 714; Richardson *v.* Williamson, L. R. 6 Q. B. 276, 40 L. J. Q. B. 145 (directors personally liable for a loan made for the corporation where they had no borrowing powers); Collen *v.* Wright, 7 E. & B. 301, 3 Jur. N. S. 363, 26 L. J. Q. B. 147, 90 E. C. L. 301 [*affirmed* in 8 E. & B. 647, 27 L. J. Q. B. 215, 92 E. C. L. 647].

b. Exception to This Rule Where Question of Authority Is Mere Question of Law. Other decisions make an exception to this rule where the question of the authority of the directors is a mere question of law, although they represent to the other contract party that they have authority, since in the absence of fraud an action for damages does not lie for the giving of a mistake in opinion upon a question of law.[44] Thus if a corporation through its directors purchases its own shares, which it has no power to do, and afterward avoids the purchase, the directors do not become liable to the vendor.[45]

4. Not Liable to Creditors For Nonfeasance, Negligence, Mismanagement, Breach of Duty to Corporation, Etc. Upon a principle already stated,[46] the fact that the directors and officers of a corporation have mismanaged its business, thereby visiting loss or damage upon its creditors, does not render them liable to the creditors, unless they are made liable by the provisions of charter or statute, the reason being that this, in theory of law, is a breach of duty to the corporation and not to its creditors.[47]

In plain opposition to the principle of the text it has been held that if a bank, through its directors, issues notes in excess of the authority given by the law of its incorporation, the directors will not be personally liable to redeem the notes. Sandford *v.* McArthur, 18 B. Mon. (Ky.) 411. So the fact that the directors have contracted an indebtedness in excess of the limit prescribed by its charter and the published notice of incorporation does not render them liable to creditors of the corporation, unless made so by the provisions of the charter or some general statute; and it is immaterial that the creditors allege that credit was extended in reliance on the business character and responsibility of the directors. Frost Mfg. Co. *v.* Foster, 76 Iowa 535, 41 N. W. 212.

44. Rashdall *v.* Ford, L. R. 2 Eq. 750, 35 L. J. Ch. 769, 14 L. T. Rep. N. S. 790, 14 Wkly. Rep. 950. See the judgment of Lord Justice Mellish in Beattie *v.* Ebury, L. R. 7 Ch. 777, 798, 41 L. J. Ch. 804, 27 L. T. Rep. N. S. 398, 20 Wkly. Rep. 994.

45. Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194.

46. See *supra*, IX, L, 3.

That creditors of a firm, whose members were directors of a corporation, have no standing in equity to impeach the conduct of the company, its directors, and officers in making preferences see Gottlieb *v.* Miller, 154 Ill. 44, 39 N. E. 992.

47. Frost Mfg. Co. *v.* Foster, 76 Iowa 535, 41 N. W. 212; Priest *v.* White, 89 Mo. 609, 1 S. W. 361; Branch *v.* Roberts, 50 Barb. (N. Y.) 435; Winter *v.* Baker, 50 Barb. (N. Y.) 432, 34 How. Pr. (N. Y.) 183; Baltimore Nat. Exch. Bank *v.* Peters, 44 Fed. 13.

Illustrations.— Bank directors not so liable to billholders. Branch *v.* Roberts, 50 Barb. (N. Y.) 435. National bank directors not so liable to creditors (Baltimore Nat. Exch. Bank *v.* Peters, 44 Fed. 13) or to depositors (Zinn *v.* Mendel, 9 W. Va. 580). But bank directors may become liable to members of the public for fraudulent representations causing loss or damage. Leffman *v.* Flanigan, 5 Phila. (Pa.) 155, 20 Leg. Int. (Pa.) 148; Maisch *v.* Seamen's Sav. Fund Soc., 5 Phila. (Pa.) 30, 19 Leg. Int. (Pa.) 140; Zinn *v.* Mendel, 9 W. Va. 580, 595 (per Haymond, P.).

A noted case departs from this doctrine by holding that the directors of a bank, by impliedly inviting the public to deal with the bank, impliedly agree with those who do so deal to use reasonable diligence in their behalf, and may accordingly become personally liable for failing to use such diligence, whereby a special deposit has been converted by the ministerial officers of the corporation. United Shakers Soc. *v.* Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731. This case is not generally regarded as being sound. See Judge Redfield's criticism on this case in 13 Am. L. Reg. N. S. 218, and the doubt expressed by Haymond, P., in Zinn *v.* Mendel, 9 W. Va. 580. Another court has held that the directors of a savings-bank are liable to depositors for gross negligence and inattention, whereby the assets of the bank have been wasted. Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84, 2 L. R. A. 534. *Compare* Litchfield *v.* White, 3 Sandf. (N. Y.) 545; Mutual Bldg. Fund, etc., Bank *v.* Bosseiux, 3 Fed. 817, 4 Hughes 387.

Liable directly to creditors under statutes. — Numerous statutes, however, exist imposing liability of this nature upon directors. See *infra*, IX, P, 6, a *et seq.*

Liability under Wis. Rev. Stat. §§ 3237, 3239, directly to creditors for restoration of what the directors have lost or wasted through violations of their duty. Gores *v.* Day, 99 Wis. 276, 74 N. W. 787. Under this statute any creditor may maintain an action in equity to redress wrongs to the corporation growing out of the misconduct of its officers resulting in loss of corporate assets. Killen *v.* Barnes, 106 Wis. 546, 82 N. W. 536.

When liable to subsequent creditors.— In Colorado subsequent creditors of a corporation may question an alleged wrongful diversion and misapplication of the corporate assets by the directors, where the acts complained of necessarily operated as a fraud upon subsequent creditors. Nix *v.* Miller, 26 Colo. 203, 57 Pac. 1084 [*distinguishing* Graham *v.* La Crosse, etc., R. Co., 102 U. S. 148, 26 L. ed. 106].

Limitation and laches in actions by credit-

5. Liable to Strangers For Malfeasance. Directors may make themselves liable to customers of the corporation and to other strangers for positive acts of malfeasance to the injury of such third persons, such as selling collaterals pledged to a bank to secure an indebtedness;[48] receiving from the officers of another bank money of the bank, knowing that such officer has no authority to disburse it;[49] infringing the patented invention of a third person, in which act directors become personally liable with the corporation;[50] or for a personal injury to a third person proceeding from negligence, or for maintaining a nuisance, although this is also a nonfeasance as toward the corporation.[51]

6. Personally Liable For Making Fraudulent Overissues of Shares of Corporation. In conformity with this principle, if the officers of a corporation issue its stock in excess of the limit allowed by its charter and make other fraudulent issues of its stock so that the purchaser of such shares cannot be admitted to the rights of a shareholder, they are liable to the purchaser of such shares, and to other shareholders, under principles already gone over.[52]

7. Or For Fraudulently Issuing Second-Mortgage Bonds of Corporation as "First-Mortgage Bonds." If the directors of a corporation issue a series of corporate bonds, and cause to be printed across the face of them the words "First-Mortgage Bonds," and there is in fact a prior mortgage upon the property to secure an indebtedness, the directors will be liable for damages in an action for deceit to any one who, on the faith of such statement, bought the bonds on the market.[53]

8. Not Liable For Overdrafts Allowed Their Corporation Upon Checks. Directors who sign checks for their corporation in the manner in which its checks, drawn upon its banker, are usually signed, do not thereby make themselves personally liable to the bank in case the corporation becomes insolvent, for the reason that the understanding of both parties is that the advance is made to the corporation and not to the directors personally.[54]

ors.— The cause of action arises from the date of passage by the directors of the unlawful resolution whereby the assets of the corporation are diverted from its creditors, and this although the creditors were in ignorance of the facts. Link *v.* McLeod, 194 Pa. St. 566, 45 Atl. 340.

48. Hempfling *v.* Burr, 59 Mich. 294, 26 N. W. 496.

49. American Nat. Bank *v.* Wheelock, 45 N. Y. Super. Ct. 205.

50. Cahoone Barnet Mfg. Co. *v.* Rubber, etc., Harness Co., 45 Fed. 582; Iowa Barb Steel Wire Co. *v.* Southern Barbed Wire Co., 30 Fed. 123; National Car-brake Shoe Co. *v.* Terre Haute Car Mfg. Co., 19 Fed. 514; Goodyear *v.* Phelps, 10 Fed. Cas. No. 5,581, 3 Blatchf. 91; Poppenhusen *v.* Faulke, 19 Fed. Cas. No. 11,279, 4 Blatchf. 495. Conceded in Lightner *v.* Kimball, 15 Fed. Cas. No. 8,345, 1 Lowell 211, and in Lightner *v.* Brooks, 15 Fed. Cas. No. 8,344, 2 Cliff. 287. But see to the contrary United Nickel Co. *v.* Worthington, 13 Fed. 392. For a case where the chairman of the board of directors authorized by them to make a contract made a contract which involved the infringement of a patented invention of a third person, and where he was exonerated from personal liability, see Lightner *v.* Brooks, 15 Fed. Cas. No. 8,344, 2 Cliff. 287.

51. Cameron *v.* Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L. R. A. 508.

The directors of a corporation publishing a newspaper are not personally liable for a libel published therein unless they personally aided or advised its publication, or unless their official duties were such as to charge them with knowledge of it prior to the fact. Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

52. Bruff *v.* Mali, 36 N. Y. 200; Shotwell *v.* Mali, 38 Barb. (N. Y.) 445; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578. That directors of a corporation who put on the market false securities in the name of the corporation are individually liable in an action of deceit to purchasers of such securities who are thereby injured see Clark *v.* Edgar, 12 Mo. App. 345 [*affirmed* in 84 Mo. 106, 54 Am. Rep. 84]; Shotwell *v.* Mali, 38 Barb. (N. Y.) 445.

53. Clark *v.* Edgar, 12 Mo. App. 345 [*affirmed* in 84 Mo. 106, 54 Am. Rep. 84]. *Compare* Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401, holding that an implied covenant against encumbrances is not a fraudulent representation affecting the rights of a director.

Defense that the title was of record and that the state of it might have been ascertained by an examination. Clark *v.* Edgar, 12 Mo. App. 345 [*affirmed* in 84 Mo. 106, 54 Am. Rep. 84, opinion by Black, J.].

54. Beattie *v.* Ebury, L. R. 7 H. L. 102, 44 L. J. Ch. 20, 30 L. T. Rep. N. S. 581, 22 Wkly. Rep. 897 [*modifying* L. R. 7 Ch. 777,

9. Liable For Issuing False Prospectuses, Making False Representations, Etc., Whereby Public Are Deceived. Acts of this kind fall within the category of acts of malfeasance already considered,[55] for which acts the directors participating therein are personally liable, notwithstanding the fact that the corporation may also be liable.[56]

10. When Liable For Negative Concealment. Promoters, directors, or officers of corporations setting forth such statements are bound not only to abstain from stating as facts that which is not true, but to omit no fact within their knowledge, the existence of which might affect the advantages held out as inducements.[57] They are personally liable to a shareholder for a loss of money which they induce him to loan to the corporation by false representations made fraudulently, or in ignorance of matters which it was their official duty to know.[58]

11. Responsible For Fraudulent Misrepresentations Whereby Persons Are Induced to Purchase Shares of Company — a. In General. The directors of a corporation who have put forth false and fraudulent prospectuses, advertisements, circulars, or other fraudulent misrepresentations concerning the corporation whereby members of the public are induced to purchase its shares to their damage make themselves liable to the persons thereby deceived and defrauded, either in an action at law for deceit,[59] or in an action at law in the nature of assumpsit, for money had and received by defendant to plaintiff's use.[60] In order that such a third person should be enabled to maintain any proceeding at law or in equity against the directors on such a ground he must show some direct connection between them and himself in the issuing of the prospectus, and its influence on

41 L. J. Ch. 804, 27 L. T. Rep. N. S. 398, 20 Wkly. Rep. 994, and *reversing* L. R. 7 Ch. 788 note].

55. See *supra*, IX, O, 5.

56. Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; Westervelt *v.* Demarest, 46 N. J. L. 37, 50 Am. Rep. 400; Kinkler *v.* Junica, 84 Tex. 116, 19 S. W. 359; Arnison *v.* Smith, 41 Ch. D. 348, 61 L. T. Rep. N. S. 63, 1 Meg. 338, 37 Wkly. Rep. 739. To the contrary Mabey *v.* Adams, 3 Bosw. (N. Y.) 346. See also Bolz *v.* Ridder, 12 Daly (N. Y.) 329. That equity will afford relief in such cases has already been shown see Stainbank *v.* Fernley, 3 Jur. 262, 8 L. J. Ch. 142, 9 Sim. 556, 16 Eng. Ch. 556. There is a learned note on the subject in 8 Am. St. Rep. 604. That a broker who, relying upon the false statements of a company as to the genuineness of one of its stock certificates, guarantees it on a sale and pays over the proceeds to his principal can recover from the company the amount paid by him in making good his guaranty of said certificate of stock see Jarvis *v.* Manhattan Beach Co., 53 Hun (N. Y.) 362, 6 N. Y. Suppl. 703, 25 N. Y. St. 1.

Illustrations of the doctrine of the text may be found in the following cases:

Connecticut.— Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255.

Georgia.— Burns *v.* Beck, 83 Ga. 471, 10 S. E. 121.

Illinois.— Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81.

Iowa.— Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915.

New Jersey.— Westervelt *v.* Demarest, 46 N. J. L. 37, 50 Am. Rep. 400.

New York.— Brewster *v.* Hatch, 122 N. Y. 349, 25 N. E. 505, 33 N. Y. St. 527, 19 Am. St. Rep. 498.

Texas.— Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101.

United States.— South Covington, etc., R. Co. *v.* Gest, 34 Fed. 628.

57. Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915.

58. Kinkler *v.* Junica, 84 Tex. 116, 19 S. W. 359.

59. Morgan *v.* Skiddy, 62 N. Y. 319; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578; Nelson *v.* Luling, 36 N. Y. Super. Ct. 544 [*affirmed* in 62 N. Y. 645]; Cross *v.* Sackett, 2 Bosw. (N. Y.) 617; Paddock *v.* Fletcher, 42 Vt. 389; Jarrett *v.* Kennedy, 6 C. B. 319, 60 E. C. L. 319; Wontner *v.* Shairp, 4 C. B. 404, 56 E. C. L. 404; Clarke *v.* Dickson, 6 C. B. N. S. 453, 5 Jur. N. S. 1027, 28 L. J. C. P. 225, 7 Wkly. Rep. 443, 95 E. C. L. 453; Gerhard *v.* Bates, 2 E. & B. 476, 20 Eng. L. & Eq. 129, 75 E. C. L. 476; Bale *v.* Cleland, 4 F. & F. 117; Bedford *v.* Bagshaw, 4 H. & N. 538, 29 L. J. Exch. 59; Davidson *v.* Tulloch, 6 Jur. N. S. 543, 3 Macq. 783, 2 L. T. Rep. N. S. 97, 8 Wkly. Rep. 309; Scott *v.* Dixon, 29 L. J. Exch. 62, note 3.

If directors of a corporation knowingly issue spurious stock and obtain a loan on it they are personally liable. The corporation need not first be sued, nor is its corporate existence in issue. Augusta Nat. Exch. Bank *v.* Sibley, 71 Ga. 726. For a useful note on this subject see 16 Am. & Eng. Corp. Cas. 414.

60. Nelson *v.* Luling, 36 N. Y. Super. Ct. 544; Paddock *v.* Fletcher, 43 Vt. 389; Jarrett *v.* Kennedy, 6 C. B. 319, 60 E. C. L. 319; Wontner *v.* Shairp, 4 C. B. 404, 56 E. C. L. 404.

his conduct in becoming an allottee.[61] If the action is to recover damages for deceit it is necessary to show fraudulent intent on the part of defendant and an actual knowledge of the falsehood of the representation must be brought home to him;[62] or else it must be made to appear that defendant made the representations with a fraudulent mind and motive, intending thereby to deceive and defraud, and indifferent as to whether the representations were true or not.[63]

b. Gist of Action Is Deceit — (i) *In General.* The gist of this species of action at common law is what is called a *scienter*, that is to say a fraudulent intent to deceive; for which reason it is held, although the holding has been challenged, that the action will not lie where the representation has been put forth through mere carelessness or inattention.[64] This is not incompatible with the principle upon which courts of equity proceed in these cases, that the promoters, directors, or officers of corporations putting forth false statements concerning the condition of their corporation are as much bound to refrain from stating as true what they do not know to be true, as from stating to be true what they know to be false, since in both cases there is a guilty *scienter*.[65] For the reason that a guilty *scienter*, or what is equivalent thereto, is the gist of the action, it will not lie against the corporation itself, since a fraudulent intent is not imputable to an artificial body; nor in case of joint-stock companies will the fraudulent intent of the directors and agents be transferred by intendment from them to the body of shareholders.[66] This does not in any manner impugn the rule that a corporation is answerable *civiliter* for the frauds of its agents. This rule is well established[67] and proceeds upon the ground that a corporation will not any more than a natural person be permitted to retain an advantage which

61. Perry *v.* Hale, 143 Mass. 540, 10 N. E. 174 (holding that the defrauded shareholder cannot maintain an action against the other shareholders, because of the fraud of a promoter, without connecting them with the fraud); Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29 [*affirming* L. R. 13 Eq. 79, *overruling* Bagshaw *v.* Seymour, 18 C. B. 903, 29 L. J. Exch. 62, note 2; Bedford *v.* Bagshaw, 4 H. & N. 538, 29 L. J. Exch. 59, and *adopting* Gerhard *v.* Bates, 2 E. & B. 476, 20 Eng. L. & Eq. 129, 75 E. C. L. 476; Scott *v.* Dixon, 29 L. J. Exch. 62, note 3].

62. Fusz *v.* Spaunhorst, 67 Mo. 256; Arthur *v.* Griswold, 55 N. Y. 400; Wakeman *v.* Dalley, 51 N. Y. 27; Nelson *v.* Luling, 36 N. Y. Super. Ct. 544; Addington *v.* Allen, 11 Wend. (N. Y.) 374.

63. Leffman *v.* Flanigan, 5 Phila. (Pa.) 155, 20 Leg. Int. (Pa.) 148; Taylor *v.* Ashton, 7 Jur. 978, 12 L. J. Exch. 363, 11 M. & W. 401; Shrewsbury *v.* Blount, 2 M. & G. 475, 2 Scott N. R. 588, 40 E. C. L. 700.

As to what will be a sufficient allegation of an intent to deceive see Matthews *v.* Stanford, 17 Ga. 543 [*sub nom.* Sisson *v.* Matthews, 20 Ga. 848]; Miner *v.* Medbury, 6 Wis. 295; Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodh. & M. 90; Evans *v.* Collins, 5 Q. B. 804, Dav. & M. 72, 7 Jur. 743, 12 L. J. Q. B. 339, 48 E. C. L. 804; Rawlings *v.* Bell, 1 C. B. 951, 9 Jur. 973, 14 L. J. C. P. 265, 50 E. C. L. 951; Gerhard *v.* Bates, 2 E. & B. 476, 20 Eng. L. & Eq. 129, 75 E. C. L. 476.

64. Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 715; Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541]; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380; Weir *v.* Bell, 3 Ex. D. 238, 47 L. J. Exch. 704, 38 L. T. Rep. N. S. 929, 26 Wkly. Rep. 746; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634. *Compare* Taylor *v.* Ashton, 7 Jur. 978, 12 L. J. Exch. 363, 11 M. & W. 401. Note again that in consequence of the decision in Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33, the rule was fixed in England by a statute known as the "Directors Liability Act," 53 & 54 Vict. c. 64.

65. See for instance Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915, where both of these propositions were asserted.

66. Scotland Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145; New Brunswick, etc., R., etc., Co. *v.* Conybeare, 9 H. L. Cas. 711, 8 Jur. N. S. 575, 31 L. J. Ch. 297, 6 L. T. Rep. N. S. 109.

67. Scotland Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145; Mackay *v.* New Brunswick Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31, 30 L. T. Rep. N. S. 180, 22 Wkly. Rep. 473; *Re* England L. Assoc., 34 Beav. 639, 11 Jur. N. S. 359, 34 L. J. Ch. 278, 12 L. T. Rep. N. S. 43, 13 Wkly. Rep. 486; Ayre's Case, 25 Beav. 513, 4 Jur. N. S. 596, 27 L. J. Ch. 579; *Re* Royal British Bank, 4 Drew. 205, 3 Jur. N. S. 879, 26 L. J. Ch. 855, 5 Wkly. Rep. 858; New Brunswick, etc., R., etc., Co. *v.* Conybeare, 9 H. L. Cas. 711, 8 Jur. N. S. 575, 31 L. J. Ch. 297, 6 L. T. Rep. N. S. 109; Ranger *v.* Great Western R. Co., 5 H. L. Cas. 72; Glasgow Nat. Exch. Co. *v.*

comes to it through the fraud of its agent.[68] But an action at law for damages, the gist of which is fraudulent intent, can obviously be maintained only against him who has been guilty of the fraudulent intent.[69] It is said that the representations must not only be false in fact, but they must have been made with an intent to deceive. This intent may be inferred from evidence showing that the party making them knew of their falsity at the time, or at least professed knowledge of their truth, when in point of fact he was conscious he had none. But in either case falsehood uttered with intent to deceive is essential to this liability on the part of directors.[70]

(II) *Not Liable For False Representations Made Under Reasonable and Well-Grounded Belief of Their Truth.* Such an action will not lie where the representations, although untrue, were made *bona fide* and under a reasonable and well-grounded belief that they were true.[71]

(III) *Director Must Have Affirmatively Participated in Fraud — Lending His Name Not Sufficient.* Quite consistently with this view it has been held that the mere fact that a person has allowed his name to be used for the purpose of floating the stock of the corporation which afterward turns out

Drew, 2 Macq. 103; *Ex p.* Ginger, 5 Ir. Ch. 174.

68. Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92; Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; Lord Chelmsford, in Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201; Scotland Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145. See on the general principle Atwood *v.* Wright, 29 Ala. 346; Bowers *v.* Johnson, 10 Sm. & M. (Miss.) 169; Meadows *v.* Smith, 42 N. C. 7; Harris *v.* Delamar, 38 N. C. 219; Bridgman *v.* Green, 2 Ves. 627, 28 Eng. Reprint 399; Huguenin *v.* Beaseley, 14 Ves. Jr. 273, 9 Rev. Rep. 148, 276, 2 White & T. Lead. Cas. 597.

69. Arthur *v.* Griswold, 55 N. Y. 400.

70. Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578; Nelson *v.* Luling, 36 N. Y. Super. Ct. 544 [*affirmed* in 62 N. Y. 645]. To the same general principle see Evans *v.* Collins, 5 Q. B. 804, Dav. & M. 72, 7 Jur. 743, 12 L. J. Q. B. 339, 48 E. C. L. 804.

Operation of the statute of limitations upon such actions. Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29.

71. Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541]. So previously held in Shrewsbury *v.* Blount, 2 M. & G. 475, 2 Scott N. R. 588, 40 E. C. L. 700. See also *In re* Wales Nat. Bank, [1899] 2 Ch. 629, 68 L. J. Ch. 634, 81 L. T. Rep. N. S. 363, 48 Wkly. Rep. 99. The decision of the house of lords in the celebrated case of Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33, which allowed directors to substitute their own belief in the place of their knowledge in putting forth prospectuses concerning their company, and escape liability to their dupes, although their belief was ill-founded, provided it was *bona fide*, tended to let down the commercial morality of England to a deplorable extent, and was met with a storm of dissent on the part of the profession and the public. It was severely criticised by Sir Frederick Pollock, in the Law Quarterly Review, of October, 1889; and unfavorable professional comments upon it will be found in 5 Law Quart. Rev. 410; 6 Law Quart. Rev. 72; 6 Law Quart. Rev. 112; 7 Law Quart. Rev. 106. But the rule which it established was subsequently abrogated by act of parliament. Directors Liability Act 1890; L. J. Stat. 403, L. R. Stat. 516, set out in full in 2 Thompson Corp. § 1466. For a construction and application of this statute see Drincqbier *v.* Wood, [1899] 1 Ch. 393, 68 L. J. Ch. 181, 79 L. T. Rep. N. S. 548, 6 Manson 76, 47 Wkly. Rep. 252, holding it too late for a shareholder to repudiate prospectus after an action has been commenced to enforce his liability. *Compare In re* Moore, [1899] 1 Ch. 627, 68 L. J. Ch. 302, 80 L. T. Rep. N. S. 104, 6 Manson 290, 47 Wkly. Rep. 401 [*reversing* 67 L. J. Ch. 677, 79 L. T. Rep. N. S. 70, 5 Manson 243]. The rule in Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33, was apparently the rule established in English courts of the common law. Shrewsbury *v.* Blount, 2 M. & G. 475, 2 Scott N. R. 588, 40 E. C. L. 700. But this rule was opposed to earlier decisions in the English court of chancery. Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Eaglesfield *v.* Londonderry, 4 Ch. D. 693, 35 L. T. Rep. N. S. 822, 25 Wkly. Rep. 190; Slim *v.* Croucher, 1 De G. F. & J. 518, 6 Jur. N. S. 437, 29 L. J. Ch. 273, 8 Wkly. Rep. 347, 62 Eng. Ch. 401; Burrowes *v.* Lock, 10 Ves. Jr. 470, 8 Rev. Rep. 33, 856. Although even in the court of chancery decisions are found supporting it. Ship *v.* Crosskill, L. R. 10 Eq. 73, 39 L. J. Ch. 550, 22 L. T. Rep. N. S. 315, 18 Wkly. Rep. 618; Burrowes *v.* Lock, 10 Ves. Jr. 470, 8 Rev. Rep. 33, 856. *Compare* Slim *v.* Croucher, 1 De G. F. & J. 518, 6 Jur. N. S. 437, 29 L. J. Ch. 273, 8 Wkly. Rep. 347, 62 Eng. Ch. 401.

to be worthless, will not make him liable, in the absence of proof that he participated in the publishing of the false representations.[72]

c. Actions For Deceit Distinguishable From Actions For Rescission or Compensation. Actions at common law for such deceits must be carefully distinguished from actions, either at law or in equity, to effect rescission[73] of the contract or to recover what plaintiff parted with to defendant by reason of the fraud, as so much money had and received by defendant to the use of plaintiff — this latter being often called an equitable action.

d. Whether Necessary That Plaintiff, in Order to Maintain Action Against Directors For Deceit, Should Have Been Immediate Purchaser of Shares From Corporation. According to the English doctrine it is so necessary; so that if, in the atmosphere of delusion produced by the fraudulent misrepresentations of the directors, the original subscribers to the shares succeed in unloading them upon other purchasers, such purchasers can have no redress, either at law or in equity, against the directors for the deceit which has really resulted in their damage.[74] The American doctrine, founded on a better conception of morality and justice is otherwise. Here it will be sufficient if the misrepresentations were contained in circulars, prospectuses, or other advertisements, with the view of influencing the public at large, or any member of the public who might chance to fall into the trap so baited, and purchase the shares; and that plaintiff saw the circulars, etc., and was by the misrepresentations contained in them, induced to become a purchaser of the shares.[75] Under this doctrine, supported by some of the overruled cases in England,[76] it is not at all necessary that the representations should have been communicated directly to the persons thereby induced to purchase the shares, nor is it necessary that they should have been concocted with the view of deceiving any person whom the deception might catch and impose upon.[77]

72. Morgan *v.* Skiddy, 62 N. Y. 319. It was so held where plaintiff, instead of purchasing shares, loaned money to the corporation. Arthur *v.* Griswold, 55 N. Y. 400.

73. See for illustration Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024.

74. Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29 [*affirming* L. R. 13 Eq. 79, *overruling* Bagshaw *v.* Seymour, 18 C. B. 903, 29 L. J. Exch. 62, note 2, 86 E. C. L. 903, and Bedford *v.* Bagshaw, 4 H. & N. 538, 29 L. J. Exch. 59, and *adopting* Gerhard *v.* Bates, 2 E. & B. 476, 20 Eng. L. & Eq. 129, 75 E. C. L. 476, and Scott *v.* Dixon, 29 L. J. Exch. 62, note 3]. The English doctrine, drawn from a celebrated case (Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519), is that where a person other than the immediate person to whom the false representations were made, has been damnified thereby and seeks to recover damages therefor, he must make it appear that the false representation was made with intent that it should be acted upon by him in such a manner as has been the cause of his loss. Barry *v.* Croskey, 2 Johns. & H. 1, not the American law.

75. Morgan *v.* Skiddy, 62 N. Y. 319; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578; Cross *v.* Sackett, 2 Bosw. (N. Y.) 617; Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596; Clarke *v.* Dickson, 6 C. B. N. S. 453, 5 Jur. N. S. 1027, 28 L. J. C. P. 225, 7 Wkly. Rep. 443, 95 E. C. L. 453. See also Davidson *v.* Tulloch, 6 Jur. N. S. 543, 3 Macq. 783, 2 L. T. Rep. N. S. 97, 8 Wkly. Rep. 309; and *supra*, VI, K, 5, e, (I) *et seq.*

76. Clarke *v.* Dickson, 6 C. B. N. S. 453, 5 Jur. N. S. 1027, 28 L. J. C. P. 225, 7 Wkly. Rep. 443, 95 E. C. L. 453; Bedford *v.* Bagshaw, 4 H. & N. 538, 29 L. J. Exch. 59.

77. Watson *v.* Crandall, 7 Mo. App. 233 [*affirmed* in 78 Mo. 583]. See also Bruff *v.* Mali, 36 N. Y. 200; Shotwell *v.* Mali, 38 Barb. (N. Y.) 445; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578. The Missouri court cited with approval the following observation of Lord Hatherly, then vice-chancellor, in Barry *v.* Croskey, 2 Johns. & H. 1, quoted by Lord Cairns in Peek *v.* Gurney, L. R. 6 H. L. 377, 413, 43 L. J. Ch. 19, 22 Wkly. Rep. 29: "Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting, is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss." *Compare* Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519. A useful review of the decisions on this question was contributed to a legal publication called The Advocate, by Dr. Bailey, of North Carolina. 1 Adv. 389 *et seq.*

Illustrations of the American doctrine and of the overruled English doctrine may be collected from the following cases: Baker *v.* Crandall, 7 Mo. App. 564 [*affirmed* in 78 Mo. 584, 47 Am. Rep. 126]; Watson *v.* Crandall, 7 Mo. App. 233 [*affirmed* in 78 Mo. 583];

e. Liability of Directors, Promoters, and Managers For Each Other's Frauds. Where several persons engage in business jointly, and to facilitate such business use a corporate name and issue stock, and in the promotion of the scheme false representations are made by those holding themselves out as promoters and managers of the business as to the material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making the false representations are liable to those who, relying upon such representations, purchase stock to their hurt.[78]

f. Liability of Directors For Frauds of Agents Employed by Them. In such a case as that stated in the last preceding section all the coadventurers will be liable, on the principle of *respondeat superior*, in damages for the consequences of the fraud of the common agent whom they have employed to effect the sale of the shares, without reference to the question of their own moral guilt or innocence. "The rule is, as it ought to be, that he who has put his trust in the wrongdoer, and held him out to the world as a person to be dealt with, shall bear the burden of his acts."[79] In such a case the negligence or confessed ignorance of one of the directors as to the fraudulent representations used and the fraudulent means employed by the common agent will not avail to exonerate him.[80]

g. The Fraudulent Misrepresentations Must Have Been a Material Inducement to the Contract—(i) *In General.* Moreover the fraudulent misrepresentations must have been a material inducement to the act of plaintiff in purchasing the shares. It must have been a misrepresentation or concealment *dans locum contractui*, giving occasion to the contract.[81] It must have been a proximate or immediate cause of inducement to the purchase of the shares, although it will be immaterial that other influences at the same time may have been at work.[82] The fraudulent representations or concealment need not have been the sole inducement to the act of plaintiff in purchasing the shares;[83] the meaning is that plaintiff must have been in fact deceived by the representations which defendant made.[84]

(ii) *If Purchaser Relied Upon Misrepresentations, Immaterial That He Made Other Inquiries.* In such a case, if it is found as a fact upon evidence that the purchaser relied upon the misrepresentations of the promoters or directors, it is not an objection to his right to recover of them on the ground of deceit that he made inquiries in other directions, provided that it may be fairly

Hornblower *v.* Crandall, 7 Mo. App. 220 [*affirmed* in 78 Mo. 581]; Bedford *v.* Bagshaw, 4 H. & N. 538, 29 L. J. Exch. 59.

78. Hornblower *v.* Crandall, 7 Mo. App. 220 [*affirmed* in 78 Mo. 581].

79. For cases affirming this principle see White *v.* Sawyer, 16 Gray (Mass.) 586; Locke *v.* Stearns, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; St. Aubyn *v.* Smart, L. R. 5 Eq. 183, 17 L. T. Rep. N. S. 439, 16 Wkly. Rep. 394; Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147; Mackay *v.* New Brunswick Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31, 30 L. T. Rep. N. S. 180, 22 Wkly. Rep. 473; Swift *v.* Jewsbury, L. R. 9 Q. B. 301, 43 L. J. Q. B. 56, 30 L. T. Rep. N. S. 31, 22 Wkly. Rep. 319.

80. Hornblower *v.* Crandall, 7 Mo. App. 220, opinion by Hayden, J. [*affirmed* in 78 Mo. 581]. To the last point the learned judge who wrote the opinion of the intermediate court cited the following cases: Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188; Chester *v.* Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628; Castle *v.* Bullard, 23 How. (U. S.) 172, 16 L. ed. 424.

81. Pulsford *v.* Richards, 17 Beav. 87, 17 Jur. 865, 22 L. J. Ch. 559, 1 Wkly. Rep. 295, 19 Eng. L. & Eq. 387.

Statements in articles of association.—Directors not liable to one who has purchased his shares on the faith of false statements contained in the articles of association, because these necessarily preceded, in the order of time, the organization of the board of directors. Mabey *v.* Adams, 3 Bosw. (N. Y.) 346.

82. Lord Carnsworth, in Matter of Royal British Bank, 3 De G. & J. 387, 420, 5 Jur. N. S. 205, 28 L. J. Ch. 257, 7 Wkly. Rep. 217, 60 Eng. Ch. 301.

83. Morgan *v.* Skiddy, 62 N. Y. 319 [*affirming* 36 N. Y. Super. Ct. 152]. This is a general principle in the law of fraud. Arthur *v.* Griswold, 55 N. Y. 400.

84. Priest *v.* White, 89 Mo. 609, 1 S. W.

inferred that his main and substantial reliance was upon what these defendants said and did.[85]

(III) *Opinions Mingling With Fraudulent Representations.* Nor is it material that with the fraudulent representations as to matters of fact many expressions of opinion were mingled which would have afforded no ground of action.[86]

(IV) *Right of Purchaser to Rely Upon Representations.* Persons investing in stocks under circumstances like the present[87] have a right to confide in those who hold themselves out as the promoters and managers of a business which they are carrying on, so far as concerns representations made by such promoters, or under their authority, as to material facts of inducement peculiarly within the knowledge of the associates or their agents.[88]

h. Liability Where Memorandum of Association Creates Company With Wider Powers Than Those Named in Prospectus. Where the memorandum of association, under the English law, which would be the articles of association, or the articles of incorporation under the American law, creates a company with wider powers than those named in the prospectus which the directors have issued to induce the public to subscribe for its shares, this mere fact in the absence of actual fraud will not avail one who on the faith of the prospectus subscribes for shares and advances money therefor, to recover the same from the directors in case the company is wound up.[89]

12. Effect of Statute of Frauds. A clause of the statute of frauds, as enacted in most of the states, provides that no action "shall be brought to charge any person upon, or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some persons thereunto by him lawfully authorized."[90] One court has placed a construction upon this statute which shields the directors of a corporation from personal responsibility for oral representations concerning

361; Eaglesfield *v.* Londonderry, 4 Ch. D. 693, 35 L. T. Rep. N. S. 822, 25 Wkly. Rep. 190. See also *supra*, VI, K, 2, a.

85. Hornblower *v.* Crandall, 7 Mo. App. 220 [*affirmed* in 78 Mo. 581].

86. Hornblower *v.* Crandall, 7 Mo. App. 220 [*affirmed* in 78 Mo. 581].

87. The investers were residents of a distant state. See 2 Thompson Corp. § 1370 *et seq.*

88. Hornblower *v.* Crandall, 7 Mo. 220, opinion by Hayden, J. [*affirmed* in 78 Mo. 581].

Upon this question of offsetting negligence, and over-confidence induced by the fraud of the party making the misrepresentations, it has been held on the one hand that a party contracting with a corporation, who is at the time in a position where by ordinary business diligence he could readily discover the existing condition of the affairs of the corporation, he being at the time a director and having access to its books, will not be relieved on the ground of fraudulent representations made by other officers of the corporation. Powell *v.* Adams, 98 Mo. 598, 12 S. W. 295. Yet on the other hand the originator and promoter of an enterprise, who is also the business manager, and fully conversant with every fact of its past history and present condition, and who by false representations as to the value of the stock of the company induces a stranger to the enterprise to trade valuable property for stock upon which the former places an exhorbitant valuation, is not relieved from liability for damages because the purchaser of the stock did not make diligent inquiry as to the truth or falsity of the representations. Cottrill *v.* Crum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549.

89. Ship *v.* Crosskill, L. R. 10 Eq. 73, 39 L. J. Ch. 550, 22 L. T. Rep. N. S. 315, 18 Wkly. Rep. 618.

90. Mass. Rev. Stat. c. 74, § 3; Mass. Pub. Stat. c. 78, § 4. Similarly see How. Stat. Mich. § 6188; Mo. Rev. Stat. § 2515, drawn from 4 Geo. IV, c. 14, § 6. This statute is regarded as a part of the statute of frauds, but has not been adopted in the American jurisdictions. In construing it it is held that if written representations are the substantial inducements a recovery can be had, although some reliance may have been placed upon oral assurances. Clark *v.* Edgar, 84 Mo. 106, 54 Am. Rep. 84; Tatton *v.* Wade, 18 C. B. 371, 86 E. C. L. 371. That is to say, if the oral representations are merely incidental, or stated in furtherance of the main ground of the complaint, they will not bring the case within the statute. Clark *v.* Edgar, 84 Mo. 106, 54 Am. Rep. 84. See construing the statute Devaux *v.* Steinkeller, 6 Bing. N. Cas. 84, 8 Dowl. P. C. 33, 3 Jur. 1053, 9 L. J. C. P. 30, 8 Scott 202, 37 E. C. L. 521, and the other cases below cited.

its condition, whereby the corporation has procured credit.[91] Another court, on the contrary, holds that such a statute has no application to conspiracies of frauds where the representation is made to enable the party making it to profit by it; and consequently that it has no application to a case where the fraudulent representations are made as to an alleged corporation which has no legal existence and where the pretense of the legal existence of the corporation is itself a fraud; because in such a case the representation is not a representation as to the character or credit of another person.[92]

13. ACTION BY SURETIES OF CORPORATE OFFICERS AGAINST TRUSTEES FOR FRAUDULENT REPRESENTATIONS. Sureties who have been induced to sign the bond of a bank treasurer by oral statements as to the soundness of the bank, made by trustees of the bank as individuals, to third persons, not intended to get to the knowledge of the sureties or to induce them to sign, cannot maintain an action against such trustees for damages which they have sustained in so becoming sureties, predicated on the fact of such representations being false and fraudulent.[93]

14. JURISDICTION OF LAW AND EQUITY CONCURRENT. In these cases the fact that the person defrauded has a remedy at law does not oust the jurisdiction at equity to afford him suitable relief; since such cases proceed upon the ground of fraud, the jurisdiction of law and that of equity are concurrent.[94]

15. ADVANTAGE OF RESORTING TO EQUITY. The only advantage of going into equity with such a suit seems to be to obtain a more ample remedy. In an action at law for deceit, plaintiff can recover only the damages he has suffered. But in equity he may claim (1) a cancellation of his subscription; (2) a decree against the directors jointly and severally for the repayment to him of all the moneys paid for the shares; and (3) an injunction against future calls. To such a suit of course the corporation is a party.[95]

91. Hunnewell *v.* Duxbury, 157 Mass. 1, 31 N. E. 700.

Analogous holdings by the same court, under the same statute, will be found in McKinney *v.* Whiting, 8 Allen (Mass.) 207; Mann *v.* Blanchard, 2 Allen (Mass.) 386; Wells *v.* Prince, 15 Gray (Mass.) 562; Kimball *v.* Comstock, 14 Gray (Mass.) 508; Norton *v.* Huxley, 13 Gray (Mass.) 285; Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726.

92. Hess *v.* Culver, 77 Mich. 598, 43 N. W. 994, 18 Am. St. Rep. 421, 6 L. R. A. 498. It was no defense to an action to charge directors with a personal liability to one who had purchased second-mortgage bonds of the corporation, fraudulently stamped by them as first-mortgage bonds. Clark *v.* Edgar, 84 Mo. 106, 54 Am. Rep. 84.

93. Ashuelot Sav. Bank *v.* Albee, 63 N. H. 152, 56 Am. Rep. 501 [*denying* Graves *v.* Lebanon Nat. Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50]..

94. Leffman *v.* Flanigan, 5 Phila. (Pa.) 155, 20 Leg. Int. (Pa.) 148; Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Barry *v.* Croskey, 2 Johns. & H. 1; Seddon *v.* Connell, 8 L. J. Ch. 341, 10 Sim. 58, 16 Eng. Ch. 58; Stainbank *v.* Fernley, 3 Jur. 262, 8 L. J. Ch. 142, 9 Sim. 556, 16 Eng. Ch. 556.

The remedy in equity may be availed of by a director who, when he finds himself liable to become involved in actions for damages by reason of such fraudulent prospectuses, may have an injunction to restrain the unauthorized use of his name. Routh *v.* Webster, 10 Beav. 561, 11 Jur. 701. That the creditors are not obliged to go into equity but may proceed at law see Rock Valley State Bank *v.* Andrews, 18 N. Y. Suppl. 167.

95. *Connecticut.*— Ashmead *v.* Colby, 26 Conn. 287.

Tennessee.— State *v.* Jefferson Turnpike Co., 3 Humphr. 305.

Texas.— Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

Wisconsin.— Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575.

England.— *In re* Ruby Consol. Min. Co., L. R. 9 Ch. 664, 43 L. J. Ch. 633, 31 L. T. Rep. N. S. 55, 22 Wkly. Rep. 833; Ross *v.* Estates Invest. Co., L. R. 3 Ch. 682, 37 L. J. Ch. 873, 19 L. T. Rep. N. S. 61, 16 Wkly. Rep. 1151 [*affirming* L. R. 3 Eq. 122]; Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328; Smith *v.* Reese River Co., L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T. Rep. N. S. 283, 14 Wkly. Rep. 606 [*affirming* L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024]; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821; Cargill *v.* Bower, 10 Ch. D. 502, 47 L. J. Ch. 649, 38 L. T. Rep. N. S. 779, 26 Wkly. Rep. 716; Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237; Thorpe *v.* Hughes, 3 Myl. & C. 742, 14 Eng. Ch. 742.

Corporation a necessary party to a suit in equity brought by a creditor of the corporation against its officers and shareholders. Deerfield *v.* Nims, 110 Mass. 115.

16. Doctrine That Grounds of Recovery Are Same at Law and in Equity. In giving relief in these cases against the directors and officers, the courts of law and the courts of equity proceed, according to the highest authority, upon the same grounds; and this is logically and undeniably so, unless we are prepared to admit that there can be two kinds of law in the same jurisdiction, depending upon the forum in which relief is sought, and what is right in one forum might be wrong in the other.[96] "There can be no doubt," says Lord Chelmsford, "that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity."[97] The previous discussion has suggested what these grounds are: (1) False representations; (2) a guilty *scienter*; (3) proximate damage to plaintiff.[98] "If you do not fix them with what is technically called a *scienter*, upon an action of deceit, you cannot fix them personally with the consequences of the injury or damage that may result to the Plaintiff who has been so deceived."[99] Another judge has said that in such a case the chancellor cannot make any other inquiry than this: "Were the representations wilfully false and fraudulent?"[1] And upon this ground he ruled that a director of a company is not liable for a fraud of this nature committed by his co-directors, or by any other agent of the company, although guilty of gross negligence, unless there was an intention to allow of the commission of the fraud.[2]

17. Action Against Both Directors and Managers. There is no obstacle to bringing an action of this kind both against the directors and the managers, if both concurred in committing the fraud.[3]

18. Liable For Preferring One General Creditor Over Another. If anything of substance remains in this "trust-fund doctrine" it carries with it the conclusion that when the line of insolvency of the corporation is reached or sensibly approached, the directors become charged with a trust in favor of all the creditors, which necessarily means that in dealing with the trust funds they must treat the creditors equally, according to their respective course of priority; from which the conclusion flows that if they dissipate the assets in favor of one creditor by preferring him, at the same time postponing another creditor of an equal grade, they are liable to make good to the latter out of their personal estates what he has lost by their breach of trust.[4]

96. In an article in the April number, 1880, of the American Law Review, by Hon. James V. Campbell, of Michigan, every line of which is full of thought, that able judge says: "In those States which retain the distinctions between law and equity, the difference is generally one of remedies; and legal and equitable suits differ only as actions of assumpsit differ from ejectment or replevin." 1 Am. L. Rev. 265.

97. Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29.

98. Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328; Barry *v.* Croskey, 2 Johns. & H. 1.

99. Sir W. Page Wood, V. C., in Henderson *v.* Lacon, L. R. 5 Eq. 249, 262, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328.

1. Cargill *v.* Bower, 10 Ch. D. 502, 516, 47 L. J. Ch. 649, 38 L. T. Rep. N. S. 779, 26 Wkly. Rep. 716, Fry, J.

2. Cargill *v.* Bower, 10 Ch. D. 502, 47 L. J. Ch. 649, 38 L. T. Rep. N. S. 779, 26 Wkly. Rep. 716. See also on this subject the very learned and interesting opinion of Hare, J., in Leffman *v.* Flanigan, 5 Phila. (Pa.) 155, 20 Leg. Int. (Pa.) 148, in which he shows that the rule in equity is so far different from that at law that there are many cases in which a party will not be allowed to refuse redress to another whom he has merely misled by unfounded assurances, on the ground that he spoke ignorantly and was free from intentional wrong.

3. Cullen *v.* Thompson, 9 Jur. N. S. 85, 6 L. T. Rep. N. S. 870, 4 Macq. 431, 2 Paton App. Cas. 143.

4. Richards *v.* New Hampshire Ins. Co., 43 N. H. 263. But this rule must not be carried so far as to make directors responsible to the holder of a litigated claim, which after being established goes unpaid, when acting in good faith, but without proper care, they reserve a sum which they think will be sufficient to meet all claims, this included, and it turns out to be insufficient. Lyman *v.* Bonney, 118 Mass. 222.

In England, where the doctrine that the directors of a company are trustees for its creditors does not obtain, the rule is different; the directors do not make themselves liable by preferring particular creditors, although it is done to absolve themselves from liability as guarantors. *In re* Wincham Shipbuilding, etc., Co., 9 Ch. D. 322, 48 L. J. Ch. 48, 38 L. T. Rep. N. S. 659, 26 Wkly. Rep. 823.

Estoppel.— Where the officers and shareholders of a corporation prefer themselves as

19. Liable For Fraudulently Diverting Assets of Corporation From Its Creditors. Outside of statutes, considered later,[5] and proceeding upon the principle that the assets of an insolvent corporation are a trust fund for its creditors, and that whoever is found in possession of a trust fund under circumstances which charge him with a knowledge of the trust is bound to account as trustee to those beneficially interested in such fund,[6] courts of equity frequently afford relief to the creditors of insolvent corporations. Under this so-called "trust-fund doctrine" even the shareholders of a corporation are conclusively charged with knowledge of the trust character which attaches to its capital stock. As to it they cannot occupy the status of innocent purchasers, but they are to all intents and purposes privies to the trust. When therefore they have in their hands any portion of this trust fund, they hold it *cum onere*, subject to the equities which attach to it in favor of others.[7] If this is true of shareholders it is true for stronger reasons of directors who, under all schemes of corporate organization, must not only be shareholders, but who also, as the managing agents of the corporation, are in a certain sense the custodians of the fund itself.[8] This doctrine has been applied so as to charge unfaithful directors with personal liability under the following circumstances: Where the managing director of a bank drew its funds to a very large amount without security and used them in his private business, in consequence of which the bank became insolvent, thus rendering the directors liable to account in equity for the amount so drawn,[9] where the directors of a corporation declared dividends when there were in reality no surplus assets to divide, in which case a creditor of the corporation was allowed to maintain a bill in equity against a director who as a shareholder had received his share of such dividend to subject them to the payment of his debt, although the dividend was not paid to him in cash, but went to him in the form of a credit upon his stock subscription;[10] where the charter of a bank required its shares to be paid in gold and silver and in notes or bills which the corporators or directors might deem equivalent to or better than specie, and the directors had taken in payment of their subscriptions notes which the subscribers had indorsed for each other, the conclusion being that this made the directors personally liable to the noteholders and creditors of the corporation for the whole amount of the capital stock pretended to be paid up in this way;[11] and where the charter of a bank required a certain portion of its capital stock to be paid in in specie, before the directors should be permitted to issue any circulating notes, and the directors in disregard of this inhibition put in circulation notes of the bank and the bank afterward became insolvent, the conclusion being that the billholders and other creditors might proceed at once against the shareholders for the stock subscribed

creditors, they are not, according to a low conception, estopped as against unsecured creditors from denying that the corporation had a capital of twenty-five thousand dollars, by the fact that its manager used letter-heads stating the capital to be twenty-five thousand dollars, in the absence of proof that the creditors became such on the faith of such representations St. Marys' Bank *v.* St. John, 25 Ala. 566; Calhoun *v.* King, 5 Ala. 523; Gratz *v.* Redd, 4 B. Mon. (Ky.) 178; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308; Adair *v.* Shaw, 1 Sch. & Lef. 266; Hill *v.* Simpson, 7 Ves. Jr. 152, 6 Rev. Rep. 105.

5. See *infra*, IX, P, 1, a *et seq.*

6. St. Marys' Bank *v.* St. John, 25 Ala. 566; Calhoun *v.* King, 5 Ala. 523; Gratz *v.* Redd. 4 B. Mon. (Ky.) 178; Wood *v.* Dummer. 30 Fed. Cas. No. 17.944, 3 Mason 308; Adair *v.* Shaw, 1 Sch. & Lef. 266; Hill *v.* Simpson, 7 Ves. Jr. 152, 6 Rev. Rep. 105.

7. Gratz *v.* Redd, 4 B. Mon. (Ky.) 178; Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57; Wood *v.* Dummer, 30 Fed. Cas. No. 17,944, 3 Mason 308.

8. Gratz *v.* Redd, 4 B. Mon. (Ky.) 178.

9. St. Marys' Bank *v.* St. John, 25 Ala. 566, the accounting was to the bank. *Compare* Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528.

10. Gratz *v.* Redd, 4 B. Mon. (Ky.) 178 [*recognized* in Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528]. *Compare* Rorke *v.* Thomas, 56 N. Y. 559; Osgood *v.* Laytin, 3 Abb. Dec. (N. Y.) 418, 3 Keyes (N. Y.) 521, 3 Transcr. App. (N. Y.) 124, 5 Abb. Pr. N. S. (N. Y.) 1, 37 How. Pr. (N. Y.) 63.

11. Moses *v.* Ocoee Bank, 1 Lea (Tenn.) 398, opinion of Heiskell, special judge, affirming decree of Cooper, chancellor.

and not paid in, and against the directors for the breach of trust which they had thus committed.[12] For the same reason the directors of a savings fund are liable to account in equity to the depositors for a maladministration of their trust, consisting of frauds or of gross negligence.[13] So it has been held that where one corporation holds the property of an insolvent corporation in trust for administration among its creditors, and the directors of the trustee corporation misapply such assets, they make themselves personally liable to the creditors of the insolvent corporation, although the trustee corporation had assumed the debts of the insolvent corporation.[14]

20. Liable to Pay For "Qualification Shares." Upon the question whether, in case the charter or other governing instrument of the corporation require that each director shall hold a certain number of shares in the corporation, one who becomes a director therein is *ipso facto* liable to pay for that number of shares in order to satisfy the demands of creditors in the event of the insolvency of the corporation, the conclusion of the English courts seems to be: (1) That the mere fact of accepting the office of director does not make the person a shareholder in respect of the number of shares necessary to qualify him to hold the office, but that it merely implies an agreement that he will qualify himself by procuring, either from the company or from some shareholder, the necessary shares.[15] (2) But that where he accepts the office of director and acts as such, and suffers himself to be held out as a shareholder, either by having his name put

12. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121. *Compare* Branch *v.* Roberts, 50 Barb. (N. Y.) 435.

13. Maisch *v.* Seamen's Sav. Fund Soc., 5 Phila. (Pa.) 30, 19 Leg. Int. (Pa.) 140. The jurisdiction of equity to call the directors of a saving fund to account is also very ably maintained by Hare, J., in Leffman *v.* Flanigan, 5 Phila. (Pa.) 155, 20 Leg. Int. (Pa.) 148.

14. Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101.

Cases not falling within this principle.— Kraft-Holmes Grocery Co. *v.* Crow, 36 Mo. App. 288 (director made *bona fide* advances to the corporation and then, after it had become insolvent, appropriated to his own use accounts due to it, to pay interest accruing on the advances, there being no fraud); Knowles *v.* Duffy, 40 Hun (N. Y.) 485 (not necessarily a fraud for trustees to purchase property from one of their number for the benefit of the corporation, paying therefor its entire capital stock); White, etc., Mfg. Co. *v.* Henry B. Pettes Importing Co., 30 Fed. 864 (directors of an insolvent corporation still doing business not liable to creditors by reason of making a *bona fide* sale of its assets to an attaching creditor, upon his agreement to cancel his own debt and discharge the debts of other attaching creditors).

Creditors may also follow misappropriated assets as a trust fund.— Peychaud *v.* Hood, 23 La. Ann. 732; Williams *v.* Colby, 3 Silv. Supreme (N. Y.) 337, 6 N.Y. Suppl. 459, 24 N. Y. St. 793; Chicago Union Nat. Bank *v.* Douglass, 24 Fed. Cas. No. 14,375, 1 McCrary 86. *Compare* Saltmarsh *v.* Spaulding, 147 Mass. 224, 17 N. E. 316 (when purchaser at subsequent execution sale cannot maintain a right of entry against a director purchasing the same property at a previous sale): Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101 (cannot follow them into the hands of the *bona fide* purchaser for value without notice).

15. *In re* Metropolitan Public Carriage, etc., Co., L. R. 9 Ch. 102, 43 L. J. Ch. 153, 29 L. T. Rep. N. S. 562, 22 Wkly. Rep. 171; *In re* Anglo-Moravian Hungarian Junction R. Co., L. R. 8 Ch. 768, 42 L. J. Ch. 857. *Contra, In re* Disderi, L. R. 11 Eq. 242, 40 L. J. Ch. 248, 23 L. T. Rep. N. S. 694, 19 Wkly. Rep. 175. *Compare In re* Canadian Oil Works Corp., L. R. 10 Ch. 593, 44 L. J. Ch. 721, 33 L. T. Rep. N. S. 466, 24 Wkly. Rep. 191; *In re* General International Agency, L. R. 2 Eq. 567, 14 L. T. Rep. N. S. 752; *In re* Peninsular, etc., Bank, L. R. 2 Eq. 435, 15 L. T. Rep. N. S. 140, 14 Wkly. Rep. 1010; *In re* Englefield Colliery Co., 8 Ch. D. 388; *In re* Percy, etc., Nickel, etc., Min. Co., 7 Ch. D. 132, 47 L. J. Ch. 201, 37 L. T. Rep. N. S. 807, 26 Wkly. Rep. 291; *In re* East Norfolk Tramways Co., 5 Ch. D. 963, 26 Wkly. Rep. 3; *In re* Percy, etc., Nickel, etc., Min. Co., 5 Ch. D. 705, 46 L. J. Ch. 543, 37 L. T. Rep. N. S. 349, 25 Wkly. Rep. 600. Contrary to the rule declared in later cases, persons who had acted as directors, and who had even permitted their names to appear in the prospectus as such for the purpose of raising further capital, were permitted to show that they did not qualify in certain particulars; e. g., that they did not apply for shares (*In re* Freehold, etc., Invest. Co., L. R. 18 Eq. 428, 43 L. J. Ch. 629, 30 L. T. Rep. N. S. 672, 22 Wkly. Rep. 791); that although shares were allotted to them they never signed the subscription contract (*Re* Hereford, etc., R. Co., 3 Giff. 28); that they were informed that no qualification shares were necessary; and that they never executed or saw the deed of settlement (Mather *v.* National Assur., etc., Soc., 14 C. B. N. S. 676, 108 E. C. L. 676). See also *supra*, VI, H, 18.

on the register as such, or otherwise, then he is deemed to have accepted the necessary number of shares to qualify him and will not be allowed to repudiate them after the company becomes insolvent.[16] (3) A director who actually accepts the shares necessary to qualify him will not be allowed to repudiate them on account of any informality in the transaction,[17] but this rule of liability does not apply to the provisional directors who are permitted to hold shares supplied to them and paid for by the promoter or his agent,[18] which is not permitted in the case of directors required to be qualified as such by holding a stated number of shares.[19] (5) That a person who has consented to act as director is entitled to resign the office without prejudice, if he does so within a reasonable time and before actually having assumed the duties of the position, in which case he will not be held to a liability to pay for qualification shares for which he has not subscribed.[20]

21. Director Liable For Allotting Shares to His Own Infant Child. If a director has procured or connived at the allotting of shares to an infant, or to any other person who cannot be made to respond to the liability of a shareholder, he has clearly been guilty of a breach of trust and ought to make good the loss which the company has thus sustained.[21]

P. Statutory Liability of Directors — 1. In General — a. General Statement as to Statutes Creating Such Liability. Statutes have been enacted, it may

16. *In re* Empire Assur. Corp., L. R. 6 Ch. 469, 40 L. J. Ch. 254, 19 Wkly. Rep. 664; *In re* Western of Canada Oil, etc., Co., L. R. 20 Eq. 580; *In re* British, etc., Tel. Co., L. R. 14 Eq. 316, 42 L. J. Ch. 9, 27 L. T. Rep. N. S. 748, 21 Wkly. Rep. 37; *In re* Great Oceanic Tel. Co., L. R. 13 Eq. 30, 41 L. J. Ch. 283, 25 L. T. Rep. N. S. 690, 20 Wkly. Rep. 84; *In re* British Colonial, etc., Ins. Corp., 45 L. J. Ch. 488. *Compare In re* Robinson, etc., Brewery Co., L. R. 13 Eq. 228 (signed memorandum of association, attended meeting of directors, and then resigned, and yet was held liable); *In re* Australian Direct Steam Nav. Co., 3 Ch. D. 661 [*affirmed* in 5 Ch. Div. 70].

The rule was held not to apply where the qualification was fixed by a resolution and not in the articles of association. *In re* British Provident L., etc., Assoc., 5 Ch. D. 306, 46 L. J. Ch. 360, 36 L. T. Rep. N. S. 329, 25 Wkly. Rep. 476.

17. Matter of Companies Act, 4 De G. J. & S. 426, 33 L. J. Ch. 731, 10 L. T. Rep. N. S. 394, 12 Wkly. Rep. 814, 994, 69 Eng. Ch. 328; Matter of Vale of Neath, etc., Brewery Joint-Stock Co., 3 De G. & Sm. 149, 14 Jur. 566 [*affirmed* on appeal in 19 L. J. Ch. 501]. And such would seem to be the rule where a person has agreed to become an officer of the company, e. g., a local manager, and has applied for the requisite number of shares to qualify him for the position, and in some respects entered upon the duties of his office. Matter of Richards, L. R. 6 C. P. 591, 40 L. J. C. P. 290, 24 L. T. Rep. N. S. 752, 19 Wkly. Rep. 893.

18. *In re* Anglo-Moravian Hungarian Junction R. Co., L. R. 8 Ch. 768, 42 L. J. Ch. 857.

19. *In re* Disderi, L. R. 11 Eq. 242, 40 L. J. Ch. 248, 23 L. T. Rep. N. S. 694, 19 Wkly. Rep. 175.

The directors were exonerated except for those shares for which they had actually subscribed in the following cases: Tothill's Case, L. R. 1 Ch. 85, 11 Jur. 1009, 35 L. J. Ch. 120, 13 L. T. Rep. N. S. 485, 14 Wkly. Rep. 153. *Compare In re* La Mancha Irr., etc., Co., L. R. 8 Ch. 548, 42 L. J. Ch. 465, 28 L. T. Rep. N. S. 652, 21 Wkly. Rep. 518; Matter of Companies Act, 4 De G. J. & S. 426, 33 L. J. Ch. 731, 10 L. T. Rep. N. S. 394, 12 Wkly. Rep. 814, 994, 69 Eng. Ch. 328; Matter of Great Northern, etc., Coal Co., 3 De G. J. & S. 367, 32 L. J. Ch. 421, 8 L. T. Rep. N. S. 472, 68 Eng. Ch. 278.

Circumstances under which directors cannot hold such shares as a gift from the promoters. *In re* Disderi, L. R. 11 Eq. 242, 40 L. J. Ch. 248, 23 L. T. Rep. N. S. 694, 19 Wkly. Rep. 175; *In re* Caerphilly Colliery Co., 4 Ch. D. 222 [*affirmed* in 5 Ch. D. 336, 46 L. J. Ch. 339, 25 Wkly. Rep. 618]; *In re* Western of Canada Oil Lands, etc., Co., 1 Ch. D. 115, 45 L. J. Ch. 5, 33 L. T. Rep. N. S. 645, 24 Wkly. Rep. 165; *Ex p.* Daniell, 1 De G. & J. 372, 58 Eng. Ch. 289. *Compare* Matter of Great Northern, etc., Coal Co., 3 De G. J. & S. 367, 32 L. J. Ch. 421, 8 L. T. Rep. N. S. 472, 68 Eng. Ch. 278.

Circumstances under which directors may hold unpaid qualification shares as paid up. *In re* Australian Direct Steam Nav. Co., 3 Ch. D. 661; Matter of Great Northern, etc., Coal Co., 3 De G. J. & S. 367, 32 L. J. Ch. 421, 8 L. T. Rep. N. S. 472, 68 Eng. Ch. 278. *Compare In re* British Provident L., etc., Assoc., 5 Ch. D. 306, 46 L. J. Ch. 360, 36 L. T. Rep. N. S. 329, 25 Wkly. Rep. 476.

20. *In re* Pelotas Coffee Co., L. R. 20 Eq. 506, 44 L. J. Ch. 622. See also *In re* East Norfolk Tramways Co., 5 Ch. D. 963, 26 Wkly. Rep. 3; *In re* National Ins., etc., Assoc., 4 De G. F. & J. 78, 8 Jur. N. S. 951, 31 L. J. Ch. 828, 10 Wkly. Rep. 548, 65 Eng. Ch. 62.

21. *In re* Crenver, etc., United Min. Co.,

be assumed in all the American states and territories, making directors personally liable for the debts of the corporation by reason of their having been guilty of certain misprisions or delinquencies hereafter described. These statutes are too numerous to collect and classify in the space to which this article is limited; but their leading features, and the leading rules adopted by the courts in their construction, will now be stated.[22]

b. These Statutes Penal. These statutes are generally regarded as penal, so that actions upon them are actions for penalties,[23] although the sound view is believed to be that they should not be construed as being penal, but simply as presenting a case where the grant of a franchise to be personally exempt from the indebtedness which the grantees contract in their own behalf is made with a qualification which reads itself into the grant.[24]

c. And to Be Strictly Construed. They are hence to be strictly construed.[25] But while this is so a substantial compliance with their terms is necessary to exonerate the directors.[26] It is quite plain from this that such a liability is not created by doubtful terms in a charter. For example a clause in the charter of a corporation providing that it shall possess all the general powers and

L. R. 8 Ch. 45, 42 L. J. Ch. 81, 27 L. T. Rep. N. S. 597, 21 Wkly. Rep. 46.

22. Examples of comprehensive statutes of this kind may be seen in the following: Cal. Pen. Code, § 560; 2 Suppl. Mass. Gen. Stat. p. 557, c. 230, § 1; 1 Suppl. Mass. Gen. Stat. p. 810, c. 224, § 38; 2 N. Y. Rev. Stat. (Banks & Bros. (6th ed.) 1876), p. 297, § 1; p. 298, § 10; Utah Comp. Laws (1876), p. 634, § 321.

Liability of trustees of an incorporated chamber of commerce, the articles of incorporation of which declare that it is not formed for profit, under a statute providing that the trustees of a corporation created for a purpose other than profit shall be personally liable for debts of the corporation contracted by them, etc., where the articles provide for a capital stock and declare that one of the purposes of the corporation is to promote the prosperity of the city. Snyder *v.* Chamber of Commerce, 53 Ohio St. 1, 41 N. E. 33.

23. *California.*— Irvine *v.* McKeon, 23 Cal. 472.

Colorado.— Gregory *v.* German Bank, 3 Colo. 332, 25 Am. Rep. 760.

Massachusetts.— Stebbins *v.* Edmands, 12 Gray 203.

Missouri.— Kritzer *v.* Woodson, 19 Mo. 327.

New Jersey.— Derrickson *v.* Smith, 27 N. J. L. 166 (construing the New York statute); Nassau Bank *v.* Brown, 30 N. J. Eq. 478.

New York.— Gadsen *v.* Woodward, 103 N. Y. 242, 8 N. E. 653; Cameron *v.* Seaman, 69 N. Y. 396, 25 Am. Rep. 212; Wiles *v.* Suydam, 64 N. Y. 173 [*reversing* 3 Hun 604, 6 Thomps. & C. 292]; Adams *v.* Mills, 60 N. Y. 533; Rorke *v.* Thomas, 56 N. Y. 559; Verona Cent. Cheese Co. *v.* Murtaugh, 50 N. Y. 314; Miller *v.* White, 50 N. Y. 137; Merchants' Bank *v.* Bliss, 35 N. Y. 412 [*affirming* 1 Rob. 391]; Garrison *v.* Howe, 17 N. Y. 458; Esmond *v.* Bullard, 16 Hun 65; Hall *v.* Siegel, 7 Lans. 206, 13 Abb. Pr. N. S. 178; Craw *v.* Easterly, 4 Lans. 513; Price *v.* Wilson, 67 Barb. 9; McHarg *v.* Eastman, 7 Rob. 137; Bird *v.* Hayden, 1 Rob. 383; Vincent *v.* Sands, 11 Abb. Pr. N. S. 366; Dabney *v.* Stevens, 10 Abb. Pr. N. S. 39, 40 How. Pr. 341.

Ohio.— Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

United States.— Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327.

24. In a recent federal case Mr. U. S. District Judge Lochren took substantially this view of such a statute. Fitzgerald *v.* Weidenbeck, 76 Fed. 695. See further to the effect that such statutes are not penal Banks *v.* Darden, 18 Ga. 318; Neal *v.* Moultrie, 12 Ga. 104; Farr *v.* Briggs, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930 (hence enforceable in another state); Davis *v.* Mills, 99 Fed. 39 (same ruling). Such an action therefore survives against the personal representatives of the directors. Taylor *v.* Cummings, 17 Nat. Corp. Rep. 732.

Examples of such statutes which have been held penal.— It has been held that the character of a penal statute should be ascribed to a statute making the trustees of corporations personally liable for its debts for failing to publish an annual report of its financial condition. Gregory *v.* German Bank, 3 Colo. 332, 25 Am. Rep. 760. The Colorado statute is identical with that of New York, which is also held to be penal in its nature, in many of the cases from that state just cited. So held in Providence Steam Engine Co. *v.* Hubbard, 101 U. S. 188, 25 L. ed. 786. And the same has been held of statutes imposing a personal liability upon the directors whenever they suffer the debts of the corporation to exceed a prescribed limit, the liability being to the extent of the excess. Irvine *v.* McKeon, 23 Cal. 472; Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

25. *Compare supra,* VIII, E, 1, a *et seq.*

26. Vincent *v.* Sands, 11 Abb. Pr. N. S. (N. Y.) 366, holding that a statutory requirement that a report of the condition of a corporation shall be signed by the president and a majority of the trustees, and verified by the president and the secretary, is not satisfied by a report signed and verified by

privileges, and that it shall be subject to all the general liabilities conferred and imposed upon corporations created by an existing general statute, does not incorporate into the charter a provision of the general statute making trustees of the corporation liable for its debts in certain cases.[27]

d. Whether Such Statutes Enforceable Outside State Enacting Them. The general rule, although seemingly founded in a narrow and tribal jealousy, by which one state of the American Union regards its sister states as foreign nations in friendly intercourse with it, has led to the doctrine, which obtains as a rule of private international law, that the courts of one of these states will not as a matter of obligation enforce the penal legislation of another of them;[28] although it is of course at liberty to do so as matter of comity, or whenever by doing so it will advance the rights of its own citizens or its own local policy.[29] This rule that the courts of one state will not enforce the penal legislation of another state applies to statutes making directors personally liable for certain misprisions, defaults, and delinquencies in those courts where such statutes are regarded as being penal in their nature;[30] but is denied in those states where such statutes are regarded as remedial.[31] This doctrine has been greatly shaken, if not entirely overthrown, by a decision of the supreme court of the United States to the effect that where a judgment has been recovered against directors in an action to enforce their personal liability for a statutory deliquency, there is a right of recovery upon the judgment in an action in a court of another state, and that a denial of this right is a failure to give full faith and credit to the judicial record of the former state, within the meaning of the constitution of the United States.[32]

e. Effect of Repeal of Such Statute Upon Accrued Rights. Under the operation of the principle that the repeal of a penal statute puts an end to all rights of action which have accrued under it, even though such actions may be pending, unless the statute contains a saving clause to the contrary,[33] many courts have

the secretary exclusively, and hence does not exonerate the trustees.

27. National Park Bank *v.* Remsen, 158 U. S. 337, 15 S. Ct. 891, 39 L. ed. 1008.

28. U. S. *v.* Lathrop, 17 Johns. (N. Y.) 4; Scoville *v.* Canfield, 14 Johns. (N. Y.) 338, 7 Am. Dec. 467; Rorer Interstate Law 148; Story Confl. Laws, §§ 620, 621; Wharton Confl. Laws, § 853 *et seq.*

29. Wait *v.* Ferguson, 14 Abb. Pr. (N. Y.) 379, is suggested as an example of this.

30. Flash *v.* Conn, 16 Fla. 428, 26 Am. Rep. 721; Attrill *v.* Huntington, 70 Md. 191, 16 Atl. 651 14 Am. St. Rep. 344, 2 L. R. A. 779 [*reversed* on a federal question in 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123]; Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204; Derrickson *v.* Smith, 27 N. J. L. 166; Price *v.* Wilson, 67 Barb. (N. Y.) 9; Bird *v.* Hayden, 1 Rob. (N. Y.) 383, 2 Abb. Pr. N. S. (N. Y.) 61.

31. Taylor *v.* Cummings, 17 Nat. Corp. Rep. 732 (a similar statute); Farr *v.* Briggs, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930 (statute making directors liable for creating debts in excess of the subscribed capital stock); Davis *v.* Mills, 99 Fed. 39 (statute making directors liable for failure to file annual financial reports).

Examples of such statutes which have been held not enforceable outside the state enacting them.— A statute making directors liable for contracting indebtedness in excess of the capital actually paid in. Plymouth First Nat. Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204. A statute making directors jointly and severally liable for the debts of the company contracted during a time when such directors are in default in not obeying a statute requiring them to make and file in some public office certain reports concerning the condition of the corporation. Halsey *v.* McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Derrickson *v.* Smith, 27 N. J. L. 166; Bird *v.* Hayden, 1 Rob. (N. Y.) 383, 2 Abb. Pr. N. S. (N. Y.) 61. Making them liable to pay the debts of the company in case of a failure to give a certain notice therein specified (Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214) or liable upon certain contracts of the corporation which it is forbidden by statute to make (Lawler *v.* Burt, 7 Ohio St. 340). For another example of the rule that such statutes are not enforceable in other states see Wait *v.* Ferguson, 14 Abb. Pr. (N. Y.) 379.

32. Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123 [*reversing* 70 Md. 191, 16 Atl. 651, 14 Am. St. Rep. 344, 2 L. R. A. 779].

33. *Alabama.*— Pope *v.* Lewis, 4 Ala. 487.

Indiana.— State *v.* Youmans, 5 Ind. 280; Stephenson *v.* Doe, 8 Blackf. 508, 46 Am. Dec. 489.

Kentucky.— Com. *v.* Welch, 2 Dana 330.

Maine.— Oriental Bank *v.* Freeze, 18 Me. 109, 36 Am. Dec. 701.

New Hampshire.— Lewis *v.* Foster, 1 N. H. 61.

New York.— Butler *v.* Palmer, 1 Hill 324; People *v.* Livingston, 6 Wend. 526.

held that statutes of the kind under consideration, being penal, a repeal discharges all rights of action under them;[34] while other courts, regarding them as creating a liability quasi *ex contractu*,[35] and still others as being remedial in their nature,[36] hold the contrary.

f. Power of Legislature to Repeal Statutes of This Kind. The existence of a provision in the constitution of a state that "dues from corporations other than banking shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law" does not render the legislature incompetent to repeal a statute making the directors of corporations liable to pay the corporate debts in consequence of a failure or refusal to file certain reports prescribed by the statute; but leaves to the legislature a wide discretion as to the manner in which it will secure such dues, and permits it to alter at its pleasure any legislation which it may have enacted to this end.[37]

g. Validity of Statute Imposing Liability After Persons Sought to Be Charged Become Directors. A statute making directors of a corporation primarily liable for its debts in the event of its insolvency is valid and operative upon such directors, although passed after they became directors, provided the indebtedness in respect of which it is sought to charge them was created subsequently to the passage of the act, they being directors at the time, such a statute, in such an application, having none of the incidents of an *ex post facto* law.[38] So, while an amended statute, making the liability of directors more onerous than under the original statute, will not make guilty any acts of directors done before its passage, which were then innocent, or attach any additional liability to such acts, yet if, by the terms of the original statute, the fact of insolvency fixed the liability of the directors, and if a particular bank became insolvent before the act took effect, then the liability of the directors became subject to its provisions.[39]

h. Effect of Dissolution of Corporation. The dissolution of the corporation does not put an end to a right of action given by statute to creditors against directors for official defaults.[40]

South Carolina.— Allen *v.* Farrow, 2 Bailey 584.

United States.— Norris *v.* Crocker, 13 How. 429, 14 L. ed. 210; U. S. *v.* Preston, 3 Pet. 57, 7 L. ed. 601; The Rachel *v.* U. S., 6 Cranch 329, 3 L. ed. 239; Yeaton *v.* U. S., 5 Cranch 281, 3 L. ed. 101.

England.— Miller's Case, 1 W. Bl. 451, 3 Wils. C. P. 420.

34. *Colorado.*— Gregory *v.* German Bank, 3 Colo. 332, 23 Am. Rep. 760.

Maine.— Gaul *v.* Brown, 53 Me. 496.

Massachusetts.— Nichols *v.* Squire, 5 Pick. 168.

Michigan.— Breitung *v.* Lindauer, 37 Mich. 217; Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9.

United States.— Norris *v.* Crocker, 13 How. 429, 14 L. ed. 210; Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327.

There is a note on this subject in 19 Am. & Eng. Corp. Cas. 112.

35. Banks *v.* Darden, 18 Ga. 318.

36. Hargroves *v.* Chambers, 30 Ga. 580.

The latter rule obtains with respect to statutes making shareholders individually liable to pay the debts of the corporation; so that a repeal of such a statute, in so far as it attempts to operate upon existing rights, impairs the obligations of a contract, within the meaning of the federal constitution, and is to that extent void. Norris *v.* Wrenschall, 34 Md. 492; Story *v.* Furman, 25 N. Y. 214, 223; Rochester *v.* Barnes, 26 Barb. (N. Y.) 657; Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87; Hathorn *v.* Calef, 2 Wall. (U. S.) 10, 17 L. ed. 776.

37. Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327. *Compare* the following cases:

California.— Noble *v.* Hook, 24 Cal. 638.

Georgia.— Harris *v.* Glenn, 56 Ga. 94; Sparger *v.* Cumpton, 54 Ga. 355.

Minnesota.— Coleman *v.* Ballandi, 22 Minn. 144; Cogel *v.* Mickow, 11 Minn. 475; Tuttle *v.* Strout, 7 Minn. 465, 82 Am. Dec. 108.

Nevada.— Hawthorne *v.* Smith, 3 Nev. 182, 93 Am. Dec. 397.

North Carolina.— Martin *v.* Hughes, 67 N. C. 293.

Wisconsin.— Parker *v.* King, 16 Wis. 223; Bull *v.* Conroe, 13 Wis. 233.

38. Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195.

For a corresponding rule as to shareholders see *In re* Reciprocity Bank, 22 N. Y. 9; *In re* Gibson, 21 N. Y. 9; Sherman *v.* Smith, 1 Black (U. S.) 587, 17 L. ed. 163. *Compare* U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, 8 Abb. Pr. (N. Y.) 192.

39. White *v.* How, 29 Fed. Cas. No. 17,548, 3 McLean 111.

40. Hargroves *v.* Chambers, 30 Ga. 580.

i. Sense in Which Directors Are Jointly Liable For Such Defaults. The statutes generally make directors jointly and severally liable for the defaults which they denounce. This does not mean that a director is answerable for the defaults of others in which he did not participate or concur, as a guarantor of the good conduct of such others. It means no more than that the creditors may proceed against them all in one action, judgment being rendered against those who are shown to be liable.[41]

j. Where Liability Is Joint or Several Creditors May Proceed Against One or More or All. Where the statute makes the liability of the directors doing the forbidden act, or guilty of the delinquency which it denounces, joint or several, the creditor may bring his action against one or more or all, at his election or convenience; and where he does not join all, the non-joinder of the others will be no defense[42] or ground of abatement,[43] the reason being that no one can rightfully claim that another shall be joined with him as defendant in an action for a tort.[44] Therefore, in a suit by a creditor of a bank against the two surviving directors, upon the ground that all the directors became individually liable by violating the charter, it was not necessary to join the representatives of the deceased directors.[45]

k. If Statute Makes All Directors Liable, Innocent as Well as Guilty, All Must Be Joined. If the statute in terms imposes a liability upon all the directors who are members of the board at the time of the doing of the prohibited act, then an action to enforce the statutory liability is joint and not several, and all must be joined, the innocent as well as the guilty, those who were absent as well as those who were present, unless a sufficient averment is made showing why this cannot be done.[46] Under such a statute a director in office at the time of the failure to do the act required cannot defend by showing that the neglect was not that of himself, but that of his co-directors.[47]

l. Corporation Need Not Be Joined. Where the liability is both joint and several, as the creditor is at liberty to single out any offending director and proceed against him alone, it follows that the corporation need not be joined with him as a co-defendant.[48]

m. Whether Right of Action Dies With Creditor. If the strict rule is applied that such an action is an action for a penalty, then it follows that it dies with the creditor who brings it;[49] but for reasons already given[50] this is not the sound and just view;[51] and the statutes giving such rights of action generally provide in terms for their survival by giving them against executors and administrators.

n. Right to Proceed Against Directors Under These Statutes Is Assignable. Where the particular statute is construed as not giving an action for a penalty, but as giving an action quasi *ex contractu*, such a right of action is regarded as

41. Irvine *v.* McKeon, 23 Cal. 472; McMaster *v.* Kohner, 44 N. Y. Super. Ct. 253. For the meaning of the expression "jointly and severally liable" in such a statute, and its effect upon rules of procedure, see 3 Thompson Corp. § 4174; Quigley *v.* Walter, 2 Sweeny (N. Y.) 175 and cases cited.

Where the act denounced was of such a nature that it could not be done by a single director, as for example the declaring of an unlawful dividend, or the discounting of a certain kind of paper, it has been held that it would be necessary to allege that the single director proceeded against had the concurrence of others in doing the prohibited act. Gaffney *v.* Colvill, 6 Hill (N. Y.) 567, per Bronson, J. *Contra*, Hill *v.* Frazier, 22 Pa. St. 320. But this does not seem to be sound, since it overlooks the fact that one director may usurp the powers of the whole board or of a majority of the board in doing the prohibited act.

42. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 928, 16 Am. St. Rep. 671, 4 L. R. A. 745; Strong *v.* Sproul, 4 Daly (N. Y.) 326 [*reversed* on other grounds in 53 N. Y. 497].

43. Andrews *v.* Murray, 33 Barb. (N. Y.) 354. *Compare* Hargroves *v.* Chambers, 30 Ga. 580; Colburn *v.* Patmore, 1 C. M. & R. 73, 3 L. J. Exch. 317, 4 Tyrw. 677.

44. Strong *v.* Sproul, 4 Daly (N. Y.) 326; Gaffney *v.* Colvill, 6 Hill (N. Y.) 567.

45. Hargroves *v.* Chambers, 30 Ga. 580.

46. Banks *v.* Darden, 18 Ga. 318.

47. Van Etten *v.* Eaton, 19 Mich. 187. But see Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y.) 130.

48. Hill *v.* Frazier, 22 Pa. St. 320.

49. Dalton *v.* Goodwin, 5 N. Y. Suppl. 257, 25 N. Y. St. 858.

50. See *supra*, IX, P, 1, b.

51. Carr *v.* Risher, 5 N. Y. Suppl. 371.

merely an additional security attached to the debt of the corporate creditor and is capable of being assigned with such debt, so that the assignee may maintain the action.[52]

o. Liability Attaches to Directors De Facto. The liability created by these statutes attaches to *de facto* directors as well as directors *de jure*.[53] It attaches to those who hold over after the expiration of the term for which they were elected, in default of the corporation holding its annual election.[54] But where the governing statute provides that if a director shall cease to be a shareholder, his office shall become vacant, then an absolute transfer by a director of all his shares after a default in the filing of a statutory annual report, although made in contemplation of the insolvency of the corporation, and for the purpose of avoiding liability for debts subsequently contracted, is effectual to relieve him from such liability.[55]

p. This Statutory Liability Cannot Be Contracted Away. It has been held that a provision in a corporate bond that no shareholder shall be individually liable thereon or in respect thereto has no effect to relieve directors of the company from their statutory liability for its debts in case of their failure to file an annual report required by statute; and if such a provision were intended to provide against such liability it would be void as against public policy.[56]

2. What Debts Are Within Such Statutes — a. Such Statutes Do Not Include Torts. The word "debt" when used therein is not generally construed so as to

52. Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175 [*affirmed* in 141 N. Y. 584, 36 N. E. 345, 57 N. Y. St. 868]; Lexow *v.* Pennsylvania Diamond Drill Co., 5 Pa. Dist. 499.

53. Therefore a director proceeded against under a suit for failing to publish an annual report cannot escape liability on the ground that he was not eligible to the office (St. George Vineyard Co. *v.* Fritz, 48 N. Y. App. Div. 233, 62 N. Y. Suppl. 775), or on the ground of the invalidity of his election (Union Nat. Bank *v.* Scott, 53 N. Y. App. Div. 65, 66 N. Y. Suppl. 145). For example on the ground that he holds less than five shares of stock, as required by N. Y. Laws (1892), c. 688, § 20. Donnelly *v.* Pancoast, 15 N. Y. App. Div. 323, 44 N. Y. Suppl. 104.

54. Janet *v.* Nims, 7 Colo. App. 88, 43 Pac. 147.

55. Sinclair *v.* Fuller, 158 N. Y. 607, 53 N. E. 510 [*affirming* 9 N. Y. App. Div. 297, 41 N. Y. Suppl. 193, 75 N. Y. St. 641].

56. Swancoat *v.* Remsen, 26 N. Y. Civ. Proc. 94, 78 Fed. 592.

No recovery under such a statute by one who makes a loan to the corporation with knowledge that the director sought to be made liable has transferred his shares to another. Sinclair *v.* Dwight, 9 N. Y. App. Div. 297, 41 N. Y. Suppl. 193, 75 N. Y. St. 641.

Pennsylvania statute of July 18, 1863, on this subject not abrogated by General Corporation Act of 1874. Kurtz *v.* Wigton, 34 Wkly. Notes Cas. (Pa.) 219. *Compare* Green *v.* Whitehead, 5 Pa. Dist. 613; Wagner *v.* Corcoran, 2 Pa. Dist. 440.

Provision of New York statute of 1848, c. 40, on this subject does not apply to corporations organized for the improvement of real estate for residences under N. Y. Laws (1871), c. 535. McComb *v.* Belknap, 30 Abb. N. Cas. (N. Y.) 119, 24 N. Y. Suppl. 935.

The liability of directors of a corporation for failure to file an annual report imposed by N. Y. Laws (1892), c. 2, was retained by N. Y. Laws (1892), c. 688, providing for the continuance of all liability accruing under any law since the passage of N. Y. Laws (1890), c. 564. Metropolis Bank *v.* Faber, 1 N. Y. App. Div. 341, 37 N. Y. Suppl. 423, 72 N. Y. St. 673 [*affirmed* in 150 N. Y. 200, 44 N. E. 779].

The omission from N. Y. Laws (1875), c. 510, of the word "annually," contained in N. Y. Laws (1848), c. 40, § 12, making trustees of corporations liable for corporate debts in case of their failure to file the statement therein mentioned, does not relieve the trustees from such liability upon filing one annual statement, since the words "each year" in the amending act take the place of the word "annually." Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175 [*affirmed* in 141 N. Y. 584, 36 N. E. 345, 57 N. Y. St. 868]. A corporation organized to manufacture and sell trees, wood, timber, and lumber, to mine, ship, and sell ore, erect and maintain blast furnaces and other iron works, purchase and construct docks, and repair, maintain, and operate a railroad, is within N. Y. Laws (1848), c. 40, as amended, authorizing the formation of corporations for manufacturing, mining, mechanical, or chemical purposes, and making trustees personally liable for the corporate debts upon failure to file the annual statement therein prescribed. Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175 [*affirmed* in 141 N. Y. 548, 36 N. E. 345, 57 N. Y. St. 868].

Director not liable who has transferred all his shares, and thereby vacated the office of director, if done openly, although to escape liability as a shareholder to creditors. Sinclair *v.* Dwight, 9 N. Y. App. Div. 297, 41 N. Y. Suppl. 193.

include torts committed by the agents of the corporation, for which the corporation is liable.[57] This rule applies only to torts *simpliciter*, which do not spring out of a breach of contract, and then only where the demand against the corporation has not been reduced to judgment.[58] It does not include a liability on the part of the directors for unliquidated damages for the breach of a contract by the corporation by reason of its insolvency.[59] If the demand against the corporation has been reduced to judgment, the directors may incur the statutory liability, but the bill seeking to charge them must so allege.[60]

b. Mere Gratuities. The word "debt" in such a statute does not extend to mere gratuities, such as bonds given by the corporation to plaintiff; since the demand against it thereby acquired did not arise in consequence of his giving credit to it.[61]

c. Security Debts. The liability of a principal to indemnify his surety is a "debt contracted" within the meaning of such a statute, and arises at the time when the surety signs the note, accepts the draft, or otherwise enters into the obligation of suretyship.[62] So an agreement of a corporation to indemnify an accommodation indorser is a "debt contracted" at the time when the agreement is made and not at the time when the debt is paid by the accepter.[63]

d. Debts Imposed Upon Corporation by Fraud. It is scarcely necessary to suggest that under a statute of this kind directors can be made liable only for *bona fide* debts of the corporation and not for debts imposed upon it by fraud.[64]

e. Debts Due to Directors Themselves. Neither are debts due from the corporation to one of its directors within the meaning of such a statute; since a director will not be permitted to create by his own wrong a cause of action against his co-directors, thereby cutting down the fund which the statute has created for the security of creditors other than the wrong-doers;[65] and as a director-creditor cannot assert such a liability in his own favor he cannot create it by assigning his demand against the corporation to another person, thereby giving to his assignee a higher right than he himself has.[66]

57. Cable *v.* Gaty, 34 Mo. 573, 86 Am. Dec. 126; Chase *v.* Curtis, 113 U. S. 452, 5 S. Ct. 554, 28 L. ed. 1038. So held under N. Y. Laws (1848), c. 40, § 12. Kirkland *v.* Kille, 99 N. Y. 390, 2 N. E. 36; Esmond *v.* Bullard, 16 Hun (N. Y.) 65. The rule is analogous where the statute extends the liability to shareholders. Bohn *v.* Brown, 33 Mich. 257; Cable *v.* Gaty, 34 Mo. 573, 86 Am. Dec. 126; Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214; Heacock *v.* Sherman, 14 Wend. (N. Y.) 58. Other courts, however, have held, in construing statutes imposing individual liability upon shareholders in corporations, that the word "debt" embraces claims against the corporation for unliquidated damages. Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417; Dryden *v.* Kellogg, 2 Mo. App. 87; Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432. *Compare* as to the meaning of the word "debt" Conroy *v.* Sullivan, 44 Ill. 451; Lathrop *v.* Singer, 39 Barb. (N. Y.) 396; Schouton *v.* Kilmer, 8 How. Pr. (N. Y.) 527; Dellinger *v.* Tweed, 66 N. C. 206; Lane *v.* Baker, 2 Grant (Pa.) 424. The doctrine of the text is obviously the correct doctrine where the statute makes the directors liable for "debts contracted." Esmond *v.* Bullard, 16 Hun (N. Y.) 65.

58. Child *v.* Boston, etc., Iron Works, 137 Mass. 516, 50 Am. Rep. 328. *Compare In re* Boston, etc., Iron Works, 23 Fed. 880.

59. MacVeagh *v.* Wild, 95 Fed. 84.

60. Archer *v.* Rose, 3 Brewst. (Pa.) 264.

61. Norris *v.* De Wolf, 12 Hun (N. Y.) 666.

62. Byers *v.* Franklin Coal Co., 106 Mass. 131; Rice *v.* Southgate, 16 Gray (Mass.) 142.

63. Byers *v.* Franklin Coal Co., 106 Mass. 131, holding that a judgment obtained by the principal against the corporation merges the obligation on which suit is brought as to the obligee, but does not merge it as to any collateral liability he may have against shareholders, and consequently against directors. For the governing principle see Byers *v.* Franklin Coal Co., 106 Mass. 131, 137 (per Morton, J.); Campbell *v.* Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139; Ward *v.* Johnson, 13 Mass. 148; Porter *v.* Ingraham, 10 Mass. 88; Gilmore *v.* Carr, 2 Mass. 171.

64. Adams *v.* Mills, 60 N. Y. 533; N. Y. Stat. (1848), c. 40, § 12. *Compare* Bolen *v.* Crosby, 49 N. Y. 183.

65. Thacher *v.* King, 156 Mass. 490, 31 N. E. 648; McClave *v.* Thompson, 36 Hun (N. Y.) 365. *Compare* Wait *v.* Ferguson, 14 Abb. Pr. (N. Y.) 379.

So as to shareholders who have acquiesced in the wrongful conduct of directors. Walker *v.* Birchard, 82 Iowa 388, 48 N. W. 71.

66. Briggs *v.* Easterly, 62 Barb. (N. Y.) 51.

f. Ultra Vires Debts. It seems that such statutes make directors liable for *ultra vires* debts, provided circumstances of estoppel exist, as where the corporation has received and appropriated the benefit of the contract, which makes the corporation liable to pay the debt;[67] but not for debts founded in plain breach of trust on the part of the contracting officers of the corporation to which the creditor has been privy, so that there are no circumstances of estoppel,[68] resulting in the conclusion that the liability of the director is measured by the liability of the company, and that the remedy against them is concurrent.[69]

g. Certificates of Deposit. A statute which in describing debts used the word "secured" embraces certificates of deposit.[70]

h. Judgments and Judgments For Costs. A judgment is certainly a "debt" within the meaning of such a statute, since under all definitions it is a debt of record;[71] and this is equally so where it is founded upon a demand for a tort;[72] and a judgment for costs is plainly a "debt" within this rule,[73] although founded on an unsuccessful action by the corporation for a tort;[74] but this is not so where the statute uses the words "debt contracted."[75]

i. Debts Which Have Been Assigned. As already seen[76] the assignment of a debt against the corporation passes to the assignee, as an incident of the debt, the right to enforce a statutory liability of the directors;[77] and this applies to a case where the debt against the corporation has been reduced to judgment.[78] If a debt thus assigned is evidenced by a negotiable instrument, the rule which protects the innocent purchaser of negotiable paper of corporations in case of *ultra*

67. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 745; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504 [*reversing* 38 N. Y. Super. Ct. 554].

68. National Park Bank *v.* Remsen, 43 Fed. 226.

69. McCormick *v.* Seeberger, 73 Ill. App. 87; Salem First Nat. Bank *v.* Almy, 117 Mass. 476; Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; New York Iron Mine *v.* Negaunee First Nat. Bank, 39 Mich. 644; Gold *v.* Clyne, 134 N. Y. 262, 31 N. E. 980, 47 N. Y. St. 770, 17 L. R. A. 767; Trinity Church *v.* Vanderbilt, 98 N. Y. 170; Jones *v.* Barlow, 62 N. Y. 202. *Compare* Medill *v.* Collier, 16 Ohio St. 599.

70. Hargroves *v.* Chambers, 30 Ga. 580.

71. Lewis *v.* Armstrong, 8 Abb. N. Cas. (N. Y.) 385.

72. See *supra*, IX, P, 2, a. But see Chase *v.* Curtis, 113 U. S. 452, 5 S. Ct. 554, 28 L. ed. 1038.

To the effect that the judgment against the corporation extinguishes the obligation which was the foundation of the suit, but does not have the effect of merging the liability of its directors for statutory defaults, see McHarg *v.* Eastman, 7 Rob. (N. Y.) 137. That obtaining a judgment against a corporation does not affect the liability of the directors for a debt contracted during their failure to file the annual report required by N. Y. Laws (1892), c. 688, § 30, where the judgment is not paid, see Providence Steam, etc., Pipe Co. *v.* Connell, 86 Hun (N. Y.) 319, 33 N. Y. Suppl. 482, 67 N. Y. St. 196.

73. Allen *v.* Clark, 108 N. Y. 269, 15 N. E. 387 [*reversing* 43 Hun (N. Y.) 377]; Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175.

74. Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175 [*affirmed* in 141 N. Y. 584, 36 N. E. 345, 57 N. Y. St. 868]. *Compare* Bolen *v.* Crosby, 49 N. Y. 183; Green *v.* Easton, 74 Hun (N. Y.) 329, 26 N. Y. Suppl. 553, 55 N. Y. St. 895.

That directors are not liable under a statute for the costs incurred by the creditor in reducing his claim to a judgment against the corporation see Green *v.* Easton, 74 Hun (N. Y.) 329, 26 N. Y. Suppl. 553, 55 N. Y. St. 895. *Compare* Allen *v.* Clark, 141 N. Y. 584, 36 N. E. 345, 57 N. Y. St. 868.

75. Armstrong *v.* Cowles, 44 Conn. 44.

76. See *supra*, IX, P, 1, n.

77. Pier *v.* George, 86 N. Y. 613 [*reversing* on another point 20 Hun (N. Y.) 210]; Bedford *v.* Sherman, 68 Hun (N. Y.) 317, 22 N. Y. Suppl. 892, 52 N. Y. St. 98; Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175; Bonnell *v.* Wheeler, 16 Abb. Pr. N. S. (N. Y.) 81; Davis *v.* Mills, 99 Fed. 39.

78. Bolen *v.* Crosby, 49 N. Y. 183. That the assignment of a judgment necessarily carries with it the debt see Thomas *v.* Hubbell, 35 N. Y. 120; Rose *v.* Baker, 13 Barb. (N. Y.) 230; Gallarati *v.* Orser, 4 Bosw. (N. Y.) 94; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; Jackson *v.* Blodget, 5 Cow. (N. Y.) 202; Green *v.* Hart, 1 Johns. (N. Y.) 580.

After assignment made and directors notified of it, they cannot compound with the assignor and so discharge their liability. Bolen *v.* Crosby, 49 N. Y. 183. *Compare* Robinson *v.* Bealle, 20 Ga. 275, holding that a release of the directors is a release of the liability of the shareholders.

vires contracts will protect such an assignee and enable him to enforce a statutory liability of the directors for failing to file an annual report.[79]

j. Wages of Employees. An obligation assumed by contract to pay an employee a stated salary is of course a "debt," within the meaning of such a statute, provided the salary has been earned,[80] and provided the services were rendered upon the request of the corporation, which request must be alleged.[81] But one employed as a "foreman" is not a "laborer, servant, or apprentice," within the meaning of such a statute.[82]

k. Debts Payable in Future. To charge a trustee of a manufacturing corporation with its debt, no report having been filed, the debt must have been so contracted as to give a present right of action against the corporation.[83]

l. Unliquidated Damages For Breaches of Contract. It has been held that such statutes do not make directors liable for unliquidated damages for breaches of contract by the corporation;[84] but the contrary is quite obviously the true rule.[85]

m. Taxes. A tax, duly assessed against the corporation, and personally payable, is a "debt" within the meaning of a statute making directors liable for the payment of such tax, in an action by the collector of taxes.[86]

n. Debts Barred by Limitation. After the bar of the statute of limitations has attached no debt remains on the basis of which the directors or trustees can be charged, under such a statute, for an official default.[87]

o. Renewals. A statute making directors liable for debts of the corporation contracted during the period of their default in making and publishing certain reports of the condition of the corporation will not extend to a renewal of an indebtedness, unless the date at which the renewal took place was within the period of the default.[88] Where the note of the corporation by which the debt is evidenced is merely a renewal and consolidation of items of previous indebtedness, the statutory liability of the directors who were such when the note was given does not attach, as in the case of a debt originally accruing during the period of their default.[89] Contrary to this it has been held that the mere liquidation of a debt by the corporation, and payment thereof in its promissory notes, does not cancel or merge the original indebtedness, and consequently does not affect the statutory liability of the trustees, provided it has become fixed with respect to the original indebtedness.[90]

79. Chemical Nat. Bank *v.* Colwell, 14 Daly (N. Y.) 361, 14 N. Y. St. 682.

80. Brandt *v.* Goodwin, 3 N. Y. Suppl. 807, 24 N. Y. St. 305 [*affirmed* in 15 Daly 456, 8 N. Y. Suppl. 339, 29 N. Y. St. 143].

81. Tovey *v.* Culver, 54 N. Y. Super. Ct. 404.

82. Welch *v.* Ellis, 22 Ont. 255.

83. Vernon *v.* Palmer, 62 How. Pr. (N. Y.) 425.

84. Victory Webb Printing, etc., Mach. Mfg. Co. *v.* Beecher, 26 Hun (N. Y.) 48.

85. Manhattan Co. *v.* Kaldenberg, 27 N. Y. App. Div. 31, 50 N. Y. Suppl. 265; Milsom Rendering, etc., Co. *v.* Baker, 16 N. Y. App. Div. 581, 44 N. Y. Suppl. 999 [*affirmed* in 153 N. Y. 687, 48 N. E. 1105]; Donnelly *v.* Pancoast, 15 N. Y. App. Div. 323, 44 N. Y. Suppl. 104; Camp Mfg. Co. *v.* Reamer, 14 N. Y. App. Div. 408, 43 N. Y. Suppl. 1027 [*reversing* 18 Misc. (N. Y.) 619, 43 N. Y. Suppl. 673, 26 N. Y. Civ. Proc. 100]; Rose *v.* Chadwick, 9 N. Y. App. Div. 311, 41 N. Y. Suppl. 190, 75 N. Y. St. 638; Green *v.* Easton, 74 Hun (N. Y.) 329, 26 N. Y. Suppl. 553, 55 N. Y. St. 895; MacVeagh *v.* Wild, 95 Fed. 84.

On the other hand a judgment against the corporation is not enough, but the creditor must also show that it was for a debt for which the statute makes the director liable. Collins *v.* Hydorn, 125 N. Y. 320, 32 N. E. 69; Wetter *v.* Lewis, 22 Misc. (N. Y.) 122, 48 N. Y. Suppl. 617.

86. Felker *v.* Standard Yarn Co., 148 Mass. 226, 19 N. E. 220.

87. Trinity Church *v.* Vanderbilt, 98 N. Y. 170.

88. That this is the rule as to the statutory liability of shareholders see Shellington *v.* Howland, 67 Barb. (N. Y.) 14 [*affirmed* in 53 N. Y. 371]; 3 Thompson Corp. § 2246.

89. Sullivan *v.* Sullivan Mfg. Co., 24 S. C. 341.

90. Deming *v.* Puleston, 35 N. Y. Super. Ct. 309 [*affirmed* in 55 N. Y. 655; Jones *v.* Barlow, 38 N. Y. Super. Ct. 142 (*affirmed* in 62 N. Y. 202)]. But note a decision of a subordinate court to the effect that where, after the filing of a false certificate for which the directors are liable under a statute, renewal notes are given for a debt contracted prior to the filing of the certificate,

p. Debts Contracted and Due in Other States. Such a statute extends to debts contracted and due in other states.[91]

q. Debts Due to Partnership Dissolved by Death. If the debt of the corporation is due to a partnership, and it has subsequently become dissolved by the death of one of the partners, the surviving partner may enforce the statutory liability of the directors.[92]

r. Bonds Secured by Mortgage. Bonds secured by mortgage are "debts" within the meaning of such a statute.[93]

s. Simple Contract Debts. In a proceeding in equity under a statute of Massachusetts,[94] making the directors of a corporation personally liable for debts in excess of the capital, plaintiffs may not only prove their judgment debt, but any further sum due them by simple contract.[95]

t. Obligation to Pay Guaranteed Dividend. One court has held, but not upon clear grounds, that the obligation assumed by a corporation issuing preferred stock, to pay semiannually a dividend guaranteed by it upon that stock is not a "debt," within the meaning of a statute of the kind under consideration, after the company becomes insolvent and suspends business, so that there are no profits out of which a dividend can be declared and paid.[96]

u. For What Other Debts Directors Liable Under These Statutes. Directors are also liable under the Colorado statute, for the unpaid debts of the preceding year;[97] under the Pennsylvania statute, for all debts contracted during the period of neglect to comply with the requirements of the statute;[98] and for the fraudulent removal of grain stored in an elevator represented by an outstanding warehouse receipt.[99]

v. For What Other Debts Directors Not Liable Under These Statutes. Directors are not liable under the Montana statute for debts of the corporation incurred before their failure to file the prescribed reports, or at all, for a contingent liability accruing to the corporation for a breach of its covenant of warranty in its deed of conveyance,[1] or for a debt the incurring of which was not previously authorized by the defendants in their capacity as trustees.[2]

the directors are personally liable for it under the statute. Ferguson *v.* Gill, 64 Hun (N. Y.) 284, 19 N. Y. Suppl. 149, 46 N. Y. St. 474. That the giving of promissory notes by the corporation in settlement of an indebtedness which accrued during the existence of the neglect of the directors to file the statutory report does not relieve them from liability where the notes are long past due and unpaid when the action to enforce their liability is commenced see Novelty Mfg. Co. *v.* Connell, 88 Hun (N. Y.) 254, 34 N. Y. Suppl. 717, 68 N. Y. St. 697. That an extension of time given to the corporation within which to pay a debt does not relieve the directors from liability for failing to make the annual statutory report see Providence Steam, etc., Co. *v.* Connell, 86 Hun (N. Y.), 319, 33 N. Y. Suppl. 482, 67 N. Y. St. 196.

91. Sears *v.* Waters, 44 Hun (N. Y.) 101.

92. Ferguson *v.* Gill, 64 Hun (N. Y.) 284, 19 N. Y. Suppl. 149, 46 N. Y. St. 474.

93. Morgan *v.* Hedstrom, 164 N. Y. 224, 58 N. E. 26 [*affirming* 25 N. Y. App. Div. 547, 49 N. Y. Suppl. 1049].

94. Mass. Pub. Stat. c. 106, § 60, cl. 3.

95. Thacher *v.* King, 156 Mass. 490, 31 N. E. 648.

96. Lockhart *v.* Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

97. And the director is not relieved from liability for the balance of such a debt by the payment by the corporation, after he becomes a director, of an amount greater than such balance. Fairbank, etc., Co. *v.* Macleod, 8 Colo. App. 190, 45 Pac. 282.

98. Kurtz *v.* Wigton, 34 Wkly. Notes Cas. (Pa.) 219.

99. Bedford *v.* Sherman, 68 Hun (N. Y.) 317, 22 N. Y. Suppl. 892, 52 N. Y. St. 98.

Other decisions under similar statutes as to the debts of the corporation for which directors become liable by reason of failing to file statutory reports of the condition of the corporation. Austin *v.* Berlin, 13 Colo. 198, 22 Pac. 433; Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544, 29 N. Y. St. 5; Ferguson *v.* Gill, 64 Hun (N. Y.) 284, 19 N. Y. Suppl. 149, 46 N. Y. St. 474; Torbett *v.* Godwin, 62 Hun (N. Y.) 407, 17 N. Y. Suppl. 46, 42 N. Y. St. 323; Whitney *v.* Cammann, 60 N. Y. Super. Ct. 391, 18 N. Y. Suppl. 200, 45 N. Y. St. 570; Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175; Woods *v.* Godwin, 19 N. Y. Suppl. 658, 46 N. Y. St. 937; Ashley *v.* Godwin, 19 N. Y. Suppl. 658, 46 N. Y. St. 936; Young *v.* Godwin, 19 N. Y. Suppl. 656, 46 N. Y. St. 934; Kurtz *v.* Wigton, 34 Wkly. Notes Cas. (Pa.) 219.

1. Giddings *v.* Holter, 19 Mont. 263, 48 Pac. 8.

2. Wetter *v.* Lewis, 22 Misc. (N. Y.) 122, 48 N. Y. Suppl. 617.

3. STATUTORY LIABILITY ATTACHES TO WHAT DIRECTORS WITH RESPECT TO TIME WHEN DEBT WAS CONTRACTED — a. Liability Attaches Only to Those Directors Who Were in Office at Time of Default Already Prohibited. Liability under statutes for official defaults and prohibited acts obviously attaches only to those directors who were in office when the particular misprisions were committed. The rule being that each one stands liable, or exempt from the particular liability, accordingly as he did or did not participate in the particular wrong.[3] Under the operation of this principle a liability for contracting debts beyond the amount limited by statute attaches only to those directors who were in office at the time the particular debt was contracted, provided the statute was then infringed by them.[4] So where a statute requires an official statement to be made on a particular day, or within a limited time after a particular day, the liability for failing to comply with it attaches only to those who were in office at the time fixed for the statement, and who might have made it, but failed so to do.[5]

b. Theory That Liability Attaches to Those Directors Who Were in Office During Period of Default, and at Time When Debt Was Created. Where the statute enjoins the making of certain reports, then it is a sound theory that unless the language of the act imports otherwise, those directors become liable who were in office (1) during the period of the default, and (2) during the period within which the debt must have been contracted. The reason being that if they allow the statutory date to pass without publishing the required statement, then, during the period wherein they are in default, with respect to publishing it, they contract debts on behalf of the corporation at their own peril.[6] Where the statute allows the directors a *locus pœnitentiæ*, they will it seems cease to be liable for debts contracted after they set themselves right, by publishing the statutory statement,

3. Schley *v.* Dixon, 24 Ga. 273, 279, 71 Am. Dec. 121; Mutual Redemption Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470. That this is the general rule (subject to exceptions) as to shareholders see Larrabee *v.* Baldwin, 35 Cal. 155; Davidson *v.* Rankin, 34 Cal. 503; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 265; Williams *v.* Hanna, 40 Ind. 535; Tracy *v.* Yates, 18 Barb. (N. Y.) 152; McCullough *v.* Moss, 5 Den. (N. Y.) 567; Harger *v.* McCullough, 2 Den. (N. Y.) 119; Adderly *v.* Storm, 6 Hill (N. Y.) 624; Moss *v.* Oakley, 2 Hill (N. Y.) 265; Judson *v.* Rossie Galena Co., 9 Paige (N. Y.) 598, 38 Am. Dec. 569. It follows that one named a director of a corporation for the first year of its existence may by resigning his office before the expiration of the year relieve himself of liability for the failure of the directors in office for the subsequent year to make the report required by statute for that year. Jackson *v.* Clifford, 5 App. Cas. (D. C.) 312.

A possible exception to the statement of the above text may exist in cases where directors who succeed those who committed the wrong do acts which amount to a ratification or to a continuation of it. Moses *v.* Ocoee Bank, 1 Lea (Tenn.) 398.

4. Windham Provident Sav. Inst. *v.* Sprague, 43 Vt. 502.

5. State *v.* Cox, 88 Ind. 254. See also in illustration of the text Austin *v.* Berlin, 13 Colo. 198, 22 Pac. 433 (where the statute required an annual report to be made and made the directors jointly and severally liable for the debts contracted during the year in case it is not made); Chandler *v.* Hoag, 2 Hun (N. Y.) 613, 5 Thomps. & C. (N. Y.) 197 (directors not liable whose terms of office began after the indebtedness had been created, and after default had been made by the previous board in failing to file the statutory report); Seaman *v.* Goodnow, 20 Wis. 27. So the filing of a false statement by the officers of a business corporation does not render them liable for debts of the corporation contracted or for liabilities incurred before the filing of such false statement. Witherow *v.* Slayback, 11 Misc. (N. Y.) 526, 32 N. Y. Suppl. 746.

6. Garrison *v.* Howe, 17 N. Y. 458; McHarg *v.* Eastman, 7 Rob. (N. Y.) 137. That two things must concur under the New York Manufacturing Act, default in publishing the reports required by the statute, and the contracting of the debt, see also Shaler, etc., Quarry Co. *v.* Bliss, 27 N. Y. 297 [*affirming* 34 Barb. (N. Y.) 309, 12 Abb. Pr. (N. Y.) 470]; Boughton *v.* Otis, 21 N. Y. 261. The same is true under the New York statute of 1892, c. 688, § 30, and this although the debt is evidenced by promissory notes of the corporation which do not become due until after the report for the following year is filed; since it is the contracting of the debt during period of default, and not the date when it becomes due, that fixes the liability. Shaler, etc., Quarry Co. *v.* Bliss, 27 N. Y. 297; Provident Steam, etc., Co. *v.* Connell, 86 Hun (N. Y.) 319, 33 N. Y. Suppl. 482, 67 N. Y. St. 196. So ruled under Connecticut Rev. Stat. § 404, p. 172. Provident Steam-Engine Co. *v.* Hubbard, 101 U. S. 188, 25 L. ed. 786. See also Witherow *v.* Slayback, 11 Misc. (N. Y.) 526, 32 N. Y. Suppl. 746, 64 N. Y. St. 456.

although not at the time required by the statute.[7] It will follow from this that if a director goes out of office during the period of default, he will be liable only for those debts which were contracted during the period of default and while he was in office.[8] On the other hand a director coming into office after the default is liable only for such debts as are contracted while he is in office, and before a report is made and published.[9] Where the liability has attached by reason of such a default, the directors cannot exclude themselves from it, by the retrospective act of filing a report relating to the period of such default.[10] Under the operation of this principle directors coming into office after the default are personally liable for such debts only as are contracted while they are in office, and before a report is made and published; so that if a director resigns the office he is not liable for debts of the company in consequence of defaults committed after he quits the office.[11]

c. Liability of Directors Holding Over. If after the time for the regular corporate election is passed a director holds over and continues to act as such, he becomes personally liable upon a failure to file the statutory report of the financial condition of the company.[12] But if at the expiration of his term he retires from office and afterward performs no official act and assumes no official authority he cannot be held so liable.[13]

d. Where Liability Is For Signing and Filing False Report. Where the liability is for signing and filing a false report it is held to attach only in respect of corporate debts contracted subsequently to the time of filing the report, and while the director continues in office.[14]

e. Where Statute Prohibits Contracting of Particular Debts. Where the statute[15] prohibits the contracting of debts of a given description, such as debts beyond the amount of the solvent stock of the corporation, the liability attaches only to those who were in office at the time when the particular debt was contracted, and who subsequently might have prevented or opposed the contracting of it. It does not attach to a member of a former board, so as to make him liable for the misconduct of his successors.[16] Plaintiff must therefore state that the debt which he seeks to charge upon defendant was contracted under the administration of defendant as a director.[17]

f. Directors Not Liable For Defaults Committed Before Coming Into Office. It is a necessary deduction from what has preceded that unless the statute is explicit to the contrary directors will not be liable for statutory defaults

7. Garrison *v.* Howe, 17 N. Y. 458; McHarg *v.* Eastman, 7 Rob. (N. Y.) 137.

8. Shaler, etc., Quarry Co. *v.* Bliss, 27 N. Y. 297 [*affirming* 34 Barb. (N. Y.) 309, 12 Abb. Pr. (N. Y.) 470]; Andrews *v.* Murray, 33 Barb. (N. Y.) 354; Squires *v.* Brown, 22 How. Pr. (N. Y.) 35.

9. Boughton *v.* Otis, 21 N. Y. 261; Shaler, etc., Co. *v.* Brewster, 10 Abb. Pr. (N. Y.) 464.

10. Duckworth *v.* Roach, 8 Daly (N. Y.) 159.

11. Squire *v.* Brown, 22 How. Pr. (N. Y.) 35.

Statute under which directors are held liable by reason of the default for all debts of the corporation whenever contracted. Nimmons *v.* Hennion, 2 Sweeny (N. Y.) 663.

12. Tysen *v.* Fritz, 44 N. Y. App. Div. 562, 60 N. Y. Suppl. 923 (especially where the governing statute provides that every director shall continue to hold his office until his successor has been elected); Reed *v.* Keese, 37 N. Y. Super. Ct. 269; Deming *v.* Puleston, 35 N. Y. Super. Ct. 309.

13. Reed *v.* Keese, 37 N. Y. Super. Ct. 269.

Statute under which if the default occurs after the death of the creditor, the directors become liable to his executor. Carley *v.* Hodges, 19 Hun (N. Y.) 187.

Statute under which the director becomes liable the moment the debt is contracted, it being during the period of default. Chapman *v.* Comstock, 58 Hun (N. Y.) 325, 11 N. Y. Suppl. 920, 34 N. Y. St. 517.

14. Woods *v.* Godwin, 19 N. Y. Suppl. 658, 46 N. Y. St. 937; Ashley *v.* Godwin, 19 N. Y. Suppl. 658, 46 N. Y. St. 936; Young *v.* Godwin, 19 N. Y. Suppl. 656, 46 N. Y. St. 934.

15. Here Ind. Rev. Stat. (1876), p. 654.

16. Schofield *v.* Henderson, 67 Ind. 258. This obvious principle of justice would apply in any relation. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

17. Irvine *v.* McKeon, 23 Cal. 472, and that he was "present when the same did happen."

committed by their predecessors and before they themselves came into the office.[18]

g. Statutory Wrongs Committed by One Board and Continued by Its Successors. Subsequent directors and shareholders of a bank are not liable for the fraud of their predecessors in issuing bills for circulation, contrary to the prohibition of a statute before the amount of stock required by the charter has been paid up in specie, if they do not participate in it; but otherwise if they continue the fraud by reporting to the public authorities from time to time that the requisite amount has been paid.[19]

h. Statute Under Which Directors Liable For All Debts Without Reference to Date When Contracted. Statutes exist making directors guilty of certain defaults liable for all debts then existing, without reference to the dates when contracted.[20] It was so held under a statute providing that officers knowingly making a false certificate of the condition of the corporation should be "liable for all its debts," since this language could not be limited to debts occurring after the making of such certificate.[21]

i. When Debt Is Deemed to Have Been Contracted "After Such Violation." Under a statute declaring that "if any corporation organized and established under the authority of this act shall violate any of its provisions, and shall thereby become insolvent, the directors ordering or assenting to such violation shall be jointly and severally liable in an action founded on this statute for all debts contracted after such violation as aforesaid,"[22] it was held that where a series of acts or a continuous course of conduct on the part of the directors in violation of the statute, finally producing the insolvency of the corporation, is begun before the debt of a creditor is contracted, the debt is not contracted "after such violation," although the series of acts or course of conduct is not completed, or the insolvency of the corporation consummated until afterward.[23]

4. Statutory Liability For Debts Contracted Before Organization — a. Policy of Statutes Creating This Liability. It has been held that members of a company not fully organized as a corporation are not liable as partners for debts contracted by their directors.[24] To obviate the injury which might accrue to the public from such rules as this statutes exist in many of the states making the directors and shareholders liable as partners, for the debts contracted for the company prior to the time when the organization of the company is completed in the manner pointed out by the statute.[25] Outside of statutes and of principles already

18. Mabey *v.* Adams, 3 Bosw. (N. Y.) 346; Ogden *v.* Rollo, 13 Abb. Pr. (N. Y.) 300; Provident Steam Engine Co. *v.* Hubbard, 101 U. S. 188, 25 L. ed. 786 (debt contracted before the president of the corporation came into office, although it remained unpaid during the period when he neglected or refused to comply with the requirements of the statute).

19. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

20. Miller *v.* White, 57 Barb. (N. Y.) 504, 8 Abb. Pr. N. S. (N. Y.) 46; Nimmons *v.* Hennion, 2 Sweeny (N. Y.) 663; Vincent *v.* Sands, 11 Abb. Pr. N. S. (N. Y.) 366, 371 [*citing* Shaler, etc., Quarry Co. *v.* Bliss, 34 Barb. (N. Y.) 309, 12 Abb. Pr. (N. Y.) 470]. Statutes construed in these cases make the directors guilty of the default liable "for all debts then existing." Nimmons *v.* Hennion, 2 Sweeny (N. Y.) 663.

21. Felker *v.* Standard Yarn Co., 148 Mass. 226, 19 N. E. 220.

22. Minn. Laws (1873), c. 11, § 23; Minn. Gen. Stat. c. 34, § 42.

23. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 745.

Conclusiveness of the action of the creditor in fixing the date of the debt so as to estop him from averring that the debt was not due until a later date. Bond *v.* Clark, 6 Allen (Mass.) 361.

24. It is held in Massachusetts that members of a corporation, to whom a certificate of organization as a corporation has been issued by the secretary of the commonwealth, in accordance with the statute of 1870, c. 224, are not liable as partners before the whole of the capital has been paid in, in violation of section 32 of that statute. Salem First Nat. Bank *v.* Almy, 117 Mass. 476. *Compare* Haggerty *v.* Foster, 103 Mass. 17; Lancaster *v.* Choate, 5 Allen (Mass.) 530; Pierce *v.* Bryant, 5 Allen (Mass.) 91; Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; Fay *v.* Noble, 7 Cush. (Mass.) 188.

25. For examples of such statutes see Hipp *v.* Muehleisen, 88 Ill. App. 55; Ill. Rev. Stat. c. 32, § 18; Wis. Rev. Stat. (1878), § 1901.

considered[26] directors or other officers of inchoate corporations who assume to contract debts not the debts of the assumed corporation, before it has acquired its corporate character, become personally liable to pay those debts, on the ground of breach of warranty of agency,[27] although in doing so they may act in good faith.[28] But that this is compatible with the conclusion that a person who knows that he is dealing with a corporation before it has made publication of its articles of incorporation, stating the amount of indebtedness which it can contract, as required by law, cannot object that the publication was not completed, although begun within the time specified.[29]

b. These Statutes Mandatory. A statute of this kind provided that the capital stock of companies organized thereunder should be paid in within eighteen months from the incorporation, and that if any company violated the provisions of the act and thereafter became insolvent, its directors, ordering or assenting to such violation, should be jointly and severally liable for all debts contracted after such violation. This statute was held to be mandatory, and, in an action under it, it was no evidence that the collection of payments for the stock was devolved upon the treasurer.[30]

As these statutes involve the liability of the members or shareholders as well as that of the directors they will be found more fully treated *supra*, VIII, H, 1 *et seq.*

That a judgment against the corporation, execution, and return of nulla bona are necessary to charge a director under such a statute see Berwind-White Coal Min. Co. *v.* Ewart, 90 Hun (N. Y.) 60, 35 N. Y. Suppl. 573, 70 N. Y. St. 233.

Under the Illinois statute the members or shareholders of a corporation illegally formed are liable as partners for its acts or contracts; and directors, officers, and agents acting and contracting in its name render themselves personally liable independently of statute. Lovering *v.* McLaughlin, 161 Ill. 417, 44 N. E. 99 [*affirming* 46 Ill. App. 373].

Illustrations.— That a director cannot avoid his liability upon his note given for shares in the corporation on the ground that the capital was not actually paid in cash, and therefore that the corporation had never been legally organized, see Raegener *v.* McDougall, 33 N. Y. App. Div. 231, 53 N. Y. Suppl. 484 [*citing* Chubb *v.* Upton, 95 U. S. 665, 24 L. ed. 523]. A corporation may maintain an action against individuals who afterward became shareholders and directors of the corporation for fraudulent representations made to its directors after their first meeting and before the filing of their certificate of organization, which was acted upon after their organization. Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046. For a special finding of fact which shows a liability under a statute of this kind see Clark *v.* Kent, 80 Ill. App. 128 [*affirmed* in 181 Ill. 237, 54 N. E. 967]. The penalty imposed by such a statute has been visited upon contracting officers of a corporation whose certificate of incorporation had been issued by the secretary of state, but not filed for record with the recorder of deeds of the county, as required by another section of the statute. Edwards *v.* Armour Packing Co., 90 Ill. App. 333 [*affirmed* in 190 Ill. 467, 60 N. E. 807]. Where the governing statute makes the directors liable if they assume to exercise corporate powers before all the stock named in the articles of incorporation "shall be subscribed in good faith," they become so liable where the ostensible subscribers do not intend to pay for their shares, but intend merely to purchase shares for other persons who do not intend to pay for them. Clark *v.* Kent, 80 Ill. App. 128 [*affirmed* in 181 Ill. 237, 54 N. E. 967].

Not liable on contracts made before being empowered by by-laws.— The writer merely states under this head what he regards as a tenable decision (Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64), under which, in connection with a previous decision (Hall *v.* Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75), somebody got plaintiff's money and neither the corporation nor the directors were responsible.

26. See *supra*, IX, O, 1 *et seq.*

27. Herod *v.* Rodman, 16 Ind. 241.

28. Farmers' Co-operative Trust Co. *v.* Floyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346. So as to promoters. Hub Pub. Co. *v.* Richardson, 59 Hun (N. Y.) 626, 13 N. Y. Suppl. 665, 37 N. Y. St. 541. So where a corporation suspended for sixteen years was galvanized into life, ostensibly reorganized, and made a means of perpetrating a great swindle upon the public, the immunities of its charter afforded no protection to the conspirators. Bartholomew *v.* Bentley, 15 Ohio 659, 666, 45 Am. Dec. 596; Bartholomew *v.* Bentley, 1 Ohio St. 37 (in a case between the same parties). The principle laid down in Vose *v.* Grant, 15 Mass. 505, 515, per Jackson, J., that conspirators cannot claim the immunities of corporators.

29. Thornton *v.* Balcom, 85 Iowa 198, 52 N. W. 190. That the authority conferred by Tex. Rev. Stat. art. 585, to dispose of unsubscribed stock does not authorize the directors to commence to do business before the stock is all subscribed see Orynski *v.* Loustaunan, (Tex. 1890) 15 S. W. 674.

30. Clow *v.* Brown, 134 Ind. 287, 33 N. E. 1126.

c. Only Those Directors Liable Who Participated in Contracting of Debts. Here as in some other cases of the doing of wrongs authoritatively forbidden by statute the liability falls only upon those directors who participated in contracting the debts without previously complying with the law.[31] Consequently a director cannot be held liable under such a statute, where the indebtedness was contracted before he became director.[32]

d. Liable to Extent of Difference Between Amount of Capital Paid in and Amount Which Should Have Been Paid in. It has been held that persons who organize a corporation, and in the character of its directors enter upon the business for which it was created and contract debts before the statutory amount of capital has been paid in, become jointly and severally liable to creditors to the extent of the difference between the amount of capital actually paid in and the amount which the statute required to be paid in.[33]

e. Liable For Making Sham Payments of Stock Subscriptions. For the directors to deposit their notes in the place of specie in payment of the stock for which they had subscribed was not a compliance with such a statute, but was a fraud upon the public of the most reprehensible character, which made them liable for the corporate debts under the terms of the statute.[34]

5. Statutory Liability For Failing to File Certain Reports — a. General Description of These Statutes. In many of the states there exist statutes, and even constitutional ordinances, requiring the directors or trustees of corporations to make and file, in some designated public office, or to publish in some designated manner, at stated periods, reports of the condition of the company. If the directors fail to perform this duty, they are made liable to pay any debts of the company contracted during the period when they are thus in default. These statutes, which make an agent liable to pay the debts of his principal in consequence of a mere nonfeasance, fall within the class which are deemed penal and are to be strictly construed. Most of the questions which have arisen under them are of a general character, and are considered in the preceding subdivisions of this article. It is scarcely necessary to say that such a statute does not render directors liable to pay the debts of the corporation, unless the statute fixes this penalty upon the failure to do the required act.[35]

b. To What Class of Corporations Liability of Directors Attaches Under These Statutes. Whether a given corporation belongs to the class of corporations required to file such a report must of course be determined by a reference to its charter or governing statute.[36] Under the Kansas statute which uses the words, "each corporation for profit," are included all classes of corporations formed for pecuniary gain, including those which conduct a purely private business, such as manufacturing.[37]

c. To What Class of Directors Liability Attaches — (I) *In General.* Only the trustees who are guilty of the negligence are liable.[38] The liability does not extend to their successors in office.[39] It seems that a trustee whose term of office expired before the contracting of the debt will not be liable, unless plaintiff proves that he held over, and the fact of his holding over will not be presumed.[40]

31. Edwards *v.* Dettenmaier, 88 Ill. App. 366; Edwards *v.* Cleveland Dryer Co., 83 Ill. App. 643.

32. Hoyt *v.* Hasse, 80 Ill. App. 187.

33. Hequembourg *v.* Edwards, 155 Mo. 514, 56 S. W. 490 [*reversing* (Mo. 1899) 50 S. W. 908 (*citing* Burns *v.* Peck, etc., Co., 83 Ga. 471; Farmers' Co-operative Trust Co. *v.* Floyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346)].

34. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

35. Margarge, etc., Co. *v.* Ziegler, 9 Pa. Super. Ct. 438, 43 Wkly. Notes Cas. (Pa.) 466; Chester Twist Drill, etc., Co. *v.* Wetherill, 7 Del. Co. (Pa.) 390; Bole *v.* West View Oil Co., 29 Pittsb. L. J. N. S. 98.

36. Cooke *v.* Pearce, 23 S. C. 239.

37. State *v.* Fenn, 60 Kan. 306, 56 Pac. 483.

38. Boughton *v.* Otis, 29 Barb. (N. Y.) 196.

39. Shaler, etc., Quarry Co. *v.* Bliss, 34 Barb. (N. Y.) 309, 12 Abb. Pr. (N. Y.) 470 [*affirmed* in 27 N. Y. 297].

40. Philadelphia, etc., Coal, etc., Co. *v.* Hotchkiss, 82 N. Y. 471. What corporations are within the provisions of this statute.

(II) *De Facto Directors.* The obligation to make and file this report and the consequent liability do not attach to a trustee by virtue of the mere fact that he has been elected as such; there must be evidence of an express or implied acceptance of the office.[41] But one who has assumed the character of trustee cannot escape the liability on the plea that he was not legally elected.[42]

d. Directors Liable For Debts Contracted During Period of Default and While Such Directors Were in Office. Unless such a statute in terms affixes to the failure to file the required report the penalty of paying antecedent debts of the corporation, its operation is to visit upon the delinquent directors the obligation of paying those debts of the corporation which were contracted under their administration and during the period of the default.[43] Where the statute charges the directors in case of a default to file an annual report with a joint and several liability for all the debts of the corporation "then existing,"[44] it follows that successive defaults by the same directors do not renew with respect to them the penalty already incurred; but that when a new director is elected a new default makes him jointly and severally liable with the old directors for the debts then existing.[45]

e. Liable For What Debts — (I) *In General.* It follows from the preceding that a director is not liable by reason of a default in failing to file the required report for a debt contracted after he ceased to be a director.[46] It has been held on the one hand that the bond of a corporation not due at the time of the default of the directors in filing the required report does not deprive it of the character of an "existing debt" within the meaning of the statute;[47] and on the other hand that a note indorsed by the corporation at a time when it was in default in the filing of its statutory report, but which did not fall due until after the next annual report of the corporation had been filed, would not charge the directors with personal liability, since the liability on the note did not become a debt with respect to the corporate indorser, until after the default by the maker and a notice thereof to the indorser.[48]

Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175.

That the publication in an obscure paper of limited circulation does not comply with the statute, but renders the trustees liable. Whitney *v.* Cammann, 60 N. Y. Super. Ct. 391, 18 N. Y. Suppl. 200, 45 N. Y. St. 570.

That the statute does not by implication prohibit a forfeiture of the charter see People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140, 29 N. E. 947, 42 N. Y. St. 753, 15 L. R. A. 240.

That the words "each year" in the amending act of 1875, c. 110, take the place of the word "annually" in the original act of 1848, c. 40, section 12, and leave the statute of the same import see Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175.

41. Cameron *v.* Seaman, 69 N. Y. 396, 25 Am. Rep. 212.

42. Easterly *v.* Barber, 65 N. Y. 252.

43. M. I. Wilcox Cordage, etc., Co. *v.* Mosher, 114 Mich. 64, 72 N. W. 117; Gennert *v.* Ives, 102 Mich. 547, 61 N. W. 9 (construing the words "willfully neglect or refuse"); Gold *v.* Clyne, 134 N. Y. 262, 31 N. E. 980, 47 N. Y. St. 770, 17 L. R. A. 767; Kirkland *v.* Kille, 99 N. Y. 390, 2 N. E. 36; Bruce *v.* Platt, 80 N. Y. 379; Losee *v.* Bullard, 79 N. Y. 404; Huguenot Nat. Bank *v.* Studwell, 74 N. Y. 621; Jones *v.* Barlow, 62 N. Y. 202.

44. As for example N. Y. Laws (1892), c. 688, § 30.

45. Morgan *v.* Hedstrom, 164 N. Y. 224, 58 N. E. 26 [*affirming* 25 N. Y. App. Div. 547, 49 N. Y. Suppl. 1049].

N. Y. Laws (1892), c. 688, § 30, making the directors of a corporation failing to file an annual report liable for its debts, unless within a prescribed time after the time limited for filing such report they file a certificate of the refusal of the other directors to file the report, does not apply where before the time expires the corporation ceases to exist. Western Nat. Bank *v.* Faber, 29 Misc. (N. Y.) 467, 62 N. Y. Suppl. 82. For a case construing the same statute and charging a director with liability see Union Bank *v.* Keim, 52 N. Y. App. Div. 135, 64 N. Y. St. 1070.

A statute making any director who fails or refuses to make the required report liable for "all debts" of the corporation renders them liable for a debt of the corporation incurred after one default in failing to file such a report and before a second report. Saginaw Bank *v.* Pierson, 112 Mich. 410, 70 N. W. 901 [*citing* Felkner *v.* Standard Yarn Co., 148 Mass. 226, 19 N. E. 220].

46. Sinclair *v.* Fuller, 158 N. Y. 607, 53 N. E. 510 [*affirming* 9 N. Y. App. Div. 297, 41 N. Y. Suppl. 193, 75 N. Y. St. 641].

47. Lee *v.* Jacob, 38 N. Y. App. Div. 531, 56 N. Y. Suppl. 645 [*explaining* Jones *v.* Barlow, 62 N. Y. 202].

48. Western Nat. Bank *v.* Faber, 29 Misc. (N. Y.) 467, 62 N. Y. Suppl. 82.

(II) *Debt Must Be Valid as Against Corporation.* Under a principle already explained[49] the debt for which alone the director can be charged must be a valid debt as against the corporation itself. If the obligation was fraudulently imposed upon the corporation there is no personal liability;[50] and in general the directors may set up, in a proceeding against them to enforce this liability, any defense to which the original indebtedness was subject.[51] It was so held where the debt consisted of a note which had been so altered as to discharge the corporation.[52]

f. Time at Which Debt Is Deemed to Accrue — (I) *In General.* On the ground that these statutes are penal and hence to be strictly construed,[53] it has been held that the directors will not be charged if they were not in default at the time the note was given, although they were in default at the time the debt was first contracted.[54] Subsequent cases, however, hold that if the directors are in default at the time the debt was first contracted, their liability is fixed, and is not discharged by the taking of a note by the creditor of the corporation.[55] Neither is such liability affected by a renewing of the note,[56] or by the recovery of a judgment against the corporation.[57]

(II) *Where Contract Is to Deliver or Receive Goods.* Under a contract to furnish to a corporation materials to be delivered at stated times, to be paid for in the company's notes at ninety days, it seems that the debt would be deemed to arise from the time when the materials were delivered, and not from the time when the contract was made.[58] And where the contract was to deliver a certain number of articles, and its terms were such that the vendor could not demand payment until all were delivered, the fact that some of them may have been delivered during a period of default would not be sufficient to charge the trustees for the debt, if a report was made and filed in conformity with the statute before the delivery was complete. The court proceeded upon the ground that the statute being highly penal the directors ought not to be charged under it with liability for an uncertain and contingent debt.[59]

g. Debts Must Be Actually Due. Whatever will defeat the right of the corporation suing for the indebtedness will be available as a defense upon the part of the director. He is liable only where the debt of the corporation is actually due, and where the present right of action exists against it therefor.[60]

h. Effect of Dissolution of Corporation. Where a contract has been made to erect buildings for the corporation, and the work is not completed, and payment

Liable for "existing debts" under New York Manufacturing Act.— This statute makes directors liable for all antecedent debts of the corporation which are due and payable at the time when the penalty for failing to file the statutory report attaches. It does not include a promissory note not due until after default. Nimmons *v.* Hennion, 2 Sweeny (N. Y.) 663.

49. See *supra*, IX, P, 2, d.

50. Adams *v.* Mills, 60 N. Y. 533.

51. Jones *v.* Barlow, 62 N. Y. 202.

52. Butte First Nat. Bank *v.* Weidenbeck, 87 Fed. 271.

53. See *supra*, IX, P, 1, b *et seq.*

54. Garrison *v.* Howe, 17 N. Y. 458.

55. Jones *v.* Barlow, 38 N. Y. Super. Ct. 142; Deming *v.* Puleston, 35 N. Y. Super. Ct. 309 [*affirmed* in 55 N. Y. 655].

56. Breitung *v.* Lindauer, 37 Mich. 217.

57. Vincent *v.* Sands, 33 N. Y. Super. Ct. 511, 11 Abb. Pr. N. S. (N. Y.) 366; McHarg *v.* Eastman, 7 Rob. (N. Y.) 137. These cases proceed upon the doctrine that the promissory note given for an antecedent debt is not the payment of an old debt, but merely an evidence of it or additional security. Freeland *v.* McCullough, 1 Den. (N. Y.) 414, 43 Am. Dec. 685.

Under the New York Manufacturing Act the fact that the company is closing up its affairs and has ceased to do business does not excuse the omission to file the report; nor does the fact that the creditor claiming the advantage of the statute is a shareholder, cognizant of the financial condition of the company. Sanborn *v.* Lefferts, 58 N. Y. 179. But it is otherwise where the creditor is himself a trustee of the corporation; he cannot enforce against his co-trustee a forfeiture for a wrong in which he himself has participated. Easterly *v.* Barber, 65 N. Y. 252.

58. Garrison *v.* Howe, 17 N. Y. 458.

59. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 68 N. Y. 34. *Compare* Cady *v.* Sanford, 53 Vt. 632.

60. Gold *v.* Clyne, 134 N. Y. 262, 31 N. E. 980, 47 N. Y. St. 770, 17 L. R. A. 767 [*affirming* 58 Hun (N. Y.) 419, 12 N. Y. Suppl. 531, 35 N. Y. St. 582]; Jones *v.* Barlow, 62 N. Y. 202.

therefor is not made until after a dissolution of the corporation, the debt is not within the statute.[61] The existence of a corporation is not terminated so as to relieve the directors of the duty of filing the annual report required by the governing statute, because the corporation has transferred a large part but not all of its property, provided it still exercises acts of absolute ownership over some of it.[62] A statute of New York, making directors failing to file a prescribed annual report liable for the debts of the corporation unless, within a stated time after the limitation for filing the report, they file a certificate of the fact that the other directors have refused to file the report, does not apply where, before the time for filing this certificate has expired, the corporation has ceased to exist.[63]

i. Report Filed in County or Counties Where Corporation Conducts Its Business. The provisions of the statutes of Michigan[64] requiring certain reports to be filed in the county or counties where the corporation may conduct its business is, when taken in connection with the rest of the statute, construed to mean that the report must be filed in each county in which the material business of the corporation is done.[65]

j. Effect of Giving Time to Corporation. Where the creditor at the request of the corporation gives a further time within which to pay the debt, this does not have the effect of discharging the directors, since they are conclusively deemed to assent thereto.[66]

k. Effect of Corporation Being Adjudged a Bankrupt. The fact that after the personal liability of the directors, by reason of their failure to file the required report has occurred, the corporation has been adjudged a bankrupt, and that notes accepted by a majority of its creditors in discharge of its indebtedness have not fallen due, does not prevent the creditors from maintaining an action to enforce the personal liability of the trustees, since this liability is created by statute, and is a cause of action entirely independent of a cause of action against the corporation.[67]

l. What Will and What Will Not Excuse Filing of Such Report. The construction of the New York Manufacturing Act is that the making and publishing of the report does not comply with the statute, but that it must also be filed as therein provided; that the trustees must make and verify the report within the time prescribed by the statute, twenty days after the close of the year, and that having done this they may file and publish it as soon thereafter as may be consistent with reasonable diligence and good faith, without incurring the penalty of

61. Gold *v.* Clyne, 134 N. Y. 262, 31 N. E. 980, 47 N. Y. St. 770, 17 L. R. A. 767 [*affirming* 58 Hun (N. Y.) 419, 12 N. Y. Suppl. 531, 35 N. Y. St. 582].

62. Witherow *v.* Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507 [*reversing* 11 Misc. (N. Y.) 526, 32 N. Y. Suppl. 746, 64 N. Y. St. 456].

63. Pittsburgh Reduction Co. *v.* De Leon, 29 Misc. (N. Y.) 130, 60 N. Y. Suppl. 262.

64. Mich. Comp. Laws, c. 63, §§ 5, 18, 19.

65. Van Etten *v.* Eaton, 19 Mich. 187.

Meaning of the expression "within twenty days from the first day of January," in the New York Manufacturing Act.—It means that it must publish the required report in the January succeeding its organization, although a year has not elapsed. Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327. *Contra*, Cameron *v.* Seaman, 69 N. Y. 396, 25 Am. Rep. 212. *Compare* Cincinnati Cooperage Co. *v.* O'Keefe, 120 N. Y. 603, 24 N. E. 993, 31 N. Y. St. 912; Knox *v.* Baldwin, 80 N. Y. 610; Victory Web Printing, etc., Co. *v.* Beecher, 26 Hun (N. Y.) 48. It is not enough that the report be made out and ready to file within twenty days from the first of January; it must be actually filed within that time. When it was made out and got ready to be filed is immaterial, so that it contains a truthful statement of the facts required by the statute as of that date. Butler *v.* Smalley, 101 N. Y. 71, 4 N. E. 104. The directors are not exonerated by filing a report on the twenty-eighth day of the preceding December, the statute requiring it to be filed within twenty days from the first day of January. Cincinnati Cooperage Co. *v.* O'Keefe, 44 Hun (N. Y.) 64.

66. Jones *v.* Barlow, 62 N. Y. 202. The case resembles the rule that the giving of time to the principal debtor does not discharge the surety who assents thereto. Wright *v.* Storrs, 32 N. Y. 691.

67. Wood, etc., Co. *v.* English, 55 N. Y. App. Div. 549, 67 N. Y. Suppl. 371 [*reversing* 31 Misc. (N. Y.) 557, 65 N. Y. Suppl. 521].

the statute.[68] The fact that a company is closing up its affairs and has ceased to do business does not exonerate the trustees from liability for failing to file such a report;[69] but a total abandonment of the enterprise, either before[70] or after[71] the corporate organization was effected, may be shown in defense. The filing of such a report is excused where, before the time for filing it arrives, the object fails for which the corporation was organized, and there is no intention to prosecute its business;[72] as where it is adjudged a bankrupt and its entire property has passed into the hands of an assignee in bankruptcy;[73] or where, prior to the date at which the report should be filed, an application for a receiver has been made, followed by the appointment of a receiver subsequently to such date;[74] or where the trustees pass a resolution that the corporation shall cease to transact business, and thereupon resign their offices to take effect at the end of their term, and do not act afterward.[75] But in the view of another court it is not excused, although the corporation has become insolvent and has entirely abandoned its business, and all its property has been turned over to one of its trustees in satisfaction of an indebtedness, and none of its officers or trustees have exercised any corporate act or function for the period of two months, and there is no intention to resume the business of the corporation.[76] The omission thus to file the report is not excused by intrusting the duty to another who fails to perform it.[77] On the other hand the making and filing of a report as required by such a statute, after the life of the corporation has expired by limitation, will not raise any presumption of law that statutory proceedings have been taken to extend its period of existence.[78] In short the construction of the New York statute is that a technical dissolution is not necessary to absolve the trustees from the duty of making, publishing, and filing such a report, but that a *de facto* dissolution or total abandonment will be sufficient.[79] It is no ground for excusing the directors of a corporation

68. Whitney *v.* Cammann, 137 N. Y. 342, 33 N. E. 305, 50 N. Y. St. 664; Butler *v.* Smalley, 101 N. Y. 71, 4 N. E. 104; Cameron *v.* Seaman, 69 N. Y. 396, 25 Am. Rep. 212.

69. Sanborn *v.* Lefferts, 58 N. Y. 179, 16 Abb. Pr. N. S. (N. Y.) 42; Brown *v.* Clark, 81 Hun (N. Y.) 267, 30 N. Y. Suppl. 801, 62 N. Y. St. 764.

70. De Witt *v.* Hastings, 69 N. Y. 518.

71. Losee *v.* Bullard, 79 N. Y. 404; Witherow *v.* Slayback, 11 Misc. (N. Y.) 526, 32 N. Y. Suppl. 746, 64 N. Y. St. 456.

72. Kirkland *v.* Kille, 99 N. Y. 390, 2 N. E. 36; Carraher *v.* Mulligan, 4 Silv. Supreme (N. Y.) 550, 8 N. Y. Suppl. 42, 28 N. Y. St. 439.

73. Bruce *v.* Platt, 80 N. Y. 379.

74. Jersey City First Nat. Bank *v.* Lamon, 130 N. Y. 366, 29 N. E. 321, 8 N. Y. Suppl. 444, 41 N. Y. St. 684 [*reversing* 55 Hun (N. Y.) 414, 29 N. Y. St. 181].

75. Van Amburgh *v.* Baker, 81 N. Y. 46.

76. Gans *v.* Switzer, 9 Mont. 408, 24 Pac. 18.

77. Gans *v.* Switzer, 9 Mont. 408, 24 Pac. 18.

Whether it is excused by the existence of an injunction see Whitney *v.* Cammann, 137 N. Y. 342, 33 N. E. 305, 50 N. Y. St. 664 [*affirming* 60 N. Y. Super. Ct. 391, 18 N. Y. Suppl. 200, 45 N. Y. St. 570].

78. Gold *v.* Clyne, 134 N. Y. 262, 31 N. E. 980, 47 N. Y. St. 770, 17 L. R. A. 767.

79. Losee *v.* Bullard, 79 N. Y. 404.

Subsequent bankruptcy of trustee.— The fact that after the term of his office had expired and before the debt in favor of plaintiff was contracted by the corporation the trustee filed his petition in bankruptcy, including in his list of assets his shares of stock in the corporation, and was adjudged a bankrupt, and assigned and delivered his shares to the assignee and received his discharge, and that after the filing of the petition in bankruptcy he had no connection with the corporation, has been held a good defense to an action to charge him under the New York statute. Philadelphia, etc., Coal, etc., Co. *v.* Hotchkiss, 82 N. Y. 471.

Circumstances under which directors liable. —Where a judgment was recovered on a four months' draft of the corporation, dated Nov. 3, 1877, and the corporation failed to file the report required by the statute in the following January, it was held that the judgment creditor could maintain an action to enforce the liability of the president. South Norwalk First Nat. Bank *v.* Fenton, 23 Hun (N. Y.) 309. Where money was loaned to the corporation in 1873, for the recovery of which a cause of action accrued in 1874, in consequence of the failure of the directors to file the statutory report in that year, and there was another default in 1875, and the action was commenced under the statute in March, 1877, it was held not a good objection that the cause of action accrued in 1874, when made for the first time after the trial had taken place. Duckworth *v.* Roach, 81 N. Y. 49. For a failure of the report of trustees of a manufacturing corporation to comply with both N. Y. Laws (1848), c. 40,

from filing a statutory report, that its accounts have not been kept in such a way as to enable them to give a detailed statement of receipts and disbursements, as required by the blank form furnished by the secretary of state;[80] that the auditor of the state who prescribed the form of such reports failed to notify the corporation of it, or to mail to it a copy of the prescribed form;[81] or that the directors are liable to creditors of the corporation under another statute, for causing its insolvency by violations of the law relating thereto.[82]

m. Defenses Against This Liability — (i) *In General.* Defendant in such a proceeding is entitled to prove that the enterprise of the contemplated company was abandoned before its formation; that no papers were filed; that he surrendered his stock, and notified the acting president that he would have nothing to do with it; and that in fact he had no further connection with it.[83] On the trial of such an action the defense that the omission to file the report was in consequence of the advice of plaintiff, given on the ground that the filing of the report would hurt the credit of the corporation, which was at the time largely indebted, should be submitted to the jury.[84] But where the indebtedness with which the director was sought to be charged for failing to file the statutory annual report consisted of bonds of the corporation, it was no defense that he was in default in failing to comply with the statute at the time when he sold the bonds to plaintiff.[85]

(ii) *Statute of Limitations.* The statute of limitations runs in favor of the trustees from the time of each particular failure to file the statutory report, and a subsequent failure, or any successive number of subsequent failures, does not operate to extend the time within which suit must be brought against them.[86] Where the indebtedness of the corporation with respect to which it is sought to charge the directors for failing to file the statutory annual report is evidenced by bonds of the corporation, the statute of limitations does not begin to run until the bonds mature; and under the statute of New York the creditor is in time if his action is brought within three years from that date.[87]

n. Construction of Other Such Statutes — (i) *California Statute Requiring Posting of Itemized Accounts and Balance-Sheets.* The California statute[88] requiring the posting of itemized accounts and balance-sheets is construed as referring to two separate papers, either of which may be posted. The detailed statement mentioned in the statute is construed as applying only to the itemized account; so that the apparent purpose of the statute may be conveniently evaded by filing a balance-sheet merely, and a "balance-sheet," according to the commercial understanding of the term, posted by the directors of a mining corporation,

and N. Y. Laws (1853), c. 333, the trustees become liable for all the debts of the company, as provided by section 12 of said chapter 40. Philadelphia, etc., Coal, etc., Co. *v.* Hotchkiss, 82 N. Y. 471; Blake *v.* Wheeler, 18 Hun (N. Y.) 466. What corporations are within the provisions of this statute. Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175. That the publication in an obscure paper of limited circulation does not comply with the statute but renders the trustees liable see Whitney *v.* Cammann, 60 N. Y. Super. Ct. 391, 18 N. Y. Suppl. 200. That the statute does not by implication prohibit a forfeiture of the charter see People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140, 29 N. E. 947, 42 N. Y. St. 753, 15 L. R. A. 240. That the words "each year" in the amending act of 1875, c. 110, take the place of the word "annually" in the original act of 1848, c. 40, § 12, and leave the statute of the same import, see Allen *v.* Clark, 21 N. Y. Suppl. 338, 49 N. Y. St. 175.

80. State *v.* Fenn, 60 Kan. 306, 56 Pac. 483.

81. Louisville, etc., Ferry Co. *v.* Com., 104 Ky. 726, 47 S. W. 877, 20 Ky. L. Rep. 927.

82. Clow *v.* Brown, 150 Ind. 185, 48 N. E. 1034 [*rehearing denied* in 49 N. E. 1057].

83. De Witt *v.* Hastings, 69 N. Y. 518.

84. Carraher *v.* Mulligan, 4 Silv. Supreme (N. Y.) 550, 8 N. Y. Suppl. 42, 28 N. Y. St. 439.

85. Morgan *v.* Hedstrom, 164 N. Y. 224, 58 N. E. 26 [*affirming* 25 N. Y. App. Div. 547, 49 N. Y. Suppl. 1049].

86. Losee *v.* Bullard, 79 N. Y. 404 [*distinguishing* Boughton *v.* Otis, 21 N. Y. 261]; Cornell *v.* Roach, 9 Abb. N. Cas. (N. Y.) 275. See also Merchants' Bank *v.* Bliss, 35 N. Y. 412.

87. Morgan *v.* Hedstrom, 164 N. Y. 224, 58 N. E. 26 [*affirming* 25 N. Y. App. Div. 547, 49 N. Y. Suppl. 1049].

88. Cal. Acts (1880), p. 134.

is sufficient, although it does not contain all the particulars mentioned in the first section.[89] In an action under this statute it must be alleged that money had in fact been received and liabilities incurred. An allegation that the directors pretended to have received large sums of money and incurred large liabilities is not sufficient.[90] The directors are liable for the wilful failure of the superintendent to make the reports therein required, but not for his negligence in failing to make them.[91] The statute does not render the directors liable for each failure to post the verified balance-sheet therein required.[92] Where it appeared in evidence, in an action under the statute, that a director and shareholder, when elected superintendent, served as such, although declaring that he would not, and managed the business of taking out ores and working them, it was held that a finding that the corporation worked its mines was justified.[93] The mere fact that the directors have not the information sufficient to enable them to post the itemized account or balance-sheet required by the statute is no defense to such an action, unless they make it appear that they could not obtain the necessary information.[94] Where a right of action accrues to a shareholder by reason of the failure of the directors to post the itemized account at the time required by the statute, it is not avoided by posting it at a subsequent time, although before an action is actually commenced.[95] It is no defense to an action to recover the penalty prescribed by this statute that plaintiff had knowledge or the means of knowledge of the condition of the accounts of the corporation.[96] A wilful and intentional purpose to violate the statute is not a necessary predicate of the right to recover the penalty, at least where no attempt is made to comply with its requirements.[97]

(II) *Colorado Statute Prescribing County in Which Report Is to Be Filed.* The annual report of the directors of a corporation, required by the Colorado statute to be filed in the county where its principal business is carried on, must be filed in the county stated in the certificate of incorporation as the principal place of business, and not in that in which the business is actually transacted. The liability denounced by this statute cannot be avoided by a statement in the certificate of incorporation that the principal business is to be carried on in another state or in any part of Colorado, where it also states that the principal business office is in a certain county.[98]

(III) *Kentucky Statute Against "Wilfully Failing or Refusing to Make Reports," Etc.* A statute of Kentucky provides that "any corporation or officer thereof wilfully failing or refusing to make reports as required by its charter shall be deemed guilty of a misdemeanor."[99] Ignorance of the law is no defense in this case to a prosecution thereunder any more than in any other case. It is not necessary that the officers of the corporation should know of the existence of the statute, in order to make them liable for failing to comply with its provisions.[1] There was not a "wilful" failure to comply with the statute, where the corporation gave to its attorney, in good faith and in ample time, the data necessary for

89. Eyre *v.* Harmon, 92 Cal. 580, 28 Pac. 779.

90. Hewlett *v.* Epstein, 63 Cal. 184.

91. Eyre *v.* Harmon, 92 Cal. 580, 28 Pac. 779.

92. Loveland *v.* Garner, 71 Cal. 541, 12 Pac. 616.

93. Beal *v.* Osborne, 72 Cal. 305, 13 Pac. 871.

94. Schenck *v.* Bandmann, 81 Cal. 231, 22 Pac. 654.

95. Schenck *v.* Bandmann, 81 Cal. 231, 22 Pac. 654.

What not excuse.— A director of a corporation organized for mining purposes is not relieved from the making and posting of an itemized balance-sheet imposed by the California act of March 30, 1874, upon directors of all corporations formed for that purpose, by the fact that it has not engaged in mining. Francais *v.* Somps, 92 Cal. 503, 28 Pac. 592.

96. Ball *v.* Tolman, 119 Cal. 358, 51 Pac. 546.

97. Ball *v.* Tolman, 119 Cal. 358, 51 Pac. 546.

98. Tabor *v.* Commercial Nat. Bank, 62 Fed. 383, 10 C. C. A. 429.

99. Ky. Stat. (1899), § 4087.

1. Louisville, etc., Ferry Co. *v.* Com., 104 Ky. 726, 47 S. W. 877, 20 Ky. L. Rep. 927.

the making of the report, and the auditor of the state, although not authorized by statute so to do, granted the attorney an extension of time.[2]

(IV) *MASSACHUSETTS STATUTE.* Construing the Massachusetts statute[3] requiring certain annual reports, it has been held that if the certificate named in the statute is made and deposited in any month during one year, the officers will be liable for any debts contracted after the corresponding month of the year next ensuing, if they do not within that time make and deposit a regular certificate, and that they will continue to be so liable for debts contracted until the proper certificate is made and deposited by the directors; but that they will not be liable for any debt contracted during or until after the expiration of the whole of the next corresponding month.[4] Under such statutes a liability attaches to *de facto* directors as well as those who are such *de jure*,[5] in conformity with a rule already stated.[6] The acting officers of a corporation will not be allowed to avail themselves of any informalities which have taken place at the meeting at which they were chosen, in order to escape the liability imposed by such statute.[7]

(V) *MICHIGAN STATUTE— WILFUL AND INTENTIONAL NEGLECT TO FILE ANNUAL REPORT.* Under a statute of Michigan making the directors of corporations who wilfully and intentionally neglect to file annual reports of their affairs personally liable for their debts, the neglect to file such reports is presumed to be wilful and intentional.[8]

(VI) *MONTANA TERRITORIAL STATUTE.* This statute was not repealed by the provision of the constitution of Montana declaring that no company or corporation formed under the laws of any other state or territory shall have any greater rights or privileges than those possessed by corporations created under the laws of the state.[9]

(VII) *NEW YORK STATUTE REQUIRING WRITTEN NOTICE WITHIN THREE YEARS.* The Stock Corporation Law of this state was amended in the year 1899,[10] by providing that no director of a corporation shall be liable to a creditor of the corporation, "because of failure to make and file an annual report, whether heretofore or hereafter accruing," unless written notice is served on him within three years. This statute does not apply to actions to enforce such liability of directors which were commenced before its passage.[11]

o. Sufficiency of Report — (I) *IN POINT OF FORM* — (A) *Signed by Majority of Board.* Under a statute requiring the prescribed annual report to be signed by a majority of the trustees, or by a majority of the directors, unless it is so signed it is a nullity, and the filing of it does not operate to release the directors from their statutory liability.[12] The annual report demanded by this statute must be signed by the trustees in point of fact; and signing the names of the trustees by the secretary and a verification by him will not be sufficient.[13] But it is sufficient if it be signed by the majority of a *de facto* board of directors; so that, although the board has been irregularly reduced from twelve to nine, yet a report signed by six of the nine will be sufficient.[14] So where the number of the

2. Suburban Electric Co. *v.* Com., 55 S. W. 684, 21 Ky. L. Rep. 1556. See also State *v.* Moore, 69 N. H. 99, 35 Atl. 584.
3. Mass. Stat. (1851), c. 133, § 9.
4. Bond *v.* Clark, 6 Allen (Mass.) 361.
5. Newcomb *v.* Reed, 12 Allen (Mass.) 362.
6. See *supra*, IX, P, 1, o.
7. Thayer *v.* New England Lithographic Steam Printing Co., 108 Mass. 523.
8. M. I. Wilcox Cordage, etc., Co. *v.* Mosher, 114 Mich. 64, 72 N. W. 117.
9. Butte First Nat. Bank *v.* Weidenbeck, 87 Fed. 271 [*criticizing* Criswell *v.* Montana Cent. R. Co., 18 Mont. 167, 14 Pac. 525, 33 L. R. A. 554].
10. N. Y. Laws (1889), c. 354.
11. Shepard *v.* Fulton, 55 N. Y. App. Div. 329, 66 N. Y. Suppl. 861; Gundlach-Bundschu Wine Co. *v.* Fritz, 49 N. Y. App. Div. 647, 63 N. Y. Suppl. 198; Loeb *v.* Bien, 49 N. Y. App. Div. 638, 63 N. Y. Suppl. 202; St. George Vineyard Co. *v.* Fritz, 48 N. Y. App. Div. 233, 62 N. Y. Suppl. 775.
12. Leonard *v.* Faber, 52 N. Y. App. Div. 495, 65 N. Y. Suppl. 391; Westerfield *v.* Radde, 12 Daly (N. Y.) 450, 67 How. Pr. (N. Y.) 204.
13. Bolen *v.* Crosby, 49 N. Y. 183.
14. Wallace *v.* Walsh, 125 N. Y. 26, 25 N. E. 1076, 34 N. Y. St. 426, 11 L. R. A. 166 [*affirming* 52 Hun (N. Y.) 328, 5 N. Y. Suppl. 351, 23 N. Y. St. 641].

directors has been reduced by the changing in the by-laws and signing by a majority of directors, this reduced number will be sufficient, although the bill has not been filed in the proper offices.[15]

(B) *Verification of Report.* Under a statute requiring the annual report to be "verified by the oath of the president or vice-president and treasurer or secretary," a verification by the president alone is insufficient, but the statute demands a verification by the oath of either the president or vice-president, together with that of either the treasurer or the secretary;[16] in which case the directors are liable precisely as though no report had been filed.[17] A sworn statement of the president of the corporation that the report is "true to the best of his knowledge and belief" is a sufficient verification so far as he is concerned.[18]

(II) *In Point of Substance* — (A) *Need Not State How Much Capital Paid in Cash, and How Much in Property.* It was at one time supposed that the clause of the statute requiring the report to state "the amount actually paid in" of the capital required it to state how much was paid in in cash and how much in property.[19] But proceeding on the ground that the statute being penal, is to be strictly construed,[20] the court of appeals of that state, two judges dissenting, held that no liability attaches for failing so to state in such a report.[21] A statement in an annual report that the "capital stock had been paid up in full" is sufficient to comply with this requirement.[22]

(B) *When Report Too Indefinite.* Under a statute requiring stock corporations to make annual reports, stating the amount of their assets, or the amount which their assets at least equal, an annual report of such a corporation stating that its assets did not exceed a certain amount was held too indefinite to protect its directors from a personal liability for its debts.[23]

(C) *What Language Sufficient to Show That Report Is Intended to Be Made as of First Day of Preceding January.* Where the report purported to state the amount of the capital stock; the proportion actually paid in; the amount, and in general terms the nature of its existing assets and debts, and of its receipts and expenditures during the year ending the preceding thirty-first of December, and

15. International Bank *v.* Faber, 86 Fed. 443, 30 C. C. A. 178.

Where the statute required that the report should be signed "by the president and a majority of the trustees," and a bare majority of the trustees signed, and one of them was president, this satisfied the statutory requirements. Brand *v.* Godwin, 15 Daly (N. Y.) 456, 8 N. Y. Suppl. 339, 9 N. Y. Suppl. 743, 29 N. Y. St. 143.

16. Manhattan Co. *v.* Kaldenberg, 27 N. Y. App. Div. 31, 50 N. Y. Suppl. 265 [*reversed* in 165 N. Y. 1, 58 N. E. 790].

17. Metropolis Bank *v.* Faber, 38 N. Y. App. Div. 159, 56 N. Y. Suppl. 542.

18. Glens Falls Paper Co. *v.* White, 18 Hun (N. Y.) 214.

Verification not rendered insufficient by the failure to sign the verification of one of the duplicate reports filed as required by the statute in the office of the secretary of state, and in the office of the county clerk of the county where the principal business of the corporation was situated (Manhattan Co. *v.* Kaldenberg, 27 N. Y. App. Div. 31, 50 N. Y. Suppl. 265 [*reversed* in 165 N. Y. 1, 58 N. E. 790]); because the verification was signed by the president, where he took the oath and a magistrate certified to that fact (International Bank *v.* Faber, 86 Fed. 443, 30 C. C. A. 178); or because not verified by the separate oath of the treasurer or secretary, in addition to that of the president, where the secretary had resigned and no successor had been elected, and four months had elapsed since his resignation without acceptance thereof; since such resignation was effective although not accepted (International Bank *v.* Faber, 86 Fed. 443, 30 C. C. A. 178).

19. Accordingly the following statement was held to be defective: "Amount of capital stock, of which all but five shares were issued for the purchase of property necessary for the business of the association, and such five shares have been paid in full, $15,000." Glens Falls Paper Co. *v.* White, 18 Hun (N. Y.) 214.

20. See *supra*, IX, P, 1, b *et seq.*

21. Bonnell *v.* Griswold, 80 N. Y. 128, Folger and Earl, JJ., dissenting [*reaffirmed* in Whitaker *v.* Masterton, 106 N. Y. 277, 12 N. E. 604, 8 N. Y. St. 888].

22. Bonnell *v.* Griswold, 80 N. Y. 128.

That an omission of the names of the owners of stock in the company will not render the officers personally liable see Walton *v.* Goodwin, 58 Hun (N. Y.) 87, 11 N. Y. Suppl. 391, 33 N. Y. St. 886.

23. Lilienthal *v.* Yuengling, 33 Misc. (N. Y.) 619, 68 N. Y. Suppl. 897 [*affirmed* in 61 N. Y. App. Div. 601, 70 N. Y. Suppl. 920].

stated that no dividends had been declared during "said year," and that the names of its then shareholders were "as follows," it was held that it sufficiently showed that it was a report as of the first of January as required by the governing statute.[24]

p. Filing False Report Not Equivalent to Filing No Report. Where a proceeding is instituted under a statute making directors liable for failure to file a stated report, the allegations of plaintiff are not made good by proving that they filed a report which was false, since this must be dealt with under another branch of the statute.[25]

6. Statutory Liability For Making False Reports — a. General Description of Statutes Imposing This Liability. The statutes which have been considered in the subdivision immediately preceding, enjoining upon the directors and officers of corporations the making of certain reports, would afford little security to the public, if they were not followed up by statutes imposing a personal liability upon them in case such reports are false. Such statutes exist in most of the states, and we are now to deal briefly with them. They are threefold: (1) Those imposing a criminal liability as for perjury; (2) those making the guilty directors jointly and severally liable for the debts of the corporation; (3) those making them liable in damages to any person injured. To the last-named class may be added statutes making them liable for damages caused by the publication of false reports, prospectuses, etc., voluntarily put forth.[26]

b. Nature and Design of These Statutes. These statutes were obviously designed to further the remedy of creditors of corporations by giving them a direct action against directors for false reports and statements put forth with the design of deceiving and entrapping any member of the public whom they might catch, where some of the courts had denied a remedy on the ground of want of privity.[27] They obviously do not merge the remedy which the creditor may have against shareholders, saving of course the liability to pay the same debt twice, once as a director, and again as a shareholder.[28]

c. Whether Swearing to False Report Is Perjury. Swearing to a report of this kind knowing it to be false is not perjury at common law, because the oath is not taken in a judicial proceeding,[29] although it would be a criminal offense under statutes which exist in some states making it a misdemeanor to make a voluntary

24. American Grocery Co. *v.* Pratt, 36 N. Y. App. Div. 152, 55 N. Y. Suppl. 467. Similarly see Western Nat. Bank *v.* Faber, 29 Misc. (N. Y.) 467, 62 N. Y. Suppl. 82. *Compare* Cheever *v.* Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69; Hanover Nat. Bank *v.* American Dock, etc., Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721; Wilson *v.* Metropolitan El. R. Co., 120 N. Y. 145, 24 N. E. 384, 30 N. Y. St. 787, 17 Am. St. Rep. 625.

25. Matthews *v.* Patterson, 16 Colo. 215, 26 Pac. 812; Heuer *v.* Carmichael, 82 Iowa 288, 47 N. W. 1034; Marshall *v.* Harris, 55 Iowa 182, 7 N. W. 509; Eisfeld *v.* Kenworth, 50 Iowa 389; Davenport First Nat. Bank *v.* Davies, 43 Iowa 424.

26. Specific references to the statutes are not given, for the reason that they are continually changing through legislative amendments and repeals.

27. As in the case of Fogg *v.* Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662. That there is no liability for filing a false certificate of the amount of capital stock paid in where the object of the statute was not to afford information to the public see Hunnewell *v.* Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733.

Statutes construed.— Effect of the Pennsylvania act of April 29, 1874, in repealing the penal provisions of the act of July 18, 1863, making directors liable for false reports. Barber *v.* Standard Sewer Pipe Co., 5 Pa. Co. Ct. 293. That the personal liability imposed on officers or directors of stock corporations for making false reports by N. Y. Stock Corporation Law, § 31, extends to reports which moneyed corporations are required to make by N. Y. Banking Law, § 30, see Hoff *v.* Hefford, 49 N. Y. Suppl. 172.

28. In the view of the court of appeals of Maryland, a judgment obtained, under the New York statute (N. Y. Laws (1875), c. 611, § 21), against a director for signing a false report, merges whatever right of action the creditor may have against the same person as a shareholder. Attrill *v.* Huntington, 70 Md. 191, 16 Atl. 651, 14 Am. St. Rep. 344, 2 L. R. A. 779. But two judges (Stone and McSherry, JJ.) dissented, and the case was reversed on a federal question in Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123. See also *supra*, IX, P, 1, d.

29. Bishop New Crim. L. § 1015.

and corrupt oath.[30] It might also fall within the statutory definition of perjury found in the criminal codes of some of the states, but even here the oath must have been taken with some degree of deliberation in order to support a conviction.[31]

d. Judgments Founded on Such Statutes Enforceable in Other States. Without reference to the question whether an action can be supported on such a statute outside the state of its creation, yet after such an action has been brought within the state whose statute law imposes the penalty, and prosecuted to judgment in such a state, a refusal of a judicial court of another state to allow a recovery on such judgment is a refusal to give full faith and credit to the judicial proceedings of another state, as required by the constitution of the United States.[32]

e. Right of Action Dies With Creditor of Corporation. One court has taken the view that such a statute is penal in such a sense that the right of action given by it does not survive to the personal representative of the creditor of the corporation.[33]

f. Directors Filing False Report Cannot Be Proceeded Against For Failing to File Any Report. Upon the ground that such statutes, being penal, must be strictly pursued, it is held that the filing of a report which is false cannot be treated by the creditor as the failure to file the report prescribed by law so as to enable him to proceed against the directors under that part of the statute which makes them liable for failing to file a report of a stated kind, thus mixing and confusing the two statutes.[34]

g. Only Those Liable Who Sign False Report. Only those directors are liable under such statutes who sign the false report.[35]

h. Whether Report Must Have Been Wilfully False. Proceeding upon the ground that statutes of this kind are penal, and hence to be strictly construed, it has been frequently held that in order to charge directors under them the report must have been knowingly and wilfully false,[36] which fact must be alleged,[37] and, where the proceeding is at law, proved to the satisfaction of a jury.[38] While this conclusion is imperative under the language of some statutes, as where the statute uses the words "knowing it to be false,"[39] yet, where the language of the statute does not require such an interpretation it is easier and more just to regard it as having been enacted for the security of the public, and to treat it as imposing upon directors the duty of knowing the truth or falsity of the report which they put forth and to charge them with the consequences of their negligent ignorance if the report is false.[40]

i. What Reports Have Been Held False Within Meaning of Such Statutes. Within the meaning of such statutes a report has been held false so as to make the directors putting it forth personally liable where the certificate set forth

30. See State *v.* Boland, 12 Mo. App. 74.

31. Com. *v.* Dunham, Thach. Crim. Cas. (Mass.) 519.

32. Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123 [*reversing* 70 Md. 191, 16 Atl. 651, 14 Am. St. Rep. 344, 2 L. R. A. 779].

33. Boyle *v.* Thurber, 50 Hun (N. Y.) 259, 2 N. Y. Suppl. 789, 19 N. Y. St. 881.

34. Matthews *v.* Patterson, 16 Colo. 215, 26 Pac. 812. See *supra*, IX, P, 5, p.

35. Pier *v.* George, 86 N. Y. 613; Pier *v.* Hanmore, 86 N. Y. 95.

36. Felker *v.* Standard Yarn Co., 148 Mass. 226, 19 N. E. 220, 150 Mass. 264, 22 N. E. 896; Stebbins *v.* Edmands, 12 Gray (Mass.) 203; Bonnell *v.* Griswold, 89 N. Y. 122; Pier *v.* George, 86 N. Y. 613; Pier *v.* Hanmore, 86 N. Y. 95.

37. Matthews *v.* Patterson, 16 Colo. 215, 26 Pac. 812. For a complaint under the Indiana statute see American Credit-Indemnity Co. *v.* Ellis, 156 Ind. 212, 59 N. E. 679.

38. Pier *v.* George, 86 N. Y. 613; Pier *v.* Hanmore, 86 N. Y. 95; Brockway *v.* Ireland, 61 How. Pr. (N. Y.) 372.

39. Stebbins *v.* Edmands, 12 Gray (Mass.) 203. So under the present statute. Felker *v.* Standard Yarn Co., 148 Mass. 226, 19 N. E. 220, 150 Mass. 264, 22 N. E. 896.

40. Huntington *v.* Attrill, 118 N. Y. 365, 29 N. Y. St. 5, 23 N. E. 544 [*affirming* 42 Hun (N. Y.) 459]; Torbett *v.* Eaton, 49 Hun (N. Y.) 209, 1 N. Y. Suppl. 614, 17 N. Y. St. 117; Brand *v.* Godwin, 3 N. Y. Suppl. 807, 24 N. Y. St. 305 [*affirmed* in 15 Daly (N. Y.) 456, 8 N. Y. Suppl. 339, 9 N. Y. Suppl. 743, 29 N. Y. St. 143, no de-

that the capital stock had been paid in cash, whereas it had been paid in property of an uncertain value;[41] where it stated that the capital stock of two million dollars had been paid up in full, when the fact was that all the shares had been issued to one person in payment for certain mining property of a speculative value, the actual value of which did not exceed seventy thousand dollars;[42] and where the certificate contained the names of two persons as shareholders and stated the amount of their stock as capital paid in, when in fact they were not shareholders at all.[43]

j. What Reports Have Been Held Not False Within Meaning of Such Statutes. The cases cited in the margin will disclose conditions of fact where such reports passed judicial scrutiny.[44]

k. Effect of Creditors Assenting to Assignment For Creditors. The fact that creditors of a corporation assent to the making by it of an assignment of its assets for the benefit of its creditors does not of course take away their right to proceed against its officers under such a statute for uttering a false report, where they expressly reserve all rights to the maintenance of their claims against the officers.[45]

l. Questions of Procedure Under These Statutes. Each false report for each successive year gives rise to a separate cause of action.[46] Under the Massachusetts statute[47] the liability is to creditors as a class, and not to any particular creditor who may chose to sue.[48] Some of the statutes provide for the simultaneous prosecution of actions against the offending officers and against the company.[49] One of them adds a provision for a discovery, with the qualification that the answer is not to be admissible against the person "charged with any of the said misde-

fense that he signed it under the advice of counsel, believing it to be true]; Chittenden *v.* Thannhauser, 47 Fed. 410.

41. Waters *v.* Quimby, 27 N. J. L. 196.

42. Blake *v.* Griswold, 103 N. Y. 429, 9 N. E. 434. Similarly see Huntington *v.* Attrill, 42 Hun (N. Y.) 459 [*affirmed* in 118 N. Y. 365, 23 N. E. 544, 29 N. Y. St. 5].

43. Brand *v.* Godwin, 15 Daly (N. Y.) 456, 8 N. Y. Suppl. 339, 9 N. Y. Suppl. 743, 29 N. Y. St. 143.

44. Waters *v.* Quimby, 27 N. J. L. 296; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504 (although the language was admitted to be ambiguous and susceptible of a meaning that a portion of the company's capital had been paid in cash). To a similar effect in a case where the complaint was framed with a count under the statute for failing to file a report, and also with a count under the statute for filing a false report, see Whitaker *v.* Masterton, 106 N. Y. 277, 12 N. E. 604, 8 N. Y. St. 888.

That a slight discrepancy as to the amount of capital stock paid in and an erroneous statement that a certain person was a shareholder will not render the officers personally liable see Walton *v.* Godwin, 58 Hun (N. Y.) 87, 11 N. Y. Suppl. 391, 33 N. Y. St. 886.

That the published certificate, although false, was voluntary and not such as was required by the statute — defense overruled. Waters *v.* Quimby, 27 N. J. L. 296.

Statements of such a report.— Under Iowa statute, not proper to state outstanding accounts without deducting approximate amount for probable losses. Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915. Sufficient under New York statute of 1848 if report states the amount of capital, and that it has been all paid in and then gives the amount of existing debts, without stating how much of the capital has been paid in cash and how much in property. Whitaker *v.* Masterton, 106 N. Y. 277, 12 N. E. 604, 8 N. Y. St. 888 [*overruling* Pier *v.* George, 20 Hun (N. Y.) 210].

The New York statute of 1875 does not make directors liable for antecedent debts by reason of publishing a false report. Torbett *v.* Godwin, 62 Hun (N. Y.) 407, 17 N. Y. Suppl. 46, 42 N. Y. St. 323, 27 Abb. N. Cas. (N. Y.) 444.

The statute of Massachusetts, using the words "liable for its debts," does make them liable for antecedent debts. Felker *v.* Standard Yarn Co., 148 Mass. 226, 19 N. E. 220.

That a director is an "officer" within the meaning of such a statute see Brand *v.* Godwin, 3 N. Y. Suppl. 807, 24 N. Y. St. 305. *Compare* Torbett *v.* Eaton, 49 Hun (N. Y.) 209, 1 N. Y. Suppl. 614, 17 N. Y. St. 117.

No defense that the director putting forth the false report is also a creditor of the corporation. Richards *v.* Crocker, 9 N. Y. St. 531, 19 Abb. N. Cas. (N. Y.) 73.

45. Hudson *v.* J. B. Parker Mach. Co., 173 Mass. 242, 53 N. E. 867 [*distinguishing* Marr *v.* Washburn, etc., Mfg. Co., 167 Mass. 35, 44 N. E. 1062].

46. Anderson *v.* Speers, 58 How. Pr. (N. Y.) 68, under the New York statute of 1848.

47. Mass. Pub. Stat. c. 106, § 60.

48. George Woods Co. *v.* Storer, 144 Mass. 399, 11 N. E. 662.

49. R. I. Gen. Stat. (1872), p. 306, § 19; S. C. Rev. Stat. (1873), p. 362, § 35.

meanors." [50] Where the rule of the jurisdiction makes it necessary to allege that defendant knew the report to be false,[51] it is not necessary to plead the evidence from which such knowledge is to be inferred.[52]

7. STATUTORY LIABILITY FOR DEBTS CONTRACTED IN EXCESS OF PRESCRIBED LIMIT — **a. Description of These Statutes.** Among the devices adoped by legislation to secure to the shareholders an exemption from liability to pay the debts of their corporations, and at the same time to protect the public dealing with such companies, is that of prohibiting the directors from contracting debts in behalf of the corporation beyond a stated limit, and making them personally liable for any such excess of indebtedness, and in some cases punishing the offense of making such excessive loans as a misdemeanor. These statutes exhibit such a variety of detail, especially as to the limit of indebtedness which they impose, that it would not be practicable to attempt to set them out in an article of this kind.[53]

b. Debts in Excess of Certain Proportion of Capital Stock. A statute making shareholders individually liable for debts of the corporation contracted in excess of a prescribed proportion of the capital stock is held to mean not the stock subscribed for when the articles were filed but of potential or authorized stock.[54]

c. Statutes Limiting Amount of Loan Made to Any One Person. Under a provision of the National Currency Act,[55] the directors of national banks who make or assent to the making of a loan to any one person, of a sum exceeding one tenth of the capital stock of the bank, become personally and individually liable for all losses sustained thereby.[56]

d. Loans Made to Directors Themselves. Loans made by a corporation to its own directors are of course to be counted in determining whether the limit prescribed by the statute has been reached prior to the making of the particular loan with which it is sought to charge the directors.[57] Considering section 5200 of the Revised Statutes of the United States, it has been held that the section does not apply as against a director where the excessive loan was made to him, since he stands thereby to the corporation in the relation of a simple contract debtor.[58] On the other hand the director violating the statute by receiving the prohibited loan cannot, if he is otherwise a creditor of the corporation, have the remedy against the directors provided for by the statute, because that would give him a remedy for his own wrong.[59]

e. Individual Liability Imposed Upon What Directors. The statutes under

50. Brightly Purd. Dig. Pa. (1873), p. 349, § 176.

51. Matthews *v.* Patterson, 16 Colo. 215, 26 Pac. 812. See *supra*, IX, P, 6, h.

52. Taylor *v.* Thompson, 66 How. Pr. (N. Y.) 102.

Report of commissioners appointed to take subscriptions to the stock competent evidence upon the question whether a certain per cent in cash had been paid in. Hatch *v.* Attrill, 118 N. Y. 383, 23 N. E. 549, 29 N. Y. St. 14.

Judgment recovered by plaintiff against the corporation not admissible in evidence against directors to establish debt. Torbett *v.* Godwin, 62 Hun (N. Y.) 407, 17 N. Y. Suppl. 46, 42 N. Y. St. 323; Watson *v.* Goodwin, 17 N. Y. Suppl. 51, 42 N. Y. St. 329 [*following* Miller *v.* White, 50 N. Y. 137].

53. They have been described and compared with each other with considerable detail in 3 Thompson Corp. §§ 4259–4261.

54. Sweney *v.* Talcott, 85 Iowa 103, 52 N. W. 106. A statute (Ky. Gen. Stat. c. 56, § 9), which provides that any person who has sustained injury from the fraudulent failure to comply with articles of incorporation may recover damages therefor, makes directors liable for debts which they have permitted the corporation to contract in excess of the limit prescribed by the articles. Gunther *v.* Baskett Coal Co., 107 Ky. 44, 52 S. W. 931, 21 Ky. L. Rep. 655.

55. U. S. Rev. Stat. § 5200.

56. Witters *v.* Sowles, 31 Fed. 1, 24 Blatchf. 332.

57. Thacher *v.* King, 156 Mass. 490, 31 N. E. 648; Bole *v.* West View Oil Co., 29 Pittsb. Leg. J. N. S. 98.

58. Witters *v.* Sowles, 31 Fed. 1, 24 Blatchf. 332.

59. Thacher *v.* King, 156 Mass. 490, 31 N. E. 648. See also *supra*, IX, P, 2, e.

For the construction of the statute of New Hampshire, providing that no shareholders who consented to the creation of a corporate debt in excess of the statutory limit "shall recover against any stockholder who did not . . . consent thereto," see Connecticut River Sav. Bank *v.* Fiske, 62 N. H. 178.

this head are numerous and variant. Many of them are set out and thrown into comparison in a recent work.[60]

f. Extent of Liability Imposed by These Statutes. In this respect the statutes present an equal variety of detail.[61] Judicial decisions construing them present wide differences of opinion, from a holding on the one hand that the liability prescribed by the statute attaches to any debt of the corporation in case it shall appear upon investigation that at any time there has been an excess of indebtedness beyond the limit fixed by the statute;[62] and on the other hand construing the same statute that the personal liability thereby created should be limited to debts due to creditors to whom the excessive indebtedness is owing.[63] It is, by the terms of most of the statutes themselves, and by their manifest policy, limited to the amount of the excess of the debts over the prescribed limit.[64] Where the statute made the directors liable "for the excess," beyond the prescribed limit of indebtedness, their liability was held to be in the nature of guarantors of final payment, in other words, a liability to pay any excess of indebtedness remaining after the exhaustion of corporate assets.[65] Manifestly the debts referred to in such a statute do not mean an indebtedness for capital stock.[66]

g. Only Those Directors Who Assent to Unlawful Loan Are Liable. By the express terms of many of the statutes and by their obvious policy determined by judicial construction, only those directors are liable who assent to the making of the prohibited loan; and many of the statutes contain provisions for exonerating those who dissent.[67] In one case alone, so far as the writer knows, has this statutory liability been held to attach to the directors without reference to their assent or dissent.[68] If the statute imposes the liability on "the directors assenting thereto," obviously the creditor must allege and prove that the defendant did assent thereto. And if the statute exempts from liability those directors who were not present when the unlawful indebtedness was contracted, it is necessary, in order to charge any particular director, to show affirmatively that he was present when this was done.[69] A simulated compliance with the mode prescribed by the statute for the exoneration of a dissenting director will not exonerate him where his course of conduct is unsustained with any other conclusion than that of his assenting, as where the director recorded a notice in the proper public office that the indebtedness of the company exceeded its capital stock by a stated amount, yet continued to act as director and to coöperate in the carrying on and expanding the business of the corporation until the amount so stated had been greatly expanded.[70]

h. To Whom Directors Liable — (1) *To Creditors* — (A) *In General.* Most of the statutes in terms make the directors liable to creditors, meaning it must be assumed to a creditor in favor of whom such excessive indebtedness was contracted.[71]

(B) *Whether Liable to Creditors as Class.* Where the statute provides a remedy in equity then, according to the principles of that forum, the liability is

60. 3 Thompson Corp. § 4263.

61. See 3 Thompson Corp. § 4264.

62. Tallmadge *v.* Fishkill Iron Co., 4 Barb. (N. Y.) 382.

63. Patterson *v.* Robinson, 37 Hun (N. Y.) 341.

64. Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

65. Allison *v.* Coal Creek, etc., Coal Co., 87 Tenn. 60, 9 S. W. 226.

That the liability of a shareholder for such an excess of indebtedness was not secondary and collateral to that of the directors so as to require their liability to be first exhausted see McDougald *v.* Lane, 18 Ga. 444.

That directors cannot evade personal liability under such a statute by applying corporate assets to the payment of the unlawful indebtedness see Margarge, etc., Co. *v.* Ziegler, 9 Pa. Super. Ct. 438, 43 Wkly. Notes Cas. (Pa.) 466.

66. Moore *v.* Lent, 81 Cal. 502, 22 Pac. 875.

67. 3 Thompson Corp. § 4266.

Construing section 24 of the New York Stock Corporation Law see Auburn Nat. Bank *v.* Dillingham, 86 Hun (N. Y.) 100, 34 N. Y. Suppl. 267, 68 N. Y. St. 147.

68. Banks *v.* Darden, 18 Ga. 318.

69. Irvine *v.* McKeon, 23 Cal. 472.

70. Cornwall *v.* Eastham, 2 Bush (Ky.) 561.

71. See 3 Thompson Corp. § 4265, where many of these statutes are cited.

to the creditors as a class, they sharing ratably in whatever is obtained from the directors doing or participating in the unlawful indebtedness.[72]

(II) *To Corporation Itself.* Some of the statutes make the creditors assenting to such excessive debts liable also to the corporation.[73] Where, however, the liability is to the corporation itself, and the action to enforce it is brought against the directors by the corporation or its legal representative, the directors are entitled to a reduction for advances made by them to the company, as well against the demand of creditors after dissolution, as they would have against the demand of the corporation before dissolution.[74] Thus action may be brought by a single creditor on behalf of himself and such other creditors as may join therein, as in other cases of creditors' bills.[75]

(III) *To Other Shareholders.* This liability extends to the benefit of other shareholders, if in their character of creditors they would have the right to invoke the statute against the directors provided they were not shareholders, since there is nothing in the fact of their being shareholders which of itself creates an estoppel against them.[76] Circumstances may, however, exist which on the theory of acquiescence or estoppel will prevent shareholders from maintaining the remedy against the directors, as where they became shareholders after the contracting of the unlawful indebtedness.[77]

i. No Recovery Except Upon Case Strictly Within Statute. A bill in equity to enforce a liability of this kind must clearly show that the excess of debts over and above the amount of the capital stock actually paid in — such was the measure of indebtedness created by the statute — happened under the administration of defendant, such being the language of the statute.[78] So it was held that plaintiff could recover only by showing that at the time when the debt was contracted it was "over and above the solvent stock of the company," such being the language of the statute.[79]

j. Whether Such Statutes Enforceable in Other States. Such statutes are not enforceable outside the state enacting them,[80] unless the rule is to be regarded as changed by a modern decision of the supreme court of the United States.[81]

k. Whether Corporation Also Liable For Such Excessive Debts. The judicial conception that the contracting of such debts being *ultra vires* the corporation cannot be held bound to pay them is seldom acted upon at the present day.[82] The reason is that the power to contract them is within the general scope of the powers of the directors, and that the creditor can never know when the limit of their power has been exceeded, but must take, and is entitled to take where everything seems fair and honest, their representations on the subject. Besides the

72. This construction was put upon the provision of the New York Manufacturing Act (N. Y. Laws (1848), c. 40, § 23), the conclusion being that such an action could be brought only by all the creditors jointly, or by one in behalf of himself and all the others, and that each creditor can recover only such a proportion of the excess of the debts over the amount of the capital stock as his debt bears to the whole amount of the debts of the company. Anderson *v.* Speers, 21 Hun (N. Y.) 568, 59 How. Pr. (N. Y.) 421.

73. S. C. Rev. Stat. (1873), p. 339, § 9.

74. Tallmadge *v.* Fishkill Iron Co., 4 Barb. (N. Y.) 382.

75. Whitney *v.* Pugh, 58 N. Y. App. Div. 316, 68 N. Y. Suppl. 992.

76. Anderson *v.* Blattau, 43 Mo. 42 [*overruling* in effect Kritzer *v.* Woodson, 19 Mo. 327].

77. Walker *v.* Birchard, 82 Iowa 388, 48 N. W. 71.

Contribution.— That the director guilty of the misprision and personally charged with liability therefor has no right of action against the shareholders for contribution see Connecticut River Sav. Bank *v.* Fiske, 62 N. H. 178.

78. Merchants' Bank *v.* Stevenson, 5 Allen (Mass.) 398.

79. Aimen *v.* Hardin, 60 Ind. 119. And for other illustrations see Irvine *v.* McKeon, 23 Cal. 472; Robinson *v.* Attrill, 66 How. Pr. (N. Y.) 121.

80. Rutland Nat. Bank *v.* Paige, 53 Vt. 452.

81. Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123 [*reversing* 70 Md. 191, 16 Atl. 651, 14 Am. St. Rep. 344, 2 L. R. A. 779]. *Compare supra*, IX, P, 1, d.

82. See, however, Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460, 42 Am. Rep. 26; Weber *v.* Spokane Nat. Bank, 50 Fed. 735.

contract is fully executed on his part by parting to the corporation with his money, his property, or his labor. These circumstances on principles of reason and justice estop the corporation from defending against its liability to pay the debt by setting up the doctrine of *ultra vires*.[83] Many of the statutes place this beyond doubt by enacting that the provision for charging the directors shall not exonerate the corporation.[84] Some of the courts have recently taken the view that unless the statute declares the contract void in express terms, it is to be construed, not as prohibiting the corporation from making it as between it and the creditor, but as making it a breach of trust on the part of the directors as between them and the corporation, and as giving the corporation or the creditors an additional remedy against the directors for any loss sustained by reason of it.[85]

l. No Defense That Corporation Did Not Get Benefit. Where the creditor is innocent it will be no defense that the corporation did not get the benefit, it being a case where one dealing with a trustee is not bound to concern himself with the manner in which the trustee makes the application of the trust fund in his hands.[86]

m. What Contracts Do Not Create "Debts" Within Meaning of Such Statutes. A mortgage given by a bank to secure a depositor in the repayment of his deposits does not violate a statutory prohibition against increasing the indebtedness of the bank without the consent of the shareholders so as to make the directors personally liable.[87]

n. Liability Both For Excessive Debts and For Deficits Occasioned by Insolvency. Statutes have been enacted[88] which render directors liable for all excess of debts beyond a prescribed limit, without regard to the solvency of the corporation; and for all deficits in case of insolvency, without regard to the excess of debts incurred.[89]

o. Effect of Renewals, Substitutions, and Applications of Part Payments. The giving of new notes for old ones is not an increase of indebtedness in such a sense as to render the directors liable, under such a statute, in an action based on the new notes, although the original indebtedness represented by them was in excess of the statutory limit.[90] In short the meaning of all these statutes is, whether they say so in direct terms or not, that the excess of corporate indebtedness which will render the directors personally liable must have existed at one time,[91] and that time must either have been the time of the creation of the particular debt upon which it is sought to charge the directors or else that debt must have been created when the statutory limit was full.[92]

p. Remedies to Enforce These Statutes — (1) *Provisions of Some Statutes.* Some of the statutes prescribe an action of contract;[93] others an action of debt;[94] and it should be observed that this is the proper action at common law to recover the penalty given by such a statute.[95] Statutes enacted in states practising under

83. See *infra*, XVII, F, 2, b, (1) *et seq.* *Compare* the reasoning in Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049.

84. See 3 Thompson Corp. § 4267, where several such statutes are referred to.

85. Smith *v.* Ferries, etc., R. Co., (Cal. 1897) 51 Pac. 710; Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049; Woolverton *v.* Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521.

86. White *v.* How, 29 Fed. Cas. No. 17,549, 3 McLean 291.

87. Ahl *v.* Rhoads, 84 Pa. St. 319. And so of the execution of non-negotiable notes and mortgages, these not being an increase of the "bonded indebtedness" so as to make the contract void. Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049.

88. Such as Mich. Act, March 15, 1837, § 25.

89. White *v.* How, 29 Fed. Cas. No. 17,548, 3 McLean 111.

90. Rutland Nat. Bank *v.* Paige, 53 Vt. 452.

Agreement the effect of which was to pay new paper of the corporation, and hence not to be an increase of indebtedness. Patterson *v.* Robinson, 116 N. Y. 193, 22 N. E. 372, 26 N. Y. St. 685.

91. Kritzer *v.* Woodson, 19 Mo. 327.

92. Seneca County Bank *v.* Neass, 5 Den. (N. Y.) 329.

93. Mass. Gen. Stat. p. 203, § 27.

94. Brightly Purd. Dig. Pa. (1873), p. 1080, § 25.

95. Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

a code, where there is but one form of civil action, merely provide that the liability may be enforced by an action.[96] One of them makes the offending directors liable to arrest and imprisonment in execution of the judgment in like manner as defendants in trespass.[97] Many of these statutes, and notably those just cited, provide for survival of the cause of action, by stating that the action may be prosecuted against executors and administrators.

(II) *Remedies of Single Creditor.* Where a single creditor is permitted to sue, he cannot recover the entire excess *in solido*, but at most can recover only the amount of his debt or demand;[98] and under some theories he can recover only his proportion of it.[99]

(III) *Right of Action Not Altered by Corporate Dissolution.* Under modern conceptions the right of action by or on behalf of the creditor to enforce the liability created by such a statute is not determined by a dissolution of the corporation.[1]

q. Defenses to Such Actions. It is therefore no defense to such an action that a proceeding has been commenced to dissolve the corporation;[2] that a receiver of its assets has been appointed,[3] although this might not be the rule where, under the statute, the right to enforce the liability is in the corporation or passes to its receiver; or that another action is pending against defendants as shareholders, since their liability as directors stands on a totally different footing.[4]

r. Operation of Statute of Limitations. It seems that the principle which determines what period of limitation is to apply is that these statutes are not penal but remedial, and that consequently the short period prescribed for penal actions does not attach.[5]

8. Statutory Liability For Certain Prohibited Loans. A class of statutes has been enacted prohibiting the lending of the money of corporations to their own directors, officers, and shareholders; prohibiting various other descriptions of loans; and making the directors and officers who authorize or participate in the making of such loans jointly and severally liable therefor.[6] Subject always to the consideration that the construction of any statute is determined by its very language, it may be said that the policy of these statutes requires them to be construed so as to make the directors or other officers of a corporation who consent to the making of the prohibited loan of the funds of the corporation liable to the corporation, and to its creditors in case of a failure of repayment. Therefore if the statute fixes the amount which may be loaned to directors and officers of a corporation it will be no defense to an action brought to charge the directors with violating the statute to say that they neglected to keep themselves informed of the amount of the loans made to such directors and officers.[7]

96. Md. Rev. Code (1878), p. 376, art. 7.

97. 2 N. Y. Rev. Stats. (Banks & Bros. (6th ed.) 1876), p. 545, § 77.

98. Moultrie *v.* Smiley, 16 Ga. 289.

99. Anderson *v.* Speers, 21 Hun (N. Y.) 568, 59 How. Pr. (N. Y.) 421.

1. Moultrie *v.* Smiley, 16 Ga. 289; Stephens *v.* Overstolz, 43 Fed. 771 (under the National Banking Act).

2. Stephens *v.* Overstolz, 43 Fed. 771.

3. White *v.* How, 29 Fed. Cas. No. 17,549, 3 McLean 291.

4. Barre First Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563.

5. Woolverton *v.* Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521 [*reversing* 30 Ill. App. 70], holding that where, after having contracted an amount of indebtedness in excess of the limit prescribed by the statute, the directors contract a further indebtedness and execute promissory notes of the corporation therefor, the statute of limitations, in an action to charge them in respect of this further indebtedness under the statute, begins to run, not from the date of the execution, but from the date of the maturity of the notes.

6. A brief description of these statutes will be found in 3 Thompson Corp. § 4285.

7. Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497. It has been held that to create a liability under such a statute there must have been "a loan of money" both in fact and in law; that is, an actual loan of money in such a form as to create an indebtedness and a liability for repayment. Billings *v.* Trask, 30 Hun (N. Y.) 314. There is an obviously unsound decision to the effect that where the charter of a bank provides that no director shall be indebted to the bank above a certain amount, a note given to the bank by one of its directors for an indebtedness in

9. Statutory Liability For Declaring Unlawful Dividends — a. Introductory. There is no form of statutory liability more commonly imposed upon directors of corporations in all the states of the Union than that which makes them personally liable for declaring and paying dividends, when there is no surplus to divide. Such a distribution of the assets of a corporation is in the nature of a fraud upon its creditors, and is remediable in equity on the same principle on which those courts aid judgment creditors in setting aside fraudulent conveyances.[8] It has been suggested that a director is liable at common law to the corporation or to a receiver of its assets for wilfully coöperating with other directors in declaring and paying dividends when there are no surplus profits to divide.[9] But where there are profits which may lawfully be divided, whether a dividend shall be declared or not rests in general in the sound discretion of the directors,[10] subject to judicial supervision in the case of abuse.[11]

b. General Description of These Statutes. The general nature of these statutes is that they prohibit the declaration and payment of dividends out of the capital stock, or where there is no surplus to divide, and make the directors assenting thereto jointly and severally liable in their individual capacities for all debts thereafter contracted so long as they continue in office. They also contain provisions for exonerating dissenting directors similar to those which have been already noticed in another connection.[12] Without special reference to the language of statutes, the conclusion is that any liability for improperly declaring and paying a dividend attaches only to those directors who participated in or assented to the wrong.[13]

c. Nature of Liabilty Under These Statutes. Obviously the directors of a corporation will not be liable under such a statute for declaring and paying dividends, because of a mere error of judgment as to whether dividends could properly be made, unless such error of judgment was the result of negligence so gross and flagrant as in the eye of the law to be equivalent to actual fraud.[14] On the other hand it is immaterial what form the transaction takes. If in point of fact it amounts to a distribution of the assets of the company among its shareholders while the company itself is insolvent, it will render the directors liable under such a statute.[15] Some of the statutes impose an individual liability upon the directors for declaring a dividend when the corporation is insolvent.[16] Where an action is

excess of that amount is void in such a sense that a guaranty thereof, although made by one not a director, is not enforceable. Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460, 42 Am. Rep. 26.

8. Thompson Stockh. § 19; St. Marys' Bank *v.* St. John, 25 Ala. 566. See also *supra*, VII, B, 1, c, (I).

9. Van Dyck *v.* McQuade, 45 N. Y. Super. Ct. 620, 57 How. Pr. (N. Y.) 62 [*reversed* on other grounds in 86 N. Y. 38].

10. Ely *v.* Sprague, Clarke (N. Y.) 351.

11. See *supra*, VII, B, 1, b, (I) *et seq.*

There is a note on the subject of the improper declaration of dividends in 19 Am. & Eng. Corp. Cas. 219.

12. Many of these statutes are referred to and the statutes themselves cited in 3 Thompson Corp. §§ 4290, 4292, and notes.

13. When therefore, after the resignation of a director, his name appears as that of a director in a report issued to the shareholders, but he took no part in drawing up the report or in recommending the dividends then proposed to be paid, he will not, even if he was aware of his name being on the report, be liable in respect of the statements in the report or the recommendation of the dividend. *In re* Wales Nat. Bank, [1899] 2 Ch. 629, 68 L. J. Ch. 634, 81 L. T. Rep. N. S. 363, 48 Wkly. Rep. 99, where it is said that in England there is no law which prohibits a limited company, even a limited banking company, from paying dividends, unless its paid-up capital is kept intact. Consequently, where directors declare dividends out of the excess of the receipts over the outgoings in each year, without making provision for losses in previous years, although such a mode of procedure may ultimately exhaust the paid-up capital, and may be an improper mode of conducting business, the dividends cannot be said to have been paid out of capital, and the directors cannot be held liable on that ground.

14. Consult on this principle Gaffney *v.* Colvill, 6 Hill (N. Y.) 567; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Charitable Corp. *v.* Sutton, 2 Atk. 400, 9 Mod. 349, 26 Eng. Reprint 642.

15. See for illustration the following somewhat complicated case: Rorke *v.* Thomas, 56 N. Y. 559.

16. Va. Code (1873), c. 57, § 33.

brought to charge the directors under such a statute, the question whether the corporation was insolvent at the date of the dividend is a question of fact, and of course plaintiff must establish it by sufficient proof.[17] A statute repealing an individual liability predicated upon the declaration of an unlawful dividend is of general application to all existing corporations in its relation to debts thereafter created.[18] In declaring upon such a statute it is not necessary to allege that defendants knowingly paid the dividends, since it is their duty to know, and ignorance is no defense.[19] Directors proceeded against under such a statute may show in defense that certain notes of third persons held by the corporation which, had they been properly classed as losses, would have left the corporation without surplus to divide on the day when the dividend was made, were thereafter paid in full, so that no actual loss was sustained by the payment of the dividend.[20]

d. What Is Not Declaration of Unlawful Dividend Under Such Statutes. The following cases have been held not to amount to the declaration of unlawful dividends within the meaning of such statutes: The ineffectual attempt of one corporation to consolidate with another to form a new corporation and to distribute the stock of the new corporation among the shareholders of both of the precedent corporations in a fixed proportion;[21] the transfer in good faith of all the assets of one corporation to another, for which the purchasing corporation issues to the shareholders of the selling corporation certificates of the shares of the purchasing corporation in lieu of the shares held by such shareholders in the selling corporation;[22] a dividend less than the whole amount of interest or profits earned, without any deduction therefrom for expenses, although the earnings have not been actually received, there being no evidence of fraud or bad faith;[23] the application of undivided profits to the retirement of stock of the corporation, in other words the use of the funds of the corporation in purchasing its own shares.[24]

e. Liable to Corporation. Many of the statutes make the directors and officers declaring and paying the prohibited dividends liable to the corporation itself.[25] On general principles of equity, and without the aid of any statute, a corporation may recover money paid to a director of the company for dividends illegally declared; and a judgment creditor of such company, whose execution has been returned *nulla bona*, may subject to the satisfaction of his demand the money so paid, when the company is insolvent; and he need not bring the other creditors and shareholders of the company before the court.[26]

f. Liable to Receiver. Where the statute creates a liability in favor of the corporation — and possibly where it does not — a right of action against the directors for declaring and paying a dividend which is within the prohibition of a statute of this kind accrues to a receiver appointed after dissolution of the corporation to wind up its affairs.[27]

g. Form of Remedy. The remedies given by these statutes are various, embracing the action of debt, action on the case, scire facias on the judgment

17. Slaymaker *v.* Jaffray, 82 Va. 346, 4 S. E. 606.

18. Slaymaker *v.* Jaffray, 82 Va. 346, 4 S. E. 606. That the declaration of a dividend when the corporation has no profits to divide and is embarrassed does not create a debt in favor of each of the shareholders upon which recovery may be had see Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Slayden *v.* H. J. Seip Coal Co., 25 Mo. App. 439. See also *supra*, I, K, 3, b.

19. Gaffney *v.* Colvill, 6 Hill (N. Y.) 567. See also *supra*, IX, M, 8.

20. Dykman *v.* Keeney, 160 N. Y. 677, 54 N. E. 1090 [*affirming* 16 N. Y. App. Div. 131, 45 N. Y. Suppl. 137; former appeal, 10 N. Y. App. Div. 610, 42 N. Y. Suppl. 488].

21. Topeka Paper Co. *v.* Oklahoma Pub. Co., 7 Okla. 220, 54 Pac. 455.

22. Skinker *v.* Taylor, 11 Mo. App. 592.

23. Van Dyck *v.* McQuade, 86 N. Y. 38, Folger and Earl, JJ., dissenting [*reversing* 45 N. Y. Suppl. 137; former appeal, 10 N. Y. 62].

24. Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., 13 Tex. Civ. App. 103, 35 S. W. 337 [*affirmed* in 89 Tex. 511, 35 S. W. 1047].

25. 3 Thompson Corp. § 4292.

26. Gratz *v.* Redd, 4 B. Mon. (Ky.) 178.

27. Van Dyck *v.* McQuade, 45 N. Y. Super. Ct. 620, 57 How. Pr. (N. Y.) 62 [*reversed* in 86 N. Y. 38].

against the corporation, and bill in equity.[28] Under Delaware statutes such a liability is not for a "debt" such as can be sued for at law, but in the event of the insolvency of the corporation it can be enforced only by a suit in equity.[29]

h. Creditor Must Have Actionable Demand Against Corporation. A creditor seeking to enforce such a liability against the corporation must of course have an actionable demand against the corporation.[30]

i. Directors Not Chargeable Except Upon Strict Proof. When it is remembered that the courts regard statutes which impose this species of liability as penal statutes, it may easily be concluded that directors will not be personally charged under such a statute for declaring a prohibited dividend except upon strict proof.[31]

j. Liable to Creditor Who Is Shareholder and Who Has Received Unlawful Dividend. Under such a statute, giving an action for such a wrong of the director to a shareholder as well as to a creditor, the shareholder is not estopped to maintain the action against the director by reason of his having received the dividend, since he may have received it innocently.[32]

k. Liability When Not Enforceable Until Dissolution of Corporation. Under the Oklahoma statute this species of liability cannot be enforced against the directors until the life of the corporation has expired by its statutory limitation or until it has been dissolved by the judgment of a court.[33]

10. Miscellaneous Liabilities and Penalties Imposed Upon Directors by Statute — a. Acting as Agent of Foreign Insurance Company Which Has Not Complied With Domestic Law. Numerous statutes imposing such a liability have been enacted;[34] but as their terms fall more properly under the object of insurance they will not be treated here further than to say that they have the substantial effect of making the officers or agents of various insurance companies writing policies within the domestic state before such companies have complied with the domestic law guarantors of the solvency of the company and personally responsible in case of a loss.[35]

b. Trustees to Wind Up Liable For Negligence of Corporation. Where the governing statute law provides that the dissolution of a corporation shall not impair any remedy for any liability incurred previous thereto, and also provides that in case of a dissolution the directors shall become the trustees to wind up its affairs and shall be the trustees of its creditors, an action will lie against such trustees after dissolution for injuries caused by the negligence of the corporation prior to dissolution.[36]

c. Directors Liable For Issuing Stock as Gratuity. Under a statute providing that if any corporation of a given description violates any provisions of the act, and shall thereby become insolvent, the directors assenting to or ordering such violation shall be liable for all debts contracted after such violation, the directors are personally liable to creditors of the corporation for issuing a large amount of stock as a mere gratuity to contractors employed to construct the plant of the corporation and who in pursuance of an agreement to that effect transfer some of the stock so issued to them to the directors.[37]

d. Liability For Unfaithfulness. A statute providing that officers of a corporation are liable for the corporate debts when guilty of "unfaithfulness" is so

28. See 3 Thompson Corp. § 4293.
29. John A. Roeblings Sons Co. *v.* Mode, 1 Pennew. (Del.) 515, 43 Atl. 480.
30. Hill *v.* Frazier, 22 Pa. St. 320.
31. Slaymaker *v.* Jaffray, 82 Va. 346, 4 S. E. 606.
32. Gaffney *v.* Colvill, 6 Hill (N. Y.) 567.
33. Topeka Paper Co. *v.* Oklahoma Pub. Co., 7 Okla. 220, 54 Pac. 455.
34. See 3 Thompson Corp. § 4298 and citations.
35. Morton *v.* Hart, 88 Tenn. 427, 12 S. W. 1026.
Outside of statutes the agent makes himself personally liable on the theory of a breach of warranty of agency. Lasher *v.* Stimson, 145 Pa. St. 30, 23 Atl. 552.
36. Marstaller *v.* Mills, 143 N. Y. 398, 38 N. E. 370, 62 N. Y. St. 443, construing N. Y. Laws (1892), c. 691, § 5.
37. Clow *v.* Brown, 150 Ind. 185, 48 N. E. 1034 [*rehearing denied* in 49 N. E. 1057].

construed as to make the directors personally liable for any violation or neglect of official duty.[38]

e. Doing Business For Corporation Without License. Where a corporation has under its charter the power to invest its surplus funds in stocks, funded debts, etc., and to sell and transfer the same at pleasure, its directors are not liable to indictment under a statute for engaging the corporation in the business of buying and selling for its own account such securities, where it does not thus engage as a broker for third persons.[39]

f. Receiving Deposits and Creating Debts While Insolvent. Many statutes and constitutional ordinances exist prohibiting the directors and other officers of banking corporations from receiving deposits of money or other valuable things, or from creating debts, while the institution is insolvent.[40]

g. Statutory Liability For Official Misconduct, Mismanagement, Etc. Statutes exist which in various forms of expressions make directors personally liable for official mismanagement, fraudulent management, official misconduct, etc. Unless otherwise expressed this liability is on principle a liability to the corporation or to its representative after insolvency or in winding-up.[41] Under such a statute it is ruled that directors to avoid liability are obliged to take the same care as factors or agents. They are answerable, not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them. They are answerable for ordinary neglect, and this means the omission of that care every man of common prudence takes of his own concerns.[42] When therefore the directors discounted paper on the pledge of stock, in violation of the statute, on irresponsible names, those of day-laborers, clerks, and bankrupts, they were held liable. But they were not liable for renewing worthless paper which was discounted by their predecessors, for the conclusive reason that the bank sustained no loss on account of such renewals.[43]

h. Liability of Directors of National Banking Associations. This subject pertains more especially to the subject of banks and banking.[44]

38. Merrill First Nat. Bank *v.* Harper, 61 Minn. 375, 63 N. W. 1079, where the "unfaithfulness" consisted in depositing as collaterals for security of debenture bonds a large amount of worthless notes and mortgages which the president of the corporation had procured from irresponsible parties, and in the appropriation of the proceeds of the sale of the debenture bonds by the president to his own use. The corporation fraudulently represented that the notes and mortgages deposited as collaterals were all made by responsible parties who were known to the corporation.

39. Henderson *v.* State, 50 Ind. 234.

40. Several of these constitutional ordinances and statutes are referred to in 3 Thompson Corp. § 4300. See also BANKS AND BANKING.

Whether such constitutional provision is self-enforcing.— Fusz *v.* Spaunhorst, 67 Mo. 256 (ill-considered decision holding the contrary); Fischer *v.* Tamm, 13 Mo. App. 108 (under a statute making directors jointly and severally liable, but without prescribing to whom they should be liable, with the undeniable conclusion that the statute would not support an action against the directors by a depositor); Cummings *v.* Spaunhorst, 5 Mo. App. 21 (a well-considered decision, holding that the provision of Mo. Const. art. 12, § 27, is self-enforcing); Dodge *v.* Mastin, 17 Fed. 660, 5 McCrary, 404 (decision by a federal judge to the contrary).

That the Pennsylvania statute making it a criminal offense to receive deposits while a bank is insolvent does not create a felony see Com. *v.* Schall, 12 Pa. Co. Ct. 554.

41. See *supra*, IX, L, 1 *et seq.*

42. See Scott *v.* Depeyster, 1 Edw. (N. Y.) 513; Domat. 132, tit. 3, § 2.

43. Mutual Redemption Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470.

Me. Stat. (1831), c. 519, § 28, "to regulate banks and banking," gave a remedy only to creditors of a bank, as holders of its bills or otherwise, and not to the shareholders, against the directors thereof, for losses arising "from the official mismanagement of the directors." Rich *v.* Shaw, 23 Me. 343; Me. Rev. Stat. (1871), p. 410, § 42.

Construction of obsolete Pennsylvania statute relating to the fraudulent insolvency of banks and the consequent personal liability of the directors, with the conclusion that there is no *prima facie* imputation of fraud springing from the mere fact of insolvency. Wright *v.* Davenport, 66 Pa. St. 148.

44. See and *compare* 3 Thompson Corp. § 4303; U. S. Rev. Stat. § 5239; 1 Brightly Purd. Dig. Pa. (1873), p. 124, § 40; National Exch. Bank *v.* Peters, 44 Fed. 13; Stephens *v.* Overstolz, 43 Fed. 465. Whether the right of action given by U. S. Rev. Stat. § 5239,

11. Remedies and Procedure Under These Statutes — a. Whether Statutory Remedy Exclusive. Contrary to the general rule that where a statute creates a right and gives a remedy for the enforcement of that right the statutory remedy is exclusive, it has been held that where the charter of a corporation makes the directors jointly and severally liable for the corporate debts (although it gives an action against them), the statutory remedy by such action is not exclusive, the reason being that the creditors of the corporation are in a sense creditors of the directors also, and may consequently pursue them or their property by law.[45]

b. Jurisdictions in Which Remedy Is in Equity. Without entering into details it may be said that equitable remedies have been recognized as appropriate and have been applied to enforce the statutory liability of directors considered in the preceding paragraphs, in the jurisdictions stated in the margin.[46]

c. Corporation or Its Assignee Not Indispensable Party. Neither the corporation nor its assignee in insolvency is an indispensable party, and hence their joinder will not be required where it would defeat the jurisdiction of the court;[47] but it is proper to make a receiver of the assets of the corporation a party defendant, in order that the decree may make proper provision as to the application of the assets, together with the amount which the directors may be required to pay in discharge of the debts in excess of the assets.[48]

d. Jurisdictions in Which Remedy Is at Law. On the other hand the remedy at law has been applied under various charters, statutes, and theories in the cases in the jurisdictions noted in the margin.[49]

is lodged alone in the receiver see and *compare* National Exch. Bank *v.* Peters, 44 Fed. 13; Stephens *v.* Overstolz, 43 Fed. 465. National bank directors resigning the office not liable for subsequent defaults accruing from the negligence of the remaining directors. Movius *v.* Lee, 30 Fed. 298 [*affirmed* in 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662]. See, generally, Banks and Banking.

45. *Ex p.* Van Riper, 20 Wend. (N. Y.) 614.

46. *Alabama.*— St. Marys' Bank *v.* St. John, 25 Ala. 566.

California.— Winchester *v.* Mabury, 122 Cal. 522, 55 Pac. 393.

Georgia.— Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

Illinois.— Woolverton *v.* Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521 (holding that the fact that the statute clothes a court of equity with jurisdiction to enforce it leads to a conclusion that the statute is not penal); Buchanan *v.* Low, 3 Ill. App. 202; Buchanan *v.* Bartow Iron Co., 3 Ill. App. 191.

Massachusetts.— Thacher *v.* King, 156 Mass. 490, 31 N. E. 648; Bond *v.* Morse, 9 Allen 471; Peele *v.* Phillips, 8 Allen 86; Merchants' Bank *v.* Stevenson, 10 Gray 232. An action at law cannot be maintained by a creditor of a corporation against its officers to enforce the officers' liability imposed by Mass. Stat. (1863), c. 246, § 2. A bill in equity is now the only remedy. McRae *v.* Locke, 114 Mass. 96. The objection to such a proceeding at law is not waived by the submission of the case upon an agreed statement of the facts necessary for the determination of the question of liability. McRae *v.* Locke, 114 Mass. 96. See also Crease *v.* Babcock, 10 Metc. 525. Requisites of a bill in equity under Mass. Stat. (1862), c. 218, to charge the officers of a manufacturing corporation personally with a debt thereof. Thayer *v.* New England Lithographic Steam Printing Co., 108 Mass. 523; Norfolk *v.* American Steam Gas Co., 108 Mass. 404. The following are statutes of Massachusetts relating to this subject: Mass. Gen. Stat. p. 385, c. 68, § 17; 1 Suppl. Mass. Gen. Stat. p. 811, § 42.

Pennsylvania.— Margarge, etc., Co. *v.* Ziegler, 9 Pa. Super. Ct. 438, 43 Wkly. Notes Cas. 466.

United States.— Hornor *v.* Henning, 93 U. S. 228, 23 L. ed. 879 [*reaffirmed* in Stone *v.* Chisolm, 113 U. S. 302, 5 S. Ct. 497, 28 L. ed. 991]; Horner *v.* Carter, 11 Fed. 362, 3 McCrary 595.

So in other states under various statutes and charters.— The remedy in equity is also applied in other states under various statutes and charters. Citizens' Loan Assoc. *v.* Lyon, 29 N. J. Eq. 110; Crown *v.* Brainerd, 57 Vt. 625; Comp. Laws Mich. (1871), § 6572 *et seq.*; N. J. Rev. Stat. (1877), p. 194, § 94.

47. James H. Rice Co. *v.* Libbey, 105 Fed. 825, 45 C. C. A. 78.

48. Whitney *v.* Wilcox, 58 N. Y. App. Div. 57, 68 N. Y. Suppl. 667.

49. *Indiana.*— Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327, federal court decision holding an action of debt appropriate to enforce a statutory liability for neglecting to publish certain reports required by charter.

Kentucky.— Cornwall *v.* Eastham, 2 Bush 561, under a statute making directors jointly and severally liable for contracting corporate debts beyond a prescribed limit.

Missouri.— Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962, jurisdiction where legal

e. Form of Action at Common Law. An action of debt is the appropriate form of action at common law to enforce a liability created by such a statute.[50]

f. Who May Maintain Action — (i) *Creditors.* Nearly all the statutes under consideration in terms give a direct action to creditors against the wrong-doing directors. But it has been held that such an action does not accrue to a creditor for wrongs done before he became a creditor.[51]

(ii) *Single Creditor Against Single Director.* Under some systems and theories an action may be maintained by a single creditor against any one of the wrong-doing directors, and he is not obliged to join other creditors as plaintiffs or other directors as defendants,[52] although he may join all who have participated in the wrong if he sees fit.[53]

(iii) *Receiver of Corporation.* If the terms of the statute are such that the penalty denounced against the directors for doing the prohibited act or for failing to do the required act accrues to the corporation itself, then plainly its receiver in the event of its insolvency or of its winding-up may maintain an action to recover it as corporate assets;[54] and where there was no statute conferring such a power on receivers of corporations, it was held competent for the court appointing the receiver to direct that such an action be brought, it being within the general jurisdiction of a court exercising equity powers.[55]

(iv) *Assignees For Benefit of Creditors.* It has been held that unless such an assignee brings an action against the directors of the corporation to charge them for declaring dividends out of the capital stock in violation of a statute, it will be a good ground for an acceptance to the final account of the assignee, and he will be personally liable for any amount which might have been realized by the bringing and prosecuting of such actions.[56]

(v) *Shareholders.* There is nothing in the relation of shareholders of the corporation to its directors[57] which will prevent a shareholder in the event he becomes a creditor of the corporation from maintaining an action to charge the directors with the personal liability denounced by a statute for their official defaults.[58] But it seems that this rule applies only in case of shareholders becoming creditors of the corporation through ordinary dealings with it and not in matters growing out of their relation as shareholders.[59]

and equitable remedies are blended under a code — holding that a receiver of the corporation may prosecute an action at law against the directors where no accounting or other equitable relief is required.

New York.— Marsh *v.* Kaye, 44 N. Y. App. Div. 68, 60 N. Y. Suppl. 439 (under Membership Corporation Law); Rock Valley State Bank *v.* Andrews, 18 N. Y. Suppl. 167, 44 N. Y. St. 788; Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. 130. But *compare* Auburn Nat. Bank *v.* Dillingham, 147 N. Y. 603, 42 N. E. 338, 49 Am. St. Rep. 692, construing present statute of New York.

Vermont.— Bassett *v.* St. Albans Hotel Co., 47 Vt. 313; Windham Provident Sav. Inst. *v.* Sprague, 43 Vt. 502; Buell *v.* Warner, 33 Vt. 570.

50. Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582; Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327 (per McDonald, J.).

51. Ogden *v.* Rollo, 13 Abb. Pr. (N. Y.) 300.

52. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 745; Rock Valley State Bank *v.* Andrews, 18 N. Y. Suppl. 167, 44 N. Y. St. 788.

53. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 745.

54. Niagara Bank *v.* Johnson, 8 Wend. (N. Y.) 645.

55. Thompson *v.* Swain, 107 Mo. 594, 17 S. W. 967; Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962.

56. Gunkle's Appeal, 48 Pa. St. 13. See also Grocers' Nat. Bank *v.* Clark, 48 Barb. (N. Y.) 26.

57. To this relation see Smith *v.* Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Willoughby *v.* Comstock, 3 Hill (N. Y.) 389; Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43.

58. Anderson *v.* Blattau, 43 Mo. 42 [*distinguishing* Kritzer *v.* Woodson, 19 Mo. 327, and holding that shareholders may recover of the directors corporate debts which the latter have contracted in excess of the amount limited by statute]; Sanborn *v.* Lefferts, 16 Abb. Pr. N. S. (N. Y.) 42.

59. This conclusion is the result of a comparison of Kritzer *v.* Woodson, 19 Mo. 327, and Anderson *v.* Blattau, 43 Mo. 42. For a statute which is construed as not creating a personal liability against individual directors for the debts of the corporation at the suit of shareholders as such see Riegel *v.* Rinehart, 26 N. J. Eq. 219.

g. When Action Proceeds Against All Directors. Where the suit is in equity, all the wrong-doing directors may be joined as defendants in an action. This necessarily results from the language of the statute making their liability both joint and several.[60]

h. Judgment Against Corporation Condition Precedent to Action to Charge Directors — (i) *In General.* On principle and authority,[61] and by the terms or the judicial construction of many statutes,[62] the creditor cannot proceed against the director to charge him with personal liability until he has exhausted his remedy against the corporation by recovering judgment and subjecting the corporate assets to his demands so far as they will go. To this rule exceptions exist under the statutes of some states which are construed as imposing upon the wrong-doing directors an original contract liability in favor of creditors,[63] so that a creditor may sue the corporation and join a director with it as a co-defendant and establish his demand against both in the same action.[64]

(ii) *Theory That Judgment Against Corporation Is Conclusive on Director.* Under some systems the judgment against the corporation is conclusive upon the directors so far as it establishes the indebtedness;[65] and even where it is deemed not even *prima facie* evidence against them it has been held to be conclusive in their favor, so that if the corporation is sued for the debt and succeeds on the merits there is no basis left on which to charge the directors.[66] The sound view is that a judgment recovered against a corporation is "a debt" of the corporation which may be counted upon and introduced in evidence in a suit against the directors to charge them with liability for debts of the corporation.[67]

That a shareholder of a bank who redeems its circulating notes may maintain an action for statutory misfeasance against the directors under a statute which gives the action to "any creditor" see Robinson *v.* Bealle, 20 Ga. 275.

That where the statute gives a right of action to "creditors who are shareholders," this does not extend such a right to a creditor who becomes such after the commission of the statutory breach of duty see Mabey *v.* Adams, 3 Bosw. (N. Y.) 346.

Actions by the attorney-general in New York.— By a very peculiar statute of New York, the attorney-general is required to bring actions to redress breaches of trust committed by directors of private corporations. N. Y. Code Civ. Proc. §§ 1781, 1782, 1808, 1810. See People *v.* Ballard, 3 N. Y. Suppl. 845, 8 N. Y. Suppl. 918, 29 N. Y. St. 926 (where the court rule, in seeming opposition to the language of the statute, that the action cannot be maintained where only private interest are involved); People *v.* Bruff, 60 How. Pr. (N. Y. 1 (where such an intervention was successful).

60. M. I. Wilcox Cordage, etc., Co. *v.* Mosher, 114 Mich. 64, 72 N. W. 117.

61. Kinsley *v.* Rice, 10 Gray (Mass.) 325; Johnson *v.* Churchwell, 1 Head (Tenn.) 146. See also Thacher *v.* King, 156 Mass. 490, 31 N. E. 648 (holding that there must be judgment execution and a return of *nulla bona*); Uptegrove *v.* Schwarzwaelder, 46 N. Y. App. Div. 20, 61 N. Y. Suppl. 623; Bird *v.* Hayden, 1 Rob. (N. Y.) 383, 2 Abb. Pr. N. S. (N. Y.) 61; Paulsen *v.* Van Steenbergh, 65 How. Pr. (N. Y.) 342.

62. 1 Suppl. Mass. Gen. Stat. p. 811, § 40; N. J. Rev. Stat. (1877), p. 194, § 96; 2 Brightly Purd. Dig. Pa. (1873), p. 1411, § 47; Norfolk *v.* American Steam Gas Co., 103 Mass. 160; Cambridge Water Works *v.* Somerville Dyeing, etc., Co., 4 Allen (Mass.) 239; Bangs *v.* Lincoln, 10 Gray (Mass.) 600; Kinsley *v.* Rice, 10 Gray (Mass.) 325; Denny *v.* Richardson, 4 Gray (Mass.) 274; Thayer *v.* Union Tool Co., 4 Gray (Mass.) 75. *Compare* Merchants' Bank *v.* Stevenson, 5 Allen (Mass.) 398.

63. Rock Valley State Bank *v.* Andrews, 18 N. Y. Suppl. 167, 44 N. Y. St. 788.

64. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 671. The rule which requires a judgment against the corporation as a condition precedent to an action against a director has been held not to apply in an action where a creditor has been enjoined from suing the corporation; but he may maintain a suit in the nature of a suit in equity in behalf of himself and of other creditors who may join with him against the directors to enforce their liability, without first obtaining a judgment against the corporation. Whitney *v.* Pugh, 58 N. Y. App. Div. 316, 68 N. Y. Suppl. 992. Under Mich. Pub. Acts (1885), No. 232, making directors liable for wilful neglect to file a report of the affairs of the company a judgment against the corporation is not a condition precedent to their liability. M. I. Wilcox Cordage, etc., Co. *v.* Mosher, 114 Mich. 64, 72 N. W. 117.

65. Thayer *v.* New England Lithographic Steam Printing Co., 108 Mass. 523.

66. Tyng *v.* Clarke, 9 Hun (N. Y.) 269.

67. Tabor *v.* Commercial Nat. Bank, 62 Fed. 383, 10 C. C. A. 429.

Judgment on plaintiffs deemed not deferred to see whether it will be allowed in

(III) *Doctrine That Judgment Against Corporation Is Not Even Prima Facie Evidence Against Directors.* Opposed to the foregoing is the doctrine that in an action to charge directors for liabilities grounded on statutory misprisions, the judgment which the creditor may have recovered against the corporation establishing his debt is not even *prima facie* evidence,[68] the theory being that the directors are not in privity with the corporation in such a sense as makes such a judgment binding upon them, but it is *inter alios acta*.[69]

(IV) *Whether Judgment Against Corporation by Garnishment, Trustee Process, or Factorizing Is Such Judgment as Will Support Action Against Directors.* This question has been answered in the affirmative in Massachusetts[70] and in the negative in Connecticut.[71]

i. Burden of Proof Under These Statutes. These statutes are penal in the sense which obliges plaintiff to prove a case within the terms of the statute, even though in order to do so it may be necessary for him to prove a negative, such as the fact that the required report was not published.[72] But where the statute predicated the liability of the directors upon an "intentional neglect to file such reports" it was held that it would be presumed that their failure to do so was intentional.[73]

j. Parol Evidence Admissible to Identify and Characterize Judgment. In a bill in equity founded on a judgment at law against the corporation, where the liability of the directors is predicated upon the ground that during a period when they were in default in failing to file the report of the condition of the corporation prescribed by the statute, the debt for which the judgment was recovered was contracted by them, parol evidence has been held admissible to show that such was the fact.[74]

insolvency proceedings where it is intended to lay the foundation for a proceeding against directors. Clarke *v.* Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887.

68. Esmond *v.* Bullard, 16 Hun (N. Y.) 65; Brand *v.* Godwin, 15 Daly 456, 8 N. Y. Suppl. 339, 3 N. Y. St. 807, 9 N. Y. Suppl. 743, 29 N. Y. St. 143 [*affirming* 3 N. Y. Suppl. 807, 24 N. Y. St. 305]; Chase *v.* Curtis, 113 U. S. 452, 5 S. Ct. 554, 28 L. ed. 1038; and other cases cited below.

69. Rorke *v.* Thomas, 56 N. Y. 559; Miller *v.* White, 50 N. Y. 137 [*reversing* 57 Barb. (N. Y.) 504, 59 Barb. (N. Y.) 434]; Esmond *v.* Bullard, 16 Hun (N. Y.) 65; McHarg *v.* Eastman, 7 Rob. (N. Y.) 137, 35 How. Pr. (N. Y.) 205. These decisions overrule Hall *v.* Siegel, 7 Lans. (N. Y.) 206.

Same rule as against shareholders.— The courts of New York, after a considerable conflict of opinion, have established the same rule in favor of shareholders when proceeded against to enforce a statutory liability. See McMahon *v.* Macy, 51 N. Y. 155, 162, and particularly the opinion of Mr. Commissioner Gray, where the previous authorities on the subject are reviewed. The doctrine of those courts being that an action against a shareholder to charge him for a debt of the corporation is an action on the original demand and not on the judgment which plaintiff has recovered against the corporation. Belmont *v.* Coleman, 21 N. Y. 96; Moss *v.* Averell, 10 N. Y. 449; Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87; Moss *v.* McCullough, 5 Hill (N. Y.) 131. For conflicting decisions see Belmont *v.* Coleman, 1 Bosw. (N. Y.) 188; Moss *v.* Oakley, 2 Hill (N. Y.) 265; Slee *v.* Bloom, 20 Johns. (N. Y.) 669, 10 Am. Dec. 273. This being so the burden of establishing the validity of his debt rests on plaintiff as an original proposition, although he may have established it as against the corporation. Dabney *v.* Stevens, 40 How. Pr. (N. Y.) 341. But in respect of the liability of corporations a contrary rule prevails in other states, the judgment against the corporation being regarded either as conclusive or at least as *prima facie* evidence against the shareholder as to the validity of the debt.

Iowa.— Donworth *v.* Coolbaugh, 5 Iowa 300.

Kansas.— Grund *v.* Tucker, 5 Kan. 70.

Maine.— Milliken *v.* Whitehouse, 49 Me. 527; Came *v.* Bingham, 39 Me. 35; Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

Massachusetts.—Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385.

Pennsylvania.—Wilson *v.* Pittsburg, etc., Coal Co., 43 Pa. St. 424.

70. Norfolk *v.* American Steam Gas Co., 103 Mass. 160.

71. Armstrong *v.* Cowles, 44 Conn. 44.

72. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 68 N. Y. 34.

73. Van Etten *v.* Eaton, 19 Mich. 187. See, however, Breitung *v.* Lindauer, 37 Mich. 217.

74. Norfolk *v.* American Steam Gas Co., 108 Mass. 404. That it is often competent to show by parol evidence what facts were passed upon by the jury in a case which proceeded to judgment see Merritt *v.* Morse, 108 Mass. 270; Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733, 14 Gray (Mass.) 433 (and cases there cited).

k. Misjoinder of Such Causes of Action. Under the statute law and code of procedure of New York a proceeding to charge the directors cannot be joined with a proceeding to charge the shareholders with a personal liability for the debts of the corporation;[75] but an action to charge directors for not making the statutory annual report may be joined with an action against them for making a false report, unless the false report was signed by all the defendants who are charged with the omission to make the annual report, in which case there would be a misjoinder, for the reason that the distinct causes of action do not affect all the defendants.[76]

l. Pleading Under Such Statutes — (i) *In General.* In a proceeding under such a statute the declaration or complaint must allege either in the words of the statute or in substance all the statutory grounds of recovery.[77]

(ii) *What Exceptions of Statute Must Be Negatived.* By an old rule of common-law pleading, in declaring upon a statute, even though it be not penal, any exception contained in the enacting or prohibiting clause of it must be excluded by averment;[78] but where exceptions contained in other clauses of the

75. Wiles *v.* Suydam, 64 N. Y. 173; Mappier *v.* Mortimer, 11 Abb. Pr. N. S. (N. Y.) 455.

76. Bonnell *v.* Wheeler, 16 Abb. Pr. N. S. (N. Y.) 81. See also Sterne *v.* Herman, 11 Abb. Pr. N. S. (N. Y.) 376; Vincent *v.* Sands, 11 Abb. Pr. N. S. (N. Y.) 366.

77. Henniker *v.* Contocook Valley R. Co., 29 N. H. 146.

The facts relating to the claims of the complainants against the corporation, where the suit is in equity, must be set out with particularity. Gunter *v.* Dale County, 44 Ala. 639; Boston, etc., R. Co. *v.* Parr, 104 Fed. 695, 44 C. C. A. 139 (holding that a bill in equity, where it alleged that the corporation was indebted to complainant in a sum "exceeding $239,000," on a contract of indemnity and insurance against liability for death or injury of employees, etc., bearing a certain date and setting out a copy of the form of the contract, was wholly insufficient, in the absence of any statement of the happening of any occurrence creating a liability under the contract, or of any fact showing how or when any part of such liability arose, or that any claims or proofs were ever submitted to the company on account of it).

A mistake in a complaint in such an action, due to a mistake as to the date on which a penalty was incurred under the governing statute, will not be construed reversible error if plaintiff has shown a right to recover within the true date. Morgan *v.* Hedstrom, 164 N. Y. 224, 58 N. E. 26 [*affirming* 25 N. Y. App. Div. 547, 49 N. Y. Suppl. 1049].

Must allege a written request to perform the duty, as required by the statute. Nassau Bank *v.* Brown, 30 N. J. Eq. 478.

Services rendered by request.— Must allege that the services creating the debt were rendered at the request of the corporation. Tovey *v.* Culver, 54 N. Y. Super. Ct. 404.

Requisites of petition in an action under Iowa Revision, § 1163, against an officer or shareholder of a corporation for fraud, etc. White *v.* Hosford, 37 Iowa 566.

Must aver that the corporation did business in the county.— Anfenger v. Anzeiger Pub. Co., 9 Colo. 377, 12 Pac. 400.

Must aver the purposes for which the corporation was organized and that defendants constituted a majority of the directors. Niles *v.* Dodge, 70 Ind. 147.

The allegation that defendants were shareholders is not irrelevant. Sterne *v.* Herman, 11 Abb. Pr. N. S. (N. Y.) 376.

For the allegations in a bill in equity under Mass. Stat. (1862), c. 218, to charge officers of a manufacturing corporation personally with a debt thereof see Thayer *v.* New England Lithographic Steam Printing Co., 108 Mass. 523; Norfolk *v.* American Steam Gas Co., 108 Mass. 404. For a bill in equity which failed to show that the excess of debts over and above the amount of capital stock actually paid in happened under the administration of the defendants see Merchants' Bank *v.* Stevenson, 5 Allen (Mass.) 398.

Not necessary to file a copy of the articles of incorporation, this not being the foundation of the action. Niles *v.* Dodge, 70 Ind. 147.

Sufficient showing that corporation was not a railroad or moneyed corporation.—That a complaint alleging that defendant was a director of the business corporation sufficiently showed that the corporation was not a railroad or moneyed corporation see Union Bank *v.* Keim, 52 N. Y. App. Div. 135, 64 N. Y. Suppl. 1070.

Sufficient allegation of director's acceptance of office.— That an allegation in the answer filed by a director sued to enforce such a statute that he was elected director, and attended one directors' meeting is sufficient proof of his acceptance of the office, although the answer also alleged that on discovering that false representations had been made to him to induce his attendance he refused further to act as director. Union Bank *v.* Keim, 52 N. Y. App. Div. 135, 64 N. Y. Suppl. 1070.

78. Gould Pl. c. 4, § 22. This has been held where the statute was not penal. Toledo, etc., R. Co. *v.* Lavery, 71 Ill. 522; Great Western R. Co. *v.* Hanks, 36 Ill. 281; Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am.

statute present matters of defense, they are to be pleaded and proved by defendant.[79]

(III) *AVERMENT OF DATE OF DEBT.* In many cases it is essential, to bring the case within the statute, for the pleader to aver the date when the debt was contracted, so as to show that it was contracted during the time when the directors were in default in failing to make the statutory report;[80] and so as to show, where the action proceeds on the ground of their making a false report and allowing the indebtedness to exceed the capital stock, that the debt was contracted after defendant became a trustee.[81]

m. Plaintiff Recovers Upon Preponderance of Evidence. It is not essential to a recovery where the ground is the making of a false report or certificate that plaintiff should satisfy the jury of the guilt of defendant beyond a reasonable doubt, but as in other civil actions he recovers upon a fair preponderance of the evidence.[82]

n. Entries in Book-Accounts — When Not Evidence. In such an action the entries in the account-books of the corporation are not competent evidence against defendant to prove the directors' claim, where it does not appear that defendant was privy to such entries.[83]

o. Procedure in Case of Death of Director. It is a rule of the common law that the personal representative of a deceased joint obligor cannot be joined in an action against the survivor.[84] This rule has been applied in Massachusetts, so as

Dec. 199; Illinois Cent. R. Co. *v.* Williams, 27 Ill. 48; Galena, etc., R. Co. *v.* Sumner, 24 Ill. 631; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390.

79. Gould Pl. c. 4, § 22; Toledo, etc., R. Co. *v.* Lavery, 71 Ill. 552; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390.

80. McHarg *v.* Eastman, 7 Rob. (N. Y.) 137, 35 How. Pr. (N. Y.) 205; Seaman *v.* Goodnow, 20 Wis. 27.

81. Anderson *v.* Speers, 8 Abb. N. Cas. (N. Y.) 382, 58 How. Pr. (N. Y.) 68.

What is not a good averment of the fact that defendant was a trustee at the time when the debt was alleged to be contracted. Anderson *v.* Speers, 8 Abb. N. Cas. (N. Y.) 382, 58 How. Pr. (N. Y.) 68.

Averment that the debt remains unpaid.— For a technical ruling to the effect that it is not enough to aver that the judgment recovered against the corporation remains unsatisfied, but that the pleader must aver that the debt remains unpaid, see McHarg *v.* Eastman, 7 Rob. (N. Y.) 137, 35 How. Pr. (N. Y.) 205. *Compare* Chambers *v.* Lewis, 28 N. Y. 454.

Misdescription of the statute immaterial. — It is not necessary for the pleader to describe the statute since the court will notice it judicially. Buell *v.* Warner, 33 Vt. 570. Therefore if he misdescribes it, as by referring to the wrong section, the misdescription will be rejected as surplusage. McHarg *v.* Eastman, 7 Rob. (N. Y.) 137, 35 How. Pr. (N. Y.) 205.

Not necessary to aver how the damage happened.— Where the damage consisted of a depreciation of plaintiff's shares it is not necessary to aver how or in what manner this depreciation was brought about, since that would be a matter of evidence. Gaffney *v.* Colvill, 6 Hill (N. Y.) 567. But another court has held, in an action to charge directors for failing to make the statutory report of the financial condition of the corporation, that the manner in which plaintiff was misled and deceived must be charged with reasonable fulness and certainty. Niles *v.* Dodge, 70 Ind. 147, setting out a complaint where it was not charged with sufficient certainty. See also Buell *v.* Warner, 33 Vt. 570, for a declaration under a statute which is set out in full, to which a number of specific objections were made by special demurrer, but where the declaration was held good.

Other points of pleading in such complaints.— Under a statute prohibiting the doing of certain acts a complaint has been held bad on special demurrer, which alleged that defendant caused the acts to be done. Gaffney *v.* Colvill, 6 Hill (N. Y.) 567. Not necessary to allege that defendants did the acts knowingly, mistake or want of guilty knowledge being matter of defense. Gaffney *v.* Colvill, 6 Hill (N. Y.) 567.

Not a good objection on the ground of duplicity that the declaration alleges that the directors did divide, withdraw, and pay to the shareholders a portion of the capital stock of the company and did thereby reduce the capital stock without the consent of the legislature. Gaffney *v.* Colvill, 6 Hill (N. Y.) 567.

Answer upon information and belief insufficient. 19 Am. & Eng. Corp. Cas. 112 note.

82. Huntington *v.* Attrill, 118 N. Y. 365, 29 N. Y. St. 5, 23 N. E. 544.

83. Leonard *v.* Faber, 52 N. Y. App. Div. 495, 65 N. Y. Suppl. 391. [The reader is cautioned that there is a conflict of authority as to the effect of books of account as evidence.]

84. Green *v.* Watkins, 6 Wheat. (U. S.) 260, 5 L. ed. 256.

to exempt the estate of a deceased shareholder from liability as such, unless his personal representative should chose to come forward and assume such liability, by paying claims or otherwise.[85] This unjust and mischievous rule has been changed by statute in most of the states it is believed.[86] But in equity the maxim, *Actio personalis moritur cum persona*, does not obtain, and therefore the liability of directors to creditors, founded in fraud, may be redressed in those tribunals by an action against their personal representative in case of their death.[87]

p. Liability of Directors For Costs in Proceedings Under These Statutes. A statute making the directors liable for the debts of the corporation does not make them liable for the costs which have accrued in recovering judgments against the corporation for such a debt,[88] although they will of course be liable for the costs accruing in an action brought to charge them.[89]

q. Directors Estopped to Deny Existence of Corporation. Persons who hold themselves out to the public as a legally organized corporation by proceeding with the business for which the corporation was ostensibly created and by contracting in the corporate name are estopped, when proceeded against as directors to enforce the statutory liability, to deny the validity of the existence of the corporation.[90]

12. Defenses to Such Actions — a. Defense of No Corporation — (I) *In General.* If the directors of a corporation incur liability under a statute, by reason of failing to make and to file certain certificates and statements therein required, they cannot, when proceeded against for the enforcement of such liability, set up as a defense an irregularity in the organization of the corporation.[91]

(II) *Cases Where This Defense Has Succeeded.* It has, however, been held, under a statute of New Jersey authorizing any persons to associate and form a corporation and choose a board of directors, and under its direction carry on the business, that if the associates choose no directors, but merely a president, who is in fact the owner of the concern and who controls its business, they are to be regarded as a corporation, but are not liable in the character of directors.

85. Dane *v.* Dane Mfg. Co., 14 Gray (Mass.) 488; Ripley *v.* Sampson, 10 Pick. (Mass.) 371; Child *v.* Coffin, 17 Mass. 64.

86. See for example Cobb Stat. Ga. 483; Hargroves *v.* Chambers, 30 Ga. 580 (holding that if a director guilty of the statutory fault should die before the commencement of the action plaintiff would not be bound to join therein his personal representative, although he would be at liberty so to do).

87. **Procedure in case of death of director in insolvency proceedings in Massachusetts.** — See 3 Thompson Corp. § 4345 [collecting and expounding the following cases: Dane *v.* Dane Mfg. Co., 14 Gray (Mass.) 488; Bangs *v.* Lincoln, 10 Gray (Mass.) 600; Merchants' Bank *v.* Stevenson, 10 Gray (Mass.) 232; Grew *v.* Breed, 10 Metc. (Mass.) 569; Kelton *v.* Phillips, 3 Metc. (Mass.) 61; Andrews *v.* Callender, 13 Pick. (Mass.) 484; Ripley *v.* Sampson, 10 Pick. (Mass.) 371; Child *v.* Coffin, 17 Mass. 64].

Other decisions under statutes of Massachusetts. — For other decisions under the local and peculiar statutes of Massachusetts see Barre First Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563; Moore *v.* Reynolds, 109 Mass. 473; Byers *v.* Franklin Coal Co., 106 Mass. 131; Dewey *v.* Baker, 16 Gray (Mass.) 130; Brayton *v.* New England Coal Min. Co., 11 Gray (Mass.) 493; Denny *v.* Richardson, 4 Gray (Mass.) 274.

88. Rorke *v.* Thomas, 56 N. Y. 559.

89. *Compare* People *v.* Ballou, 12 Wend. (N. Y.) 277.

Various matters of practice in such cases. — What processes must be issued and served upon the directors separately see Cunningham *v.* Pell, 5 Paige (N. Y.) 607. That a mere return of *nulla bona* is not a sufficient ground for an action to charge directors, but that the return must set out that no real or personal property of the corporation was exhibited to the officer sufficient to satisfy the debt as required by the statute, see Bacon *v.* Morris, 10 Phila. (Pa.) 93, 30 Leg. Int. (Pa.) 392. When an action against a corporation was prosecuted under a writ commanding the body of a certain named director to be taken, it was held untenable to argue, after a judgment against the company and an appeal taken by it, that the suit was against the director and not against the corporation. Aycock *v.* Wilmington, etc., R. Co., 51 N. C. 231.

Nominal defendant in action against English joint-stock company. — Bartlett *v.* Pentland, 1 B. & Ad. 704, 20 E. C. L. 657; Wormwell *v.* Hailstone, 6 Bing. 668, 8 L. J. C. P. O. S. 264, 4 M. & P. 512, 19 E. C. L. 301; Harrison *v.* Pimmins, 7 Dowl. P. C. 28, 8 L. J. Exch. 94, 4 M. & W. 510.

90. Gay *v.* Kohlsaat, 80 Ill. App. 178.

91. Newcomb *v.* Reed, 12 Allen (Mass.) 362. *Compare* Utley *v.* Union Tool Co., 11 Gray (Mass.) 139.

but are liable in equity as shareholders to be charged with debts of the concern [92] to the extent unpaid on their shares. So where it appeared in such an action that the defendants had drawn up articles of incorporation, but with the understanding that they were not to take effect until certain things were done, which never were done, it was held that this did not constitute them a corporation, and that the president and directors could not be made liable under a statute [93] making such officers personally liable for debts contracted by the corporation or voluntary association before complying with certain statutory requirements.[94] So where a member of an association which had failed of a legal incorporation purchased claims against the association, it was held that this did not give an action against the directors, because it was a partnership, and one partner cannot sue the others at law.[95] So it has been held that with the expiration of a bank charter the personal liability of the directors for overissues of circulating notes ceases.[96]

b. Defense of Negligence, Ignorance of Law, Want of Guilty Scienter. Where the statute which has been violated enjoins an affirmative act, negligent ignorance is of course no defense;[97] but where it merely prohibits a wrongful act, then as a general rule only those who affirmatively participated in or assented to the wrong are liable under it; and such affirmative assent must in general be averred and proved,[98] although with respect to the evidence by which the fact is proved it is to be observed that such a statute raises a presumption of assent in the absence of some prescribed affirmative act of dissent; and many of the statutes in terms create a presumption of assent from the doing of the prohibited act and even from the failing to do the required act.[99] On the other hand, where the directors are sued under a statute making them liable for the debts of the corporation contracted during the time when they have been in default under a statute in filing certain prescribed reports, it will be no defense that they were ignorant of the existence of the law, or that they did not know whether or not the reports had been filed, and had not intentionally neglected to conform to the requirements of the statute, and indeed had no knowledge of such requirements and thought nothing about them. Although the statute only fixes personal liability upon the directors when they "intentionally neglect or refuse to comply with the provisions and to perform the duties required of them" by its terms, it is not incumbent upon a person sued under it to prove that the omission was intentional; the intent will be inferred from the neglect of the duty.[1] On the other hand, where the statute attaches a liability to a negative prohibition, it has been justly reasoned that to constitute "assent" there must be something more than mere negligence on the part of a director in not knowing what, in the exercise of proper care, he ought to have known. There must be some wilful or intentional violation of duty, assenting to it, knowing that the act is being done, or that it is about to be done. But if with such knowledge he neither objects to nor opposes it when his duty requires and when he has the opportunity of doing so this is "assent."[2]

c. Director Exonerated by Resigning or Abandoning Office. Where the liability imposed by a statute of this kind has not attached, a director may of

92. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

93. Vt. Rev. Laws, § 3279.

94. Corey *v.* Morrill, 61 Vt. 598, 17 Atl. 840.

95. Coleman *v.* Coleman, 78 Ind. 344.

96. Moultrie *v.* Hoge, 21 Ga. 513. *Contra*, Moultrie *v.* Smiley, 16 Ga. 289.

As to the manner of proving the corporate character of the association in a suit in equity to enforce the liability of the officers of a manufacturing company see Salem First Nat. Bank *v.* Almy, 117 Mass. 476; Priest *v.* Essex Hat Mfg. Co., 115 Mass. 380.

97. Van Etten *v.* Eaton, 19 Mich. 187.

98. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 745.

99. See statute set out in 3 Thompson Corp. § 4357.

1. Van Etten *v.* Eaton, 19 Mich. 187. But see Breitung *v.* Lindauer, 37 Mich. 217. *Compare In re* Wales Nat. Bank, [1899] 2 Ch. 629, 68 L. J. Ch. 634, 81 L. T. Rep. N. S. 363, 48 Wkly. Rep. 99.

2. Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 745.

course escape such liability by resigning or abandoning his office.[3] Nor is it necessary that the resignation should be accepted;[4] and it is immaterial in what form it is made, so that it is distinct and unequivocal. It may be made orally;[5] and it may be evidenced by conduct merely, as where the director sold out his shares and thereafter ceased to take any part in the affairs of the corporation, although his successor was not elected.[6]

d. Other Evidence of Want of Assent. Evidence of want of assent has been discovered in the act of the director in refusing to consent to the proposed violation of the statute and in protesting against it;[7] in failing to dissent when afterward informed that the indebtedness prohibited by the statute has been created;[8] in doing nothing more than failing to attend meetings, in not being consulted, in doing nothing but sign annual reports on the strength of their reliance of the truth and statement of a co-trustee.[9]

e. Assent of Plaintiff to Prohibited Act. Where plaintiff has himself assented, either in the character of director or otherwise, to the doing of the act prohibited by the statute, this fact will in general be a good defense in accordance with the maxim, *Volenti non fit injuria.*[10]

f. Operation of Statute of Limitations — (I) *Whether Statute Relating to Penalties Applicable.* Where statutes of this kind are regarded in the nature of penal statutes, it follows that the clause of the statute of limitations applicable to actions for penalties applies.[11] But where the view has been taken that such statutes are remedial, the short statute of limitations applicable to actions for penalties does not apply.[12]

(II) *When Statute Begins to Run.* Plainly such a statute does not begin to run until the debt is due; for until there is a right of action against the cor-

3. Bruce *v.* Platt, 80 N. Y. 379; Reed *v.* Keese, 37 N. Y. Super. Ct. 269 (director resigned after debt had been contracted, but before default had taken place, in filing the prescribed report, and escaped liability).

4. Blake *v.* Wheeler, 18 Hun (N. Y.) 496.

5. Movius *v.* Lee, 30 Fed. 298.

6. Sturges *v.* Vanderbilt, 73 N. Y. 384 (Miller, J., dissenting), holding that he could not be made liable for the acts of the managers five years afterward. But it has been held that in a proceeding to charge a director on statutory grounds he cannot show that he was adjudged a bankrupt, assigned and delivered his stock to the assignee in bankruptcy, received his discharge in bankruptcy, and had no connection with the corporation thereafter. Philadelphia, etc., Iron Co. *v.* Hotchkiss, 82 N. Y. 471. That a surety who took no part in the transaction of the bank after he had received the certificate required by the statute could not be charged with implied knowledge or notice as a director or manager see Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

7. Schofield *v.* Henderson, 67 Ind. 258.

8. Patterson *v.* Robinson, 36 Hun (N. Y.) 622, dissent doubtful.

9. Patterson *v.* Robinson, 36 Hun (N. Y.) 622. The following English decisions may be usefully consulted on the question what will and what will not be regarded as evidence of assent by the director to the doing of the act for which it is sought to charge him with liability. Johnson *v.* Goslett, 18 C. B. 728, 86 E. C. L. 728 [*affirmed* in 3 C. B. N. S. 569, 4 Jur. N. S. 50, 27 L. J. C. P. 122, 6 Wkly. Rep. 127, 37 Eng. L. & Eq. 308, 91 E. C. L. 569]; Burt *v.* British Nat. L. Assur. Assoc., 4 De G. & J. 158, 5 Jur. N. S. 612, 28 L. J. Ch. 731, 7 Wkly. Rep. 517, 61 Eng. Ch. 125; *Ex p.* Johnson, 31 Eng. L. & Eq. 430.

10. Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 366. The following case, which was an action against the corporation, involved an application of the principle. Philadelphia, etc., R. Co. *v.* Love, 125 Pa. St. 488, 17 Atl. 455. See also Knox *v.* Baldwin, 80 N. Y. 610, assignee of a manufacturing firm, one member of which was a trustee in the corporation, likewise estopped.

11. Merchants' Bank *v.* Bliss, 35 N. Y. 412 [*affirming* 1 Rob. (N. Y.) 391]. See also Chapman *v.* Comstock, 58 Hun (N. Y.) 325, 11 N. Y. Suppl. 920, 34 N. Y. St. 517; Bird *v.* Hayden, 1 Rob. (N. Y.) 383, 2 Abb. Pr. N. S. (N. Y.) 61; Lawler *v.* Burt, 7 Ohio St. 340 [*overruling* Lawler *v.* Walker, 18 Ohio 151] (action for issuing unauthorized notes in the similitude of bank paper); N. Y. Code Civ. Proc. § 383. See also Merchants' Nat. Bank *v.* Northwestern Mfg., etc., Co., 48 Minn. 349, 51 N. W. 117; Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

12. Neal *v.* Moultrie, 12 Ga. 104.

In the nature of a specialty — Not barred until twenty years. — A widely opposite view is that the liability of directors created by statute is in the nature of a specialty, and is therefore not within the operation of the statute of limitations, and is consequently not barred until the expiration of twenty years, when a presumption of payment arises. Hargroves *v.* Chambers, 30 Ga. 580; Banks *v.* Darden, 18 Ga. 318; Neal *v.* Moultrie, 12 Ga. 104. For an explanation of this view

poration, there can be none against the directors.[13] Where the debt has become due within the period of default in making a report required by statute, and has been extended by the consent of the creditor, the statute does not begin to run in favor of the defaulting trustee at the date of the maturity of the debt prior to its extension.[14]

(III) *NOT AVAILABLE TO DIRECTOR WHERE CORPORATION HAS FAILED TO PLEAD IT.* There is a questionable decision in New York to the effect that the defense that the debt itself is barred by the statute of limitations is not available to the director, where the corporation failed to plead the statute, and suffered a judgment for the debt to be recovered against it.[15]

(IV) *NOT AVAILABLE UNLESS RAISED IN TRIAL COURT.* This well-known rule of procedure applies to actions of the kind under consideration, so that the defense must, if they would avail themselves of the defense of the statute of limitations, set up the defense in their pleading and prove it at the trial.[16]

g. Defense of Laches. Where the proceeding is in equity the defense that the creditor has been guilty of laches is available as in other cases in that forum.[17]

h. Defense of Pendency of Proceedings Before Assigning For Creditors or Receiver. The pendency of proceedings before a voluntary assignment for the benefit of creditors, or before a receiver is appointed to wind up the affairs of a corporation, does not constitute a defense to a proceeding on the part of creditors to enforce a statutory liability of the directors.[18]

i. Defense of Waste of Corporate Assets by Assignee or Receiver. In such an action it would ordinarily be no defense that the primary fund out of which the

of the operation of the statute of limitations see 3 Thompson Corp. § 4362, and note on page 3203. The statutory liability of shareholders to pay the debts of the corporation has been held to be in the nature of a specialty, and within this rule. Thornton *v.* Lane, 11 Ga. 459; Lane *v.* Morris, 10 Ga. 162; Bullard *v.* Bell, 4 Fed. Cas. No. 2,121, 1 Mason 243. The supreme court of the United States has, however, ruled otherwise in a decision which it is thought must be accepted as overruling Bullard *v.* Bell, 4 Fed. Cas. No. 2,121, 1 Mason 243. Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738.

13. Duckworth *v.* Roach, 81 N. Y. 49; Jones *v.* Barlow, 62 N. Y. 202 [*overruling* on this point Merchants' Bank *v.* Bliss, 1 Rob. (N. Y.) 391, 13 Abb. Pr. (N. Y.) 225, 21 How. Pr. (N. Y.) 365 (*affirmed* in 35 N. Y. 412, where it was held that the statute begins to run from the time of contracting the corporate debt during the period of default in making the statutory report)]; Sullivan *v.* Sullivan Mfg. Co., 20 S. C. 79.

14. Jones *v.* Barlow, 62 N. Y. 202. See also Chapman *v.* Comstock, 58 Hun (N. Y.) 325, 11 N. Y. Suppl. 920, 34 N. Y. St. 517.

For a case where the question is made to turn upon whether it was the intention of the parties to renew the old debt or to create a new one, a mere metaphysical subtlety, see Sullivan *v.* Sullivan Mfg. Co., 20 S. C. 79.

The right of action given by a statute against directors has been held not saved by bringing suit against the corporation within the limitation prescribed by the statute, and then delaying for some years to sue the directors. Hall *v.* Siegel, 7 Lans. (N. Y.) 206, 13 Abb. Pr. N. S. (N. Y.) 178. Although the conclusion arrived at by the court seems sound, it is to be observed that it proceeds upon the authority of Miller *v.* White, 57 Barb. (N. Y.) 504, which has been since reversed (50 N. Y. 137), and its authority may therefore be considered doubtful.

An action by judgment creditors to charge a railroad company and its former managers with the payment of their judgment, because of an unlawful payment of money to the president of the corporation, is barred within six years from the date of the adoption of the resolution authorizing such payment, irrespective of the ignorance of the judgment creditors. Link *v.* McLeod, 8 Pa. Dist. 175, 22 Pa. Co. Ct. 273.

15. Van Cott *v.* Van Brunt, 2 Abb. N. Cas. (N. Y.) 283. For suggestions which render this decision questionable see 3 Thompson Corp. § 4365.

16. Duckworth *v.* Roach, 81 N. Y. 49. For an answer which attempted to set up this defense but failed so to do see Cornell *v.* Roach, 101 N. Y. 373, 5 N. E. 52.

17. Merchants' Bank *v.* Bliss, 1 Rob. (N. Y.) 391. Seemingly untenable view that the right to proceed against a director of a national bank under U. S. Rev. Stat. § 3259, is lost by allowing such a period of time to lapse as cuts off the right to forfeit the charter under the same section, by reason of the misconduct complained of. Welles *v.* Graves, 41 Fed. 459.

18. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121; Patterson *v.* Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L. R. A. 745 (holding that the appointment of a receiver neither takes away nor suspends the right of action against the directors); White *v.* How, 29 Fed. Cas. Nos. 17,548, 17,549, 3 McLean 111, 291 (at least without averring

debt due to plaintiff should have been satisfied has been wasted by a receiver or by an assignee for creditors, since the creditors are in general not responsible for the good conduct of this species of trustee.[19]

j. Right to Set Off in Such Actions. Where the statute makes the liability of the directors a liability to the corporation, then the director may obviously set off against this liability any indebtedness of the corporation to him. But this rule would obviously not apply where the liability created by the statute was a liability to the creditors directly, for in such case there would be no mutuality.[20]

k. Defense of Former Adjudication. The fact that plaintiff has recovered a judgment against the corporation does not preclude him, under a Massachusetts statute, from enforcing the liabilities of the officers of the corporation for the original debt, by a bill in equity.[21]

l. Other Defenses Which Have Been Held Unavailing. Directors when sued to enforce their personal statutory liability cannot question the original consideration of a corporate note indorsed before maturity to a *bona fide* taker for value;[22] set up that there has been a judgment of forfeiture against the corporation, or that its charter has expired by limitation;[23] or, where the proceeding is against a director for signing false statements, that plaintiff is also a director;[24] that the company has liquidated the debt by giving its promissory notes therefor, since this does not cancel it nor affect the liability of its trustees;[25] or that subsequently to the time when the liability was incurred, the legislature permitted the corporation to form itself into two distinct companies, since this would not have the effect of exonerating the officers of one of the constituent companies from their statutory liability.[26]

13. Contribution and Subrogation — a. When Wrong-Doing Directors Entitled to Contribution Among Themselves. It seems that where the wrong consists of mere negligence and inattention, as in the case of an inadvertent failure to file certain reports of the condition of the corporation, required by statute, any one of the directors who is charged with more than his quota of liability because of misprision will be entitled to contribution against his co-directors,[27] but this would not be so in case of a positive wrong, involving a guilty *scienter*, such as the making of a false report, in which case no one would be responsible except those actually concurring in the wrong and the maxim, *Ex turpi causa non oritur actio*, would apply.[28]

and proving either that the receiver had paid the notes or that there were assets in his hands sufficient to pay them).

19. Hargroves *v.* Chambers, 30 Ga. 580.

For an analogous rule where the action is to charge shareholders with a separate personal liability see Stewart *v.* Lay, 45 Iowa 604.

20. Tallmadge *v.* Fishkill Iron Co., 4 Barb. (N. Y.) 382. A judgment against a corporation upon which a particular director may be charged under a statute will be available as a set-off to an action by such creditor against the owner of such judgment, but the plea of set-off must show that the amount of the incorporate indebtedness which, under the statute, plaintiff has become liable to pay, is equal to defendant's judgment. Chambers *v.* Lewis, 28 N. Y. 454. As to the defense of set-off where the action is against the corporation by a shareholder for money lent see Milvain *v.* Mather, 5 Exch. 55, 19 L. J. Exch. 227, 1 L. M. & P. 220. Set-off of advances made by a shareholder against an action for a call see Matter of Joint-Stock Co.'s Winding-up Acts, 4 De G. M. & G. 19, 18 Jur. 710, 27 Eng. L. & Eq. 158, 53 Eng. Ch. 16. That in determining the amount for which creditors who are not directors can charge the directors for contracting an excess of debts over the statutory limit debts due the directors themselves are not to be counted. Thacher *v.* King, 156 Mass. 490, 31 N. E. 648.

21. Byers *v.* Franklin Coal Co., 106 Mass. 131. For an analogous rule with respect to the liability of shareholders see Vincent *v.* Sands, 11 Abb. Pr. N. S. (N. Y.) 366, 42 How. Pr. (N. Y.) 231.

22. Cooke *v.* Pearce, 23 S. C. 239.

23. Hargroves *v.* Chambers, 30 Ga. 580.

24. Richards *v.* Crocker, 19 Abb. N. Cas. (N. Y.) 73.

25. Deming *v.* Puleston, 35 N. Y. Super. Ct. 309.

26. Kane *v.* People, 8 Wend. (N. Y.) 203.

27. But see to the contrary Andrews *v.* Murray, 33 Barb. (N. Y.) 354.

Where there is no element of wrong-doing the right of contribution of course exists. Slaymaker *v.* Gundacker, 10 Serg. & R. (Pa.) 75.

28. Nickerson *v.* Wheeler, 118 Mass. 295.

b. Directors Not Entitled to Contribution From Shareholders. Where directors have acted contrary to statutory injunctions or prohibitions, and have thereby incurred a personal liability to creditors which they have been obliged to satisfy, they are not entitled to contribution from other shareholders; because the directors and the shareholders do not stand upon a common footing, they are not *in æquali jure.*[29] But where the transaction for which the director has been charged is merely *ultra vires,* has been taken in good faith, and is not characterized by moral turpitude, he is, on common principles of justice, entitled to contribution from his co-directors.[30]

c. When Wrong-Doing Directors Have No Right of Subrogation Against Company. Outside of statutes a director of a corporation against whom a judgment has been rendered for assenting to a declaration of a dividend when there were no profits to divide has no right of subrogation as against the company.[31]

d. Right of Contribution Among Directors by Agreement. Directors may have the right of contribution as among themselves, where they have become personally liable for the debts of the company, under an agreement for contribution among themselves in such a case.[32]

Q. Compensation of Directors — 1. Directors Not Entitled to Compensation For Services as Directors. Directors of corporations, like other trustees,[33] presumptively serve without compensation, and are not entitled to claim compensation for their services, unless the governing statute or some by-law, regulation, resolution, or contract, made or assented to by the corporation at large, and not merely by the directors themselves, gives it to them. The scope of this rule is such that they are not entitled to recover from the corporation compensation for any services incidental to their office of director.[34] The law does not imply a promise to pay for such services, although rendered to the corporation upon

29. Heald *v.* Owen, 79 Iowa 23, 44 N. W. 210; Stone *v.* Fenno, 6 Allen (Mass.) 579.

30. Ashhurst *v.* Mason, L. R. 20 Eq. 225, 44 L. J. Ch. 337, 23 Wkly. Rep. 506.

Construction of a statute providing that an officer of a corporation who has paid a debt for which by the statute he is made liable shall have no claim against the shareholders individually for contribution, so as to deprive a director of this right, who had paid a judgment rendered against himself as indorser of a note of the corporation, issued with his consent, but in excess of the statutory limit of indebtedness. Connecticut River Sav. Bank *v.* Fiske, 62 N. H. 178.

Statutes granting or withholding the right to contribution.— Numerous statutes have been enacted granting to or withholding from directors who have incurred statutory liability which they have been obliged to satisfy the right to contribution or subrogation. See 3 Thompson Corp. § 4378, where some of these statutes are collected.

31. Hill *v.* Frazier, 22 Pa. St. 320.

32. Smith *v.* Morrill, 54 Me. 48 [*cited* in Coolidge *v.* Wiggin, 62 Me. 568].

33. American Cent. R. Co. *v.* Miles, 52 Ill. 174.

34. *California.*— Brown *v.* Valley View Min. Co., 127 Cal. 630, 60 Pac. 424, cannot recover compensation for doing what he should have done as a director.

Colorado.— Brown *v.* Republican Mountain Silver Mines, 17 Colo. 421, 30 Pac. 66, 16 L. R. A. 426.

Connecticut.— New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170.

Georgia.— Burns *v.* Beck, 83 Ga. 471, 10 S. E. 121.

Illinois.— Holder *v.* Lafayette, etc., R. Co., 71 Ill. 106, 22 Am. Rep. 89; Cheeney *v.* Lafayette, etc., R. Co., 68 Ill. 570, 18 Am. Rep. 584; Rockford, etc., R. Co. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587; Merrick *v.* Peru Coal Co., 61 Ill. 472; American Cent. R. Co. *v.* Miles, 52 Ill. 174.

Indiana.— Maux Ferry Gravel Road Co. *v.* Branegan, 40 Ind. 361.

Massachusetts.— Pew *v.* Gloucester First Nat. Bank, 130 Mass. 391; Sawyer *v.* Pawner's Bank, 6 Allen 207.

Michigan.— Eakins *v.* American White Bronze Co., 75 Mich. 568, 42 N. W. 982.

New Hampshire.— Smith *v.* Putnam, 61 N. H. 632.

New York.— Butts *v.* Wood, 37 N. Y. 317; Fitchett *v.* Murphy, 26 Misc. 544, 56 N. Y. Suppl. 322 (and the fact that each director refrained from voting on the resolution fixing his own salary does not alter the case); Pierson *v.* Thompson, 1 Edw. 212. That a trustee of a corporation organized under the Manufacturing Act (N. Y. Laws (1848), c. 40) cannot recover for services rendered to the corporation see McDowall *v.* Sheehan, 129 N. Y. 200, 29 N. E. 299 [*reversing* 59 Hun 618, 13 N. Y. Suppl. 386, 36 N. Y. St. 104].

Oregon.— Wood *v.* Lost Lake Mfg. Co., 23 Oreg. 20, 23 Pac. 848, 37 Am. St. Rep. 651.

Pennsylvania.— Martindale *v.* Wilson-Cass Co., 134 Pa. St. 348, 19 Atl. 680, 19 Am. St. Rep. 706; Kilpatrick *v.* Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497; Accom-

request; since a person rendering gratuitous services in the line of his legal duty does not thereby raise an implication that they are to be paid for by request of the party benefited by them.[35]

2. CANNOT VOTE THEMSELVES SALARIES OR COMPENSATION. The principle that directors cannot deal for themselves with the corporation[36] necessarily precludes them from voting compensation for themselves either before or after the rendition of the services for which the compensation is voted.[37] Such a resolution is void, as being a promise without a consideration, and hence it cannot be enforced in an action;[38] and in an action founded on such a resolution it is not admissible in evidence.[39] The director who claims compensation for his services being disqualified from voting on the question,[40] if he is necessary to make up a quorum of the board,[41] or if his vote is necessary to the result,[42] the resolution will be void in the sense already stated. But where his vote is not necessary to the adoption of such a resolution it will not necessarily be void, although he may have voted for it.[43]

3. CANNOT VOTE THEMSELVES "BACK PAY" FOR SERVICES ALREADY RENDERED. Especially is it the law that directors cannot vote themselves compensation for

modation Loan, etc., Assoc. *v.* Stonemetz, 29 Pa. St. 534.

Vermont.— Hall *v.* Vermont, etc., R. Co., 28 Vt. 401.

Washington.— Burns *v.* Commencement Bay Land, etc., Co., 4 Wash. 558, 30 Pac. 668, 709.

United States.— Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

England.— *In re* Newman, [1895] 1 Ch. D. 674, 64 L. J. Ch. 407 (holding that shareholders have no power as against creditors of the company to authorize the making of presents to the directors out of money borrowed by the company); Dunston *v.* Imperial Gas Light, etc., Co., 3 B. & Ad. 125, 1 L. J. K. B. 49, 23 E. C. L. 63.

See 12 Cent. Dig. tit. "Corporations," § 1334.

Valuable notes on the compensation of officers and agents of corporations will be found in 3 L. R. A. 378; 23 Am. & Eng. Corp. Cas. 616; 37 Am. & Eng. R. Cas. 277.

35. Rockford, etc., R. Co. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587; American Cent. R. Co. *v.* Miles, 52 Ill. 174; Accommodation Loan, etc., Assoc. *v.* Stonemetz, 29 Pa. St. 534.

36. Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624. See *supra*, IX, G, 1.

37. *California.*— Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786; Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Shattuck *v.* Oakland Smelting, etc., Co., 58 Cal. 550; Chamberlain *v.* Pacific Wool-Growing Co., 54 Cal. 103.

Connecticut.— Mallory *v.* Mallory Wheeler Co., 61 Conn. 131, 23 Atl. 708; New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170.

Indiana.— Maux Ferry Gravel Road Co. *v.* Branegan, 40 Ind. 361.

Michigan.— Miner *v.* Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412.

Minnesota.— Jones *v.* Morrison, 31 Minn. 140, 16 N. W. 854.

Missouri.— Ward *v.* Davidson, 89 Mo. 445, 1 S. W. 846; Davis Mill Co. *v.* Bennett, 39 Mo. App. 460; Bennett *v.* St. Louis Car Roofing Co., 19 Mo. App. 349.

New Jersey.— Gardner *v.* Butler, 30 N. J. Eq. 702.

New York.— Butts *v.* Wood, 37 N. Y. 317 [*affirming* 38 Barb. 181]; Copeland *v.* Johnson Mfg. Co., 47 Hun 235; MacNaughton *v.* Osgood, 41 Hun 109, 3 N. Y. St. 795; Kelsey *v.* Sargent, 40 Hun 150; Blatchford *v.* Ross, 54 Barb. 42, 5 Abb. Pr. N. S. 434, 37 How. Pr. 110. *Contra*, and alone, McNab *v.* McNab, etc., Mfg. Co., 62 Hun 18, 16 N. Y. Suppl. 448, 41 N. Y. St. 906.

Pennsylvania.— Accommodation Loan, etc., Assoc. *v.* Stonemetz, 29 Pa. St. 534.

United States.— Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62.

See 12 Cent. Dig. tit. "Corporations," § 1340.

38. Gardner *v.* Butler, 30 N. J. Eq. 702; Copeland *v.* Johnson Mfg. Co., 47 Hun (N. Y.) 235; Accommodation Loan, etc., Assoc. *v.* Stonemetz, 29 Pa. St. 534.

39. Shattuck *v.* Oakland Smelting, etc., Co., 58 Cal. 550.

40. See *supra*, IX, G, 5, d; IX, I, 10.

41. Butts *v.* Wood, 37 N. Y. 317.

42. Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; R. T. Davis Mill Co. *v.* Bennett, 39 Mo. App. 460; Copeland *v.* Johnson Mfg. Co., 47 Hun (N. Y.) 235.

For examples of devices resorted to, but unsuccessfully, to evade this principle see Mallory *v.* Mallory Wheeler Co., 61 Conn. 131, 23 Atl. 708.

Application of this doctrine to an attempt of officers of a corporation to reduce their salaries see Richard Thompson Co. *v.* Brooks, 14 N. Y. Suppl. 370, 37 N. Y. St. 506. That an agreement between the president and the directors whereby the president is to forego his salary is void for want of consideration and mutuality see Snow *v.* Russell Coe Fertilizer Co., 58 Hun (N. Y.) 134, 11 N. Y. Suppl. 492, 33 N. Y. St. 959.

43. Clark *v.* American Coal Co., 86 Iowa 436, 53 N. W. 291, 17 L. R. A. 557. See

services as directors previously rendered, unless the power to do so has been granted by the by-laws or other governing instrument.[44]

4. Cannot Recover Compensation For "Extra" Services Incidental to Their Official Duties. Directors cannot recover compensation from the corporation for services, although of an extraordinary character, which they may have undertaken by virtue of their office,[45] unless such services are clearly and unquestionably beyond the range of their official duties,[46] or unless they were rendered under such circumstances as warrants the conclusion that it was understood by the proper corporate officers as well as by the director himself that they were to be paid for.[47]

5. May Recover Compensation For Services Clearly Outside Their Duties as Directors. On the other hand a director or other fiduciary officer of a corporation can recover, on an express or an implied assumpsit, compensation for services rendered the corporation provided such services are clearly outside the scope of

Ashley *v.* Kinnan, 2 N. Y. Suppl. 574, 18 N. Y. St. 791.

44. *California.*— Ashton *v.* Dashaway Assoc., 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809.

Connecticut.— New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170.

Georgia.— Burns *v.* Back, 83 Ga. 471, 10 S. E. 121.

Illinois.— Gridley *v.* Lafayette, etc., R. Co., 71 Ill. 200; Holder *v.* Lafayette, etc., R. Co., 71 Ill. 106, 22 Am. Rep. 89.

Indiana.— Blue *v.* Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655; Maux Ferry Gravel Road Co. *v.* Branegan, 40 Ind. 361.

Iowa.— Schoening *v.* Schwenk, 112 Iowa 733, 84 N. W. 916, by-law authorizing directors to fix salaries of officers and employees does not authorize them to vote compensation to themselves.

Michigan.— Eakins *v.* American White Bronze Co., 75 Mich. 568, 42 N. W. 982.

Minnesota.— Jones *v.* Morrison, 31 Minn. 140, 16 N. W. 854.

Missouri.— Bennett *v.* St. Louis Car Roofing Co., 19 Mo. App. 349.

New Hampshire.— Smith *v.* Putnam, 61 N. H. 632.

New York.— Butts *v.* Woods, 37 N. Y. 317; Hofheimer *v.* American Distributing Co., 34 N. Y. App. Div. 628, 54 N. Y. Suppl. 270; Fitchett *v.* Murphy, 26 Misc. 544, 56 N. Y. Suppl. 322.

Ohio.— State *v.* People's Mut. Ben. Assoc., 42 Ohio St. 579.

Oregon.— Wood *v.* Lost Lake Mfg. Co., 23 Oreg. 20, 23 Pac. 848, 37 Am. St. Rep. 651.

Pennsylvania.— Martindale *v.* Wilson-Cass Co., 134 Pa. St. 348, 19 Atl. 680, 26 Wkly. Notes Cas. 48, 19 Am. St. Rep. 706; Kilpatrick *v.* Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497; Accommodation Loan, etc., Assoc. *v.* Stonemetz, 29 Pa. St. 534.

Rhode Island.— Flynn *v.* Columbus Club, 21 R. I. 534, 45 Atl. 551.

Vermont.— Henry *v.* Rutland, etc., R. Co., 27 Vt. 435.

West Virginia.—Ravenswood, etc., R. Co. *v.* Woodyard, 46 W. Va. 558, 33 S. E. 285.

United States.— National Loan, etc., Co. *v.* Rockland Co., 94 Fed. 335, 36 C. C. A. 370; *In re* Grubbs-Wiley Grocery Co., 96 Fed. 183 (that a resolution or by-law of a corporation entered of record is necessary to make a valid contract to pay one of the directors for his services as managing officer); Stewart *v.* St. Louis, etc., R. Co., 41 Fed. 736.

England.— *In re* Newman, [1895] 1 Ch. 674, 64 L. J. Ch. 407, unless authorized to do so by the governing instrument of the company, or by the shareholders at a meeting properly convened.

Canada.— Gardner *v.* Canadian Manufacturer Pub. Co., 31 Ont. 488.

45. Cheeney *v.* Lafayette, etc., R. Co., 68 Ill. 570, 18 Am. Rep. 584; Pew *v.* Gloucester First Nat. Bank, 130 Mass. 391; Pierson *v.* Thompson, 1 Edw. (N. Y.) 212; Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220.

46. New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170.

47. Brown *v.* Republican Mountain Silver Mines, 17 Colo. 421, 30 Pac. 66, 16 L. R. A. 426.

For the extreme doctrine that the director is entitled to no compensation, although the services were performed outside of his ordinary duties as director, and that a resolution of the board allowing compensation for such services imposes no duty on the corporation to pay for them, see Mobile Branch Bank *v.* Scott, 7 Ala. 107; Mobile Branch Bank *v.* Collins, 7 Ala. 95.

Illustrations of the doctrine that directors cannot claim compensation for their services see Holder *v.* Lafayette, etc., R. Co., 71 Ill. 106, 22 Am. Rep. 89 (holding that a director serving as treasurer cannot afterward claim compensation for so serving unless his compensation had been previously fixed by the board); Cheeney *v.* Lafayette, etc., R. Co., 68 Ill. 570, 18 Am. Rep. 584 (railway director cannot recover for services as a member of the executive committee in making efforts to contract for the construction of the road); Stacy *v.* State Bank, 5 Ill. 91 (cannot claim a reward offered by the bank for the discovery of a robber); Pew *v.* Gloucester First Nat. Bank, 130 Mass. 391 (holding that a director and president of a bank who received

his duties as such director or officer.[48] If the directors appoint one of their number an agent of the corporation to perform ministerial acts or transact business such as might be performed by an agent who is not a director he will be entitled to compensation therefor.[49] Special services rendered by a director in soliciting subscriptions of stock or in procuring a right of way in case of a railroad company;[50] in acting as land commissioner and attorney;[51] in acting as attorney, and also in procuring aid notes, right of way, and enlisting capitalists in the enterprise, it being a railroad company;[52] in rendering services to the company as its general counsel;[53] as superintendent, treasurer, and general manager;[54] as secretary under a resolution of appointment which does not specify his compensation;[55] as commander of one of the boats of the corporation, it being a steam-navigation company and he being its president;[56] or for services

a salary as president could not recover from the bank additional compensation for acting as a member on "a committee on alterations and repairs"); Ogden *v.* Murray, 39 N. Y. 202 (holding that the directors of a foreign steamship company cannot create a trust in certain of their own number who are American citizens, for the purpose of giving their steamships the privileges of American vessels, and thereby creating a claim to compensation in favor of such trustees for the performance of their duties as trustees); Pierson *v.* Thompson, 1 Edw. (N. Y.) 212 (directors appointed by the bank to subscribe for a certain amount of stock in the corporation); Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220 (that a director could not in addition to or in lieu of the compensation provided by a resolution of the board claim a commission for negotiating the bonds of the corporation).

48. *California.*— Bassett *v.* Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611, 61 Pac. 791, holding that the action of the directors in granting compensation for such services may be ratified so as to exonerate the directors from personal liability therefor as for a wrongful expenditure of corporate funds.

Colorado.— Ruby Chief Min., etc., Co. *v.* Prentice, 25 Colo. 4, 52 Pac. 210; Brown *v.* Republican Mountain Silver Mine, 17 Colo. 421, 30 Pac. 66, 16 L. R. A. 426.

Illinois.— Gridley *v.* Lafayette, etc., R. Co., 71 Ill. 200; Lafayette, etc., R. Co. *v.* Cheeney, 68 Ill. 570, 18 Am. Rep. 584, 87 Ill. 446.

Indiana.— Greensboro, etc., Turnpike Co. *v.* Stratton, 120 Ind. 294, 22 N. E. 247; Prilliman *v.* Mendenhall, 120 Ind. 279, 22 N. E. 247.

Iowa.— Citizens' Nat. Bank *v.* Elliott, 55 Iowa 104, 7 N. W. 470, 39 Am. Rep. 167, doctrine recognized.

Kentucky.— Huffaker *v.* Krieger, 107 Ky. 200, 53 S. W. 288, 21 Ky. L. Rep. 887, 46 L. R. A. 384, holding that the court would not under the circumstances disturb the action of the board in voting compensation for the services of certain of its members at the instance of a dissenting shareholder.

Maryland.— Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389, 33 Am. Rep. 264.

New Jersey.— Evans *v.* Trenton, 24 N. J. L. 764, 769; Chandler *v.* Monmouth Bank, 13 N. J. L. 255.

Ohio.— *In re* Armleder Plumbing Co., 11 Ohio Cir. Dec. 320, holding that a director performing special services under a contract with the corporation is an "operative" and is entitled to have his wages preferred under a statute. *Compare* Williams *v.* Southard, 8 Ohio S. & C. Pl. Dec. 693, holding the contrary.

Vermont.— Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220; Henry *v.* Rutland, etc., R. Co., 27 Vt. 435.

West Virginia.— Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 33 S. E. 125.

United States.— Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

49. *Illinois.*— Lafayette, etc., R. Co. *v.* Cheeney, 68 Ill. 570, 18 Am. Rep. 584, 87 Ill. 446.

Kentucky.— Waller *v.* State Bank, 3 J. J. Marsh. 201.

Mississippi.— Shackelford *v.* New Orleans, etc., R. Co., 37 Miss. 202, holding that a director is not bound to perform any services outside of his duties as a director, and that if he does he will be entitled to compensation therefor.

Missouri.— Beach *v.* Stoffer, 84 Mo. App. 395, holding that the compensation of the director for services outside of his office of director should be fixed before the services are rendered.

New Jersey.— Chandler *v.* Monmouth Bank, 13 N. J. L. 255.

New York.— Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652, holding that the implication of an agreement to pay for such outside services may be repelled by a long lapse of time during which no claim is made therefor.

50. Cheeney *v.* Lafayette, etc., R. Co., 68 Ill. 570, 18 Am. Rep. 584, 87 Ill. 446.

51. Rogers *v.* Hastings, etc., R. Co., 22 Minn. 25.

52. Ten Eyck *v.* Pontiac, etc., R. Co., 74 Mich. 226, 41 N. W. 905, 16 Am. St. Rep. 633, 3 L. R. A. 378.

53. Watts *v.* West Virginia Southern R. Co., 48 W. Va. 262, 37 S. E. 700.

54. Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 134 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

55. Rogers *v.* Hastings, etc., R. Co., 22 Minn. 25.

56. New Orleans, etc., Packet Co. *v.* Brown, 36 La. Ann. 138, 51 Am. Rep. 5.

rendered by the president and director of a mining company in obtaining an option for certain lands, for obtaining a loan in London, and in procuring the surrender and cancellation of the first-mortgage bonds of the company, which surrender and cancellation were necessary to obtaining a loan, which services were either previously authorized or subsequently ratified by the corporation,[57] must be paid for by the corporation under that rule.

6. RIGHT TO COMPENSATION FOR SERVICES RENDERED PRIOR TO ORGANIZATION OF CORPORATION. In the view of some courts there can be no recovery by a director for services rendered as a promoter prior to the organization of the corporation.[58] Some courts on the contrary as already seen[59] hold a corporation liable for services necessarily rendered in bringing it into existence, on a theory resembling that of ratification; the corporation takes the benefit of the acts thus done in its favor and takes them *cum onere*.[60]

7. FORM OF RELIEF IN CASE OF MONEY MISAPPROPRIATED BY DIRECTORS IN PAYMENT OF COMPENSATION TO THEMSELVES. As already shown the form of relief varies according to the circumstances of the case and it may be an action at law by the corporation,[61] a suit in equity by the corporation proceeding upon the jurisdictional grounds of fraud and trust,[62] or an action by a single shareholder suing for himself and others,[63] where those in control of the corporation refuse to sue, in which latter case the action is always in equity.[64] And it may follow the suggestions given in the marginal notes.[65]

57. Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389, 33 Am. Rep. 264.

Circumstances under which a promoter was not entitled to share in the compensation offered by the proprietor of certain lands, to the promoters of a corporation organized to promote the sale of such lands. Armstrong *v.* Ebener, 46 N. J. Eq. 457, 19 Atl. 265.

58. *Connecticut.*— New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170.

Illinois.— Rockford, etc., R. Co. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587; Safety Deposit L. Ins. Co. *v.* Smith, 65 Ill. 309.

Maryland.— Franklin F. Ins. Co. *v.* Hart, 31 Md. 59.

New Jersey.— Armstrong *v.* Ebener, 46 N. J. Eq. 457, 19 Atl. 265.

New York.— Blatchford *v.* Ross, 54 Barb. 42, 5 Abb. Pr. N. S. 434, 37 How. Pr. 110 (holding that the executive committee of a company had no right to vote money to themselves, and that if they vote large sums for those services it will afford good grounds for the appointment of a receiver); Van Valkenburg *v.* Thomasville, etc., R. Co., 4 N. Y. Suppl. 782, 22 N. Y. St. 379.

Pennsylvania.— Tifft *v.* Quaker City Nat. Bank, 8 Pa. Co. Ct. 606.

See also *supra*, I, Q, 4.

59. See *supra*, I, Q. 4.

60. Bell's Gap R. Co. *v.* Christy, 79 Pa. St. 54, 21 Am. Rep. 39. *Compare* Mobile Branch Bank *v.* Collins, 7 Ala. 95; Twelfth St. Market Co. *v.* Jackson, 102 Pa. St. 269; Allentown First Nat. Bank *v.* Hoch, 89 Pa. St. 324, 33 Am. Rep. 769.

That the services for which the corporation may be thus charged must have been authorized by a majority of the shareholders and that the promise of a single shareholder will not be sufficient see Tift *v.* Quaker City Nat. Bank, 141 Pa. St. 550, 21 Atl. 660.

Power of equity to restrain exorbitant payments.— Untenable holding that a court of equity has no power at the suit of a minority shareholder to restrain the payment of exorbitant salaries. Fitchett *v.* Murphy, 46 N. Y. App. Div. 181, 61 N. Y. Suppl. 182 [*reversed* in 26 Misc. (N. Y.) 544, 56 N. Y. Suppl. 322].

Provision in articles of incorporation that directors shall be entitled to receive a certain sum "by way of remuneration in each year," under which no remuneration can be claimed except for a full year of service. Salton *v.* New Beeston Cycle Co., [1899] 1 Ch. 775, 68 L. J. Ch. 370, 80 L. T. Rep. N. S. 521, 6 Manson 238, 47 Wkly. Rep. 462, where it was held that the right of a director to compensation under a provision of the articles that the board shall be entitled to receive in each year £5,000, not dependent on his subscribing for the amount of shares which the articles make necessary for the qualification of a director. See also *In re* Anglo-Austrian Printing, etc., Co., [1892] 2 Ch. 158, 61 L. J. Ch. 481, 66 L. T. Rep. N. S. 593, 40 Wkly. Rep. 518, where the next preceding case was followed.

61. See *supra*, IX, N, 1, a.

62. See *supra*, IX, N, 1, b.

63. See *infra*, XI, F, 1, b, (III).

64. See *infra*, XI, B, 7.

65. That the officers of the corporation have no lien on the votes of the corporation for their services see Emporium Real Estate, etc., Co. *v.* Emrie, 54 Ill. 345. So held in case of the cashier of an insolvent bank in Bruyn *v.* Middle Dist. Bank, 1 Paige (N. Y.) 584.

That a court of equity will compel the reassignment of choses in action belonging to the corporation which have been improperly assigned to officers for their compensation see

X. MINISTERIAL OFFICERS AND AGENTS.

A. The President — 1. His Powers — a. As Presiding Officer. The president of a private corporation is, as the term implies, the presiding officer of its board of directors and of its shareholders when convened in general meeting.[66]

b. As an Agent — (I) *In General.* The office itself, however, confers no power to bind the corporation or control its property.[67] The president's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it, directly or through its board of directors, formally expressed or implied from a habit or custom of doing business.[68]

(II) *Implied Powers* — (A) *In General.* On the one hand in a corporation in which business transactions are few and carried on entirely by its board of trustees, the president exercises the functions of a presiding officer merely; unaccustomed to act for the corporation he has no powers as an agent not specially conferred.[69] On the other hand in a large business corporation, where its board of directors meets at long intervals and the management of its ordinary business is left entirely in the hands of its president, he is invested with large authority as its representative. Accustomed to act for the corporation daily in a multitude of transactions he has the power of a general agent in its usual course of business.[70]

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Emporium Real Estate, etc., Co. *v.* Emrie, 54 Ill. 345.

That an assignee of the corporation can maintain an action to recover money taken by the directors to themselves as payment for past services see Smith *v.* Putnam, 61 N. H. 632.

That a court of equity will open its door to a shareholder where those in charge of the machinery of the corporation refuse to sue and recover the money or property lost by such breaches of trust see Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Jones *v.* Morrison, 31 Minn. 140, 16 N. W. 854; MacNaughton *v.* Osgood, 41 Hun (N. Y.) 109, 3 N. Y. St. 795; Butts *v.* Wood, 38 Barb. (N. Y.) 181 [*affirmed* in 37 N. Y. 317].

For various other holdings respecting the kind of relief available in such cases see Jennery *v.* Olmstead, 105 N. Y. 654 (holding that if the officer who has illegally appropriated compensation voted to him by the directors is under bond it may be recovered in an action on the bond); MacNaughton *v.* Osgood, 41 Hun (N. Y.) 109, 3 N. Y. St. 795 (holding that in an action by a shareholder the burden is upon plaintiff to make out a case and show that the corporation ought to have exercised its right to avoid the resolution made by the directors); Butts *v.* Wood, 38 Barb. (N. Y.) 181 [*affirmed* in 37 N. Y. 317, circumstances under which one shareholder, suing in behalf of himself and the others, had the right to set aside a vote of money to pay the treasurer for his services when the quorum of directors consisted of the treasurer himself, his father, and another relative]. See also Ellis *v.* Ward, 137 Ill. 509, 25 N. E. 530, holding that the directors voting compensation to an officer of the company for past services may become personally liable, as for a breach of trust, for what is thereby lost to the corporation.

66. 4 Thompson Corp. § 4611.

67. Wait *v.* Nashua Armory Assoc., 66 N. H. 581, 23 Atl. 77, 49 Am. St. Rep. 630, 14 L. R. A. 356; Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783; Almon *v.* Law, 26 Nova Scotia 340.

68. Crawford *v.* Albany Ice Co., 36 Oreg. 535, 60 Pac. 14.

69. Wait *v.* Nashua Armory Assoc., 66 N. H. 581, 23 Atl. 77, 49 Am. St. Rep. 630, 14 L. R. A. 356; Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

70. *California.*— Siebe *v.* Joshua Hendy Mach. Works, 86 Cal. 390, 25 Pac. 14.

Illinois.—Anderson *v.* South Chicago Brewing Co., 173 Ill. 213, 50 N. E. 655 [*reversing* 67 Ill. App. 300]; Smith *v.* Smith, 62 Ill. 493; Voris *v.* Renshaw, 49 Ill. 425; Moser *v.* Kreigh, 49 Ill. 84; Chicago, etc., R. Co. *v.* Boone County, 44 Ill. 240; Chicago, etc., R. Co. *v.* Coleman, 18 Ill. 297, 68 Am. Dec. 544; Gubbins *v.* Bank of Commerce, 79 Ill. App. 150.

Kansas.— Topeka Primary Assoc. *v.* Martin, 39 Kan. 750, 18 Pac. 941.

Kentucky.— Kenton Ins. Co. *v.* Bowman, 84 Ky. 430, 1 S. W. 717, 8 Ky. L. Rep. 467.

Louisiana.— Marlatt *v.* Levee Steam Cotton Press Co., 10 La. 583, 29 Am. Dec. 468.

Michigan.— Ceeder *v.* H. M. Loud, etc., Lumber Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134.

Missouri.— Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 361, 12 L. R. A. 714; Bambrick *v.* Campbell, 37 Mo. App. 460.

New York.— Quee Drug Co. *v.* Plaut, 55 N. Y. App. Div. 87, 67 N. Y. Suppl. 10; Hudson River, etc., R. Co. *v.* Hanfield, 36 N. Y. App. Div. 605, 55 N. Y. Suppl. 877.

Pennsylvania.— Dougherty *v.* Hunter, 54 Pa. St. 380; Baltimore, etc., Steam Boat Co. *v.* McCutcheon, 13 Pa. St. 13; Grafius *v.* Land Co., 3 Phila. 447, 16 Leg. Int. 292.

Between these two extremes the implied powers of a president as an agent vary with the nature of the corporation's business and the custom of conducting it.[71] The "usual course of business" of the corporation is the limit of those powers, and as the meaning of this phrase depends so largely upon the facts of each particular case the use of general terms in defining them can lead only to confusion and apparent conflict. More profit can be derived from collating the instances in which such powers have been admitted and the instances in which they have been denied.

(B) *Particular Powers Implied.* The following powers have been implied in a president acting in the usual course of the business his corporation is engaged in: To make ordinary sales in the course of business of the goods or commodities in which the corporation deals;[72] to prosecute and defend ordinary litigation of the corporation and appoint attorneys to that end;[73] to indorse its negotiable paper for the purpose of transferring title in the ordinary course of business;[74]

South Carolina.— Lancaster County *v.* Cheraw, etc., R. Co., 5 S. C. 338, 28 S. C. 134.

Virginia.— Richmond, etc., R. Co. *v.* Snead, 19 Gratt. 354, 100 Am. Dec. 670.

The possession of certain powers necessarily implies the possession of certain other powers. Thus it has been held on the one hand that where he has power to contract with reference to a given subject-matter so as to bind the corporation, he may release a party to a contract or may substitute another party in his stead. Indianapolis Rolling-Mill Co. *v.* St. Louis, etc., R. Co., 26 Fed. 140. And on the other hand that where he has no power to contract with reference to a given subject-matter he cannot affirm an unauthorized contract made by a former president. Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

71. See Terre Haute Nat. State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330.

72. Horton Ice Cream Co. *v.* Merritt, 17 N. Y. Suppl. 718, 43 N. Y. St. 416.

73. *California.*— Streeten *v.* Robinson, 102 Cal. 542, 36 Pac. 946.

Illinois.— Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513; Boston Tailoring House *v.* Fisher, 59 Ill. App. 400.

Kansas.— Citizens' Nat. Bank *v.* Berry, 53 Kan. 696, 37 Pac. 131, 24 L. R. A. 719; St. Louis, etc., R. Co. *v.* Grove, 39 Kan. 731, 18 Pac. 958.

Louisiana.— Bright *v.* Metairie Cemetery Assoc., 33 La. Ann. 58.

Massachusetts.— Smith's Charities *v.* Connolly, 157 Mass. 272, 31 N. E. 1058; Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298.

Nebraska.— Johnston *v.* Milwaukee, etc., Invest. Co., 46 Nebr. 480, 64 N. W. 1100.

Nevada.— Reno Water Co. *v.* Leete, 17 Nev. 203, 30 Pac. 702.

New Jersey.—Beebe *v.* Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

New York.— Oakley *v.* Working Men's Union Benev. Soc., 2 Hilt. 487; American Ins. Co. *v.* Oakley, 9 Paige 496, 38 Am. Dec. 561.

Oregon.— Lucky Queen Min. Co. *v.* Abraham, 26 Oreg. 282, 38 Pac. 65.

Texas.— Dallas Ice-Factory, etc., Co. *v.* Crawford, 18 Tex. Civ. App. 176, 44 S. W. 875.

West Virginia.— Coleman *v.* West Virginia Oil, etc., Co., 25 W. Va. 148.

United States.— Davis *v.* Memphis City R. Co., 22 Fed. 883.

The president, appearing for the body in a civil action, must be regarded as its attorney in fact for this purpose. Oakley *v.* Working Men's Union Benev. Soc., 2 Hilt. (N. Y.) 487.

Whether suit against corporation or president.— But the suit must be filed against the corporation by name and not against its president as such officer. Pentz *v.* Sackett, Lalor (N. Y.) 113; Ogdensburgh Bank *v.* Van Rensselaer, 6 Hill (N. Y.) 240; Delafield *v.* Kinney, 24 Wend. (N. Y.) 345. A banking association organized under the New York Banking Law of 1838 might be sued in the name of its president; but in such suit the debt or contract must be laid as that of the corporation, not as that of "the defendant." Ogdensburgh Bank *v.* Van Rensselaer, 6 Hill (N. Y.) 240; Delafield *v.* Kinney, 24 Wend. (N. Y.) 345. *Compare* Hunt *v.* Van Alstyne, 25 Wend. (N. Y.) 605. Effect of the death of a president of a corporation in whose name an action has been brought. Wright *v.* Rogers, 26 Ind. 218. Conversely a declaration by one styling himself president, etc., is not a declaration of the corporation as plaintiff. In such case the title of office is merely *descriptio personæ*. Hunt *v.* Van Alstyne, 25 Wend. (N. Y.) 605.

An affidavit made by the president, secretary, or other proper officer or agent of the corporation, when the corporation is a party to the suit, is in legal contemplation an affidavit made by the corporation. New Brunswick Steamboat, etc., Transp. Co. *v.* Baldwin, 14 N. J. L. 440; *Ex p.* Sargeant, 17 Vt. 425.

74. Palmer *v.* Nassau Bank, 78 Ill. 380; Howland *v.* Myer, 3 N. Y. 290; Caryl *v.* McElrath, 3 Sandf. (N. Y.) 176; Merrill *v.* Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; Irwin *v.* Bailey, 13 Fed. Cas. No. 7,079, 8 Biss. 523. A bank president with general authority for that purpose from the directors may transfer by his indorsement a

to make a promissory note in settlement of an ordinary obligation;[75] when intrusted with the entire management of the corporate business, to execute a bill of sale to secure the corporation's debts;[76] to purchase chattels used in the ordinary course of its business;[77] to guarantee a lease;[78] to pay a broker for effecting sales of the goods in which the corporation deals;[79] to make such an acknowledgment of a debt due by the corporation, it being a bank, as will take it out of the statute of limitations;[80] to waive a provision in an order for goods, inserted by his direction, to the effect that delivery should be made to the manager or foreman of the corporation;[81] to take a conveyance of land to himself in an attempt to save a debt due to the corporation, and his estate will be protected against consequent loss;[82] to assign mortgages given by the subscribers for their

note made payable to the bank without a special vote or the use of a corporate seal. Northampton Bank *v.* Pepoon, 11 Mass. 288; Spear *v.* Ladd, 11 Mass. 94. There is a holding, however, to the effect that the president of an insurance company, when not authorized by its charter or by-laws to do so, has no authority as president to indorse and negotiate notes belonging to it. New York City Mar. Bank *v.* Clements, 3 Bosw. (N. Y.) 600. To the effect that the authority of the president of a corporation to indorse its notes must be proved see National Bank of Republic *v.* Navassa Phosphate Co., 56 Hun (N. Y.) 136, 8 N. Y. Suppl. 929, 30 N. Y. St. 289. But the general rule is that in the absence of any restriction in the charter or in the by-laws known to the party accepting the paper, it may be transferred by the president in accordance with the custom of the company by his official indorsement. Palmer *v.* Nassau Bank, 78 Ill. 380; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Patten *v.* Moses, 49 Me. 255; New York City Mar. Bank *v.* Clements, 31 N. Y. 33 [*affirming* 6 Bosw. (N. Y.) 166]; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Caryl *v.* McElrath, 3 Sandf. (N. Y.) 176; Chillicothe Branch Ohio State Bank *v.* Fox, 5 Fed. Cas. No. 2,683, 3 Blatchf. 431. And such a transfer is presumptively valid, and must hence in pleading be denied on oath. Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

Accommodation paper.— A corporation has no implied power to indorse for the accommodation of others, and consequently no such power is implied in its directors and still less in its president. Ætna Nat. Bank *v.* Charter Oak L. Ins. Co., 50 Conn. 167; Pick *v.* Ellinger, 60 Ill. App. 570. But circumstances may exist where such an indorsement will be upheld for the protection of a third person. National Park Bank *v.* German American Mut. Warehousing, etc., Co., 53 N. Y. Super. Ct. 367.

75. Seeley *v.* San José Independent Mill, etc., Co., 59 Cal. 22; Consolidated Perfume Co. *v.* National Bank of Republic, 86 Ill. App. 642; Africa *v.* Duluth News-Tribune Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424; Richmond, etc., R. Co. *v.* Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

Paying claims against corporation.— Payment of claims against the corporation by the president binds it where such course is sanctioned by recognized usage or ratification by the board of directors. Perry *v.* Simpson Waterproof Mfg. Co., 37 Conn. 520; Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674; Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127; Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162. But the payment of a claim by the president on the verbal direction of a majority of the board of directors, even if regarded as irregularly made, cannot be recovered back in an action against him when the claim is justly due, and there is no good reason for withholding payment of it. New Orleans Bldg. Co. *v.* Lawson, 11 La. 34.

76. Quee Drug Co. *v.* Plaut, 55 N. Y. App. Div. 87, 67 N. Y. Suppl. 10.

77. Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714.

78. Hall *v.* Ochs, 34 N. Y. App. Div. 103, 54 N. Y. Suppl. 4.

79. Northern Cent. R. Co. *v.* Bastian, 15 Md. 494; Lee *v.* Pittsburgh Coal, etc., Co., 56 How. Pr. (N. Y.) 373. But it is not within the scope of the powers of a president of a railroad corporation to promise a person a large fee for finding contractors who would agree to build a portion of the line of his company. Risley *v.* Indianapolis, etc., R. Co., 1 Hun (N. Y.) 202 [*reversed* on another point but *affirmed* as to this in 62 N. Y. 240].

80. Morgan *v.* Merchants' Nat. Bank, 13 Lea (Tenn.) 234.

81. American Cotton Bale Imp. Co. *v.* Forsgard, (Tex. Civ. App. 1898) 47 S. W. 475.

82. Brown *v.* Mechanics', etc., Nat. Bank, 12 N. Y. Suppl. 861, 35 N. Y. St. 665.

Evidence insufficient to show that notes were the notes of the bank where they were taken by a bank president in his own name. Tradesmen's Nat. Bank *v.* Manhattan Lumber Co., 18 N. Y. Suppl. 920.

Rights of a bank under mortgages taken by its president to secure money borrowed by the president and cashier of the bank and loaned to a failing debtor and also to secure a debt owing by such debtor to the president personally. Apperson *v.* Exchange Bank, 10 S. W. 801, 10 Ky. L. Rep. 943.

Compelling conveyance of legal title.— Where the president of a bank took a conveyance of land in his own name in payment of a debt due the bank, in trust for the use and

shares, the same being payable to him;[83] in the president of a street railway company to employ an engineer and bookkeeper for the term of one year;[84] to arrange to renew a debt due the corporation, it being a bank;[85] to certify under the charter that the note sued on is the *bona fide* property of the incorporated bank which sues;[86] to authorize a broker to sell certain stock which the bank has taken to secure a loan;[87] in the case of a bank, to draw, indorse, and receipt bills of exchange, give certificates of deposit, etc., in the course of ordinary daily business;[88] to assign a judgment recovered by the bank to a trustee for collection;[89] to offer a reward for information tending to the arrest of its absconding teller;[90] in case of a national bank, to guarantee commercial paper on making a sale thereof;[91] and to pledge the bank's deposit kept with another bank as security for loans made to the former.[92]

(c) *Particular Powers Not Implied.* The following cases, proceeding either upon the theory that the nature of the corporation or the custom of transacting its business gives the president no implied powers, or else that the particular act is beyond the scope of his authority while acting in the usual course of its business, have denied to him the power, without the authorization of the directors, to bind the corporation by a contract with an architect to make plans and specifications for a building which the corporation had been created to erect;[93] to make a contract for the purchase of material to be used in the repairing of a building belonging to the corporation;[94] in case of a railroad company, to make a sale of a quantity of ties belonging to the company, in payment of a debt due by the company;[95] to sell bonds of the company or to make a power of attorney authorizing another to sell them;[96] to dispose of "treasury stock" of the corporation;[97]

benefit of the bank, and the interest of the bank was sold and conveyed by a receiver appointed in another state where the bank was situated, it was held that the grantee of the receiver as *cestui que trust* was entitled to have a decree requiring the widow and heirs at law of the president to convey the legal title to him. Moore *v.* Munn, 69 Ill. 591.

83. Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179, holding that he need not use a seal, or that he may assign under his own seal instead of that of the corporation.

84. Trawick *v.* Peoria, etc., R. Co., 68 Ill. App. 156.

85. Cake *v.* Pottsville Bank, 116 Pa. St. 264, 9 Atl. 302, 2 Am. St. Rep. 600.

86. Bancroft *v.* Mobile Branch State Bank, 1 Ala. 230.

87. Sistare *v.* Best, 16 Hun (N. Y.) 611, sustained on new trial, 88 N. Y. 527.

88. Allison *v.* Hubbell, 17 Ind. 559; Jones *v.* Hawkins, 17 Ind. 550. It has been held that a bank president has power to assign the bank's choses in action. Northampton Bank *v.* Pepoon, 11 Mass. 288; Spear *v.* Ladd, 11 Mass. 94.

89. To the end that the trustee may maintain an action thereon in connection with a judgment against the same debtor assigned to him by another creditor. Guernsey *v.* Black Diamond Coal, etc., Co., 99 Iowa 471, 68 N. W. 777.

90. Such action not being prohibited by the by-laws. Minneapolis Bank *v.* Griffin, 168 Ill. 314, 48 N. E. 154 [*affirming* 66 Ill. App. 577].

91. In the absence of notice to such purchaser of such paper of the want of such authority. Thomas *v.* City Nat. Bank, 40 Nebr. 501, 58 N. W. 943, 24 L. R. A. 263.

92. Such power inferred from the course of business which the directors had permitted to grow up. Bell *v.* Hanover Nat. Bank, 57 Fed. 821.

93. Wait *v.* Nashua Armory Assoc., 66 N. H. 581, 23 Atl. 77, 49 Am. St. Rep. 630, 14 L. R. A. 356. See also Mathias *v.* White Sulphur Springs Assoc., 19 Mont. 359, 48 Pac. 624.

94. Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

95. Walworth County Bank *v.* Farmers' L. & T. Co., 14 Wis. 325. Or make a contract for work already contracted to be done. Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

As to the power of the president of a railroad company to make contracts for the construction of the road see Risley *v.* Indianapolis, etc., R. Co., 1 Hun (N. Y.) 202, 4 Thomps. & C. (N. Y.) 13 [*reversed* in 62 N. Y. 240]; Queen *v.* Second Ave. R. Co., 35 N. Y. Super. Ct. 154. *Compare* Alexander *v.* Brown, 9 Hun (N. Y.) 641.

96. Titus *v.* Cairo, etc., R. Co., 37 N. J. L. 98; East Cleveland R. Co. *v.* Everett, 19 Ohio Cir. Ct. 205, 10 Ohio Cir. Dec. 493.

97. Without rendering himself liable to account to the corporation for the proceeds. *In re* Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521 [*affirming* 19 N. Y. App. Div. 627, 46 N. Y. Suppl. 1102].

Antedating issue of stock.— It has been held that he cannot issue a certificate of stock to the corporation bearing date seven years

to agree to pay an agent for selling capital stock;[98] to prescribe the mode of selling the shares of the corporation which are to be sold upon an increase of its capital stock, although shareholders have attempted to delegate to him that power;[99] in case of a turnpike company to make a contract for the doing of work and labor for the company;[1] to make a subscription for the payment of a designated sum by the corporation, upon the definite acceptance of specified lots as a site for a post-office building;[2] in case of a railroad company to make an affidavit of local prejudice for the purpose of removing the action to a court of the United States;[3] in case of an insurance company to indorse and negotiate securities belonging to it;[4] in case of a manufacturing company to make a contract for the purchase of supplies, when a resolution forbidding such a purchase stands on the books of the company, although the seller has no notice of the resolution;[5] to change contracts authorized by the directors after they have been made;[6] in case of a gravel-road company to make a contract for the grading of a piece of land between the terminus of his company's road and that of another company;[7] in case of a banking corporation to make admissions which will release the maker of a note held by the bank from his legal responsibility created by the note;[8] to convey the corporate real estate;[9] to mortgage the corporate property;[10] to make a deed of a patent for an invention, upon the possession of which the whole business of the corporation depends;[11] to commence actions on behalf of the corporation or bind it by an appearance in court;[12] to employ counsel so as to make the corporation liable for his services;[13] to confess a judgment against the corporation,[14] especially in favor of himself, thus getting a preference over other creditors;[15] to

before. Manhattan L. Ins. Co. *v.* Forty-Second, etc., Ferry R. Co., 139 N. Y. 146, 34 N. E. 776, 54 N. Y. St. 474.

98. Clarkson *v.* Keystone Oilcloth Co., 8 Pa. Dist. 593, 23 Pa. Co. Ct. 189, 15 Montg. Co. Rep. (Pa.) 169.

99. Smith *v.* Franklin Park Land, etc., Co., 168 Mass. 345, 47 N. E. 409.

1. Mt. Sterling, etc., Turnpike Road Co. *v.* Looney, 1 Metc. (Ky.) 550, 71 Am. Dec. 491.

2. B. S. Green Co. *v.* Blodgett, 49 Ill. App. 180, 55 Ill. App. 556 [*affirmed* in 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146].

3. Mahone *v.* Manchester, etc., R. Corp., 111 Mass. 72, 15 Am. Rep. 9.

4. New York City Mar. Bank *v.* Clements, 3 Bosw. (N. Y.) 600. See also Leavitt *v.* Connecticut Peat Co., 15 Fed. Cas. No. 8,170, 6 Blatchf. 139.

But this power will be implied as incident to the execution of the power to adjust and pay all losses of the company conferred by the by-laws. Union Ins. Co. *v.* Greenleaf, 64 Me. 123; Baker *v.* Cotter, 45 Me. 236.

5. Westerfield *v.* Radde, 7 Daly (N. Y.) 326. See also Reed *v.* Ashburnham R. Co., 120 Mass. 43; Westcott *v.* Atlantic Silk Co., 3 Metc. (Mass.) 282.

6. Western R. Co. *v.* Bayne, 11 Hun (N. Y.) 166 [*affirmed* in 75 N. Y. 1]. Nor have the president and cashier of a banking corporation any power, according to one holding, to modify the terms of a written contract on which the bank has parted with its money. Thompson *v.* McKee, 5 Dak. 172, 37 N. W. 367.

7. Brooklyn Gravel Road Co. *v.* Slaughter, 33 Ind. 185.

8. Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51.

9. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Tempel *v.* Dodge, 89 Tex. 68, 33 S. W. 222 [*rehearing denied* in 32 S. W. 514].

10. Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989.

11. Especially for a consideration which does not pass to the corporation. Kansas City Hay Press Co. *v.* Devol, 72 Fed. 717.

12. Ellsworth Woolen Mfg. Co. *v.* Faunce, 79 Me. 440, 10 Atl. 250; Globe Works *v.* Wright, 106 Mass. 207; Ashuelot Mfg. Co. *v.* Marsh, 1 Cush. (Mass.) 507. See also Markey *v.* Mutual Ben. L. Ins. Co., 103 Mass. 78; E. Carver Co. *v.* Manufacturers' Ins. Co., 6 Gray (Mass.) 214; White *v.* Westport Cotton Mfg. Co., 1 Pick. (Mass.) 215, 11 Am. Dec. 168.

It has been held that he cannot execute a cognovit upon which judgment may be entered against the corporation. Rauh *v.* Blairstown Creamery Assoc., 56 N. J. L. 262, 28 Atl. 384.

13. Pacific Bank *v.* Stone, 121 Cal. 202, 53 Pac. 634; Bright *v.* Metairie Cemetery Assoc., 33 La. Ann. 58.

14. J. W. Butler Paper Co. *v.* Robbins, 151 Ill. 588, 38 N. E. 153; Lemars Shoe Co. *v.* Lemars Shoe Mfg. Co., 89 Ill. App. 245; P. P. Mast Buggy Co. *v.* Litchfield Furniture, etc., Co., 55 Ill. App. 98; Adams *v.* Cross Wood Printing Co., 27 Ill. App. 313; Joliet Electric Light, etc., Co. *v.* Ingalls, 23 Ill. App. 45; Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237; Mallory *v.* Kirkpatrick, 54 N. J. Eq. 50, 33 Atl. 205; Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cir. Ct. 783; Thew *v.* Porcelain Mfg. Co., 5 S. C. 415. *Contra*, Chamberlain *v.* Mammoth Min. Co., 20 Mo. 96.

15. Adams *v.* Cross Wood Printing Co., 27 Ill. App. 313.

give a power of attorney to another to confess such judgment;[16] under any theory of his powers to alien the corporate property, except in the ordinary course of its business;[17] to assign its property for the benefit of its creditors;[18] to consent to the appointment of a receiver;[19] in general to release the debts due to the corporation or otherwise give away its assets;[20] to change the rate of interest of a mortgage bond in consideration of extension of time of payment;[21] to agree with a vendor of land taking stock in payment to repurchase the stock if he becomes dissatisfied with it;[22] to relieve against the forfeiture of the shares of a member for the non-payment of assessments thereon;[23] to bind the corporation by promissory notes;[24] to borrow money in the name of the corporation and pledge its responsibility therefor;[25] to assign its assets as security therefor;[26] to assign cor-

16. Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237. Except where he has authority to execute a contract for property purchased by the corporation, which contract provides for a power of attorney to confess judgment on a note given under it. McDonald *v.* Chisholm, 131 Ill. 273, 23 N. E. 596 [*affirming* 30 Ill. App. 176]. But where such a power was formally executed under the corporate seal, the burden is on the party challenging it. Parker *v.* Washoe Mfg. Co., 49 N. J. L. 465, 9 Atl. 682 [*distinguishing* Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237]. The mere fact that the president is the owner of most of the stock and is also the superintendent and treasurer of the corporation and accustomed to borrow money for its use is not evidence of the possession of such authority. Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237.

17. German Nat. Bank *v.* Hastings First Nat. Bank, 55 Nebr. 86, 75 N. W. 531; Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237; Hoyt *v.* Thompson, 5 N. Y. 320.

Illustrations.— As to sell judgments belonging to it (Merchants' Bank *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394); to sell the safe to pay its debts (Asher *v.* Sutton, 31 Kan. 286, 1 Pac. 535); or to sell its lands (Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306, 36 S. W. 1078). But it has been held that he may without special authority transfer a special tax bill. Bambrick *v.* Campbell, 37 Mo. App. 460.

18. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Illinois.— Wagg-Anderson Woolen Co. *v.* Lesher, 78 Ill. App. 678.

Kansas.— Asher *v.* Sutton, 31 Kan. 286, 1 Pac. 535.

Massachusetts.— Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178.

Missouri.— McKeag *v.* Collins, 87 Mo. 164; Webb *v.* Midway Lumber Co., 68 Mo. App. 546.

New York.— Hoyt *v.* Thompson, 5 N. Y. 320; Schaefer *v.* Scott, 40 N. Y. App. Div. 438, 57 N. Y. Suppl. 1035.

Oregon.— Luse *v.* Isthmus Transit R. Co., 6 Oreg. 125, 25 Am. Rep. 506.

Wisconsin.— Walworth County Bank *v.* Farmers' L. & T. Co., 14 Wis. 325.

19. Walters *v.* Anglo-American Mortg., etc., Co., 50 Fed. 316.

20. Thompson *v.* McKee, 5 Dak. 172, 37 N. W. 367; State Sav., etc., Co. *v.* Stewart, 65 Ill. App. 391 (on payment of part only of the debt); Reynolds, etc., Constr. Co. *v.* Police Jury, 44 La. Ann. 863, 11 So. 236; Hone *v.* Allen, 1 Sandf. (N. Y.) 171 note; Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158; Olney *v.* Chadsey, 7 R. I. 224; Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51; Potts *v.* Wallace, 146 U. S. 689, 13 S. Ct. 196, 36 L. ed. 1135; U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316.

21. Colton *v.* Depew, 59 N. J. Eq. 126, 44 Atl. 662 [*affirmed* in 60 N. J. Eq. 454, 46 Atl. 728].

22. Olds *v.* Phillipsburg Land Co., (Tenn. Ch. App. 1898) 48 S. W. 285.

23. Weeks *v.* Silver Islet Consol. Min., etc., Co., 55 N. Y. Super. Ct. 1, 8 N. Y. St. 110 [*affirmed* in 120 N. Y. 620, 23 N. E. 1152, 29 N. Y. St. 996]. That he cannot release a subscriber to the stock of the corporation see United Growers' Co. *v.* Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Suppl. 906. But it has been held that a power to contract carries with it a power to release the contract. Indianapolis Rolling Mill Co. *v.* St. Louis, etc., R. Co., 120 U. S. 256, 7 S. Ct. 542, 30 L. ed. 639. Other courts have upheld his power to compromise with debtors (Belleville Sav. Bank *v.* Winslow, 25 Fed. 471) and to enter a remittitur of a judgment after having arranged for its satisfaction (Case *v.* Hawkins, 53 Miss. 702).

24. *Iowa.*— Cattron *v.* Manchester First Universalist Soc., 46 Iowa 106.

New York.— McCullough *v.* Moss, 5 Den. 567.

Oregon.— Saylor *v.* Com. Invest., etc., Co., 38 Oreg. 204, 62 Pac. 652; Crawford *v.* Albany Ice Co., 36 Oreg. 535, 60 Pac. 14.

Pennsylvania.— Hazleton Coal Co. *v.* Megargel, 4 Pa. St. 324; Worthington *v.* Schuylkill Electric R. Co., 10 Pa. Super. Ct. 117, 44 Wkly. Notes Cas. 118.

Vermont.— Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 561, 22 Atl. 575, 25 Am. St. Rep. 783.

25. Hyde *v.* Larkin, 35 Mo. App. 365; Battin *v.* Grand Music Conservatory, 27 Misc. (N. Y.) 780, 57 N. Y. Suppl. 740; Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 31. Although facts may exist from which such power may be implied. Spangler *v.* Butterfield, 6 Colo. 356.

26. Hill *v.* Marston, 178 Mass. 285, 59 N. E. 766; Hyde *v.* Larkin, 35 Mo. App. 365.

porate assets as part payment of a corporate debt;[27] to do any act which has the effect of overruling or revoking the action of the directors;[28] to buy or sell land for the corporation;[29] in case of a railroad corporation to grant trackage rights over its land for nine hundred and ninety-nine years;[30] in case of a mining company to make a lease of any portion of its lands;[31] or in case of a bank to dispose of notes belonging to the bank,[32] to accept an order upon a third person in satisfaction of notes held by the bank,[33] to charge the bank with liability for a special deposit contrary to its custom,[34] to honor the checks of a corporation holding a claim against himself but having no deposits in the bank,[35] to sell a horse belonging to the bank,[36] or to bind the bank as surety upon an undertaking for a judicial order of arrest in a proceeding in which the bank is not interested.[37]

(III) *When Acting Also as General Manager.* The appointment of the president of a corporation to the office of general superintendent or manager necessarily invests him with the powers incident to that office or agency.[38] Or if he has been so held out and has been permitted in that character to act for the corporation it cannot escape liability upon a contract so made by him in the ordinary course of business, on the ground that the same was made without its knowledge or concurrence.[39] In the absence of an express grant of power or of an implication of the possession of power from custom, holding out, or habit of acting, judicial theory has ascribed to the president of various kinds of corporations, when also acting as the general manager of the corporation, the power to

27. Ferguson *v.* Venice Transp. Co., 79 Mo. App. 352.

28. Madison Ins. Co. *v.* Griffin, 3 Ind. 277; Tradesmen's Nat. Bank *v.* Manhattan Lumber Co., 18 N. Y. Suppl. 920, 46 N. Y. St. 487. See also the following cases:

Iowa.— Templin *v.* Chicago, etc., R. Co., 73 Iowa 548, 35 N. W. 634.

Missouri.— McKeag *v.* Collins, 87 Mo. 164.

Nevada.— Lonkey *v.* Succor Mill, etc., Co., 10 Nev. 17.

New York.— Western R. Co. *v.* Bayne, 11 Hun 166 [*affirmed* in 75 N. Y. 1].

Vermont.— Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220.

United States.— Farmers' L. & T. Co. *v.* San Diego St. Car Co., 45 Fed. 518.

Where a matter has been committed to another officer or body, as for instance to a committee of directors, the president has no power to act alone with respect thereto. Third Ave. R. Co. *v.* Ebling, 12 Daly (N. Y.) 99 [*reversed* on another point in 100 N. Y. 98, 2 N. E. 878].

29. Bliss *v.* Kaweah Canal, etc., Co., 65 Cal. 502, 4 Pac. 507.

30. Chicago, etc., R. Co. *v.* Union Pac. R. Co., 47 Fed. 15.

31. Yellow Jacket Silver Min. Co. *v.* Stevenson, 5 Nev. 224.

That the president of a building association has no such power see Kock *v.* National Union Bldg. Assoc., 35 Ill. App. 465 [*affirmed* on other grounds in 137 Ill. 497, 27 N. E. 530]. But he may lease an office for the use of the corporation. Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13.

32. Central City First Nat. Bank *v.* Lucas, 21 Nebr. 280, 31 N. W. 805. But while a president has no power *ex officio* to transfer the property and securities of the corporation he may acquire it by a delegation of authority from the directors (Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621; Stevens *v.* Hill, 29 Me. 133; Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178; Northampton Bank *v.* Pepoon, 11 Mass. 288; Spear *v.* Ladd, 11 Mass. 94; Valk *v.* Crandell, 1 Sandf. Ch. (N. Y.) 179; Curtis *v.* Swartwout, 1 N. Y. Leg. Obs. 406; Irwin *v.* Bailey, 13 Fed. Cas. No. 7,079, 8 Biss. 523) or by a recognized usage of the corporation (Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621; Brown *v.* Donnell, 49 Me. 421, 77 Am. Dec. 266; Hoyt *v.* Thompson, 5 N. Y. 320; Howland *v.* Myer, 3 N. Y. 290; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Elwell *v.* Dodge, 33 Barb. (N. Y.) 336; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Scott *v.* Johnson, 5 Bosw. (N. Y.) 213; Brouwer *v.* Harbeck, 1 Duer (N. Y.) 114).

33. Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

34. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Austin *v.* Daniels, 4 Den. (N. Y.) 299.

35. Dowd *v.* Stephenson, 105 N. C. 467, 10 S. E. 1101.

36. Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403.

37. Long *v.* Hubbard, 6 Kan. App. 878, 50 Pac. 968.

38. See Seeley *v.* San Jose Independent Mill, etc., Co., 59 Cal. 22.

But the president has not as such power to appoint a general business manager of the corporation without the consent of the directors. Vogel *v.* St. Louis Museum, etc., Gallery, 8 Mo. App. 587.

39. Grand Rapids Safety Deposit Co. *v.* Cincinnati Safe, etc., Co., 45 Fed. 671. See also Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714; Perkins *v.* Washington Ins. Co., 4 Cow. (N. Y.) 645.

do any act in the ordinary transaction of its business in behalf of the corporation so as to bind it;[40] in the president of a manufacturing company to employ labor by the season in the ordinary business of the corporation;[41] in the president of a charitable corporation to institute a suit to foreclose a mortgage;[42] in the president of a railway corporation to promise to repay a purchaser of land from the corporation the purchase-money and interest in case the title proves defective;[43] in the president of a stage company to enter into a contract with an individual granting him an equal interest in such contract for carrying mail as the corporation may secure;[44] in the president of a business corporation to make a power of attorney to confess judgment upon procuring the discounting of a note of the corporation.[45] The president of a corporation, acting as its manager and controlling man, may assent to a reformation of a contract negotiated and executed by him in the name of the corporation, by inserting the proper term instead of one embodied therein by mistake.[46] On the other hand judicial theory has denied to the president of a corporation, who is also clothed with the office of its general manager, the power to bind the corporation by the following acts: By executing a note in the name of the corporation to a third person for an account due him from such corporation;[47] by encumbering its property by a mortgage, or by confessing a judgment for money borrowed, although he has been accustomed to borrow money for the corporation;[48] in the president of a railway company to indemnify a subcontractor against loss in consideration of his continuing the construction of the road after he was justified in abandoning it because of a breach of the contract on the part of the principal contractor;[49] in the president of a business corporation to enter into a transaction by which the corporation prefers one of its creditors, being in failing circumstances,[50] or purchase property not required for the common purposes of the corporation.[51]

(iv) *When Acting Conjointly With Secretary.* If a corporation commits the entire management of its affairs to its president and secretary and holds no meeting of its directors, except when the president sees fit to call them together, a conveyance of land made by the president and secretary without official authority from the board will be deemed valid, in favor of a bank which has made large advances upon notes secured by a vendor's lien given to the president and secretary for the purchase-money and transferred to the bank.[52] But it has been held that they have no power: To transfer substantially all the corporate property to

40. Unless the other party to the transaction has notice of his want of power. Powers *v.* Schlicht Heat, etc., Co., 23 N. Y. App. Div. 380, 48 N. Y. Suppl. 237. Especially in a case where the president is the substantial owner of the corporate stock. Senour Mfg. Co. *v.* Clarke, 96 Wis. 469, 71 N. W. 883.

41. Ceeder *v.* H. M. Loud, etc., Lumber Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134.

So the president and superintendent of a boom company have, unless restrained by the articles or by-laws, the authority to hire men to carry on the company's business, and a resolution by the board of directors authorizing the employment of a certain class of men at a certain rate of compensation is in no sense a restriction of the power of the company through its officers to hire other men than those alluded to on the same terms. Hardy *v.* Tittabawassee Boom Co., 52 Mich. 45, 17 N. W. 235.

42. Smith Charities *v.* Connolly, 157 Mass. 272, 31 N. E. 1058.

43. Dubuque, etc., R. Co. *v.* Pierson, 70 Fed. 303, 17 C. C. A. 401 [*rehearing denied* in 71 Fed. 268, 17 C. C. A. 403].

44. Calvert *v.* Idaho Stage Co., 25 Oreg. 412, 36 Pac. 24.

45. Especially where the act was not objected to by the directors after acquiring knowledge of it. Ford *v.* Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902.

46. Nichols *v.* Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561, 51 N. Y. St. 277.

47. Miller *v.* Reynolds, 92 Hun (N. Y.) 400, 36 N. Y. Suppl. 660, 71 N. Y. St. 574.

48. Smead Foundry Co. *v.* Chesbrough, 6 Ohio Cir. Dec. 670.

49. Grant *v.* Duluth, etc., R. Co., 66 Minn. 349, 69 N. W. 23.

50. Dooley *v.* Pease, 79 Fed. 860.

51. Blen *v.* Bear River, etc., Min. Co., 20 Cal. 602, 81 Am. Dec. 132.

52. Estes *v.* German Nat. Bank, 62 Ark. 7, 34 S. W. 85.

The president and secretary of a corporation have implied authority to execute notes of the corporation unless their authority in this respect is specifically limited. Fisk *v.* Carbonized Stone Co., 67 Ill. App. 327.

certain creditors by way of preference to them;[53] to convey an interest in a canal and pipe-line, where the directors had authorized merely the conveyance of a right to water to be delivered at specified points;[54] to mortgage the property of the corporation to secure its directors against an existing liability as shareholders for the corporation;[55] to order machinery for the corporation such as it presumptively needs in the prosecution of its business;[56] to appoint an agent to manage, control, sell, and transfer the corporate property;[57] or to execute negotiable notes in the name of the corporation.[58]

(v) *When Acting in Manifest Violation of Duty.* Acts of manifest bad faith or breach of duty toward the corporation on the part of its president are not binding upon it. Strangers who thus participate in a wrong against the corporation cannot be allowed to profit by it. Accordingly it has been held that the transaction is not binding, where the president of an insurance company, on receiving a premium note, agrees that it shall be given up at maturity[59] or waives the performance of certain conditions in the contract of insurance;[60] or where the president of a bank stays the collection of an execution against the estate of one of its debtors,[61] consents to an arrangement by which the security of the bank on paper due to it will be impaired, especially where the purpose is to release himself as indorser,[62] loans out money of the bank to known irresponsible parties,[63] assumes for the corporation liability for an individual debt of his own without consideration moving to it,[64] makes a corporate note and mortgage to himself to secure money advanced to pay the subscription of a shareholder,[65] makes a corporate note to himself and gives it to another for his individual debt, whatever the state of the accounts between himself and the corporation,[66] or, his own corporation being insolvent, draws drafts upon another against a fund not yet due, to be applied upon his corporation's notes upon which he is surety,[67] or indorses a note given by a contractor for materials furnished to the corporation and for which he has been paid by it.[68]

53. St. Joseph State Nat. Bank *v.* John Moran Packing Co., 68 Ill. App. 25 [*affirmed* in 168 Ill. 519, 48 N. E. 82].

54. Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

55. Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624, 17 S. E. 968.

56. Des Moines Mfg., etc., Co. *v.* Tilford Milling Co., 9 S. D. 542, 70 N. W. 839.

57. Johnson *v.* Sage, (Ida. 1896) 44 Pac. 641.

58. City Electric St. R. Co. *v.* First Nat. Exch. Bank, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282, 31 L. R. A. 535.

It has been held that a mortgage executed by the president and secretary of a corporation in pursuance of an invalid resolution of the board of directors cannot be upheld as a valid exercise of their general powers, even if such powers were sufficient to enable them to execute the contract without a resolution. State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519, 48 N. E. 82 [*affirming* 68 Ill. App. 25].

59. Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158.

60. Sturgis First Nat. Bank *v.* Bennett, 33 Mich. 520; St. Nicholas Ins. Co. *v.* Howe, 7 Bosw. (N. Y.) 450.

61. Spyker *v.* Spence, 8 Ala. 333.

62. Gallery *v.* National Exch. Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. St. Rep. 149. See also Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51; Metropolis Bank *v.* Jones, 8 Pet. (U. S.) 12, 8 L. ed. 850; U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316.

63. Sturgis First Nat. Bank *v.* Reed, 36 Mich. 263.

64. Barnhardt *v.* Star Mills, 123 N. C. 428, 31 S. E. 719. A bank, the creditor of both a corporation and its president individually, which receives from a debtor of the corporation, pursuant to the order of the president, who is its sole manager and principal shareholder, a payment on the president's individual obligation, is not thereby barred from a *pro rata* share on the claim against the corporation from its receiver in insolvency. Malcomson *v.* Wappoo Mills, 99 Fed. 633.

65. Hodson *v.* Eugene Glass Co., 156 Ill. 397, 40 N. E. 971 [*affirming* 54 Ill. App. 248]. Or makes a corporate mortgage to secure his own indebtedness. State *v.* A. F. Shapleigh Hardware Co., 147 Mo. 366, 48 S. W. 927.

66. Union Nat. Bank *v.* Post, 55 Ill. App. 369; Wall *v.* Niagara Min., etc., Co., 20 Utah 474, 59 Pac. 399. And it has been held that where the president is payee of a corporate note the presumption is against its validity, and the burden is on the holder to show that it is in fact the obligation of the corporation. Porter *v.* Winona, etc., Grain Co., 78 Minn. 210, 80 N. W. 965; Saylor *v.* Commonwealth Invest., etc., Co., 38 Oreg. 204, 62 Pac. 652.

67. Bosworth *v.* Jacksonville Nat. Bank, 64 Fed. 615, 12 C. C. A. 331.

68. Worthington *v.* Schuylkill Electric R.

(VI) *When Acting in Interest of Himself or Third Party.* Subject to exceptions in favor of innocent parties, the general rule is that acts of officers of a corporation in any transaction in which both the corporation and they themselves individually are interested do not bind the corporation.[69] Thus if the president of a corporation makes a note of the corporation and uses it for his own benefit, the corporation will not be chargeable thereon in favor of the holder, unless the latter occupies the position of a *bona fide* purchaser without notice.[70] Nor is the company bound by its president's acts, where he is clearly acting as the special agent of a third person.[71]

(VII) *Extension of Authority by Holding Out.* As in the case of other agents, the president of a corporation may acquire larger powers than those ordinarily belonging to him by being held out to the public as possessing them, and by being suffered by the directors habitually to exercise such powers in the face of the public.[72]

Co., 10 Pa. Super. Ct. 117, 44 Wkly. Notes Cas. (Pa.) 118.

69. Davenport First Nat. Bank *v.* Gifford, 47 Iowa 575; Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293.

For a conection of facts where it was held that the president acted for himself personally see Wisconsin F. & M. Ins. Co.'s Bank *v.* Filer, 80 Mich. 67, 45 N. W. 63, 83 Mich. 496, 47 N. W. 321. See also Hall *v.* Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75; Baumann *v.* Manistee Salt, etc., Co., 94 Mich. 363, 53 N. W. 1113.

A general authority to the president of a bank to certify checks drawn upon it does not extend to check drawn by himself, and the fact that he does so attempt to use his official character for his private benefit puts third persons upon inquiry and deprives them of the protection accorded to innocent purchasers. Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293 [*reversing* 36 Barb. (N. Y.) 540]. *Compare* Palmer *v.* Nassau Bank, 78 Ill. 380.

70. Kelley *v.* Post, 37 Ill. App. 396; Arnkens *v.* Rouse, 11 Ohio Dec. (Reprint) 380, 26 Cinc. L. Bul. 221. See also Tradesmen's Nat. Bank *v.* Manhattan Lumber Co., 18 N. Y. Suppl. 920, 46 N. Y. St. 487.

71. As where the president of a corporation subscribed for stock in the name of defendant, promising to "take care of it for him" (St. Nicholas Ins. Co. *v.* Howe, 7 Bosw. (N. Y.) 450), or where he is acting as trustee under an assignment for creditors (Alpena Nat. Bank *v.* Greenbaum, 80 Mich. 1, 44 N. W. 1123). See also Sturgis First Nat. Bank *v.* Bennett, 33 Mich. 520, where the president agreed to indemnify sureties on a note discounted by his bank.

72. *Arkansas.*— Texarkana, etc., R. Co. *v.* Bemis Lumber Co., 67 Ark. 542, 55 S. W. 944.

Illinois.— Libby *v.* Union Nat. Bank, 99 Ill. 622.

Kansas.— Sherman Center Town Co. *v.* Swigart, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137.

Michigan.— Ceeder *v.* H. M. Loud, etc., Lumber Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134.

Missouri.— Washington Sav. Bank *v.* Butchers', etc., Bank, 107 Mo. 133, 17 N. W. 644, 28 Am. St. Rep. 405.

New York.— Corn Exch. Bank *v.* American Dock, etc., Co., 163 N. Y. 332, 57 N. E. 477 [*modifying* 14 N. Y. App. Div. 453, 43 N. Y. Suppl. 1028]; Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707; Dallas City Nat. Bank *v.* National Park Bank, 32 Hun 105; Olcott *v.* Tioga R. Co., 40 Barb. 179; Western Nat. Bank *v.* Faber, 29 Misc. 467, 62 N. Y. Suppl. 82. See also Martin *v.* Niagara Falls Paper Mfg. Co., 44 Hun 130; Buffalo Mar. Bank *v.* Butler Colliery Co., 5 N. Y. Suppl. 291, 23 N. Y. St. 318.

Tennessee.— Neiffer *v.* Knoxville Bank, 1 Head 162.

Texas.— Dallas Ice Factory, etc., Co. *v.* Crawford, 18 Tex. Civ. App. 176, 44 S. W. 875. See also Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306, 16 S. W. 1078.

United States.— Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608; LeRoy, etc., R. Co. *v.* Sidell, 66 Fed. 27, 13 C. C. A. 308.

See also Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

Illustrations.— Thus although in the absence of the regular cashier of a banking company a person was appointed to discharge his duties, yet if it was the custom of the president to sign checks when the regular cashier was absent, a check so signed will be binding upon the bank. Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162. See also Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577, 58 N. E. 162; Milbank *v.* De Riesthal, 82 Hun (N. Y.) 537, 31 N. Y. Suppl. 522, 64 N. Y. St. 199. So if the president of a company has been in the habit of acting as a business agent for the company with its knowledge and without objection, actual authority will be inferred from such fact and the company will be bound by his acts done as such agent. Dougherty *v.* Hunter, 54 Pa. St. 380. So the president of a banking corporation may, with the concurrence of the board of directors, as shown by a long-continued custom, assume the powers of a general manager of the affairs of the bank, and in such capacity may purchase real estate in satisfaction of debts due the

(VIII) *Restriction of Apparent Authority by Express Prohibition.* A by-law restraining the powers of the president of a corporation so as to make them less than those ascribed to such officers by the law of the jurisdiction, or less than those habitually exercised by the particular officer, will not affect the rights of a party dealing with the corporation through its president, unless the by-law is brought to his notice.[73]

(IX) *Ratification of Unauthorized Acts.* The contracts made by the president of a corporation, although invalid at the time when they are entered into, may be made good by ratification,[74] on principles which are hereafter fully

bank. Libby *v.* Union Nat. Bank, 99 Ill. 622. On the other hand the habitual ratification by the board of directors of a land company of sales made by the president of the land of the corporation, reserving a vendor's lien, gives the president no authority to sell land without reserving such lien, especially where it is the invariable custom of the country to make such reservation. Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306, 16 S. W. 1078.

73. Smith *v.* Martin Anti-fire Car Heater Co., 19 N. Y. Suppl. 285, 47 N. Y. St. 26. See also *supra*, V, A, 5.

Where adverse party was chargeable with notice.— But where the by-laws of a corporation require the indorsement of its secretary on a promissory note to pass the title of such corporation to the note, it was held that the indorsement of such a note by the president of the corporation did not pass the title, where the indorsee was chargeable with knowledge of the fact that the indorsement was unauthorized by the corporation. Leavitt *v.* Connecticut Peat Co., 15 Fed. Cas. No. 8,170, 6 Blatchf. 139.

Contract made directly with corporation.— When the by-laws of a corporation give its president power to make contracts and execute conveyances, where a contract is made directly with the corporation and recorded on its books, any instruments executed by the president in carrying such contract into effect are, so far as they depart from the terms of the contract, *prima facie* unwarranted. Monroe Mercantile Co. *v.* Arnold, 108 Ga. 449, 34 S. E. 176; East Rome Town Co. *v.* Brower, 80 Ga. 258, 7 S. E. 273.

Where the president has no power, express or implied, to do an act, the admission of evidence of a by-law forbidding him to do it is immaterial and not ground for reversal. Wait *v.* Nashua Armory Assoc., 66 N. H. 581, 23 Atl. 77, 49 Am. St. Rep. 630, 14 L. R. A. 356.

Restrictions contained in statute or charter. — The secretary and the president of a corporation, under a charter empowering them to conduct the business of the corporation subject to the by-laws and the regulations of the board of directors, cannot revoke a submission to arbitration made by the board of directors. Madison Ins. Co. *v.* Griffin, 3 Ind. 277. See also Lonkey *v.* Succor Mill, etc., Co., 10 Nev. 17. Under a statute prohibiting a corporation from using its funds in the purchase of stock in another corporation without the written consent of all the shareholders of each corporation, it was held a good defense to a suit on a note of a corporation given by its president in part payment of a subscription by him for his corporation to stock in another company that the shareholders never authorized such act. Midland Steel Co. *v.* Citizens' Nat. Bank, 26 Ind. App. 71, 59 N. E. 211.

74. *California.*—Shaver *v.* Bear River, etc., R. Co., 10 Cal. 396.

District of Columbia.— Washington Times Co. *v.* Wilder, 12 App. Cas. 62.

Illinois.— Oakford *v.* Fischer, 75 Ill. App. 544.

Ohio.— East Cleveland R. Co. *v.* Everett, 19 Ohio Cir. Ct. 205, 10 Ohio Cir. Dec. 493.

Oregon.— Crawford *v.* Albany Ice Co., 36 Oreg. 535, 60 Pac. 14.

Pennsylvania.—Bagaley *v.* Pittsburgh, etc., Iron Co., 146 Pa. St. 478, 23 Atl. 837.

Virginia.— West Salem Land Co. *v.* Montgomery Land Co., 89 Va. 192, 15 S. E. 524.

Washington.— Glover *v.* Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380.

Wisconsin.— Northwestern Fuel Co. *v.* Lee, 102 Wis. 426, 78 N. W. 584.

United States.— Prentiss Tool, etc., Co. *v.* Godchaux, 66 Fed. 234, 13 C. C. A. 420; Belleville Sav. Bank *v.* Winslow, 35 Fed. 471.

By accepting the benefits derived therefrom a corporation has been held to have ratified the unauthorized act of its president in contracting for the repair of a vessel (The Sappho, 94 Fed. 545, 36 C. C. A. 395 [*reversing* 89 Fed. 366]); in purchasing land (Lake St. El. R. Co. *v.* Carmichael, 82 Ill. App. 344 [*affirmed* in 184 Ill. 348, 56 N. E. 372]; Wall *v.* Niagara Min., etc., Co., 20 Utah 474, 59 Pac. 399; Northwestern Fuel Co. *v.* Lee, 102 Wis. 426, 78 N. W. 584) or chattels (Allen *v.* Groves Springs Hotel, etc., Co., 85 Hun (N. Y.) 537, 33 N. Y. Suppl. 355, 67 N. Y. St. 39); in employing a secretary (Mobile, etc., R. Co. *v.* Owen, 121 Ala. 505, 25 So. 612), an attorney (Freeman Imp. Co. *v.* Osborn, 14 Colo. App. 488, 60 Pac. 730), or a surveyor (Heinze *v.* South Green Bay Land, etc., Co., 109 Wis. 99, 85 N. W. 145); in making a lease (Louisville, etc., R. Co. *v.* Carson, 151 Ill. 444, 38 N. E. 140; Chase *v.* Redfield Creamery Co., 12 S. D. 529, 81 N. W. 951); in executing a note (Phillips *v.* Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749; National Sparker Bank *v.* George C. Treadwell Co., 80 Hun (N. Y.) 363, 30 N. Y. Suppl. 77, 61 N. Y. St. 817); in making unauthorized representations (Balfour *v.* Fresno Canal, etc., Co., 123 Cal. 395, 55 Pac. 1062); in delivering collateral security in considera-

discussed.[75] Such a ratification must of course be had by the body having power to contract in the premises.[76] This body will generally be the board of directors; but unless the governing statute makes the power of the directors exclusive as between them and the shareholders a ratification by the body of the shareholders, although not by the directors, will be good.[77]

(x) *Express Powers.* When the authority of the president is derived from a formal expression of his powers, as in a statute, charter, by-law, or resolution, it becomes the province of the court to define its meaning and determine its scope. Thus in the interpretation of various express powers it has been held that an authority given by statute to the president of a corporation to execute conveyances of its lands confers upon him no authority to make sales of such lands,[78] but that authority conferred upon the president of a bank to sell and convey premises implies a power to negotiate and make a bargain with a purchaser, prior to the conveyance, and that therefore such officer has power to execute a bond binding the corporation to make the conveyance;[79] that an express power conferred upon the president of a corporation to buy materials or goods used by it in its operations includes the power to buy on credit and to give the promissory note of the corporation therefor;[80] that the president is not authorized to dispose of the company's personalty in payment of its debts by a resolution appointing him the fiscal agent of the company with power "to purchase such equipments for the road as the board might direct, to purchase all necessary materials for the car-shop and to contract for all necessary transportation of the company";[81] that a by-law authorizing him to act as the "business and financial agent" of the corporation does not empower him to execute a mortgage upon the property of the corporation to secure one of its debts;[82] that the vote of the directors authorizing the president to "sell and convey" a tract of land empowers him to execute

tion of an extension of time (Smith *v.* Richardson, 77 Mo. App. 422); in assigning a corporate asset in payment of a corporate debt (Ferguson *v.* Venice Transp. Co, 79 Mo. App. 352); or in unjustly attempting to repossess premises leased by the corporation (Texas, etc., Coal Co. *v.* Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843).

To be binding the act of ratification must be done with full knowledge of the circumstances. Bright *v.* Canadian International Stock Yard, etc., Co., 83 Hun (N. Y.) 482, 32 N. Y. Suppl. 71, 65 N. Y. St. 234. See also *infra*, XV, C, 2, f, (I) *et seq.*

75. See *infra*, XV.

76. George *v.* Nevada Cent. R. Co., 22 Nev. 228, 38 Pac. 441.

77. Chicago, etc, R. Co. *v.* Union Pac. R. Co., 47 Fed. 15. See also *infra*, XV, B, 7, a, (I) *et seq.*

Cannot be ratified by president.— But the acts of the president himself, in regard to a corporate note which he has made payable to himself, such as part payment of it with the corporate funds, does not amount to a ratification of the unauthorized execution of the note. Porter *v.* Winona, etc., Grain Co., 78 Minn. 210, 80 N. W. 965.

78. Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306, 16 S. W. 1078. See also Gibson *v.* Goldthwaite, 7 Ala. 861, 42 Am. Dec. 592.

79. Augusta Bank *v.* Hamblet, 35 Me. 491.

80. Siebe *v.* Joshua Hendy Mach. Works, 86 Cal. 390, 25 Pac. 14.

A power to make a sale of goods includes the power to agree to pay a commission to a broker for effecting such a sale. Northern Cent. R. Co. *v.* Bastian, 15 Md. 494.

For a case where a promise to pay a commission bound the president personally see Fitch *v.* Cunningham, 45 Hun (N. Y.) 590, 10 N. Y. St. 17.

Power to make a contract includes power to complete it by delivering the customary evidence of it. Allison *v.* Tennessee Coal, etc., Co., (Tenn. Ch. App. 1897) 46 S. W. 348.

81. Walworth County Bank *v.* Farmers' L. & T. Co., 14 Wis. 325.

82. Luse *v.* Isthmus Transit R. Co., 6 Oreg. 125, 25 Am. Rep. 506. But a president authorized by a by-law to transact all its ordinary business may indorse its notes (Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59; Howland *v.* Myer, 3 N. Y. 290) and lease premises for the business use of the corporation (Hawley *v.* Gray Bros. Artificial Stone Pav. Co., 106 Cal. 337, 39 Pac. 609), but not sell its bonds (East Cleveland R. Co. *v.* Everett, 19 Ohio Cir. Ct. 205, 10 Ohio Cir. Dec. 493), and where such power was given to the president of an insurance company, it was held that this included the power to borrow money for payment of a loss, and give premium notes to the amount of over one thousand dollars as collateral security therefor without a resolution of the directors (Brouwer *v.* Harbeck, 1 Duer (N. Y.) 114). But a by-law giving him "the general charge and direction of the business of the company, as well as all matters connected with the inter-

a bond binding the corporation to convey,[83] but a resolution authorizing him to execute a bond of indemnity to the shareholders in consideration of their signing a joint note to provide for a debt of the company does not authorize him to execute to them a note of the corporation, and such a note cannot be enforced;[84] that a resolution authorizing him to convey land to purchasers includes authority to convey land given by the corporation by way of donation;[85] that he may appoint himself assignee of the corporation for its creditors under a resolution authorizing him to nominate a trustee to carry into effect the assignment;[86] that a power to appoint, remove, and fix the compensation of each and every person employed by the company does not authorize the employment of a person for life;[87] that under a power to incur indebtedness, negotiate loans, to contract and otherwise act as the agent of the corporation, the president has authority to execute a note binding the corporation;[88] that, under a statute permitting the board of directors to borrow money and mortgage corporate property, and providing that such powers should be exercised by them, the president cannot bind the corporation by a contract of employment to sell corporate bonds,[89] and that where a corporation constitutes its president its universal agent it is bound by any act of his which is within its corporate powers.[90]

(xi) *Declarations by, and Notice to, President.* A corporation is bound by the declarations and admissions of its president concerning corporate business while acting within the scope of his authority. Thus where the president and treasurer of a corporation, jointly authorized to sell and lease land, while negotiating a lease pointed out the boundaries of the land, their declarations relative thereto are admissible in evidence against the corporation, and after their decease against its subsequent grantees.[91] So where the president has implied power to bind the corporation by contracts in its ordinary business it will be presumed that he has an authority to make admissions as to matters pertaining to its ordinary business which will be binding upon it.[92] When the president is acting in the exercise of his office or agency, a notice to him of any matter pertaining to that office or agency is notice to the corporation; and as he is the chief executive officer of the corporation and the president of its board of directors it can hardly be doubted that in any case a notice properly communicated to him at the chief office of the corporation will bind the corporation. Thus a resignation by a bank

ests and objects of the corporation," does not authorize him "to do an act, which, by another by-law, is expressly given to a separate committee." Twelfth St. Market Co. *v.* Jackson, 102 Pa. St. 269. And if a statute or other governing instrument requires that all contracts shall be authenticated by the secretary the president cannot authenticate them. See *infra*, XII, B, 1, a. And if it requires the president and vice-president, the secretary and vice-president will not do. Thompson *v.* Des Moines Driving Park, 112 Iowa 628, 84 N. W. 678. But in the absence of such provision one court discovered no reason why the president might not act also as secretary at a meeting of the board of directors. Budd *v.* Walla Walla Printing, etc., Co., 2 Wash. Terr. 347, 7 Pac. 896.

83. Augusta Bank *v.* Hamblet, 35 Me. 491.

84. Bacon *v.* Mississippi Ins. Co., 31 Miss. 116.

85. State *v.* Glenn, 18 Nev. 34, 1 Pac. 186. See also Siebe *v.* Joshua Hendy Mach. Works, 86 Cal. 390, 25 Pac. 14.

His power to settle accounts and allow interest thereon. Farmers' L. & T. Co. *v.* Mann. 4 Rob. (N. Y.) 356.

86. But creditors cannot avail themselves of the objection. Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75.

87. Carney *v.* New York L. Ins. Co., 19 N. Y. App. Div. 160, 45 N. Y. Suppl. 1103 [*affirmed* in 162 N. Y. 453, 57 N. E. 78, 76 Am. St. Rep. 347, 49 L. R. A. 471].

88. McCormick *v.* Stockton, etc., R. Co., 130 Cal. 100, 62 Pac. 267. But power to execute judgment notes, mortgages, and other securities for borrowing money does not extend to prior debts created on general credit. J. W. Butler Paper Co. *v.* Robbins, 151 Ill. 588, 38 N. E. 153.

A by-law providing that the president shall not borrow money to exceed the amount fixed by the directors impliedly authorizes him to borrow unless his power is limited by the directors. Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453.

89. East Cleveland R. Co. *v.* Everett, 19 Ohio Cir. Ct. 205, 10 Ohio Cir. Dec. 493.

90. Petrolia Mfg. Co. *v.* Jenkins, 29 N. Y. App. Div. 403, 51 N. Y. Suppl. 1028.

91. Holmes *v.* Turner's Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

92. Bullock *v.* Consumers' Lumber Co.,

director made orally to the president has been held sufficient, where he has sold out his stock and thus parted with his qualification to be a director.[93]

(XII) *PROOF OF OFFICIAL CHARACTER AND AUTHORITY.* The official character of a president of a corporation may be established by proof that he has habitually acted in that capacity in the undisputed possession of the office and exercised its functions.[94] So the official character of a person assuming to act as president of a corporation may be proved by recognition and an adoption on the part of the corporation, just as the existence of a corporation may be proved by recognition and adoption on the part of the state.[95] Likewise the authority of the president may be established by proof that the corporation held him out to the public as possessing the powers which he exercised in the given case,[96] or that

(Cal. 1892) 31 Pac. 367. See also Henry *v.* Northern Bank, 63 Ala. 527; Johnson *v.* Union Switch, etc., Co., 129 N. Y. 653, 29 N. E. 964, 42 N. Y. St. 337 [*affirming* 13 N. Y. Suppl. 612, 37 N. Y. St. 876, unauthorized admission that company will continue to pay royalties not binding]; Gould *v.* Cayuga County Nat. Bank, 56 How. Pr. (N. Y.) 505 (misinformation by another officer no excuse for false statements of president); Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28 It has been held that a statement by the president of a corporation authorized to represent it within the limits of its usual business to the holder of a note of the corporation, who had the election to declare the same immediately due upon the failure or insolvency of the corporation, that the corporation was insolvent and is about to make an assignment, is within the scope of his authority and is chargeable to the corporation. Merchants' Nat. Bank *v.* Columbia Spinning Co., 21 N. Y. App. Div. 383, 47 N. Y. Suppl. 442. But it has been held that an investment company is not bound by the declarations of its president as to its condition, made to the maker of a note to the corporation secured by a deposit of its stock as collateral, whereby the latter was induced to keep his stock instead of selling it and paying the note. Philadelphia Invest. Co. *v.* Eldridge, 175 Pa. St. 287, 34 Atl. 629, 38 Wkly. Notes Cas. (Pa.) 181.

93. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662. But if the president is acting partly for himself, the notice will not bind the corporation (Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33. See also *infra*, XIII, A, 3, b, (I) *et seq*), unless the circumstances are such that it would be for his interest rather to communicate than conceal it. For example where the president of a railway corporation executed to certain directors of the company, to secure the payment of his indebtedness to it, a mortgage of the premises, to which his wife had an equitable claim under an unrecorded deed to her, it was held that having acted in the matter not for the company but for himself alone, his knowledge of his wife's equities was not the knowledge of the company unless shown to have been communicated to it. Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231.

94. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457. See also *supra*, IX, B, 1.

95. Blackman *v.* Mobile Branch Bank, 8 Ala. 103; Kennedy *v.* Cotton, 28 Barb. (N. Y.) 59. See also *supra*, I, M, 10.

A president without power to contract with reference to a given subject-matter cannot affirm an unauthorized contract made by a former president. Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783. But where this species of indirect proof is not available, but resort must be had to direct proof, then the official character of the president must be proved by evidence that he was president *de jure*. Crawford *v.* Mobile Branch State Bank, 7 Ala. 205.

96. *Illinois.*— Libby *v.* Union Nat. Bank, 99 Ill. 622.

Kansas.—Sherman Center Town Co. *v.* Swigart, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137.

Michigan.— Ceeder *v.* H. M. Loud, etc., Lumber Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134.

Missouri.—Washington Sav. Bank *v.* Butchers', etc., Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405.

New York.—Martin *v.* Niagara Falls Paper Mfg. Co., 44 Hun 130; Olcott *v.* Tioga, etc., R. Co., 40 Barb. 179; Buffalo Mar. Bank *v.* Butler Colliery Co., 5 N. Y. Suppl. 291, 23 N. Y. St. 318.

Pennsylvania.— Dougherty *v.* Hunter, 54 Pa. St. 380.

Tennessee.— Neiffer *v.* Knoxville Bank, 1 Head 162.

Texas.— Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306, 16 S. W. 1078.

West Virginia.—Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

United States.— Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

This most frequently happens in cases where the directors appoint him general manager, superintendent, or managing agent, by whatever name called, of the ordinary business corporation, in which case the law assumes that they intend to confer upon him the ordinary contracting powers which belong to such an agent, and will protect the innocent public in acting upon that assumption. Seeley *v.* San Jose Indenendent Mill, etc., Co., 59 Cal. 22; Hardy *v.* Tittabawassee Boom Co., 52 Mich. 45, 17 N. W. 235; Sparks

the corporation has ratified his unauthorized acts.[97] And if it becomes necessary to prove a special authority of the president in the particular transaction this proof need not be made in the form of a resolution of the board of directors, duly entered upon the records of the corporation, conferring the authority upon the president, but the act of the directors may be shown by an oral vote[98] and may be otherwise proved by parol,[99] and often equally well by circumstantial evidence.[1]

(XIII) *PRESUMPTION OF VALIDITY OF CORPORATE ACT PROPERLY EXECUTED.* A careful distinction must always be taken between a president's power to make contracts for the corporation and his power formally to execute contracts made for the corporation by its board of directors or other authorized persons, it may be himself. The obvious distinction between making a sale of land and executing the deed illustrates what is here intended. Thus if a corporate contract is evidenced by a sealed instrument the presence of the corporate seal carries with it a presumption of antecedent authority on the part of the president and secretary to execute the contract.[2] The evidence is *prima facie* only, and the presumption may be rebutted, for the president cannot acquire a power which he does not otherwise possess, by the unauthorized use of the corporate seal.[3] But it operates to shift the burden of proof upon the corporation and compel it to prove that the sealed instrument was executed without authority.

v. Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714; Grand Rapids Safety Deposit Co. *v.* Cincinnati Safe, etc., Co., 45 Fed. 671. But even here he has no power to purchase property not required for the common purposes of the corporation. Blen *v.* Bear River, etc., Water, etc., Co., 20 Cal. 602, 81 Am. Dec. 132.

97. There may be circumstances under which a ratification will be received as evidence of an authority to do a future act of the same kind. Thus because of the acquiescence of the corporation in the execution of a note by its president for money advanced for a steam-boiler, it has been held that the other party was warranted in considering he had authority to execute another note for further necessary advances. McDonald *v.* Chisholm, 131 Ill. 273, 23 N. E. 596. See also Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714. But this principle must be carefully guarded. It is believed that a ratification can never be evidence of a future authorization except in two cases: (1) Where there have been so many acts of ratification as to make a custom; (2) where the act or acts of ratification take place under such circumstances as to hold out to third persons dealing with the corporation the prospect of further ratifications of similar acts, in which case an estoppel would arise against the corporation.

98. Clark *v.* Pratt, 47 Me. 55.

99. Southern Hotel Co. *v.* Newman, 30 Mo. 118; Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552.

1. McDonald *v.* Chisholm, 131 Ill. 273, 23 N. E. 596; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714; Providence Fifth Nat. Bank *v.* Navassa Phosphate Co., 119 N. Y. 256, 23 N. E. 737, 29 N. Y. St. 993; Shimmel *v.* Erie R. Co., 5 Daly (N. Y.) 396. On the other hand, in an action against a corporation to recover goods claimed by it to have been furnished under an unauthorized contract, evidence of an agreement between the president of the board of trustees of such corporation and his co-trustees that he was to furnish the goods gratuitously is admissible to show his want of authority to bind the corporation for their price. Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

2. Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187; Little Saw-Mill Valley Turnpike, etc., Road Co. *v.* Federal St., etc., Passenger R. Co., 194 Pa. St. 144, 45 Atl. 66, 75 Am. St. Rep. 690; Texas, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1899) 54 S. W. 381 [*reversed* in Tex. Sup. 1900) 55 S. W. 562]. And it has been held that one who takes such a contract so executed will be protected, unless he has knowledge of a want of authority on the part of the officers who profess to act for the corporation, or unless the circumstances are such as to put him upon inquiry as to whether they have power in the particular case. Winscott *v.* Nevada Guarantee Invest. Co., 63 Mo. App. 367; White *v.* Sheppard, 41 N. Y. App. Div. 113, 58 N. Y. Suppl. 563. But the testimonium to a mortgage executed for a corporation by the president thereof, reciting that such president is fully authorized to execute the mortgage without the corporate seal, is not sufficient proof of his authority. American Sav., etc., Assoc. *v.* Smith, 122 Ala. 502, 27 So. 919.

3. Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Bliss *v.* Kaweah Canal Co., 65 Cal. 502, 4 Pac. 507; Luse *v.* Isthmus Transit R. Co., 6 Oreg. 125, 25 Am. Rep. 506.

Power to use the corporate seal.— It has been held that where the charter of a bank

(XIV) *How Execute Contracts so as to Bind Corporation and Not Himself.* To make a written contract the contract of the corporation, it must appear somewhere on its face to be the act of the corporation.[4] It is sufficient if this appears either in the body of the instrument or in the form of the signature.[5] But the mere addition of his corporate title to the signature, where there is nothing else to show that the instrument is a corporate act, is mere *descriptio personæ* and does not exclude the personal liability of the president.[6]

2. His Liability — a. To Corporation — (1) *For Mismanagement.* Where the president of a corporation is vested with the general care, oversight, and management of its concerns, and is paid a salary for his services, he is bound, in return for the confidence thus reposed in him and the compensation thus paid to him, to exercise good business diligence in the discharge of the duties thus assumed. He is therefore answerable to the corporation for the want of the reasonable or ordinary care bestowed by a good business man in the oversight of a similar business under similar circumstances.[7]

intrusts its management to a board of directors its president and cashier have no power, without the board's consent, to make a deed of corporate property requiring the use of the corporate seal. Hoyt *v.* Thompson, 5 N. Y. 320 [*affirming* 3 Bosw. (N. Y.) 267, 285]. For a case in which it was held that the corporation was not bound by a lease executed by its president without the use of the corporate seal see Bohm *v.* Loewer's Gambrinus Brewing Co., 16 Daly (N. Y.) 80, 9 N. Y. Suppl. 514, 30 N. Y. St. 424 [*following* Rathburn *v.* Snow, 15 Daly (N. Y.) 141, 3 N. Y. Suppl. 925, 22 N. Y. St. 227]. It is not, however, a good objection to an instrument that it is too formal or that the corporate seal is unnecessarily used. Crawford *v.* State Bank, 5 Ala. 679.

4. See *infra*, XII, H, 1 *et seq.*

Exception in case of banking corporations. — By a custom of business peculiar to banks the presidents and cashiers of such corporations can make indorsements in their behalf by simply indorsing their own names with their titles of office; and such an indorsement is sufficient to charge the corporation, and to enable the indorsee to bring a suit in his own name. Chillicothe Branch Ohio State Bank *v.* Fox, 5 Fed. Cas. No. 2,683, 3 Blatchf. 431. A receipt signed by a bank president without his title for money for deposit has been held evidence that the money went to the bank. Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. (Pa.) 179. And the payment or allowance of a claim to "Andrew T. Hall, President of the Tremont Bank," has been held to be the same as a payment to the bank. Tremont Bank *v.* Paine, 28 Vt. 24. But a satisfaction-piece signed by a bank president with his title, but without authority and without the corporate seal, is not a satisfaction by the bank. Booth *v.* Farmers', etc., Nat. Bank, 4 Lans. (N. Y.) 301.

5. St. Peter Episcopal Church *v.* Varian, 28 Barb. (N. Y.) 644. Similarly see Ellis *v.* Pulsifer, 4 Allen (Mass.) 165; Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179 [*affirmed* in 27 N. Y. 546].

6. See *infra*, XII, H, 1 *et seq.*

Although it is prima facie the president's individual contract, in some jurisdictions he is allowed to show that it was mutually understood to be the act of the corporation, provided he adds proof of the corporation's power and his own authority to do the act. Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261. So a deed describing the grantors as a corporation, executed by the president thereof, in his own name and under his own seal, does not pass the title from the corporation. Hatch *v.* Barr, 1 Ohio 390. Of course an oral promise by the president to see that the company pays is his own obligation and not that of the company. Van Valkenburgh *v.* Thomasville, etc., R. Co., 4 N. Y. Suppl. 782, 22 N. Y. St. 379. And where he acts without authority he is liable on his implied warranty of agency, regardless of his belief that he had it. Nelligan *v.* Campbell, 20 N. Y. Suppl. 234, 47 N. Y. St. 576.

7. Thus it has been held that where losses occur to a savings-bank through investments by the president in securities not within the restrictions of the charter, or not such as ordinarily prudent men would make in the transaction of their own business, by means of checks signed and left in blank by the treasurer, the president and treasurer are personally liable, the president first and the treasurer next. Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824. An honest error of judgment while in the exercise of ordinary care does not make the president liable to the corporation. Gubbins *v.* Bank of Commerce, 79 Ill. App. 150. It has been held that, although he should have consulted the board of directors before authorizing certain expenditures, yet if he acted in good faith and did no more than what they probably would have authorized, he was not liable to the corporation for damages. Davis *v.* Memphis City R. Co., 22 Fed. 883. It has also been held that a president of a national bank is guilty of no want of ordinary care in accepting a leave of absence granted to him of one year on account of ill health, and is not to be held for neglect of duty because he did not resign. Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662. See also

(II) *For Breach of Fiduciary Obligations.* The president's obligations as a fiduciary rest upon the same footing as those of the directors, which have been considered.[8] He is bound to exercise his official powers in the utmost good faith for the benefit of the company, and he is not allowed to prostitute them for his own private gain and advantage.[9]

Movius *v.* Lee, 30 Fed. 298. It has been held that the president of a corporation is liable for allowing a debt of a corporation with which he is closely connected to accumulate until the debtor corporation becomes insolvent, when it could have been saved by prompt action. Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62. But he cannot be held responsible for not defending a suit, where there is no good defense. Boston Tailoring House *v.* Fisher, 59 Ill. App. 400.

8. See *supra*, IX, G, 1 *et seq.*

9. Thomas *v.* Sweet, 37 Kan. 183, 14 Pac. 545.

He will be compelled to account to the corporation for any personal profit made in dealing with the corporate property. Markley *v.* Rhodes, 59 Iowa 57, 12 N. W. 775; Thomas *v.* Sweet, 37 Kan. 183, 14 Pac. 545; McClure *v.* Law, 161 N. Y. 78, 55 N. E. 388, 76 Am. St. Rep. 262 [*reversing* 20 N. Y. App. Div. 459, 47 N. Y. Suppl. 84]; Center Creek Water, etc., Co. *v.* Lindsay, 21 Utah 192, 60 Pac. 559. And in general equity will interpose, if appealed to in time and by the proper party, to break up any "Credit Mobilier" arrangements by which he seeks to enrich himself at the expense of his associates. Langdon *v.* Branch, 37 Fed. 449, 2 L. R. A. 120; Earle *v.* Burland, 27 Ont. 540.

It has been held that he is not a technical trustee (Warner *v.* McMullen, 131 Pa. St. 370, 18 Atl. 1056. *Compare* Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417 [where it is said that "every deposit is a direct trust"]; York's Appeal, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65), but equity will nevertheless take jurisdiction to compel him to account for funds misappropriated (Warner *v.* McMullen, 131 Pa. St. 370, 18 Atl. 1056).

What acts are inconsistent with such obligations.—He cannot pay his own debt with corporate funds. Reed *v.* Newburgh Bank, 6 Paige (N. Y.) 337. His acts and declarations will not create an estoppel against the corporation in favor of another company of which he is also president (Pennsylvania R. Co.'s Appeal, 80 Pa. St. 265), although they might bind it under honest conditions (see *supra*, IX, J, 1, a *et seq.*). Where he agrees with the other trustees of the corporation to furnish certain materials as a gratuity, this will not bind the corporation for their payment, if he orders them of another company of which he is a member. Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783. It is inconsistent with his fiduciary obligations to make a contract on behalf of the corporation with a partnership of which he is a member. Sims *v.* Petaluma Gas Light Co., 131 Cal. 656, 63 Pac. 1011; German National Bank *v.* Hastings First Nat. Bank, 55 Nebr. 86, 75 N. W. 531. He cannot acquire a title adverse to his corporation by purchasing a tax-title against its property and transferring it to another corporation organized by him. Appleton Waterworks Co. *v.* Central Trust Co., 93 Fed. 286, 35 C. C. A. 302. If the president of a bank becomes interested with a customer of the bank in an outside enterprise, and to facilitate that enterprise directs that such customer be allowed to overdraw his account, and establishes the custom of paying his overdrafts, he will be liable to the bank for the loss thereby sustained as for a breach of trust. Oakland Sav. Bank *v.* Wilcox, 60 Cal. 126. To the same effect on nearly the same facts see Sturgis First Nat. Bank *v.* Reed, 36 Mich. 263; Boker's Estate, 7 Phila. (Pa.) 479 (liable for placing the money of a depositor to his own credit, and then allowing the depositor to withdraw).

What acts consistent with this obligation.—It does not prevent him from making a contract with the company, provided his own vote in the board is not necessary to the making of it. See *supra*, IX, G, 5, d; IX, I, 10; IX, J, 4, a. To assist the corporation when in distress, it has been held that he may purchase its past-due, outstanding bonds, and make a valid contract renewing, extending, and increasing their rate of interest. Bradley *v.* South Carolina Mar., etc., Phosphate Min., etc., Co., 3 Fed. Cas. No. 1,789, 3 Hughes 26. He may contract on his own behalf to do the business which his defunct corporation has ceased to do. Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140. *Compare* Ward *v.* Davidson, 89 Mo. 445, 1 S. W. 846. When his company needs rolling-stock which it cannot purchase he may rent it some of his own cars. St. Louis, etc., R. Co. *v.* O'Hara, 177 Ill. 525, 52 N. E. 734, 53 N. E. 118 [*affirming* 75 Ill. App. 496]. He may give the corporation pecuniary assistance in its difficulties, but unless he lawfully secures himself he becomes merely a general creditor. Sanders *v.* Page, 11 Colo. 518, 19 Pac. 468. See also Hentig *v.* Sweet, 33 Kan. 244, 6 Pac. 259. But where a bank, in violation of statute, issued time notes in payment of state stock, it was held that the president could not, by advancing to the seller the price agreed to be paid, enforce the payment against the bank. State Bank Com'rs *v.* St. Lawrence Bank, 7 N. Y. 513 [*reversing* 8 Barb. (N. Y.) 436]. If he advances money to raise a mortgage he is entitled to be subrogated to the rights of the mortgagee. Bush *v.* Wadsworth, 60 Mich. 255, 27 N. W. 532. He may accept stock of a company with which his own is consolidated, in consideration of not entering a rival business for a term of years, where that was the motive for the consolida-

b. To Third Parties — (I) *For Torts.* His liability for torts rests upon principles already considered.[10] Where the wrong done consists of mere nonfeasance, of the mere failure to perform some duty which the corporation, his principal, owes to plaintiff, then the corporation only is liable; but where it consists of misfeasance, an affirmative act wrongfully ordered or done against plaintiff, then he cannot escape liability by setting up that it was the act of the corporation, for although the corporation may be liable, he may be liable also. He, as a personal trespasser; it, on the principle of *respondeat superior*. It is, in the eye of the law, like other cases of joint trespass.[11] On principles elsewhere considered[12] the president of a corporation is liable to third persons for losses sustained by them in dealing with it on the faith of his misrepresentations as to its financial condition[13] or other facts forming a material inducement to the contract.[14] But in all these cases the evidence must in some way connect him with the fraud.

(II) *For Breach of Warranty of Authority.* As in the case of directors[15] and other contracting agents of corporations,[16] if the president executes a written obligation in the name of the corporation, but without authority to do so, whereby the obligee loses recourse against the corporate funds, the president will

tion. Bristol *v.* Scranton, 63 Fed. 218, 11 C. C. A. 144. In a transaction between two corporations, the fact that the same man is the president of both does not of itself make void a promissory note (St. Joe, etc., Consol. Min. Co. *v.* Arpen First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055 [motion to dismiss appeal denied in 24 Colo. 537, 52 Pac. 678]) or a mortgage (Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590, 17 So. 236). It has been held on the one hand that a president's fiduciary obligations permit him to buy land that his corporation was simply negotiating for. Lagarde *v.* Anniston Lime, etc., Co., 126 Ala. 496, 28 So. 199. And on the other hand that it prevents his buying land which he knows is desired for the corporation, and selling to it at an advance without the unanimous consent of the shareholders. Earle *v.* Burland, 27 Ont. App. 540. In the absence of a contract on the part of a shareholder, conferring a lien upon his stock for indebtedness to the corporation, or provisions of the charter or by-laws to this effect, there is nothing in the position of the president of a bank as a fiduciary which will prevent him from taking an assignment to himself of the shares of such shareholder, by way of security for a debt, and subsequently transferring the same in payment of such indebtedness, although the shareholder is in failing circumstances at the time and a debtor of the corporation. Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398.

Conversion.— His liability for converting to his own use the property of the corporation rests upon the same footing as that of any other agent. Southern Mut. Ins. Co. *v.* Pike, 32 La. Ann. 488; Greenville Gas Co. *v.* Reis, 54 Ohio St. 549, 44 N. E. 271; Hayes *v.* Kenyon, 7 R. I. 136. So where a resolution of a corporation authorized its president to sell certain bonds at a certain price, and the president lent the bonds, in an action against him for their conversion, it was held that the question of his general powers as president had no bearing upon the case, but that as to these bonds the extent of his authority was measured by the resolution. Second Ave. R. Co. *v.* Mehrbach, 49 N. Y. Super. Ct. 267.

10. As for instance for fraud in procuring credit for the corporation. Phillips *v.* Wortendyke, 31 Hun (N. Y.) 192. See *supra*, IX, L, 1 *et seq.*

11. Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421; Bates *v.* Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. 949. See also Perkins *v.* Mayville Dist. Camp-Meeting Assoc., 10 S. W. 659, 10 Ky. L. Rep. 781 (not liable for president's interference with trade of outsider); Bayless *v.* Orne, Freem. (Miss.) 161 (injunction to prevent malfeasance in office refused).

Donations of property wrongfully extorted by the president of a railroad company will be held by him in trust for donors. Union Pac. R. Co. *v.* Durant, 24 Fed. Cas. No. 14 377, 3 Dill. 343. See also *supra*, IX, G, 8, h.

He will not be held to be an innocent purchaser of county bonds purchased from his company to which they were illegally issued. Madison County *v.* Paxton, 57 Miss. 701.

12. See *supra*, IX, O, 5 *et seq.*

13. Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; King *v.* Davis, 16 N. Y. Suppl. 427, 41 N. Y. St. 898; Tyler *v.* Savage, 143 U. S. 79, 12 S. Ct. 340, 36 L. ed. 82.

14. Clark *v.* Dunham Lumber Co., 86 Ala. 220, 5 So. 560; Cable *v.* Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526; Bonhomme *v.* Bickerdike, 17 Quebec Super. Ct. 28. And the acts of a third party in revealing the falsity of the president's statements and causing the abandonment of the contract thereby induced is not actionable by the corporation. Hale *v.* Mason, 160 N. Y. 561, 55 N. E. 202 [*affirming* 22 N. Y. App. Div. 630, 48 N. Y. Suppl. 1105].

15. See *supra*, IX, O, 3, a *et seq.*

16. See *supra*, I, Q, 7, c, (I) *et seq.*

be held personally liable thereon, on the theory of a breach of his express or implied warranty of his authority.[17]

3. His Compensation — a. No Compensation For Ordinary Duties of His Office — (i) *In General.* The president of a corporation is not entitled to any compensation for performing the ordinary duties of his office, unless the governing statute or some by-law, regulation, resolution, or contract to which his own vote was not essential has given it to him.[18]

(ii) *Unless by Antecedent, Valid Agreement.* As the law does not imply any agreement to pay for such services, in order for him to recover compensation for them he must at least show an antecedent, valid agreement to pay for them.[19] In the absence of any specified method this is usually accomplished by a resolution of the board of directors fixing his salary,[20] but in some of the United States the statute law provides that there shall be no compensation for

17. Bradford *v.* Woodworth, 108 Cal. 684, 41 Pac. 797; Miller *v.* Reynolds, 92 Hun (N. Y.) 400, 36 N. Y. Suppl. 660, 71 N. Y. St. 574; Nelligan *v.* Campbell, 20 N. Y. Suppl. 234, 47 N. Y. St. 576.

Ultra vires contracts.— Where the president of a corporation who in behalf of the corporation attempts to bind it by a contract *ultra vires* the corporation, he does not bind himself, if the other party knows that his action was not so intended. Holt *v.* Winfield Bank, 25 Fed. 812. *Compare supra*, VIII, C, 8, b, (I) *et seq.*

18. Citizens' Nat. Bank *v.* Elliott, 55 Iowa 104, 7 N. W. 470, 39 Am. Rep. 167; Martindale *v.* Wilson-Cass Co., 134 Pa. St. 348, 19 Atl. 680, 26 Wkly. Notes Cas. (Pa.) 48, 19 Am. St. Rep. 706.

19. *Illinois.*— St. Louis, etc., R. Co. *v* O'Hara, 177 Ill. 525, 52 N. E. 734, 53 N. E. 118 [*affirming* 75 Ill. App. 496]; Ellis *v.* Ward, 137 Ill. 509, 25 N. E. 530; Illinois Linen Co. *v.* Hough, 91 Ill. 63.

Louisiana.— Levisee *v.* Shreveport City R. Co., 27 La. Ann. 641.

Maine.— McAvity *v.* Lincoln Pulp, etc., Co., 82 Me. 504, 20 Atl. 82; Holland *v.* Lewiston Falls Bank, 52 Me. 564.

Massachusetts.— Sawyer *v.* Pawners' Bank, 6 Allen 207.

Missouri.—Adlets *v.* Progressive Shoe Co., 84 Mo. App. 288.

New York.— Barril *v.* Calendar Water-Proofing Co., 50 Hun 257, 2 N. Y. Suppl. 758, 19 N. Y. St. 877.

Oregon.— Wood *v.* Lost Lake Mfg. Co., 23 Oreg. 20, 23 Pac. 848, 37 Am. St. Rep. 651; Thompson *v.* Willamette S. M. L., etc., Co., 15 Oreg. 604, 16 Pac. 647.

Pennsylvania.— Martindale *v.* Wilson-Cass Co., 134 Pa. St. 348, 19 Atl. 680, 26 Wkly. Notes Cas. 48, 19 Am. St. Rep. 706.

20. See Smith *v.* Woodville Consol. Min. Co., 66 Cal. 398, 5 Pac. 688; Sawyer *v.* Pawners' Bank, 6 Allen (Mass.) 207. But after the insolvency of the corporation the board is powerless to pass such a resolution. McAvity *v.* Lincoln Pulp, etc., Co., 82 Me. 504, 20 Atl. 82. See *supra*, IX, Q, 3. Nor is such a resolution of any avail to create a claim for past services. Ellis *v.* Ward, 137 Ill. 507, 20 N. W. 671; Wood *v.* Lost Lake Mfg. Co., 23 Oreg. 20, 23 Pac. 848, 37 Am. St. Rep. 651. It has been held competent evidence to show that the salary had been fixed as therein stated, but not to show a contract for prior services. Smith *v.* Woodville Consol. Min. Co., 66 Cal. 398, 5 Pac. 688. But it has been held on the other hand that the president is entitled to the salary fixed until his death or removal, although incompetent to perform the duties of the office. Brown *v.* Galveston Wharf Co., 92 Tex. 520, 50 S. W. 126 [*reversing* (Tex. Civ. App. 1898) 48 S. W. 41, 43]. Of course he cannot by his own vote as a director increase his salary. Jones *v.* Morrison, 31 Minn. 140, 16 N. W. 854; Ward *v.* Davidson, 89 Mo. 445, 1 S. W. 846; Butts *v.* Wood, 37 N. Y. 317. But it has been held that the action of the board of directors in electing a president and leaving his salary to be fixed by him and another director, who together practically represent all the stock, is such an exercise of the board's authority to fix his salary as to constitute a contract on which he can recover. Bagaley *v.* Pittsburgh, etc., Iron Co., 146 Pa. St. 478, 23 Atl. 837. See also Clark *v.* American Coal Co., 86 Iowa 436, 53 N. W. 291, 17 L. R. A. 557.

Where the directors, empowered to fix salaries, cut that of the president from twenty-five thousand dollars to ten thousand five hundred dollars, while making little if any change in those of the other officers, it was held that the reduction was not a fair and honest execution of the by-laws and did not prevent him from recovering the value of his services. Banigan *v.* U. S. Rubber Co., 22 R. I. 452, 45 Atl. 739.

Contract held void.— It has been held that a contract with one who controls, as trustee, a majority of the shares of a company, that plaintiff shall be retained as vice-president thereof at a salary of at least five thousand dollars per annum is void as against public policy. West *v.* Camden, 135 U. S. 507, 10 S. Ct. 838, 34 L. ed. 254.

Validity of note executed by president for his salary.— That a negotiable promissory note authorized to be executed by the president for his own salary will be good in the hands of a *bona fide* purchaser see Wilson *v.* Metropolitan El. Co., 120 N. Y. 145, 24 N. E 384, 30 N. Y. St. 787, 17 Am. St. Rep. 625.

services rendered by the president of a corporation unless it be allowed by the shareholders.[21]

b. Can Claim Compensation For Extra Services — (i) *In General.* While the president cannot claim compensation for services incidental to the duties of his office, unless such compensation has been previously fixed, he may claim compensation for services which are clearly outside of the scope of such official duties.[22]

(ii) *Test by Which to Determine What Services Are Extra.* In determining whether there was an implied contract to pay the president of a corporation for his services outside of his official duties, the nature of the corporation and of its business, the extent and character of the services, the comparative value and amount of the services of other officers of the company, and all other circumstances must be considered.[23]

B. The Vice-President — **1. Nature of His Office.** There is no office pertaining to a private corporation about which both the statute and case-made law have so little to say as that of vice-president. The etymology of the term would indicate that the officer has no functions to perform other than those of an ordinary director, except in case of the absence, disability, or death of the president, when he acts in his stead, presiding at the meetings of the board of directors and performing the other functions of the office.[24]

2. Sources of His Power. It is well known, however, that in many extensive corporations such as railroad companies, two or three vice-presidents are provided for, each of whom receives a salary, and to each of whom are assigned special definite duties. Where such is the case, or where the vice-president acts in the absence of the president, his powers are derived from the same source[25] as those of

21. Under such a statute the directors cannot, without the consent of the shareholders, pass a resolution fixing the salary of the president. Ravenswood, etc., R. Co. *v.* Woodyard, 46 W. Va. 558, 33 S. E. 285. But a payment made under such a resolution, which was afterward approved at a general meeting of the shareholders, was held to be not a violation of the statute. Shickell *v.* Berryville Land, etc., Co., 99 Va. 88, 37 S. E. 813, 3 Va. Supreme Ct. 45.

22. Bartlett *v.* Mystic River Corp., 151 Mass. 433, 24 N. E. 780; Bagley *v.* Carthage, etc., R. Co., 165 N. Y. 179, 58 N. E. 895 [*affirming* 25 N. Y. App. Div. 475, 49 N. Y. Suppl. 718]; Outterson *v.* Fonda Lake Paper Co., 20 N. Y. Suppl. 980, 49 N. Y. St. 556; Olney *v.* Chadsey, 7 R. I. 224; Toponce *v.* Corinne Mill Canal, etc., Co., 6 Utah 439, 24 Pac. 534.

Illustrations.— Thus in the absence of an explicit contract compensation has been denied to a railroad president for superintending the construction of buildings or works for the company (Citizens' Nat. Bank *v.* Elliott, 55 Iowa 104, 7 N. W. 470, 39 Am. Rep. 167; Levisee *v.* Shreveport City R. Co., 27 La. Ann. 641); and to a bank president for guaranteeing its paper (Leavitt *v.* Beers, Lalor (N. Y.) 221. See also Gill *v.* New York Cab Co., 48 Hun (N. Y.) 524, 1 N. Y. Suppl. 202, 16 N. Y. St. 236). Right of president to compensation under particular states of fact. Rosborough *v.* Shasta River Canal Co., 22 Cal. 556; Indianapolis, etc., R. Co. *v.* Hyde, 122 Ind. 188, 23 N. E. 706; Com. *v.* Eagle F. Ins. Co., 14 Allen (Mass.) 344; Nebraska R. Co. *v.* Lett, 8 Nebr. 251. And where plaintiff, while drawing a salary as general manager, acted also as secretary, but without making any claim for compensation as such, it was held that after his retirement from the service of the company he could not recover for salary as secretary. Fowler *v.* Great Southern Telephone, etc., Co., 104 La. Ann. 751, 29 So. 271. On the other hand the president of a club has been allowed to recover compensation for services rendered the corporation, on its authority, in letting its building and collecting the rents, where that was not within his duty as president. Flynn *v.* Columbus Club, 21 R. I. 534, 45 Atl. 551. And the president of an insolvent mortgagor corporation has been held entitled to compensation for care of the property pending foreclosure, after a receiver had been refused. Onondaga Trust, etc., Co. *v.* Spartanburg Waterworks Co., 97 Fed. 409.

23. Bartlett *v.* Mystic River Corp., 151 Mass. 433, 24 N. E. 780.

24. Wagg-Anderson Woolen Co. *v.* Lesher, 78 Ill. App. 678; Aaronson *v.* David Mayer Brewing Co., 26 Misc. (N. Y.) 655, 56 N. Y. Suppl. 387 [*reversed* on other grounds in 29 Misc. (N. Y.) 289, 61 N. Y. Suppl. 1067]. And it has been held that on the death of the president the vice-president may act in his stead, although that office was not provided for by name in the by-laws, the directors simply being authorized to create other offices and they having created that of vice-president. Colman *v.* West Virginia Oil, etc., Land Co., 25 W. Va. 148.

25. The following implied powers have

the president, and his liabilities rest upon the same principles that determine those of the president.[26]

3. Although Acting as President, Not Entitled to President's Salary. But where the vice-president acts during the president's disability he is not entitled to a salary in lieu of the president's salary, where there is no by-law to that effect and the by-laws make no provision for the deduction from the president's salary during his absence.[27]

C. The Managing Agent Other Than President and Cashier — 1. Who Regarded as Managing Agent. It seems that within the meaning of a statute providing for the service of process upon "the managing agent" of a corporation only that agent is to be regarded as a managing agent who has control of all the business of the corporation, as contradistinguished from an agent who has control of a part of its business merely.[28] Accordingly it has been held that neither the station agent of a railroad,[29] the ticket agent,[30] the baggage-master,[31] nor one having authority only to purchase the horses and feed for a street railroad corporation, whose employment continues only at the pleasure of the president,[32] answers this description.

2. His Appointment and Tenure — a. "Managing Agent" Not an Officer but an Agent Holding During Pleasure. The "managing agent" of a corporation, by whatever name called, other than president, and in case of a banking corporation, the cashier, is a mere employee of the board of directors, has no franchise in his

been admitted: In the vice-president of a land company to employ persons to get out logs on its land (Kentucky Land, etc., Co. *v.* Wallace, 55 S. W. 885, 21 Ky. L. Rep. 1601); in the vice-president of a bank to assign notes belonging to the bank as security, additional to a bond previously executed with himself as surety, to secure a deposit of county funds (Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294); and in the vice-president of a manufacturing company to accept notes due under a contract for the construction of a manufactured article (Whitaker *v.* Kilroy, 70 Mich. 635, 38 N. W. 606).

The following implied powers have been denied: In the vice-president of a business corporation to sign a guaranty (Rahm *v.* King Wrought-Iron Bridge-Manufactory Co., 16 Kan. 277; Aaronson *v.* David Mayer Brewing Co., 29 Misc. (N. Y.) 289, 60 N. Y. Suppl. 523 [*reversing* 26 Misc. (N. Y.) 655, 56 N. Y. Suppl. 387, 390]); in the vice-president of a railway company to make an agreement transferring all the franchises, road-bed, track, and other property of the company (Russell *v.* Alabama Midland R. Co., 94 Ga. 510, 20 S. E. 350); and in the vice-president of a bank to create evidence of indebtedness against the bank, which could be used to charge the shareholders after its dissolution, by executing a note in the name of the corporation, in favor of his own clerk (Bonaffe *v.* Fowler, 7 Paige (N. Y.) 576).

Question submitted to jury.— For a case in which it was held that the circumstances were sufficient to warrant the submission to a jury of the question of the validity of a guaranty made for the corporation by him see Fuld *v.* Burr Brewing Co., 18 N. Y. Suppl. 456, 45 N. Y. St. 649.

Presumption of validity from due execution by vice-president.— Proper formal execution by the vice-president of a corporation has been held to lend presumptive validity to a corporate deed (Smith *v.* Smith, 62 Ill. 493; Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433) and to a bill of sale (Springer *v.* Bigford, 55 Ill. App. 198). And so does a contract within the scope of the regular business of the corporation. Neosho Valley Invest. Co. *v.* Hannum, 10 Kan. 499, 63 Pac. 92.

26. He is not personally liable on contracts made in behalf of the corporation where to the knowledge of the other contracting party the contract is intended to bind the company, and is not made on his own behalf. Inhoff *v.* House, 36 Nebr. 28, 53 N. W. 1038.

Circumstances under which the corporation was held not responsible for the vice-president's conversion of the property of a third person. Thompson *v.* Six Penny Sav. Bank, 5 Bosw. (N. Y.) 293.

27. Brown *v.* Galveston Wharf Co., 92 Tex. 520, 50 S. W. 126.

28. Flynn *v.* Hudson River R. Co., 6 How. Pr. (N. Y.) 308; Brewster *v.* Michigan Cent. R. Co., 5 How. Pr. (N. Y.) 183.

Construction of the words "general or special agent," within the meaning of a statute relating to service of garnishment. Lake Shore, etc., R. Co. *v.* Hunt, 39 Mich. 469. See also Washington, etc., Turnpike Co. *v.* Crane, 8 Serg. & R. (Pa.) 517.

That the acting superintendent of a railroad is to be deemed the superintendent within the meaning of a contract see Connecticut River R. Co. *v.* Williston, 16 Gray (Mass.) 64.

29. Brewster *v.* Michigan Cent. R. Co., 5 How. Pr. (N. Y.) 183.

30. Doty *v.* Michigan Cent. R. Co., 8 Abb. Pr. (N. Y.) 427.

31. Flynn *v.* Hudson River R. Co., 6 How. Pr. (N. Y.) 308.

32. Emerson *v.* Auburn, etc., R. Co., 13 Hun (N. Y.) 150.

office, but holds it like any other agent or servant subject to the terms of the particular contract under which it is assumed. Unless a stated term is fixed in the contract of employment, undoubtedly such an agent holds his agency subject to being terminated at the pleasure of the board of directors.[33]

b. Not Necessary That Charter Should Provide For His Election. It is not necessary, in order that his acts done within the scope of his agency shall bind the corporation, that the charter should provide for the election of such an officer. When therefore he has power to sell the personal property of the corporation as an incident to its business, its receiver after insolvency cannot impeach a sale made by him on the ground that the charter did not provide for such an officer; but it will be sufficient that he was the general manager *de facto*.[34] The governing principle, which applies in the case of other agents, is that where one has the actual charge and management of the business of a corporation, with the knowledge of the directors, the corporation will be bound by his contracts, made on account of the corporation in the course of the business thus conducted by him, without other evidence of actual authority from the corporation.[35]

3. General View of Scope of Powers of Managing Agents — a. Said to Be Virtually the Corporation Itself. It has been said, speaking with reference to a railroad corporation, that "the general agent of the company is virtually the corporation itself";[36] and so he is within the scope of his duties, that is to say, within the ordinary routine of the business of the corporation, but not for all purposes.

b. Has Power to Bind Corporation by Acts Done in Ordinary Course of Its Business — (I) *In General.* This power is impliedly ascribed to him in the absence of notice to the contrary, on the ground that otherwise the public would have no security in dealing with the corporation through its managing agent.[37] By such an appointment the corporation impliedly holds the managing agent out to the public as possessing all the authority to bind it by contracts which are necessary, proper, or usual to be made in the ordinary transaction of its business;[38] and so as possessing the authority to represent himself as possessing the full powers usually ascribed to such office or agency, which representations will bind the corporation,[39] a qualification of the well-known rule that an agent cannot make himself such so as to bind his principal by his own declarations.[40]

(II) *His Apparent Powers, Acquired by a Holding Out, Etc.* A corporation is bound by acts of its general manager which were in excess of his actual authority, where it had held him out to the public as possessing such authority.[41]

33. So held in regard to a superintendent of a street railway company in Queen *v.* Second Ave. R. Co., 44 How. Pr. (N. Y.) 281.

Grounds for removal held insufficient.— The sale by the general manager of a coal-mining corporation, of a large amount of coal to a railroad corporation of which he is fuel agent, was held not sufficient cause for his removal and for the removal of other directors and majority shareholders, as for mismanagement, where the price received was full market price. Hill *v.* Gould, 129 Mo. 106, 30 S. W. 181.

34. Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434.

35. Goodwin *v.* Union Screw Co., 34 N. H. 378.

36. Per Horton, C. J., in Atlantic, etc., R. Co. *v.* Reisner, 18 Kan. 458, 460.

The negligence of a superintendent is the negligence of the corporation itself. Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289, 298, per Cooley, J.

37. Georgia Military Academy *v.* Estill, 77 Ga. 409; Getty *v.* C. R. Barnes Milling Co., 40 Kan. 281, 19 Pac. 617; Topeka Primary Assoc. *v.* Martin, 39 Kan. 750, 18 Pac. 941; Kenton Ins. Co. *v.* Bowman, 84 Ky. 430, 1 S. W. 717, 8 Ky. L. Rep. 467; Whitaker *v.* Kilroy, 70 Mich. 635, 38 N. W. 606.

38. Georgia Military Academy *v.* Estill, 77 Ga. 409.

39. Whitaker *v.* Kilroy, 70 Mich. 635, 638, 38 N. W. 606.

40. Circumstances under which one who had been appointed superintendent of the business of a corporation in a foreign country, his duties not to commence until a certain stage in the development of the business, could not bind the corporation by his declarations as to one who relied solely upon them. Rathbun *v.* Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355 [*affirming* 15 Daly (N. Y.) 141, 3 N. Y. Suppl. 925, 22 N. Y. St. 227].

41. Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721. Thus it has been held that a corpora-

(III) *His Apparent Powers Not Limited by Secret By-Laws.* Such being the law, an innocent stranger, dealing with the corporation through such an agent, will not be affected by any limitation of his authority contained in the by-laws or other private instruments of the corporation of which he has no notice.[42]

4. What His Implied Powers Include. The powers thus ascribed to the managing agent of a corporation by implication of law have been held to include: In the general manager of a brewing and ice company, the power to purchase property which is necessary, or at least useful, in the proper conduct of its brewing and ice factory;[43] in the manager of a trading corporation, the power to purchase a machine necessary to the business of the corporation;[44] in the general manager of a foreign corporation, the power to make an agreement to pay a stated price for the rent of a storehouse occupied by an agent to sell the goods of the corporation;[45] in the general manager of a telegraph company, having full charge of its ordinary business transactions, the power to pledge the security of the company by making an overdraft in bank, where the receipts of the company are much less than its outlay and the company knew that the general manager was keeping an account in its name in the bank;[46] in the president, treasurer, and general manager of a business corporation, the power to subscribe to a fund to purchase land for the site of a post-office, which will result in the erection of a post-office adjoining the place of business of the corporation, and which will be of advantage to it;[47] in the general agent of a manufacturing corporation, the power to employ workmen to carry on the business of the concern, and to pay them with the funds of the corporation, or if the corporation is not in funds to execute a note of the corporation in payment;[48] in the general agent of a railroad company, the power to take a lease of property to be used for a ticket office of the road;[49] and in an officer of a manufacturing corporation who attends to the general details of its business and who has power to approve sales made through other officers, the power to bind the corporation by making a sale of its manufactured goods.[50]

5. What His Implied Powers Do Not Include. In the bookkeeper of a lumber company, left in charge by the superintendent, the hiring of a horse and buggy

tion engaged in the purchase and sale of land is bound by the act of its general manager, without reference to his actual authority, in bidding in land at a judicial sale and executing a bond for purchase-money in its name, where the corporation, by permitting him to purchase numerous other tracts of land, executing therefor similar obligations, has held him out as possessing such authority. Hurst *v.* American Assoc., 105 Ky. 793, 49 S. W. 800, 20 Ky. L. Rep. 1624. See also Auburn Bank *v.* Putnam, 1 Abb. Dec. (N. Y.) 80, 3 Keyes (N. Y.) 343, 1 Transcr. App. (N. Y.) 322, agent had frequently before indorsed corporate name to accommodation paper — corporation held.

42. Hamilton Coal Co. *v.* Bernhard, 16 N. Y. Suppl. 55, 40 N. Y. St. 875. See also *supra*, V, A, 5; *infra*, XVII, F, 1, n, (I).

43. New South Brewing, etc., Co. *v.* Shuck, 50 S. W. 681, 20 Ky. L. Rep. 2005.

44. Thompson *v.* Brantford Electric, etc., Co., 25 Ont. App. 340, seller is not chargeable with notice of a resolution of the board of directors, specifying the terms upon which he is authorized to purchase the machine.

45. Singer Mfg. Co. *v.* McLean, 105 Ala. 316, 16 So. 912.

In the general manager of a loan association, the power to employ a broker to effect a sale or exchange of its property acquired under foreclosure sale, and not necessary to its corporate functions. Norton *v.* Genesee Nat. Sav., etc., Assoc., 57 N. Y. App. Div. 520, 68 N. Y. Suppl. 32. Special circumstances under which a real-estate broker was held entitled to rely upon the possession of such authority by the secretary and general manager of a savings and loan association. Tyler *v.* Anglo-American Sav., etc., Assoc., 30 N. Y. App. Div. 404, 52 N. Y. Suppl. 77.

46. Helena Nat. Bank *v.* Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628.

47. Green Co. *v.* Blodgett, 55 Ill. App. 556.

48. Bates *v.* Keith Iron Co., 7 Metc. (Mass.) 224; Odiorne *v.* Maxcy, 13 Mass. 178; Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66. But see Benedict *v.* Lansing, 5 Den. (N. Y.) 283 [*citing* Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256].

49. Ecker *v.* Chicago, etc., R. Co., 8 Mo. App. 223.

50. Emmons *v.* Excelsior Distilling Co., 9 Mo. App. 578.

for the use of its employees, the same not being necessary for the transaction of its business;[51] in the superintendent of a manufacturing company, the power to contract with an employee for an interest in the business and profits of the company;[52] in the superintendent of a waterworks company, the power to contract to furnish water to a hotel for a small proportion of the price charged to regular customers under a city ordinance, the same being much less than the water would be worth at regular rates;[53] in the secretary and business manager of a manufacturing and trading corporation, the power to exchange its manufactured articles for shares of its own capital stock;[54] or in the general agent of a corporation, to bind the company by the payment of a debt contracted by individual shareholders of the company before it was incorporated.[55]

6. WHETHER AUTHORITY TO EMPLOY SURGEONS, ETC., FOR WOUNDED EMPLOYEES — a. In General. This question has been answered differently by different courts.[56] Such an employment does not raise an implied promise to pay the physician or surgeon, where there is no legal duty toward the patient on the part of the person making the request, but in such a case the making of the request is ascribed to the exercise of an ordinary office of humanity.[57] The fundamental question therefore is whether there is a legal duty on the part of the corporation to furnish surgical or medical aid to the employee who is suddenly injured while in its service and in the line of its duty; and, secondly, whether its managing agent, by whatever name called, has implied authority to bind it to the performance of this legal duty. Such an implied power has been ascribed to the superintendent of a railroad;[58] to the division superintendent of a railroad, with the conclusion that he has power to ratify such an employment made by a subordinate without instructions;[59] to the assistant superintendent of a railroad;[60] and to the general superintendent of a mining company, having only charge of its affairs and property.[61]

b. Cases Denying Possession of This Authority. The possession of such an implied authority has been denied in the case of a superintendent of a manufacturing corporation[62] and in the manager of a business corporation.[63] Its posses-

51. Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425.

52. Deffenbaugh *v.* Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197.

53. Meridian Waterworks Co. *v.* Schulherr, (Miss. 1892) 17 So. 167.

54. Calteaux *v.* Mueller, 102 Wis. 525, 78 N. W. 1082, holding that the power of a corporation to purchase its own shares cannot be exercised by a ministerial officer without a special authorization by its board of directors.

55. White *v.* Westport Cotton Mfg. Co., 1 Pick. (Mass.) 215, 11 Am. Dec. 168, opinion by Parker, C. J.

56. An able discussion of it will be found in Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289, where the court was equally divided.

57. *Missouri.*— Meisenbach *v.* Southern Cooperage Co., 45 Mo. App. 232.

New York.— Crane *v.* Baudouine, 55 N. Y. 256.

Pennsylvania.— Boyd *v.* Sappington, 4 Watts 247.

Vermont.— Smith *v.* Watson, 14 Vt. 332.

England.— Veitch *v.* Russell, 3 Q. B. 928, 43 E. C. L. 1041, C. & M. 362, 41 E. C. L. 201, 3 G. & D. 198, 7 Jur. 60, 12 L. J. Q. B. 13; Sellen *v.* Norman, 4 C. & P. 80, 19 E. C. L. 416.

58. Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Union Pac. R. Co. *v.* Winterbotham, 52 Kan. 433, 34 Pac. 1052; Walker *v.* Great Western R. Co., L. R. 2 Exch. 228, 36 L. J. Exch. 123, 16 L. T. Rep. N. S. 327, 15 Wkly. Rep. 769.

59. Pacific R. Co. *v.* Thomas, 19 Kan. 256. *Contra*, Brown *v.* Missouri, etc., R. Co., 67 Mo. 122, holding that a division superintendent has no implied authority to bind the company to pay for drugs, etc., furnished on his order to a wounded employee.

60. Bigham *v.* Chicago, etc., R. Co., 79 Iowa 534, 44 N. W. 805, power to employ nurses.

That a surgeon of a railroad company has no implied authority to bind the company to pay for services and meals furnished nurses and others in attendance upon a wounded employee was held in Bushnell *v.* Chicago, etc., R. Co., 69 Iowa 620, 29 N. W. 753.

61. Mt. Wilson Gold, etc., Min. Co. *v.* Burbidge, 11 Colo. App. 487, 53 Pac. 826.

62. Meisenbach *v.* Southern Cooperage Co., 45 Mo. App. 232 [*distinguishing* McCarthy *v.* Missouri R. Co., 15 Mo. App. 385].

63. Chase *v.* Swift, 60 Nebr. 696, 84 N. W. 86, 83 Am. St. Rep. 552. For an answer by a practising physician, in a suit by a railroad company, setting up a claim for professional services rendered at the request of its manager to a wounded employee, which was held

sion has even been denied in the case of a road-master and conductor of a railroad company.[64]

7. Power to Alien Corporate Property — a. Such Power Generally Denied — (I) *Statement of Rule.* The courts generally deny to the managing agent, the general manager, or the superintendent of business corporations, by whatever name called, the power to alien the property of the corporation except in the ordinary course of its business. He can alien the property of the corporation in the ordinary course of its business,[65] but he has no incidental or implied power, by virtue of his office, to transfer the real estate of the corporation by deed, although such a deed will estop himself and those claiming through him.[66] A general agent of a corporation, even though his authority in this respect is not limited either by common usage or by the by-laws of the company, has no power as such to convey real estate of the company, but a special power is necessary.[67]

(II) *Instances Where It Was Denied.* For example such an agent has no authority, by virtue of his agency, to pledge or mortgage the machinery used by the company in the transaction of its work, for the security of a loan procured for the company;[68] to make a lease for the purpose of trying the title to land into which he has entered for condition broken, under a vote of the corporation specially authorizing him to enter and hold the land, but containing no provision empowering him to make a lease, and this, although he has uniformly made leases of lands in the possession of the corporation, with the knowledge of and without objection on the part of the corporation;[69] in the superintendent of a mining company to pledge the property of the company for a corporate debt;[70] in the local or district manager of a general electric company to assign the choses in action of the company;[71] or in the general manager of a mining company to grant an assignment of a license in the real property of the company.[72]

b. His Power to Pledge or Mortgage Personal Property of Corporation For Its Debts. It must be concluded from what has preceded that no such power exists, unless an authorization, expressed or implied, is shown;[73] but we have high judicial authority, in a decision of the supreme judicial court of Massachusetts, speaking through Chief Justice Shaw, to the effect that the general agent and the treasurer of a manufacturing corporation might pledge the property of the corporation, without specific authority, and that, although the by-laws con-

bad because it did not allege that the power to bind the corporation by such an engagement was within the scope of the manager's authority, see New Pittsburgh Coal, etc., Co. *v.* Shaley, 25 Ind. App. 282, 58 N. E. 87.

64. Peninsular R. Co. *v.* Gary, 22 Fla. 356, 1 Am. St. Rep. 194.

65. Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434.

66. Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99. Even the trustees are in some cases restrained by the charter from aliening the real estate of the corporation. Stevens *v.* Willard, 43 Vt. 692. What acquiescence of the directors of a banking corporation in an arrangement made by an officer who has assumed the general management of its business will bind the corporation. Davies *v.* New York Concert Co., 13 N. Y. Suppl. 739, 36 N. Y. St. 816. Liability of a corporation for the acts of one shown to be its financial manager. Case Mfg. Co. *v.* Soxman, 138 U. S. 431, 11 S. Ct. 360, 34 L. ed. 1019.

67. Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

Whether the president and secretary of a corporation were especially authorized to convey its land was determined upon a review of the evidence in Marshall County High School Co. *v.* Iowa Evangelical Synod, 28 Iowa 360.

68. Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Whitwell *v.* Warner, 20 Vt. 425.

69. Gillis *v.* Bailey, 17 N. H. 18.

70. Trent *v.* Sherlock, 24 Mont. 255, 61 Pac. 650, where it was also held that a bill of sale of a portion of a mining company's property by the superintendent, which he had no authority to make, was not *prima facie* binding on the corporation and did not tend to show that he had an implied power to make it.

71. Rigby *v.* Lowe, 125 Cal. 613, 58 Pac. 153.

72. Butte, etc., Consol. Min. Co. *v.* Montana Ore-Purchasing Co., 21 Mont. 539, 52 Pac. 375, 55 Pac. 112.

73. Rigby *v.* Lowe, 125 Cal. 613, 58 Pac. 153; Trent *v.* Sherlock, 24 Mont. 255, 61 Pac. 650; Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Whitwell *v.* Warner, 20 Vt. 425.

ferred upon them the specific power to do certain acts but did not include the power to pledge the property of the corporation.[74]

c. His Power to Make Assignments For Creditors — (I) *In General.* The strict rule on this subject is that a ministerial officer of a corporation has no inherent power by reason of his office to make a general assignment of the property of the corporation for the benefit of creditors. Such power rests alone in the board of directors duly assembled.[75] For example it has been held upon a thorough consideration of the question that the general manager of a manufacturing corporation has no authority to turn over the bulk of its property to a creditor on the eve of a receivership, without the previous knowledge or subsequent ratification of the directors.[76]

(II) *Cases Affirming This Power.* On the contrary it has been held that where the management of the affairs of a corporation is intrusted to a general managing agent, he has power to assign its choses in action to its creditors, either in payment of, or as security for, a debt of the corporation, without express authority from the directors.[77] So it has been held that a conveyance of all the property of a lumber company to a trustee for the benefit of its creditors, made by a managing agent to whom the entire direction of the business of the company had been intrusted by the shareholders, they not having held a single meeting, but having left everything to him, was presumably made with their consent and was hence valid.[78] In like manner it has been held that a general manager of a corporation conducting a sawmill business and a general merchandise store, who is given general power to conduct and manage its business, is authorized to execute a deed of trust upon the interest of the corporation in a town site held for commercial purposes, and not essential to the conduct of its business, to secure debts contracted in the course of the business.[79]

d. His Power to Make Leases of Corporate Lands. It seems that even the general agent of a corporation cannot make a lease of its lands without special authority. Thus it has been held that the general agent of a corporation, having charge of its lands and buildings, cannot, by virtue of a special vote authorizing him to enter and hold certain lands, make a lease of the same, after his entry for condition broken, in order to try the title thereto; nor is he authorized to do so by reason of his having ordinarily leased lands of the corporation for rent.[80]

8. His Powers Touching Litigation — a. In General. It has been held that the general manager and agent of a corporation must be presumed *prima facie* at least to have authority to direct the issue of a replevin writ, for the improper service of which the company is sued.[81]

b. Power to Employ Counsel — (I) *In General.* Managing officers and agents of corporations have power to employ attorneys and counselors to prosecute or defend suits for the corporation, or otherwise to assist in legal proceedings in which it is interested, without any express delegation of power so to do, or any formal resolution of the board of directors to that effect.[82]

74. Fay *v.* Noble, 12 Cush. (Mass.) 1. See also St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

75. Cupit *v.* Park City Bank, 20 Utah 292, 58 Pac. 839, power denied to cashier of a bank.

76. Hadden *v.* Dooley, 92 Fed. 274, 34 C. C. A. 338 [*reversing* 84 Fed. 80, *affirmed* in 93 Fed. 728, 35 C. C. A. 554, *citing* England *v.* Dearborn, 141 Mass. 590, and *distinguishing* Lewis *v.* Hartford Silk Mfg. Co., 56 Conn. 25, 12 Pac. 637].

77. McKiernan *v.* Lenzen, 56 Cal. 61.

78. Conley *v.* Collins, 119 Mich. 519, 78 N. W. 555, 44 L. R. A. 844, where the assignment was held bad upon a contest by a deferred creditor, because it was a preferential assignment.

79. Thayer *v.* Nehalem Mill Co., 31 Oreg. 437, 51 Pac. 202.

80. Gillis *v.* Bailey, 17 N. H. 18.

81. Frost *v.* Domestic Sewing Mach. Co., 133 Mass. 563.

82. Luce *v.* San Diego Land, etc., Co., (Cal. 1894) 37 Pac. 390; Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89; Western Bank *v.* Gilstrap, 45 Mo. 419; Lewis *v.* Pulitzer Pub. Co., 77 Mo. App. 434; Mumford *v.* Hawkins, 5 Den. (N. Y.) 355; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Dallas Ice Factory, etc., Co. *v.* Crawford, 18 Tex. Civ. App. 176, 44 S. W. 875.

(II) *To What Officers and Agents This Power Has Been Ascribed.* This power has been ascribed to the president of a corporation;[83] to the cashier of a banking corporation;[84] to the superintendent of a railroad;[85] to the general manager of a newspaper publishing company who has under a contract a financial interest in its business, who is employed for a definite time, and who is free from the control of the other officers of the company;[86] to the general manager of a land company in California, whose president and directors are in a distant state;[87] to the general manager of a corporation whose duty it is to take charge of all the business and property of the corporation, and who is authorized to contract debts for the necessary operation of the business without an order of the board of directors, with the conclusion that he may bind the corporation by a contract to pay a fee to counsel whom he has consulted with reference to a suit against the company, brought to recover a large amount and to foreclose a lien upon its property, given to secure its payment.[88]

(III) *No Such Power in Subordinate Officers or Agents.* But while the managing officers of a corporation presumptively have authority to employ counsel to attend to legal business for the corporation, no such presumption obtains in the case of subordinate officers or agents.[89]

(IV) *Such Power Implied From Adoption or Recognition.* As in other cases[90] the authority of any other agent of a corporation, for example the superintendent of a railway company, to employ counsel in its behalf may be implied from the adoption or recognition of his acts by the company.[91]

9. His Powers to Make, Accept, and Indorse Negotiable Paper — a. No Such Power Ascribed to Him as Matter of Law. Generally speaking the managing agent of a corporation, other than the cashier of a bank, has no implied power to bind the corporation by making, accepting, or indorsing negotiable paper.[92] But where such a power in him is claimed it must be sought for in some special authorization, or in such a continued exercise of it as amounts to a holding out of him by the corporation as possessing it, raising the implication of a previous authorization or a subsequent ratification.[93]

That a town agent in Vermont may bind the town by employing an attorney see Langdon *v.* Castleton, 30 Vt. 285.

83. Cincinnati Sav. Bank *v.* Benton, 2 Metc. (Ky.) 240; Mumford *v.* Hawkins, 5 Den. (N. Y.) 355; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561. The president may authorize counsel to appear for the corporation, and if in so doing he exceeds his power to the damage of the corporation, it must look to him for the damages. Lime Rock Bank *v.* Macomber, 29 Me. 564; Eastman *v.* Coos Bank, 1 N. H. 23; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561. See also *supra*, X, A, 1, b, (II), (B).

84. Western Bank *v.* Gillstrap, 45 Mo. 419; Root *v.* Olcott, 42 Hun (N. Y.) 536.

85. Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89.

86. Lewis *v.* Pulitzer Pub. Co., 77 Mo. App. 434.

87. Luce *v.* San Diego Land, etc., Co., (Cal. 1894) 37 Pac. 390.

88. Dallas Ice Factory, etc., Co. *v.* Crawford, 18 Tex. Civ. App. 176, 44 S. W. 875.

89. Maupin *v.* Virginia Lead Min. Co., 78 Mo. 24.

90. See *infra*, X, D, 1, f, (I) *et seq.*

91. Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89.

92. It has been so held with respect to the agents of manufacturing corporations (Benedict *v.* Lansing, 5 Den. (N. Y.) 283) and with respect to the general agents of mining corporations (New York Iron Mine *v.* Negaunee First Nat. Bank, 39 Mich. 644).

93. *Arkansas.*— City Electric St. R. Co. *v.* First Nat. Exch. Bank, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282, 31 L. R. A. 535.

Kansas.— Topeka Capital Co. *v.* Remington Paper Co., 61 Kan. 6, 57 Pac. 504 [*modified* in 59 Pac. 1062].

Louisiana.— Culver *v.* Leovy, 19 La. Ann. 202.

Massachusetts.— Craft *v.* South Boston R. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641, note signed by defaulting treasurer without authority.

Michigan.— Merchants' Nat. Bank *v.* Detroit Knitting, etc., Works, 68 Mich. 620, 36 N. W. 696; New York Iron Mine *v.* Negaunee First Nat. Bank, 39 Mich. 644.

Montana.— Helena Nat. Bank *v.* Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 43 Am. St. Rep. 628, a telegraph company.

Nevada.— Edwards *v.* Carson Water Co., 21 Nev. 469, 34 Pac. 381.

New Mexico.— Oak Grove, etc., Cattle Co. *v.* Foster, 7 N. M. 650, 41 Pac. 522, president of corporation no such implied power.

New York.— Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544, 29 N. Y. St. 5; Rail-

b. Power Need Not Be Formally Conferred, but May Be Inferred From Habit of Acting. No resolution of the directors or other formal proceeding or authorization is necessary to clothe the manager of a corporation with power to make and deliver notes of the corporation; but the power may be inferred from his being held out as possessing it, and from his habit of acting as in other cases.[94] Upon the question what course of business or conduct will afford presumptive evidence of such a power on the part of the managing officer of a corporation, it has been held that the fact that he has been accustomed to make and discount notes to raise money to meet its expenses is not evidence to prove his authority to accept accommodation drafts drawn upon it by another corporation in which the drawee had no interest; nor will the corporation be held liable on such acceptances by reason of the entries upon its books, by direction of the managing officer, of the accounts of such acceptances, without the direction or knowledge of its other officers.[95]

c. What Written Authorization and Habit of Acting Do Not Confer This Power. According to a recent holding the power of a general manager of a telegraph company to bind the company by executing a promissory note in its name is not conferred by a document clothing him with the power to manage the business of the company, and to make all necessary contracts and arrangements in carrying on and operating the business; by his habit of drawing checks against the funds of the corporation; or by evidence that he had on three previous occasions executed notes in the name of the corporation, where such facts had never been brought to the knowledge of the corporation.[96]

d. What Documents and Circumstances Have Been Held to Confer This Power. On the other hand it has been held that the general "manager" of a branch of an insurance company, as its executive officer, having the care and management of its business under the direction of the general board of directors, may accept a draft addressed to such branch department, in the absence of proof of any restriction upon the general powers conferred upon him.[97] Again, where the agent of a manufacturing corporation was empowered by its by-laws to manage the affairs of the corporation committed to his care; to exercise the powers committed to him according to his best ability and discretion; promptly to collect all assessments and other sums that should become due to the corporation; and to disburse them according to the order of the board of directors, who were made a board of control over him, it was held that such agent, unless the board of directors interposed to control his proceedings, had authority to employ workmen to carry on the business of the corporation, and to pay them with its funds; and consequently when not in funds to execute notes binding upon the corporation in payment.[98] Again where, under the articles of a corporation, an officer was

way Equipment, etc., Co. *v.* Lincoln Nat. Bank, 82 Hun 8, 31 N. Y. Suppl. 44, 63 N. Y. St. 338.

Virginia.— Davis *v.* Rockingham Invest. Co., 89 Va. 290, 15 S. E. 547.

England.— *In re* Cunningham, 36 Ch. D. 532, it not being shown that it was necessary for him to sign the paper in order to carry on the business of the company.

Compare Glidden, etc., Varnish Co. *v.* Interstate Nat. Bank, 69 Fed. 912, 16 C. C. A. 534; Grommes *v.* Sullivan, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419 (when *bona fide* purchaser protected).

94. Washington Times Co. *v.* Wilder, 12 App. Cas. (D. C.) 62.

95. Merchants' Nat. Bank *v.* Detroit Knitting, etc., Works, 68 Mich. 620, 36 N. W. 696.

Other circumstances under which the "general manager" of a land company had no authority on the footing of usage or conduct, to indorse and negotiate paper for the company. Davis *v.* Rockingham Invest. Co., 89 Va. 290, 15 S. E. 547.

That the general manager of a corporation has presumptive authority to receive for the corporation promissory notes executed in settlement of a contract with it, so that the corporation cannot maintain an action on the original consideration, see Whitaker *v.* Kilroy, 70 Mich. 635, 38 N. W. 606.

96. Helena Nat. Bank *v.* Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628 [*citing* Elwell *v.* Puget Sound, etc., R. Co., 7 Wash. 487, 35 Pac. 376].

97. Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151 [*affirmed* in 66 N. Y. 616].

98. Bates *v.* Keith Iron Co., 7 Metc. (Mass.) 224. *Compare* Odiorne *v.* Maxcy, 13

given general charge, control, and management of its affairs, and authority to sign all contracts and conveyances, it was held that he had authority to indorse commercial paper on behalf of the corporation in the regular course of business.[99] Again, where the managing agent of a corporation executes a note in its name to secure a debt on which it is primarily liable to the creditor, but on which, as between it and a third person signing the note, it is a surety, the company is liable thereon, although no express authority has been given the agent to so execute the note.[1]

e. Special as to Power to Indorse. The distinction is often taken between the power to indorse for the mere purpose of transferring paper and to indorse for the purpose of binding the corporation as indorser.[2]

f. Managing Agent May Not Clothe Subagents With Power to Make Commercial Paper. Applying the principle that delegated power cannot be delegated, it has been held that although the general agent of a trading company may be regarded as having an implied power to bind the company by the making of negotiable paper, yet the subagents whom he may in the course of business of the company appoint have no such power, although it may be a part of their duty to buy and sell, and although they may in the course of their buying and selling pledge the credit of the company.[3]

g. Power to Waive Demand and Notice. A corporate agent, when authorized to raise money and create liability on the part of his principal, may also waive demand and notice on a note indorsed by such company, and this too after the note has been negotiated.[4]

10. Power of Managing Agent to Employ Workmen. Power has been ascribed to the managing agent of a manufacturing corporation to employ workmen.[5] Such a corporation has been held liable for the wages of a workman employed for the season by its president, acting as general manager of its business, although he had no express authority to employ by the season.[6]

11. His Powers and Liabilities With Respect to Taxation. The subject of the

Mass. 178, 15 Mass. 39, which was the case of a manufacturing copartnership.

99. Hiawatha Iron Co. *v.* John Strange Paper Co., 106 Wis. 111, 81 N. W. 1034 [*citing* Hoge *v.* Lansing, 35 N. Y. 136; Houghton *v.* Elkhorn First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107; Warren-Scharf Asphalt Paving Co. *v.* Commercial Nat. Bank, 97 Fed. 181, 38 C. C. A. 108; U. S. National Bank *v.* Little Rock First Nat. Bank, 64 Fed. 985, 13 C. C. A. 472].

1. Andres *v.* Morgan, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712.

2. Brown *v.* Donnell, 49 Me. 421, 77 Am. Dec. 266. Also it has been held that where a trading corporation which has been in the habit of assisting persons with whom it does business allows its general manager to transact all its business, and he indorses in the corporate name the note of one with whom the corporation is dealing, causes the note to be discounted, and pays the proceeds to the maker, he is not liable to the corporation, although it is obliged to pay the note. Holmes *v.* Willard, 5 N. Y. Suppl. 610, 24 N. Y. St. 260.

3. Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

4. Whitney *v.* South Paris Mfg. Co., 39 Me. 316.

5. Bates *v.* Keith Iron Co., 7 Metc. (Mass.) 224, also holding that the agent may execute notes binding on the corporation to raise money to pay the workmen whom he thus hires; but on this point the case has been often distinguished or contested.

6. Cceder *v.* H. M. Loud, etc., Lumber Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134. Circumstances under which a jury were warranted in finding that the principal foreman of a foreign mining corporation doing business in Michigan had authority to hire men for the season. Tunison *v.* Detroit, etc., Copper Co., 73 Mich. 452, 4 N. W. 502.

Evidence under which it was held that the superintendent and vice-president of a railroad corporation had authority to bind the company hy employing a civil engineer. Lewis *v.* Albemarle, etc., R. Co., 95 N. C. 179. Somewhat to the same effect see Benesch *v.* John Hancock Mut. L. Ins. Co., 16 Daly (N. Y.) 394, 11 N. Y. Suppl. 714, 34 N. Y. St. 16.

A division superintendent of a railroad has no implied authority to bind the company hy an agreement to give a life employment to an employee of the company in settlement of a claim for personal injuries. Maxson *v.* Michigan Cent. R. Co., 117 Mich. 218, 75 N. W. 459.

What written authorization does not warrant the superintendent of a flumes company in employing an expensive broker in the absence of evidence that such an employment was necessary or usual. Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758.

taxation of corporations is not included in this article,[7] but with respect to the powers and liabilities of the managing agents of corporations concerning the taxation of corporations see the cases cited in the note.[8]

12. Powers Ascribed to Particular Kinds of Managing Agents — a. Powers Ascribed to "Managing Director." This officer has a defined status in English law with respect to joint-stock companies, but is unknown to the American law. In this country a single director has by virtue of his office no agency for the corporation, but whatever power he possesses must have its source in a specific appointment or authorization;[9] but he can, for the purpose of the protection of the public dealing with the corporation through him, acquire power so as to bind the corporation by the exercise of it, by a long-continued course of action from which the previous authorization may be presumed.[10]

b. Powers of Officer Designated a "Superintendent." This officer or agent has no power which is defined in law, but the implications as to his power are left to be derived from facts in each particular case. The general superintendent of a railroad company may fairly be presumed to have the power to bind the company by contracts relative to the safe and effective operation of the road, such as a contract to fence its tracks.[11] The superintendent of iron works whose authority, as stated in the by-laws of the corporation, was "to have charge of the manufacturing department of the works, audit bills for materials and labor, and to appoint and discharge foremen and workmen" had no authority to receive a loan of money in the name of the company, and in consideration thereof to execute a contract in its name for the sale of a quantity of iron.[12] Similarly it has been decided that the superintendent of a mine, with authority to take ore therefrom and crush it, for the purpose of obtaining gold, cannot, upon such authority, borrow money in the name of his principal for the purpose of carrying on the mine.[13] It is competent for the secretary of a gas company, being also the superintendent, and having general control over its business and affairs, to waive a regulation of the company requiring applications for the supply of gas to be made in writing.[14]

c. General or Managing Agent of Particular Kinds of Corporations. The powers of the general or managing agents of mining companies have been the subject of judicial consideration with reference to special facts in several cases.[15] An educational corporation, organized to found and carry on a military academy, becomes responsible for the cost of printing, advertising, etc., by its superintendent, on the principle of having held him out as its general agent.[16] But in the

7. See, generally, TAXATION.

8. Lake County *v.* Sulphur Bank Quicksilver Min. Co., 68 Cal. 14, 8 Pac. 593; People *v.* Stockton, etc., R. Co., 49 Cal. 414; Wyandotte *v.* Corrigan, 35 Kan. 21, 10 Pac. 99.

9. New Haven, etc., Co. *v.* Hayden, 107 Mass. 525.

10. Walker *v.* Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187.

11. New Albany, etc., R. Co. *v.* Haskell, 11 Ind. 301.

Written instruments which do not confer upon the "superintendent" of a street railroad the power to bind the company by contracting for medical attendance to an employee. Stephenson *v.* New York, etc., R. Co., 2 Duer (N. Y.) 341. *Compare supra*, X, C, 6, a *et seq.*

12. Adriance *v.* Roome, 52 Barb. (N. Y.) 399.

13. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531.

14. Shepherd *v.* Milwaukee Gas Light Co., 11 Wis. 234.

Evidence proving the authority of the superintendent of a mining company to accept a mill built for it. Starr *v.* Gregory Consol. Min. Co., 6 Mont. 485, 491, 13 Pac. 195, 198.

Circumstances putting a dealer on inquiry as to the powers of a general superintendent. Planters' Rice Mill Co. *v.* Olmstead, 78 Ga. 586, 3 S. E. 647.

15. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531; Powrie *v.* Kansas Pac. R. Co., 1 Colo. 529; Consolidated Gregory Co. *v.* Raber, 1 Colo. 511; Starr *v.* Gregory Consol. Min. Co., 6 Mont. 485, 491, 13 Pac. 195, 198. The superintendent of the New Albany and Vincennes road in Indiana was not liable to holders of certificates issued by the commissioner appointed under the Indiana acts of 1843 and 1844, relating to that road, for the non-payment of money due on such certificate. Clendenin *v.* Frazier, 1 Ind. 553.

16. Georgia Military Academy *v.* Estill, 77 Ga. 409.

absence of evidence it will not be presumed that the business manager of a theatrical company has the power to engage performers for a year.[17]

d. Powers of General Agent Who Is Also President. The fact that a person having an active conduct of the business of a corporation is also its president does not operate as a limitation upon the powers usually exercised by its general agents or managers. His authority is not limited to that possessed by virtue of his office as president, but is incidental to the management of the business.[18]

13. His Liability to the Company. The manager of an investment company who indorsed notes given in renewal of notes indorsed by him personally before the organization of the company, which the funds of the company were ultimately used to pay, was held liable to the assignee of the company therefor, in the absence of an undertaking by the company to indemnify him against outstanding indorsements.[19]

14. His Liability to Third Persons For Negligence, Misfeasance, Etc. The personal liability of the managing agents of corporations for injuries to third persons depends upon the question whether the wrongful act or neglect is to be regarded as a misfeasance or as a mere nonfeasance or breach of duty toward his principal, the corporation. The manager of a corporation in charge of its work of constructing and building has been held liable to the person injured in consequence of his failure to erect a scaffold which was necessary to protect persons near the walls of the building.[20] An officer of a lumber company, who is also its managing agent, may be held personally liable for setting an inexperienced and ignorant employee at work on a machine which the officer knows to be dangerous.[21]

D. Powers of Other Subordinate Corporate Agents — 1. General Considerations Relating to Appointment, Tenure of Office, and Powers of Such Agents — a. Appointment, Tenure, Salaries, Removal, Control of Directors Over — (I) *Power of Directors to Appoint.* The power of directors to appoint subordinate agents, to make contracts with them touching their compensation, and the tenure of their agency is of course not open to question.[22]

(II) *Not Necessary That Directors Should Appoint* — (A) *In General.* On the other hand it is not at all necessary that subordinate agents, servants, and employees should, in order to be entitled to recover compensation for their services, derive their appointment from the directors, or that the directors should at a formal meeting either authorize or ratify the appointment.[23]

(B) *Ministerial Officers and Agents May Appoint.* For many purposes the ministerial officers and agents of the corporation may employ persons to perform services for it; and such employment, being within the scope of the agent or officer's duty, binds the corporation.[24]

17. Vogel *v.* St. Louis Museum, etc., Gallery, 8 Mo. App. 587.

18. Ceeder *v.* H. M. Loud, etc., Lumber Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134.

19. Minneapolis Trust Co. *v.* Clark, 47 Minn. 108, 49 N. W. 386.

Thefts of bookkeeper.— The manager of a corporation placed in immediate control and direction of all persons in its employ, and whose duty it was to cause regular and accurate accounts of all transactions of the corporation's business to be kept by a competent bookkeeper, was held liable for thefts of the bookkeeper, which the manager would have discovered if he had given proper attention to his duties, and which the bookkeeper was led to make by embezzlements by the manager, to conceal which he had the bookkeeper make false, deceptive, and fraudulent entries in the books. San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410, opinion by Henshaw, J.

20. Mayer *v.* Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433.

21. Greenburg *v.* Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439. But the manager of a corporation was exonerated from personal liability to an injured employee resulting from his failure to examine the appliances with which the employee was required to work, where he did not know that they were unsafe. O'Neil *v.* C. Young, etc., Seed, etc., Co., 58 Mo. App. 628.

22. Mobile Branch State Bank *v.* Collins, 7 Ala. 95.

23. 4 Thompson Corp. § 4873.

24. 4 Thompson Corp. § 4873.

(III) *Proof of Appointment of Agent.* We are dealing now with agents other than the regular officers of the corporation, whose appointment rests in contract, and whom the corporation may, as in the case of a mere clerk, remove at pleasure,[25] subject only to a civil liability for damages for breach of their contract with him. It must have been inferred from what has preceded that an entry upon the records of a corporation of the resolution appointing an agent is not essential to the validity of the appointment, unless the charter or by-laws absolutely require such entry to be made.[26] Nor unless the charter otherwise prescribes need such an appointment be made in writing[27] or by a vote or resolution[28] of the board of directors or trustees; nor need a resolution of appointment be entered upon the minutes.[29] Still less need it be evidenced by an instrument under the corporate seal;[30] but such appointments may be proved by parol[31] and by evidence of habitual action and recognition, under principles hereafter discussed.[32] As corporations from their nature can act only through agents, a grant of power to a corporation to do a particular act carries with it by necessary implication the grant of a power to appoint suitable agents by whom to perform such act. It is therefore held that a corporation may employ an agent to perform services consonant with its general design, without any specific authority for that purpose conferred by the charter.[33] But as courts cannot judicially notice the by-laws of corporations, or even their charters where they are granted by special acts of the legislature, unless the statute law otherwise provides,[34] a party claiming the existence of such a power under the charter or by-laws must introduce them in evidence.[35]

(IV) *Liability of Corporation Receiving Benefit of Services of Agents so Appointed* — (A) *In General.* In other cases if an officer employs

25. Martino *v.* Commerce F. Ins. Co., 47 N. Y. Super. Ct. 520.

26. Smiley *v.* Chattanooga, 6 Heisk. (Tenn.) 604, where it was so held in an action against a city for labor upon a smallpox hospital, where the city records failed to show the appointment upon the health committee of the alderman who engaged plaintiff. When therefore three persons organized a joint-stock corporation, all being directors, and at a meeting agreed that one of them should be empowered to act for and bind the corporation, it was held that the corporation was bound by their action and by that of the agent duly authorized, and that it was not necessary to this result that there should have been previous notice of the meeting or written resolution or record of what was done. Wood *v.* Wiley Constr. Co., 56 Conn. 87, 13 Atl. 137.

27. Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146, 33 Am. Dec. 460; Williams *v.* Christian Female College, 29 Mo. 250, 77 Am. Dec. 569.

28. Williams *v.* Christian Female College, 29 Mo. 250, 77 Am. Dec. 569; Kraft *v.* Freeman Printing, etc., Assoc., 87 N. Y. 628.

29. Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

30. Bates *v.* State Bank, 2 Ala. 451; Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Planters' Bank *v.* Bivingsville Cotton Mfg. Co., 10 Rich. (S. C.) 95; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

31. Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146, 33 Am. Dec. 460; Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

32. See *infra*, XII, F, 3, e, (I) *et seq.*

33. Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514. See also Sharp *v.* New York, 40 Barb. (N. Y.) 256, 25 How. Pr. (N. Y.) 389. See *infra*, XVII, E, 1.

34. See *supra*, I, M, 2.

35. Haven *v.* New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512.

Points as to the appointment of corporate agents.— That a member of a committee appointed by a town to procure subscriptions for the stock of a railroad company is not an agent of the corporation. Beloit, etc., R. Co. *v.* Palmer, 19 Wis. 574. That an instrument showing that A had been appointed agent of a foreign corporation "for transacting business at I," filed in accordance with Ind. Rev. Stat. (1881), § 3022, made A the company's general agent at that place. Morrow *v.* U. S. Mortgage Co., 96 Ind. 21. That an agent of a bank, being required to produce a sworn copy of his appointment, if of record on the books of the bank, does so by annexing what purports to be a copy from the books, and swearing to it, although he does not expressly state that he compared it with the original. Henderson *v.* Montgomery Bank, 11 Ala. 855. Authority may be conferred upon a corporate officer to act in a class of cases by a single resolution of the directors as well as by a separate resolution for each case. Elwell *v.* Dodge, 33 Barb. (N. Y.) 336. See further as to the appointment of corporate agents Kalamazoo Novelty Mfg. Works *v.* Macalister, 40 Mich. 84; Felton *v.* McClave, 46 N. Y.

a person to perform a service for the corporation, and it is performed with the knowledge of the directors, and they receive the benefit of such service without objection, the corporation is liable upon an implied assumpsit.[36]

(B) *Such Subordinate Agents Entitled to Recover Compensation on Implied Assumpsit.* The rule in regard to directors[37] does not extend so far as to prevent a mere ministerial agent or servant of a subordinate character, for whose salary no provision has been made by corporate action, from recovering a *quantum meruit* on an implied assumpsit.[38]

(V) *Removal of Ministerial Agents.* The ministerial agents of a corporation, not holding for fixed terms, defined and limited by statute or by-laws, may be removed by the body that chose them, subject only to a right of action against the corporation, if such removal resulted in a breach of their contract of employment.[39]

b. Corporation Bound by Acts of Their Agents Same as Natural Persons — (I) *General Rule.* The general rule of law is that corporations are bound by the acts and declarations of their agents, done or made within the general scope of their authority, the same as natural persons are,[40] unless their charters or governing statutes otherwise provide.[41]

(II) *Not Bound by Acts or Engagements of Agents Not Within Limits of Their Authority.* On the other hand a corporation is not as a general rule any more than a natural person bound by any acts or engagements of its agents which are not within the limits of the authority conferred on them.[42]

(III) *Not Necessary That There Should Have Been Express Authorization or Approval by Corporation.* Therefore it has been held error to refuse to instruct a jury that "an individual officer of a corporation cannot by his acts bind the corporation, unless such acts are authorized or approved by the

Super. Ct. 53; Hancock *v.* Holbrook, 9 Fed. 353, 4 Woods 52.

36. Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351.

37. See *supra*, IX, Q, 1.

38. Waller *v.* Commonwealth Bank, 3 J. J. Marsh. (Ky.) 201.

Index to other holdings.— Circumstances under which an employee of a railroad company was held not entitled to recover compensation for obtaining a contract for the construction of the road, notwithstanding the promise of its president to see him paid. Van Valkenburgh *v.* Thomasville, etc., R. Co., 4 N. Y. Suppl. 782, 22 N. Y. St. 379. Payment of brokerage to a shareholder for placing company's shares a breach of trust. *In re* Faure Electric Accumulator Co., 40 Ch. D. 141, 58 L. J. Ch. 48, 59 L. T. Rep. N. S. 918, 1 Meg. 99, 37 Wkly. Rep. 116. Dismissal by a railroad company of a servant without giving him three months' notice, etc., because of an offensive letter written by him. East Anglian R. Co. *v.* Lythgoe, 10 C. B. 726, 15 Jur. 400, 20 L. J. C. P. 84, 2 Eng. L. & Eq. 331, 70 E. C. L. 726. Promise of superintendent when no evidence of agreement to raise salary of employee. Raysor *v.* Berkeley Co. R., etc., Co., 26 S. C. 610, 2 S. E. 119. No payment of compensation for an act prohibited by law, as for securing a loan to a corporation prohibited from doing business within the state. Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55. Action by a secretary for his salary, counter-claim for an unpaid assessment on stock purchased by such creditor — materiality of a special interrogatory to the jury. Cormac *v.* Western White Bronze Co., 77 Iowa 32, 41 N. W. 480.

39. *In re* A. A. Griffing Iron Co., 63 N. J. L. 357, 46 Atl. 1097 [*affirming* 63 N. J. L. 168, 41 Atl. 931].

40. Smith *v.* Atlas Steam Cordage Co., 41 La. Ann. 1, 5 So. 413; Essex Turnpike Corp. *v.* Collins, 8 Mass. 292; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Clark *v.* Washington, 12 Wheat. (U. S.) 40, 6 L. ed. 544.

41. Covington *v.* Covington, etc., Bridge Co., 10 Bush (Ky.) 69.

42. *Connecticut.*— Hartford Bank *v.* Hart, 3 Day 491, 3 Am. Dec. 274.

Kentucky.— Mt. Sterling, etc., Turnpike Road Co. *v.* Looney, 1 Metc. 550, 71 Am. Dec. 491.

Louisiana.— Reynolds, etc., Constr. Co. *v.* Police Jury, 44 La. Ann. 863, 11 So. 236; Seibrecht *v.* New Orleans, 12 La. Ann. 496.

Mississippi.—Commercial Bank *v.* Bonner, 13 Sm. & M. 649; State *v.* Commercial Bank, 6 Sm. & M. 218, 45 Am. Dec. 280.

New York.— Brady *v.* New York, 2 Bosw. 173, 7 Abb. Pr. 234, 16 How. Pr. 432 [*affirmed* in 20 N. Y. 312, 18 How. Pr. 343]; Appleby *v.* New York, 15 How. Pr. 428; McCullough *v.* Moss, 5 Den. 567.

Pennsylvania.—Pittsburg, etc., R. Co. *v.* Allegheny County, 79 Pa. St. 210.

Wisconsin.— Chicago, etc., R. Co. *v.* James, 22 Wis. 194.

United States.— Washington Gaslight Co. *v.* Lansden, 172 U. S. 534, 19 S. Ct. 296, 43

corporation."[43] But there are plainly many states of fact where the giving of such an instruction would be error.[44]

(iv) *Binds Corporation by Contract Where Purpose to Act For Corporation Is Manifest From Whole Instrument.* It has been well said that a contract executed by an agent or officer of the corporation is the contract of the corporation, where the officer or agent acts within the scope of his authority, and the purpose to act for the corporation is manifest from the contract taken as a whole.[45]

(v) *Binds Corporation Where It Is Not His Purpose to Act For It.* But a corporation will incur responsibility in many cases for the acts of its agent, where it is not his purpose to act for the corporation, but where he acts in violation of his duty, or even without authority to do the particular act, or even against the express orders of his superior, provided the act be within the general scope of his authority, and the injured party be innocent of knowledge that he is transcending his powers.[46]

c. Individual Shareholders and Directors No Inherent Authority as Agents of Corporation. It has already been pointed out[47] that a corporation cannot be bound by the acts or declarations of individual members, whether shareholders or directors, but can be bound only by the voice of the corporators or the directors, when acting or speaking in a body, and generally in a meeting duly convened.[48]

d. Distinction Between General and Special Agents. In defining the authority of agents, not only of corporations, but also of individuals, the terms "special" and "general" are frequently applied to such agents, for the purposes of classification. It has been said that the agents of corporations, like those of natural persons, are either general or special; that is, they act for the corporation either by virtue of a general power which attaches to their office by known usage, or by law, or else in virtue of an authority specially conferred upon them.[49] It may be doubted whether these distinctions are of much practical value in the administration of justice.[50]

L. ed. 543 [*reversing* 9 App. Cas. (D. C.) 508, 24 Wash. L. Rep. 807].

43. Brooklyn Gravel Road Co. *v.* Slaughter, 33 Ind. 185.

44. See *supra*, X, A, 1, b, (VII); X, A, 1, b, (XII).

45. Bryson *v.* Johnson County, 100 Mo. 76, 13 S. W. 239. *Compare infra*, XII.

46. Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457. For instance if it is a part of the general duty of the ticket agent of a railway corporation to post in his office a notice pertaining to the business carried on there, and he posts such a notice containing a libel upon a third person, the corporation will be responsible for it to such third person in damages. Fogg *v.* Boston, etc., R. Corp., 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583.

47. See *supra*, IX, C, 5; IX, E, 1, a *et seq.*

48. *Indiana.*— Harris *v.* Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372.

Maine.— Ruby *v.* Abyssinian Religious Soc., 15 Me. 306.

Maryland.— State University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

Massachusetts.— Canal Bridge *v.* Gordon, 1 Pick. 297, 11 Am. Dec. 170; Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143.

New York.— Lawrence *v.* Gebhard, 41 Barb. 575.

Pennsylvania.— Allegheny County Workhouse *v.* Moore, 95 Pa. St. 408.

Vermont.— Wheelock *v.* Moulton, 15 Vt. 519.

England.— Bramah *v.* Roberts, 3 Bing. N. Cas. 963, 32 E. C. L. 441.

The distinction between a corporation and the aggregate of the members forming such corporation is well illustrated by the case of Practical Knowledge Soc. *v.* Abbott, 2 Beav. 559, 4 Jur. 453, 9 L. J. Ch. 307, 17 Eng. Ch. 559.

Corporation not bound by statement of a single director that the corporation would pay for goods furnished an employee. Rice *v.* Peninsular Club, 52 Mich. 87, 17 N. W. 708.

"Managing director" no authority as agent, unless by special appointment; as in Wood *v.* Wiley Constr. Co., 56 Conn. 87, 13 Atl. 137.

For a case erroneously holding that the separate action of the directors within their usual sphere binds the company see Foot *v.* Rutland, etc., R. Co., 32 Vt. 633.

49. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 553, 23 Am. Dec. 728, where the doctrine is stated with more brevity than in the text.

50. This attempted classification was disapproved by Comstock, J., in Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 632. See also the observations of Bell, J., in Smith

e. General Rule That Corporation Is Not Bound by Declarations of Officer or Agent as to Extent of His Authority. As such agents neither appoint themselves nor prescribe the limits of their own authority, the fact that a person (1) not being the officer or agent of a corporation claims to be such, or (2) being such officer or agent claims to possess power which has not been conferred upon him,[51] will not, subject to the exceptions elsewhere noted, bind the corporation. But where the power may be rightfully inferred from the nature of the office itself, to which the person has been appointed, then it has been held that the corporation is bound by his declaration that he possesses the power in point of fact.[52]

f. Both Appointment and Powers of Agent Proved by Recognition, Adoption, and Habitual Action — (I) *In General.* Stated generally, both the appointment and the powers of an agent may be proved by his having habitually exercised certain powers as agent with the adoption or recognition of the corporation or its superior agents, that is, of those entitled to oppose him, without the production of any record or other writing showing his appointment or authorization.[53]

(II) *Rightful Possession of Power Legally Inferred From Continuous Habit of Exercising It* — (A) *In General.* In general it may be stated to be well settled that if an officer of a corporation is allowed to exercise a particular authority in respect to the business of the corporation, or a particular branch of it, continuously and publicly, for a considerable time; in other words, if he is in effect held out to the world as having authority in the premises, the corporation is bound by his acts in the same manner as if the authority were expressly granted[54] in which case it is not necessary in order to charge the corporation to prove special authorization.[55] It is sometimes said that the corporation is bound on the theory of a recognition[56] of the course of action of the agent; but a little

v. Nashua, etc., R. Co., 27 N. H. 86, 59 Am. Dec. 364.

51. Officers of a corporation who have no power to bind the company by executing a contract on its behalf cannot impose any liability upon the company by stating that the company itself has executed a given contract, which it has not. Hillyer *v.* Overman Silver Min. Co., 6 Nev. 51.

52. Whitaker *v.* Kilroy, 70 Mich. 635, 38 N. W. 606.

53. *Maine.*— Fitch *v.* Lewiston Steam-Mill Co., 80 Me. 34, 12 Atl. 732; Lime Rock Bank *v.* Macomber, 29 Me. 564; Badger *v.* Cumberland Bank, 26 Me. 428.

Maryland.—Equitable Gas-Light Co. *v.* Baltimore Coal Tar, etc., Co., 65 Md. 73, 3 Atl. 108; Eckenrode *v.* Canton Chemical Co., 55 Md. 51; Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

Michigan.— Detroit *v.* Jackson, 1 Dougl. 106.

Missouri.— Lingenfelter *v.* Phœnix Ins. Co., 19 Mo. App. 252.

New York.— Phillips *v.* Campbell, 43 N. Y. 271; Perkins *v.* Washington Ins. Co., 4 Cow. 645.

Tennessee.—Smiley *v.* Chattanooga, 6 Heisk. 604.

Texas.— Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434.

Wisconsin.— Chicago, etc., R. Co. *v.* James, 22 Wis. 194.

Effect of defective appointment or want of appointment.— Exercise of general authority in respect to the business of a company, with the knowledge and acquiescence of its officers, by one who purports to be its agent, will render the corporation liable for his acts in transactions within the corporate scope, although his appointment be defective, or if there was in fact no appointment at all. Robinson Reduction Co. *v.* Johnson, 10 Colo. App. 135, 50 Pac. 215; Wood *v.* Wiley Constr. Co., 56 Conn. 87, 13 Atl. 137; Morrill *v.* C. T. Segar Mfg. Co., 32 Hun (N. Y.) 543; Chicago, etc., R. Co. *v.* James, 22 Wis. 194.

54. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248, 257 [per Hallett, C. J., *citing* St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Chicago, etc., R. Co. *v.* Coleman, 18 Ill. 297, 68 Am. Dec. 544; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146; Dougherty *v.* Hunter, 54 Pa. St. 380; Alleghany City *v.* McClurkan, 14 Pa. St. 81; Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636; Peyton *v.* St. Thomas' Hospital, 3 C. & P. 363, 14 E. C. L. 610]; Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453; Phillips *v.* Campbell, 43 N. Y. 271; Conover *v.* Albany Mut. Ins. Co., 1 N. Y. 290; Medbury *v.* New York, etc., R. Co., 26 Barb. (N. Y.) 564; Partridge *v.* Badger, 25 Barb. (N. Y.) 146; Knight *v.* Lang, 4 E. D. Smith (N. Y.) 381, 2 Abb. Pr. (N. Y.) 227, 381; Smith *v.* Hull Glass Co., 11 C. B. 897, 73 E. C. L. 897 (note especially the language of Maule, J., in Smith *v.* Hull Glass Co., 11 C. B. 897, 928, 73 E. C. L. 897); Allard *v.* Bourne, 15 C. B. N. S. 468, 3 New Rep. 42, 109 E. C. L. 468.

55. Fayles *v.* National Ins. Co., 49 Mo. 380.

56. Stothard *v.* Aull, 7 Mo. 318.

reflection will make it clear that this recognition is the same as a holding out. The same conclusion is differently expressed by saying that if an officer of a corporation openly exercises a power which presupposes a delegated authority for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful, and the delegated authority will be presumed.[57]

(B) *Corporation Must Have Consented to Appearance of Power Exhibited by Agent.* A governing principle, and one which brings the matter down to the ordinary rule of estoppel *in pais*, is that the circumstances must have been such that the corporation must have apparently consented to the appearance of power exhibited by the agent.[58] To illustrate this, take the case where a sale of chattels belonging to a corporation was made by the treasurer of the corporation, who was not authorized by any by-law to make such sale, but was proved to have been in the habit of doing such business, with the knowledge and sanction of the company, and to have been in fact its sole managing agent. It was held that the sale was valid.[59] A stronger illustration is found in a case where a railroad company without objection allowed a person to rent an office on its right of way, and display a sign styling it the office of the company. It thereby became bound by the purchase of goods by him in its name, although he was in fact agent of a foreign corporation of the same name.[60]

(C) *Corporation Must Have Had Knowledge or Means of Knowledge of Act of Its Agent.* As in other cases where an estoppel is predicated upon passive acquiescence,[61] the corporation must have had knowledge of the representations of its agent as to the existence of the particular fact in order to become estopped from denying the existence of such fact.[62] This knowledge may, however, be imputed to the corporation where the circumstances were such that it became the duty of the board of directors to know. For example a knowledge of, and acquiescence in, the fact that the treasurer of a manufacturing corporation was indorsing the corporate name to commercial paper, sufficient to raise the implication of an agency for that purpose, may be imputed to the board of directors where even a casual examination of the books of the corporation would have disclosed the repeated exercise by the treasurer of such an assumed authority.[63]

(III) *Corporations Bound by Acts of Their Officers and Agents Within Scope of Their Apparent Powers.* It is but another expression of the doctrine of the preceding paragraph to say that persons dealing in good faith with the officers of a corporation may rely upon what they do or omit to do in the exercise of their apparent powers.[64] Stating the same doctrine differently, authority will be presumed on the part of an officer of a corporation, who openly exercises a power which presupposes such authority, where such corporate acts show that the corporation must have contemplated the legal existence of such authority.[65]

57. Fayles *v.* National Ins. Co., 49 Mo. 380.

58. Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 634. In New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30, the next preceding case was undoubtedly overruled, but yet the opinion of Comstock, J., herein, contains many observations which are sound and worthy of attention.

59. Phillips *v.* Campbell, 43 N. Y. 271, opinion by Peckham, J.

Other apt illustrations will be found in Lime Rock Bank *v.* Macomber, 29 Me. 564; Dean *v.* Ætna L. Ins. Co., 4 Thomps. & C. (N. Y.) 497; Chicago, etc., R. Co. *v.* James, 22 Wis. 194.

60. Florida Midland, etc., R. Co. *v.* Varnedoe, 81 Ga. 175, 7 S. E. 129.

For still another illustration see Alexander *v.* Brown, 9 Hun (N. Y.) 641, 644, per Daniels, J. See also Fay *v.* Noble, 12 Cush. (Mass.) 1.

61. See *infra*, XIV.

62. Wheeler *v.* Home Sav., etc., Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161 [*reversing* 85 Ill. App. 28].

63. Blake *v.* Domestic Mfg. Co., (N. J. Ch. 1897) 38 Atl. 241.

64. Home Sav., etc., Bank *v.* Wheeler, 74 Ill. App. 261.

65. Leroy, etc., Air-Line R. Co. *v.* Sidell, 66 Fed. 27, 13 C. C. A. 308.

(IV) *THEORY THAT FACT THAT CORPORATE OFFICER OR AGENT EXERCISES CERTAIN POWERS IS EVIDENCE OF HIS AUTHORITY*—(A) *In General.* Some of the cases disclose the theory that the fact that a corporation has appointed an agent of a particular kind or class is of itself evidence, upon which the public may safely act, that the agent may rightfully exercise the powers belonging to that kind or class of agents. Thus it is said that "the primary intention of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with the agent upon that understanding."[66] So also it is reasoned that where persons deal with an officer of a corporation, who assumes authority to act in the premises, and no want of authority or irregularity is brought to the knowledge of the party so dealing with the corporation, and nothing occurs to excite suspicion of such defect, the corporation is bound, although the agent exceeded his powers.[67] An extreme expression of the same doctrine is that corporations whose business is necessarily conducted altogether by agents will be required at their peril to see that the officers and agents employed by them not only know their powers but that they do not transcend them.[68]

(B) *Limitation of Foregoing Doctrine Suggested.* It is believed that the foregoing expressions of doctrine are applicable only to cases where the agent of a class so habitually exercises certain powers in the face of the public that the public fall into the habit of acting on the faith of their possessing them, and that the courts, on a principle of public policy and convenience, take judicial notice of the fact. Thus in one such case the contract of the agent bound the corporation because he was made in effect the superintendent of its business, and the contract was in the ordinary course of its business;[69] and in another case because he was its president and was also in the active management of its business.[70]

(C) *Evidence of Single Seizure of Power Not Sufficient.* A single seizure of power by a corporate officer or agent is not necessary to satisfy this rule and to furnish evidence of its rightful possession. There must be something in the nature of a continual or habitual exercise of it publicly and in the face of those who have the right to oppose.[71]

66. Ceeder *v.* H. M. Loud, etc., Lumber Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134.

67. Lungstrass *v.* German Ins. Co., 57 Mo. 107 [*citing* Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008].

68. Benesch *v.* John Hancock Mut. L. Ins. Co., 16 Daly (N. Y.) 394, 11 N. Y. Suppl. 714, 34 N. Y. St. 16.

69. Georgia Military Academy *v.* Estill, 77 Ga. 409.

70. Ceeder *v.* H. M. Loud, etc., Lumber Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134.

An illustration of the manner in which the courts have seemingly applied this doctrine may perhaps be found in a case where, for the purpose of establishing that a certain person was the agent of the corporation defendant, plaintiff offered letters written by the president of the corporation to that person, in which he was addressed as superintendent of the company, and the affairs and prospects of the company were discussed. It was shown that the president, for a considerable time before this and afterward, had assumed general authority in the affairs of the corporation, the control of its property, payment of its debts, and the management of its lawsuits. It was held that the letters were admissible without direct evidence of authority to write them, the presumption being indulged that the president was acting the part of a faithful executive, and with the knowledge and assent of the corporation. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248. So it has been held that where a mortgage given to secure a loan to a corporation recites on its face that it was duly authorized by the directors, the mortgagee, knowing that the corporation had power to borrow the money upon such security, has the right to assume that the necessary authority existed. Manhattan Hardware Co. *v.* Roland, 128 Pa. St. 119, 18 Atl. 429; Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110, 18 Atl. 428. But this conclusion might be placed on the presumption which attends a corporate instrument executed under its seal. See *infra*, XII, D, 3, c, (I) *et seq.*

71. In conformity with this view it has been held that neither a remittance of money to one as the agent of a bank by another party, and his consent to receive it as such, nor his admissions, nor the fact that he is a director of the bank, have any tendency to prove that he is in point of fact the agent of the bank. Holman *v.* Norfolk Bank, 12 Ala. 369.

(D) *Nor Is Evidence of the Doing of a Few Similar Isolated Acts.* Thus where a clerk of a corporation borrowed a sum of money from it and absconded with it, and it was shown that in two or three previous instances he had borrowed money of other persons in the name of the corporation, which moneys had been used by the corporation and repaid by another clerk, of which transactions the person making the loan in question had no knowledge, it was held that the corporation was not liable.[72]

(V) *General View That Officers and Agents of Corporations Are Held Out as Having Powers Commensurate With General Usages of Business in Which Corporation Is Engaged.* This doctrine is that the officers of a business corporation are impliedly held out to the public as having authority to act in accordance with the general usage, practice, and course of the business in which such corporation is engaged; and consequently that their acts, within the scope of such usage, practice, and course of business, will in general bind the corporation in favor of persons possessing no knowledge of limitations of their authority or who are not in possession of facts attaching such limitations, such as ought to put prudent men upon inquiry;[73] and on the other hand that the officer or agent of the corporation binds the corporation only by his acts in the usual course of business.[74] It must be manifest on a little reflection that the first proposition can be ascribed only to managing or general agents or officers.

g. Certain Powers Ascribed to Certain Corporate Officers by Implication of Law. In general toward third persons the officers of a corporation are to be considered as having the authority usually incident to their offices; the treasurer to act in respect of the finances, the secretary to keep the records, the general agent or manager to superintend the business for which the corporation was created.[75] Although judicial opinion on the question is not unanimous,[76] the prevailing American doctrine, founded upon considerations of the most obvious sense, justice, and business convenience, is that certain powers usually exercised by certain officers of business corporations are presumed to exist in them, and that the public in dealing with such corporations have the right to act upon this presumption until the contrary fact is disclosed. Such powers are said to exist in particular officers by implication of law.[77]

h. Extent to Which Persons Dealing With Corporations Are Bound to Take Notice of Authority of Their Officers and Agents — (I) *In General.* Generally speaking all persons dealing with the officers and agents of corporations are bound to take notice of the fact that they act under charters, general statutes, by-laws, or usages, which more or less define the extent of their authority. Such persons must therefore in doubtful cases at their peril acquaint themselves with the extent of that authority.[78]

72. Martin *v.* Great Falls Mfg. Co., 9 N. H. 51.

73. Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

74. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

75. Fay *v.* Noble, 12 Cush. (Mass.) 1.

76. The contrary doctrine has been maintained: That there is no grant of power in the name by which a corporate officer is designated; that persons dealing with the corporation are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon it contained in the charter and by-laws. Adriance *v.* Roome, 52 Barb. (N. Y.) 399; Farmers' Bank *v.* McKee, 2 Pa. St. 318. Such is the strict view taken by the English decisions, but it lacks favor in this country.

77. A striking illustration of this is presented by the acts of the cashier of a bank (not specially treated of in this article, but see, generally, BANKS AND BANKING) of whose powers the courts take judicial notice. U. S. *v.* Columbus City Bank, 21 How. (U. S.) 356, 16 L. ed. 130, where the duties of a cashier are judicially defined.

78. *Alabama.*— Commonwealth Bank *v.* Comegys, 12 Ala. 772, 46 Am. Dec. 278.

Connecticut.— Witte *v.* Derby Fishing Co., 2 Conn. 260; Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271.

Georgia.— Hall *v.* Carey, 5 Ga. 239.

Illinois.— Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453.

Massachusetts.— Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315; New Haven, etc., Co. *v.* Hayden, 107 Mass. 525; Brown *v.* Winnisimmet Co., 11 Allen 326; Burrill *v.* Nahant Bank, 2 Metc. 163, 35 Am.

(II) *Not Chargeable With Notice of Secret Instructions.* But where the corporation has within the foregoing principles clothed the agent with certain ostensible powers, third persons will not be limited by secret instructions given to the agent restricting such powers.[79]

(III) *Not Bound to Know That Authority Is Rightfully Exercised in Particular Instance.* Nor in the absence of fraud or collusion is the third person dealing with the corporation through its agent bound to know that he exercises his authority rightfully in the particular instance, the distinction being between limits of the power conferred and the rightful exercise of it within those limits.[80]

(IV) *May Take Representation of Agent That Power Is Rightfully Exercised.* Having ascertained that the agent possesses the power, and that the act about to be done is within the general limits of that power, the person dealing in good faith with the corporation through the agent is entitled, in the absence of notice to the contrary, or of circumstances putting him upon inquiry, to take and rely upon the declarations and representations of the agent as to facts and circumstances which show that he is rightfully exercising the power in the given case.[81]

(V) *Whether Third Persons Are Bound to Take Notice of Limitations of Authority of Agents Contained in By-Laws.* Another doctrine which seems to be gradually fading out is that unless the corporate officer or agent has acquired the appearance of possessing the powers which he has assumed in a given case to exercise, within the meaning of the principle already stated,[82] or unless, like a bank cashier or general manager, he is an agent of such a character that his power to do the particular act is implied in law, then the rule of the last section extends so far as to require any person dealing with the corporation through him to take notice of the extent of his powers, not only as conferred by the charter or governing statute, but also as conferred or limited by the by-laws[83]

Dec. 395. *Compare* Essex Turnpike Corp. *v.* Collins, 8 Mass. 292.

Michigan.— McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 100. *A fortiori* if the articles of association limit the authority of an officer, and these are exhibited to a person dealing with such officer, he is bound by the limitation therein. Hotchin *v.* Kent, 8 Mich. 526.

Missouri.— Washington Mut. F. Ins. Co. *v.* St. Mary's Seminary, 52 Mo. 480; Kansas City First Nat. Bank *v.* Hogan, 47 Mo. 472; Barcus *v.* Hannibal, etc., Plankroad R. Co., 26 Mo. 102.

New Hampshire.— New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187; Martin *v.* Great Falls Mfg. Co., 9 N. H. 51.

New York.— Alexander *v.* Canldwell, 83 N. Y. 480; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Risley *v.* Indianapolis, etc., R. Co., 1 Hun 202; Akin *v.* Blanchard, 32 Barb. 527; Partridge *v.* Badger, 25 Barb. 146; Beers *v.* Phœnix Glass Co., 14 Barb. 358; Corn Exch. Bank *v.* Cumberland Coal Co., 1 Bosw. 436; Knight *v.* Lang, 4 E. D. Smith 381, 2 Abb. Pr. 227; French *v.* O'Brien, 52 How. Pr. 394; Dabney *v.* Stevens, 40 How. Pr. 341; Benedict *v.* Lansing, 5 Den. 283; Troy Turnpike, etc., Co. *v.* McChesney, 21 Wend. 296; Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. 256; Litchfield Iron Co. *v.* Bennett, 7 Cow. 234.

Pennsylvania.— Fox *v.* Northern Liberties, 3 Watts & S. 103.

Tennessee.— Farmers', etc., Bank *v.* Chester, 6 Humphr. 458, 44 Am. Dec. 318.

Virginia.— Bocock *v.* Alleghany Coal, etc., Co., 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128.

Wisconsin.— Walworth County Bank *v.* Farmers' Loan, etc., Co., 16 Wis. 629.

Collection of facts which did not cast upon a person dealing with the agent of a trading corporation the duty to make inquiry as to his authority to sell the goods of the corporation at the price asked. Levy *v.* Metropolis Mfg. Co., 73 Conn. 559, 48 Atl. 429.

79. California Ins. Co. *v.* Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376; Rivara *v.* Queens Ins. Co., 62 Miss. 720; Benesch *v.* John Hancock Mut. L. Ins. Co., 11 N. Y. Suppl. 348, 32 N. Y. St. 73; Farmers' Mut. Ins. Co. *v.* Taylor, 73 Pa. St. 342.

80. Cook *v.* Beatrice, 32 Nebr. 80, 48 N. W. 828.

81. Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; North River Bank *v.* Aymar, 3 Hill (N. Y.) 262. Although this last case was reversed in the court of errors, yet as the decision of that court was never reported the court of appeals of New York, in the subsequent case of Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678 [*affirming* 4 Duer (N. Y.) 219], regarded it as authority for the above proposition.

82. See *supra*, X. D, 1, f, (II), (B).

83. Adriance *v.* Roome, 52 Barb. (N. Y.)

of the corporation. More broadly and loosely it has been said that "every person dealing with a corporation is bound to take notice of its constitution, by-laws, and ways of doing business." [84] To this extent the principle already considered holds good, that a person dealing with a corporation is bound to know whether or not the person who assumes to represent it and to act in its name is authorized to do so.[85] The theory which justifies this rule is that the ministerial officers of corporations are presumptively special and not general agents,[86] and that the only general agents in contemplation of law are the directors, when acting together as a board. But it elsewhere sufficiently appears [87] that the tendency of modern decisions is to regard the by-laws of private corporations as being in the nature of private rules and regulations for the government of the officers, agents, and members of the corporation as among themselves, and not as governing the relations of the corporation with strangers who have no notice of such by-laws, and who have not the means of rightfully acquiring knowledge of them. The rule which requires strangers to notice them at their peril seems to be shockingly absurd and unjust. The true doctrine is that the by-laws of a corporation limiting the authority which would ordinarily be inferred from the employment pursued by its agent are binding on a third person who knows of them, but not if he does not know of them.[88] For example the by-laws of a corporation engaged in carrying on a large department store do not affect contracts made with third persons who relied on the apparent authority of the executive agents of such corporation.[89]

(VI) *Strangers Deal With Corporate Agents Acting For Themselves at Their Peril.* A person who enters into a contract with a corporate officer or agent, knowing that he is not acting for the corporation, cannot of course hold the corporation liable on the contract.[90] The rule is the same where the circumstances put him upon inquiry. Therefore one who receives from an officer of a corporation the securities of the corporation as security for a personal debt of such an officer does so at his peril.[91]

i. **Proof of Authority of Corporate Agent** — (I) *Provable by Books and Records of Corporation* — (A) *In General.* The books and records of the corporation as elsewhere seen are admissible against the corporation [92] on the footing of self-disserving statements or admissions made by it. A transaction entered upon the books of the corporation, although by its ministerial officers, is presumed to have been done with the knowledge and assent of the trustees, who are responsible for the acts of the officers whom they place and retain in position.[93] The records of the corporation may be admitted to prove any other relevant fact. For example the records of a shareholders' meeting are admissible in evidence in an action against the corporation to recover the value of services

399; Dabney *v.* Stevens, 2 Sweeny (N. Y.) 415, 10 Abb. Pr. N. S. (N. Y.) 39, 40 How. Pr. (N. Y.) 341.

84. Bocock *v.* Alleghany Coal, etc., Co., 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128; Bockover *v.* Life Assoc. of America, 77 Va. 85. See also Haden *v.* Farmers', etc., F. Assoc., 80 Va. 683; Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337.

85. Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 417, 1 Am. St. Rep. 123; Smith *v.* Co-operative Dress Assoc., 12 Daly (N. Y.) 304; Bocock *v.* Alleghany Coal, etc., Co., 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128.

86. Officers of a corporation it is said are special and not general agents; consequently they have no power to bind the corporation except within the limits prescribed by the charter and by-laws. Persons dealing with such officers are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon it contained in the charter and by-laws. Nor is there any grant of power in the name by which such officer is designated. Adriance *v.* Roome, 52 Barb. (N. Y.) 399.

87. See *supra*, V, A, 5.

88. Hallenbeck *v.* Powers, etc., Casket Co., 117 Mich. 680, 76 N. W. 119.

89. Standard Fashion Co. *v.* Seigel-Cooper Co., 44 N. Y. App. Div. 121, 60 N. Y. Suppl. 739.

90. Patten *v.* Climax Quick Tanning Co., 40 N. Y. App. Div. 607, 57 N. Y. Suppl. 758.

91. Wheeler *v.* Home Sav., etc., Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161 [*reversing* 85 Ill. App. 28].

92. See *supra*, VI, P, 5, b, (I).

93. Paine *v.* Irwin, 59 How. Pr. (N. Y.) 316.

rendered, to prove that the improvement with respect to which the services were rendered was recognized by the corporation.[94]

(B) *If Books Not Produced, Secondary Evidence of Their Contents Necessary.* When an effort is made to prove the fact of agency by an order upon the corporate books the books themselves must be produced or secondary evidence given of their contents after notice to produce them.[95]

(II) *Provable by Other Relevant Written Instruments.* Proof may also be made by other written instruments which afford evidence of official acts done. Thus it has been held that checks purporting to have been drawn by the president of a canal company on their treasurer in favor of contractors are evidence to show that such person acted as their president;[96] and similar instruments might no doubt be admitted under proper conditions, at least on the footing of relevant circumstances, to be considered in connection with other facts for the purpose of proving the powers of subordinate agents.

(III) *Provable by Parol.* The power of a corporate agent may be proved by parol evidence.[97]

(IV) *Provable by Circumstantial Evidence.* The authority of an agent of a corporation, like that of an agent of a natural person, may be proved by facts and circumstances, written evidence not being necessary.[98]

(V) *Provable by Parol Evidence of Recognition and Habitual Action.* Proof may also be made by parol evidence, including evidence of recognition or of habitual action, under principles already discussed. To illustrate: The testimony of a director of a railroad company as to the official position and authority of a certain person as member of the executive committee, coupled with evidence that he was recognized and acted as such, is competent and sufficient to show his authority to act for the corporation as to third persons.[99] So evidence that a contract for the keeping of the horses of a canal company was made in behalf of the corporation, by one who was directed to make it by the assistant of the general superintendent of the corporation, and that the corporation sent their horses to be kept under the contract, and that they were so kept for several weeks, has been held sufficient evidence to leave to the jury the question of the authority from the corporation to make the contract.[1]

(VI) *Proof Helped Out by Presumption of Right-Acting.* Finally, at a certain limit, the party affirming the agency need not go further, but his proof will be helped out by the presumption of right-acting on the part of the corporate officials.[2] Thus it has been held that in an action against a corporation upon a note signed by its officers, where it appears that the execution of the note was expressly authorized at a meeting of the board of directors, it will be presumed

94. Clarke *v.* Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887.

95. Montgomery R. Co. *v.* Hurst, 9 Ala. 513.

96. Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393.

97. Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Evidence sufficient to sustain a finding that the general agent of a corporation was authorized to make a certain contract. Siemens Regenerative Gas-Lamp Co. *v.* Horstmann, 16 Atl. 490, 24 Wkly. Notes Cas. (Pa.) 396.

98. Elysville Mfg. Co. *v.* Okisko Co., 5 Md. 152. There are cases which suggest that parol evidence of the authority of such an agent is only heard where there is no written evidence on the records of the corporation. Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361. But this is not the true conception. The records of a corporation having been made by the corporation for their own purposes, not being binding on a stranger, he may resort for proof of the agency to parol evidence, just as though the record did not exist, and may prove the authority given by a private corporation to its agent to enter into a contract on its behalf by parol evidence, although such authority was conferred at a meeting of its directors, and although the record was made of the resolution conferring it. Morrill *v.* T. C. Segar Mfg. Co., 32 Hun (N. Y.) 543. The idea of proving the authority of corporate officers, and this by the way is not a new idea in the law, will be discovered by an examination of the old case of Manby *v.* Long, 3 Lev. 107.

99. St. Louis, etc., R. Co. *v.* Drennan, 26 Ill. App. 263.

1. Stone *v.* Western Transp. Co., 38 N. Y. 240.

4. 4 Thompson Corp. § 4894.

in the absence of any proof to the contrary that the board was rightfully in session at the time such authority was given.[3]

(VII) *Antecedent Authority Proved by Subsequent Recognition and Adoption.* On the principle hereafter stated[4] the fact of agency and the authority of the agent are often proved by a subsequent recognition and adoption on the part of those who have the power to affirm or disaffirm for the corporation, and subsequent recognition or adoption warranting a finding that the previous act was authorized by the corporation.[5]

(VIII) *Other Evidence Bearing on Question of Authority of Corporate Agent.* In an action to recover the value of services, where the corporation denies that it employed plaintiff to render the services, the record of a meeting of shareholders is admissible in evidence to show that the improvement was recognized by the corporation.[6] In an action against a corporation for goods sold and delivered evidence that an alleged officer of the corporation was in its offices transacting its business and conversing with parties dealing with it was held admissible in order to lay a foundation for evidence that such officer ordered and received the goods in controversy on behalf of the corporation.[7] On an issue whether certain cattle which had been purchased by the superintendent of a corporation were purchased for the corporation or for himself individually, the fact that a note given in part payment was signed by him individually was not regarded as being conclusive of the fact that the sale was made to him personally.[8]

j. Authority to Execute Sealed Instrument Presumed From Corporate Seal and Proper Signatures. When the instrument is under the corporate seal the mode of proof is easier. The rule is said to be that when the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority. The contrary must be shown by the objecting party.[9]

k. Delivery to and Possession by Corporation. Delivery to an officer or agent of a corporation who is empowered to receive the thing for the corporation is of course delivery to the corporation, and his custody is the custody of the corporation,[10] and the corporation and not the officer or agent receiving the custody of the thing, will be considered, with respect to the owner, as the depositary.[11] On the other hand the possession of the chattel by an officer of a corporation will not be the possession of the corporation, unless the chattel is held in his official character and for corporate purposes.[12]

l. Interpretation of Grants of Power to Corporate Agents — Powers Included by Implication — (I) *In General.* A grant of power by a corporation to an agent is interpreted by the same canon which applies in the interpretation of grants of power by the sovereign to corporations in their charters; the grant of a

3. Hardin *v.* Iowa R., etc., Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52.

4. See *infra*, XV, A, 1, a.

5. Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315.

6. Clarke *v.* Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887.

7. Deutz Lithographing Co. *v.* International Registry Co., 32 Misc. (N. Y.) 687, 66 N. Y. Suppl. 540.

8. Lake Shore Cattle Co. *v.* Modoc Land, etc., Co., 130 Cal. 669, 63 Pac. 72, opinion by McFarland, J.

Evidence sufficient to raise a question for a jury whether an employee of a corporation had authority to make a contract for advertising the goods of the corporation in a magazine for two years. Conant *v.* American Rubber Tire Co., 48 N. Y. App. Div. 327, 62 N. Y. Suppl. 972.

9. St. Louis Public Schools *v.* Risley, 28 Mo. 415, 75 Am. Dec. 131. See Chouquette *v.* Barada, 28 Mo. 491; Berks, etc., Turnpike Road *v.* Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402. See *infra*, XII, D, 3, c, (II), (A) *et seq.*

This rule has been applied to the case where the officers of a corporation who customarily are empowered to act in its behalf executed a note in its name and caused the execution to be authenticated by the corporate seal. Bullen *v.* Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115.

10. Moore *v.* Atlantic Mut. Ins. Co., 56 Mo. 343.

11. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

12. Doyle *v.* Mizner, 40 Mich. 160.

general power carries with it by implication a grant of all the special powers which are necessary to effectuate the grant of the general power; and also all those general powers which by reasonable implication are included in the general grant, unless in either case a purpose to exclude such special power is manifest from some other portion of the instrument making the grant.[13]

(II) *Instances Under This Rule.* To give an instance under this rule, a grant of power to the vice-president of a bank to give a bond for the security of county moneys loaned to the bank includes power to give collateral security.[14] A railway engineer was appointed by the company its agent to procure the plaintiff's signature to a writing. He consented to a delay of one month. It was held that the company was bound by this action.[15] A grant of power to do an act which is severable manifestly includes the power to do a part of it.[16] So officers of a public corporation authorized to issue a certain amount of its bonds have the power and right, upon a sufficient reason, to issue a less amount.[17] Again if an agent has authority to purchase land for a corporation he may bind it by his agreement to pay more than the consideration expressed in the deed.[18] So an agent of a corporation charged with the performance of a particular duty may contract for the assistance of third persons necessary for this purpose.[19] So a general power confided to the agent of a manufacturing corporation by its by-laws to manage the affairs of the corporation committed to its care, to exercise the powers committed to him according to his best ability and discretion, promptly to collect all assessments and other sums that should become due to the corporation, and to disburse according to the order of the board of directors, who were made a board of control over him, has been held to include — if the board of directors did not interpose to control his proceedings — an authority to employ workmen to carry on the business of the corporation and to pay them with its funds or, not being in funds, to give the notes of the corporation in payment.[20] So it has been held that a resolution of the directors of a corporation whose business necessarily requires the employment of workmen to pay a certain rate of compensation to a certain class of workmen does not exclude the power to hire additional workmen on the same terms.[21] The power conferred upon an officer of a corporation to object to a plant constructed for the corporation if he is not satisfied therewith includes the power to accept if he is satisfied.[22] A by-law of a land company giving the president the general supervision of the business of the company, with power to sign all contracts, empowers him to employ a surveyor to plat the land of the company so as to bind the company for his services.[23]

(III) *Instances Not Included Within This Rule.* On the other hand it has been held that the grant of power by the directors of a corporation to execute a note for a certain sum at a given rate of interest does not include the power to execute a note which stipulates for the payment of attorney's fees in the event of

13. See *infra*, XVII, A, 1, c *et seq.*

14. Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294.

15. Pratt *v.* Hudson River R. Co., 21 N. Y. 305.

16. Thus where a number of notes were placed by a corporation in the hands of trustees, who were authorized by resolution of the directors to dispose of any of them in a specified manner, and such trustees transferred a portion of them for the purpose stated, it was held that the transfer was valid. Warner *v.* Chappell, 32 Barb. (N. Y.) 309.

17. Chicago, etc., R. Co. *v.* Ozark Tp., 46 Kan. 415, 26 Pac. 710.

18. Kickland *v.* Menasha Wooden Ware Co., 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831.

19. Lovejoy *v.* Middlesex R. Co., 128 Mass. 480. Thus a railroad company which sends an agent to remove a wreck on its road gives him implied authority to employ necessary outside assistance and is liable to a bystander who on his request assists in the labor and is injured by the negligence of the company in furnishing defective appliances with which to do the work. Goff *v.* Toledo, etc., R. Co., 28 Ill. App. 529.

20. Bates *v.* Keith Iron Co., 7 Metc. (Mass.) 224.

21. Hardy *v.* Tittabawassee Boom Co., 52 Mich. 45, 17 N. W. 235.

22. Frey-Sheckler Co. *v.* Iowa Brick Co., 104 Iowa 494, 73 N. W. 1051.

23. Heinze *v.* South Green Bay Land, etc., Co., 109 Wis. 99, 85 N. W. 145.

a suit for collection.[24] Nor does the grant of power by a railroad company to an agent to "procure a right of way" include the power to promise an owner of land that the company will locate a depot in a certain place.[25]

m. Power of Agent Cannot Exceed Power of Corporation — (I) *In General.* In all these cases it must be borne in mind that the powers of the agents of corporations are necessarily limited to such contracts as the corporation may lawfully make, and to such acts as the corporation may lawfully do;[26] and that it cannot be presumed that the agent of a corporation had authority to transact business which the corporation was not by its charter authorized to engage in.[27] Nor will the corporation be estopped from repudiating an attempted contract made by its agent which the corporation itself had no power to make.[28]

(II) *Power of Agent Ceases With Power of Corporation.* Consequently when the power of the corporation to do a given act ceases, as by its dissolution, the power of an agent of the corporation to bind it or its funds in liquidation by doing the prescribed act necessarily ceases also.[29]

n. Corporation Responsible For Acts of Officers and Agents Holding Over. If after the expiration of the term of their office or agency the corporation permits the officer or agent to continue in the face of the public to exercise the duties of the office or agency, unquestionably the corporation will be bound by such of his acts as would bind it if he were an officer or agent *de jure*.[30] The meaning is that, regardless of any term of office, however specified, the agent of a corporation, like the agent of an individual, has power to bind the corporation so long as he is held out as qualified for this purpose. Likewise if the agency be general and unlimited in terms it continues until the principal revokes the authority or ceases to exist.[31]

o. Determination of Office or Agency Releases Surety on Official Bond — (I) *In General.* The obligations of sureties for the conduct of officers will not be enlarged to embrace a period beyond the term of office, although the officer is permitted by the corporation to hold over, and no successor has been appointed.[32]

(II) *When Office or Agency Determines For Purpose of This Rule.* Subordinate officers and agents of corporations are deemed officers of the corporation and not of the directors. Their offices and agency do not hence necessarily terminate with the expiration of the offices of the directors, but they may continue to perform their functions after the particular members of the board by whom they were appointed have passed out of office.[33] Consequently the sureties of the official bond of such an agent may be liable for the faithful conduct of his duties

24. Hardin *v.* Iowa R., etc., Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52.

25. Houston, etc., R. Co. *v.* McKinney, 55 Tex. 176.

Another illustration.— Authority given by the board of directors to certain officers to execute a bond to secure the performance of a contract does not empower them to sign a bond providing for liquidating damages. Roberts *v.* Washington Water Power Co., 19 Wash. 392, 53 Pac. 664.

26. Downing *v.* Mt. Washington Road Co., 40 N. H. 230.

27. Alexander *v.* Cauldwell, 83 N. Y. 480.

28. Hood *v.* New York, etc., R. Co., 22 Conn. 1, 502; Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543. See to the contrary Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507, railroad company estopped from denying authority of agent to represent that it will carry beyond its own line.

29. Wilson *v.* Tesson, 12 Ind. 285 [*citing* State *v.* Vincennes University, 5 Ind. 77].

30. Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 1.

31. Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Thompson *v.* Young, 2 Ohio 334.

32. Mutual Loan, etc., Assoc. *v.* Price, 16 Fla. 204, 26 Am. Rep. 703; Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 1; Bigelow *v.* Bridge, 8 Mass. 275; Dover *v.* Twombly, 42 N. H. 59; Peppin *v.* Cooper, 2 B. & Ald. 431; St. Saviour *v.* Bostock, 2 B. & P. N. R. 175; Liverpool Water-Works *v.* Atkinson, 6 East 507, 2 Smith K. B. 654; Curling *v.* Chalklen, 3 M. & S. 502; Hassell *v.* Long, 2 M. & S. 363; Arlington *v.* Merricke, 2 Saund. 411.

33. Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

after the expiration of the terms of office of the directors by whom he was appointed.[34]

2. Their Declarations and Admissions — a. Declarations Made Dum Fervet Opus. The declarations of an agent of a corporation as to the matter in his charge, accompanying his acts as agent, stand on the same ground with the acts themselves, and both go to show what has been the conduct of the corporation in the matter to which they relate.[35] Such declarations of agents are often called verbal acts.

b. Declarations as to Present Matters. It is merely to state the same rule a little differently, to say that declarations made by the officers or agents of corporations, while acting in the course of their official duties or of the business of their agency, with reference to the then existing state of affairs, are admissible in evidence as part of the *res gestæ*.[36]

c. Declarations Made With Reference to Past Transactions. As a corporation can speak only through the mouths of its agents, their declarations or admissions as to past transactions will be admissible in evidence against the corporation, provided it was within the scope of their office or agency to make declarations or admissions on the particular subject.[37]

d. Declaration Must Have Been Made With Reference to Matters Within Scope of Agency — (I) *In General.* Such declarations, in order to bind the corporation, must of course have been made with reference to matters within the scope of the office or agency of the person making them.[38] The rights of the shareholders are not to be affected by the irregular transactions or by the declarations or confessions of their officers beyond the legal sphere of their action.[39] In other words such declarations must have been made officially and not privately.[40]

(II) *Authority of Corporate Officers to Make Declarations Scrutinized.* Where it is sought to bind the corporation by the declarations of its offi-

34. Anderson *v.* Longden, 1 Wheat. (U. S.) 85, 4 L. ed. 42. See also Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335; Northampton Bank *v.* Pepoon, 11 Mass. 288; Exeter Bank *v.* Rogers, 7 N. H. 21. For the governing principle see also Curling *v.* Chalklen, 3 M. & S. 502. It followed that a bond of indemnity given to the trustees of a public unincorporated insurance company in England conditioned for the good conduct of a clerk while in the service of the company remained in full force during the period within which the clerk continued to serve the company, although there may have been a very considerable annual fluctuation in the membership of the company. Metcalfe *v.* Bruin, 2 Camph. 422, 12 East 400, 11 Rev. Rep. 432.

35. Toll Bridge Co. *v.* Betsworth, 30 Conn. 380, declarations made by drawbridge tenders at various times that they preferred to have them sail through instead of warping through, binding on the toll-bridge company.

36. Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37; Union Sav. Assoc. *v.* Edwards, 47 Mo. 445; Spelman *v.* Fisher Iron Co., 56 Barb. (N. Y.) 151.

Declarations of agents of corporations affecting the sureties on their official bonds.— Union Sav. Assoc. *v.* Edwards, 47 Mo. 445; Cheltenham Fire-Brick Co. *v.* Cook, 44 Mo. 29; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Smith *v.* Whittingham, 6 C. & P. 78, 25 E. C. L. 330.

37. Morse *v.* Connecticut River R. Co., 6 Gray (Mass.) 450 (admissions of the officers of a railway company as to the manner of the loss of a passenger's baggage); Malecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17 (declarations of a street railway superintendent justifying an assault upon a passenger).

38. National F. Ins. Co. *v.* Denver Consol. Electric Co., (Colo. App. 1901) 63 Pac. 949; Cosh-Murray Co. *v.* Adair, 9 Wash. 686, 38 Pac. 749 (unless previously authorized or subsequently ratified); Walrath *v.* Champion Min. Co., 63 Fed. 552. On this ground the declaration of the secretary of a corporation as to the amount due on a mortgage has been held not admissible. Johnston *v.* Elizabeth Bldg., etc., Assoc., 104 Pa. St. 394. And so of a certificate by the treasurer of a corporation, and so also a consulting director, as to a balance due on account of salary. Kalamazoo Novelty Mfg. Co. *v.* McAlister, 36 Mich. 327.

39. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 7 Am. Dec. 194. The declaration of an agent outside the scope of his agency is like the *obiter dictum* of a judge.

40. Stewart *v.* Huntingdon Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628. See also Pemigewassett Bank *v.* Rogers, 18 N. H. 255; Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28. *Compare* Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713, which contains language which in connection with the facts seems inconsistent with this principle,

cers or agents, a careful scrutiny will be instituted to determine whether such declarations are within the scope of their authority, and if found to be in excess of it the declaration will not be left in evidence.[41] To warrant the admission of such a declaration there must be either an actual authority or a reasonable presumption of authority.[42]

e. Such Declarations Must Have Been External, Not Merely Internal, Communications. Such declarations, in order to bind the corporation, must have been something more than mere communications to the directory or to the shareholders by the officer or agent;[43] but where they relate to a claim against the corporation, if made to the directors in the presence of claimant and allowed to pass uncontradicted, they will be evidence against the corporation, although not conclusive.[44]

f. Declarations of Individual Shareholders Not Binding on Corporation. The declarations or admissions of individual shareholders are not binding upon the corporation.[45]

g. Declarations of Individual Directors. The declarations of a single director will not bind the corporation, unless in addition to his office of director he is holding some office or exercising some agency under the corporation.[46] A broad statement of this doctrine is that neither shareholders nor directors, without special power, can create a corporate liability; hence the confessions, admissions, or knowledge of either, while not engaged in the precise business confided to them, cannot affect the corporation.[47] Such declarations, to be even evidentiary against the corporation, must be ordinarily made at a meeting of the board;[48] otherwise

41. Wakefield *v.* South Boston R. Co., 117 Mass. 544; Hackney *v.* Allegheny County Mut. Ins. Co., 4 Pa. St. 185; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

42. Custar *v.* Titusville Gas, etc., Co., 63 Pa. St. 381.

43. Hall *v.* Mobile, etc., R. Co., 58 Ala. 10.

44. Williams *v.* Christian Female College, 29 Mo. 250, 77 Am. Dec. 569.

45. *Connecticut.*— Fairfield County Turnpike Co. *v.* Thorp, 13 Conn. 173.

Georgia.— Mitchell *v.* Rome R. Co., 17 Ga. 574.

Maine.— Oldtown Bank *v.* Houlton, 21 Me. 501; Ruby *v.* Abyssinian Religious Soc., 15 Me. 306; Polleys *v.* Ocean Ins. Co., 14 Me. 141.

New York.— Osgood *v.* Manhattan Co., 3 Cow. 612, 15 Am. Dec. 304.

Ohio.— Loomis *v.* Eagle Bank, 1 Disn. 285, 12 Ohio Dec. (Reprint) 625.

46. *Illinois.*— Grayville, etc., R. Co. *v.* Burns, 92 Ill. 302.

Maine.—Ruby *v.* Abyssinian Religious Soc., 15 Me. 306.

New Hampshire.— Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

New York.— East River Bank *v.* Hoyt, 41 Barb. 441; Soper *v.* Buffalo, etc., R. Co., 19 Barb. 310.

Ohio.— Loomis *v.* Eagle Bank, 1 Disn. 285, 12 Ohio Dec. (Reprint) 625.

See also *supra*, IX, E, 1, b, (I) *et seq.*

A qualification is sometimes made, "unless they are within the scope of his ordinary powers, or some special agency relative to the subject-matter." Soper *v.* Buffalo, etc., R. Co., 19 Barb. (N. Y.) 310, 312, per Strong, J., but this expression is inaccurate, since no director has such a power, "ordinary" or otherwise, touching the corporation. In another case the expression of doctrine is that the declarations of individuals, who are directors of a corporation, not forming a part of an official act, are not admissible to prove an antecedent fact against the corporation. Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

47. Loomis *v.* Eagle Bank, 1 Disn. (Ohio) 285, 12 Ohio Dec. (Reprint) 625.

48. *Alabama.*— Holman *v.* Norfolk Bank, 12 Ala. 369.

Connecticut.— Fairfield County Turnpike Co. *v.* Thorp, 13 Conn. 173; Hartford Bridge Co. *v.* Granger, 4 Conn. 142; Lockwood *v.* Smith, 5 Day 309; Hartford Bank *v.* Hart, 3 Day 491, 3 Am. Dec. 274.

Maine.— Polleys *v.* Ocean Ins. Co., 14 Me. 141.

New Hampshire.— Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

New York.— Soper *v.* Buffalo, etc., R. Co., 19 Barb. 310; First Baptist Church *v.* Brooklyn F. Ins. Co., 18 Barb. 69 [*reversed* in 19 N. Y. 305]; National Bank *v.* Norton, 1 Hill 572; Osgood *v.* Manhattan Co., 3 Cow. 612, 15 Am. Dec. 304.

Pennsylvania.— Stoystown, etc., Turnpike Road Co. *v.* Craver, 45 Pa. St. 386; Stewart *v.* Huntingdon Bank, 11 Serg. & R. 267, 14 Am. Dec. 628.

Tennessee.— Jones *v.* Planters' Bank, 9 Heisk. 455.

England.— Holt's Case, 22 Beav. 48; Matter of Royal British Bank, 3 De G. & J. 387, 5 Jur. N. S. 205, 28 L. J. Ch. 257, 7 Wkly. Rep. 217, 60 Eng. Ch. 301; McMillan *v.* Liverpool, etc., Steamship Co., 38 L. T. Rep. N. S. 288.

a single director might revoke or alter the engagements or any or all the others.[49]

h. Personal Responsibility For Erroneous Declarations. Outside the limits of fraud and negligence, there is in general no personal liability on the part of an officer or agent of the corporation for damages which may accrue to a third person in consequence of giving erroneous information to him.[50]

3. Powers of Ministerial Officers and Agents Touching Particular Acts — a. Appointment of Agents, Foremen, Etc. Under a power given to the directors of a company "to appoint a secretary and such surveyors and other assistants as may be necessary," they have authority to appoint an agent who may sign contracts on such terms as may be previously authorized by them.[51] Where the superintendent of a manufacturing corporation hired a foreman for the mill of the company, the company was bound thereby, the contract being within the general scope of the authority of the superintendent.[52]

b. Borrowing Money. It has been well observed that the authority of the agent of a corporation to borrow money for the use of his principal may be inferred from the character of his agency, his habit of borrowing money for the corporation, and the fact of the application of the money to the use of the corporation, without any direct authority being shown by a resolution by the board of directors.[53]

c. Touching Commercial Paper — (I) *Indorsing For Accommodation* — (A) *In General.* The power to indorse commercial paper for the accommodation of third persons is denied to agents, because it does not exist in the corporation itself unless expressly granted by charter or governing statute.[54] Such an indorsement is void in the hands of everyone who has notice that it is made for accommodation,[55] although good in the hands of all innocent purchasers of the paper.[56]

(B) *Such Power Implied From Previous Recognition.* But it has been held that a corporation cannot evade liability on negotiable paper indorsed with its name, by their agent, for the accommodation of a third person, on the ground that the agent had no authority so to indorse it, if it appears that the agent had frequently before indorsed their paper, and procured it to be discounted by plaintiff, and received the avails, and that the corporation had recognized the validity of such previous transactions.[57]

(II) *Notes Executed in Name of Corporation Presumed to Be Corporate Obligations.* A note purporting to be a note of a corporation, and signed by its agent, is therefore at the outset presumed to be a corporate obligation;[58] and the party denying it must do so by a plea, or by an answer in the nature of a plea, of *non est factum*, which in most jurisdictions must be under oath.[59]

Proof of authority necessary.— In an action by a bank, evidence of parol declarations of "officers of the bank" is not admissible for the defendant, without proof of the particular officers being authorized by the board of directors to speak for them, even though it should appear that the board of directors kept no minutes of their transactions. Stewart *v.* Huntingdon Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628.

49. East River Bank *v.* Hoyt, 41 Barb. (N. Y.) 441, per Clarke, J. See also Shackelford *v.* New Orleans, etc., R. Co., 37 Miss. 202. As to the right and necessity of consultation see *supra*, IX, E, 6.

50. Herrin *v.* Franklin County Bank, 32 Vt. 274.

51. Wright *v.* Delafield, 23 Barb. (N. Y.) 498.

52. Peck *v.* Dexter Sulphite Pulp, etc., Co., 164 N. Y. 127, 58 N. E. 6.

53. Allen *v.* Citizens' Steam Nav. Co., 22 Cal. 28. So as to the agent who usually transacts the financial business of the company. Elwell *v.* Dodge, 33 Barb. (N. Y.) 336; Beers *v.* Phœnix Glass Co., 14 Barb. (N. Y.) 358.

54. See *infra*, XVII, C, 4, a, (I) *et seq.*

55. Genesee Bank *v.* Patchin Bank, 13 N. Y. 309, 19 N. Y. 312.

56. See *infra*, XVII, C, 4, c.

Evidence held not sufficient to suggest to the taker of the paper that it was indorsed for accommodation. Chemical Nat. Bank *v.* Colwell, 16 Daly (N. Y.) 28, 9 N. Y. Suppl. 285, 29 N. Y. St. 726.

57. Auburn Bank *v.* Putnam, 1 Abb. Dec. (N. Y.) 80.

58. Butts *v.* Cutbertson, 6 Ga. 166; Bradley *v.* McKee, 3 Fed. Cas. No. 1,784, 5 Cranch C. C. 298.

59. Instances of promissory notes held cor-

(III) *Such Powers Inferred From Public Habit of Exercising Them.* Under principles already stated [60] the power to make, accept, or indorse commercial paper may be inferred from the public habit of exercising it. For instance the authority of the president of a corporation to indorse notes may be shown by acquiescence or ratification by the trustees, or by proof of such a course of dealing by the president, and such negligence on the part of the trustees as would estop the corporation from denying his authority.[61]

(IV) *Power to Appoint Agents to Draw, Indorse, Etc.* The officers of a corporation, unless prohibited by its charter, may confer authority upon an agent to draw and execute bills of exchange on behalf of the company. And no action in writing on the part of the board of directors is necessary in order to vest such authority in the agent.[62]

d. Arranging Novation. The novation of a debt due from a corporation is within the authority of a general agent who has power to pay its debts.[63]

e. Increasing Capital Stock. It is plainly not within the implied powers of any corporate officer to bind the corporation to increase the capital stock, by an agreement with an employee that the latter shall receive stock for his services, when the corporation holds no stock.[64]

f. Releasing Contracts. Where the by-laws of a corporation provided that its superintendent should, with the approval of the president, buy and sell material and make all contracts for the same, and that the superintendent and all others should be subject to the control of the board of directors in everything where the board should elect to exercise such control, it was held that the president, who also held the office of superintendent, had power to release a contract executed by him as president, without the seal of the company, and without any express resolution or ratification of the directors; and that a disaffirmance by them, by a resolution passed two years after the release, or by bringing suit on the contract six months after a knowledge of the release, was too late.[65]

g. Compromising Disputed Claims. One who is the cashier and one of the bookkeepers and the corresponding clerk of a manufacturing company, and who is sent by the company to another place to collect a bill, has no implied authority to enter into an extraordinary contract compromising a dispute, settling unliqui-

porate obligations. Lake Shore Nat. Bank *v.* Butler Colliery Co., 51 Hun (N. Y.) 63, 3 N. Y. Suppl. 771, 20 N. Y. St. 688; Liebscher *v.* Kraus, 74 Wis. 387, 43 N. W. 166, 17 Am. St. Rep. 171, 5 L. R. A. 496.

60. See *supra*, X, D, 1, f, (I) *et seq.*

61. National Bank of Republic *v.* Navassa Phosphate Co., 56 Hun (N. Y.) 136, 8 N. Y. Suppl. 929, 30 N. Y. St. 289. But it has been held that evidence that the general agent of a corporation was in the habit of giving notes for such company is inadmissible, unless there is an offer to prove that the company had some knowledge that the agent was in the practice of giving notes in the name of the company. Lawrence *v.* Gebhard, 41 Barb. (N. Y.) 575. *Compare* Dabney *v.* Stevens, 2 Sweeny (N. Y.) 415, 10 Abb. Pr. N. S. (N. Y.) 39, 40 How. Pr. (N. Y.) 341. That such authority may be shown by other evidence than the by-laws see Brown *v.* Donnell, 49 Me. 421, 77 Am. Dec. 266.

62. Preston *v.* Missouri, etc., Lead Co., 51 Mo. 43.

When corporation cannot set up its by-laws to disprove such authority see Marine Bank *v.* Butler Colliery Co., 1 Silv. Supreme (N. Y.) 155, 5 N. Y. Suppl. 291, 23 N. Y. St. 318.

63. Mulcrone *v.* American Lumber Co., 55 Mich. 622, 22 N. W. 67.

Want of power in agent of manufacturing corporation to bind the company by issuing non-transferable "labor tickets." Stanley *v.* Sheffield Land, etc., Co., 83 Ala. 260, 5 So. 34. That the acceptance of an order by a corporation to pay money already provided for by a contract with it is not within a governing instrument requiring all contracts creating liabilities for the payment of money to be signed by at least three members of the board of managers see French Spiral Spring Co. *v.* New England Car Trust, 32 Fed. 44.

64. Finley Shoe, etc., Co. *v.* Kurtz, 34 Mich. 89. That the president and secretary of a corporation have power to bind it by an agreement to pay a certain number of its shares to a broker for procuring a loan for it see Arapahoe Cattle, etc., Co. *v.* Stevens, 13 Colo. 534, 22 Pac. 823.

65. Indianapolis Rolling Mill Co. *v.* St. Louis, etc., R. Co., 120 U. S. 256, 7 S. Ct. 542, 30 L. ed. 639.

dated damages, releasing a debt due to the company, and in effect giving away its property.[66]

4. Civil and Criminal Liability of Ministerial Officers and Agents — a. Responsibility of Officers and Agents to Corporation — (I) *In General.* The officers of a corporation are merely its agents, and if they transcend or abuse their powers they are as much responsible to their principal as the agent of an individual is to him.[67] They are responsible to their principal for nonfeasance and negligence in like manner as other agents. Thus, although the general agent of a company is not responsible for bad debts, or for negligence or faithlessness of agents necessarily employed by him, yet it is his duty to see that the debts due the company are collected, and he must show that he exercised ordinary diligence for that purpose.[68]

(II) *Their Liability to Account to Corporation.* Officers of a corporation, to whom money borrowed by it is turned over to a third person in discharge of a debt upon which they are personally liable, who fail to make payment until after a receiver is appointed for the corporation, are accountable to the receiver for such moneys.[69]

b. Their Personal Liability For Trespasses — (I) *In General.* The command, direction, or authorization of the master does not exonerate a servant from liability for committing a trespass, although it may make the master jointly liable with the servant or separately; and this rule applies to trespasses committed by the executive agents of corporations under the orders or authorization of the directors.[70] Obviously the liability of the corporation is not essential to the liability of the officer committing the trespass; he may be liable and it not be. It may fall within the numerous class of cases where the doctrine of *respondeat superior* does not obtain, but where the act is found not to have been authorized by the corporation through its board of directors or other authoritative agency, nor ratified by it, but where it is to be ascribed to the private malice of the actor.[71] The nature of the trespass may be entirely personal to the agent, and yet it may be done under such circumstances as involve a violation of the duty which the corporation has assumed toward the injured person, as where the conductor of a railway train attempted improper familiarities with a female passenger, and an action for damages was sustained against the company, because the wrong involved a violation of its undertaking to carry the passenger safely.[72]

(II) *Officers or Agents Not Liable For Trespasses of Subordinate Agents.* Nor will such an officer be personally liable for the trespasses of his subordinate officer; for the doctrine of *respondeat superior* does not apply to

66. Delta Lumber Co. *v.* Williams, 73 Mich. 86, 40 N. W. 940.

67. Austin *v.* Daniels, 4 Den. (N. Y.) 299; Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y.) 130.

68. Williams *v.* Gregg, 2 Strobh. Eq. (S. C.) 297.

As to the effect of a ratification of an unauthorized contract upon the remedy of the corporation against its agent who made it see *infra*, XVI, D, 2, a.

69. Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 534, 42 N. E. 924. An officer of a railroad corporation who is intrusted with its bonds and stock to use in constructing the road will be held to account only for the actual market value, although he is unable, because of the lapse of a long period of time before he was called upon to account, to state precisely the amount realized therefrom. Danville, etc., R. Co. *v.* Kase, 39 Atl. 301, 41 Wkly. Notes Cas. (Pa.) 411.

Circumstances under which a member of a committee of a building and loan association was not liable to the association for embezzlement of large sums of the association's funds by its secretary. Alpena Loan, etc., Assoc. *v.* Denison, 121 Mich. 159, 79 N. W. 1098.

70. Lightner *v.* Brooks, 15 Fed. Cas. No. 8,344, 2 Cliff. 287. See Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

71. Thomson *v.* Sixpenny Sav. Bank, 5 Bosw. (N. Y.) 293; Mill *v.* Hawker, L. R. 10 Exch. 92, 44 L. J. Exch. 49, 33 L. T. Rep. N. S. 177, 23 Wkly. Rep. 348; McManus *v.* Crickett, 1 East 106, 5 Rev. Rep. 518; 2 Thompson Neg. p. 886.

72. Cracker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

intermediate agents, but only applies to the ultimate principal, which is the corporation.[73]

(III) *Where Wrong Arises Out of Contract, Corporation, Not Agent, Generally Liable.* The reason for this is that the corporation, and not the agent through whom the contract is effected, is the contracting party. For example where the president of a corporation made a contract with a contractor, which involved the use of a certain patented machine for which the contractor had no license, this did not make the president personally liable to the patentee for a trespass.[74]

c. Their Personal Liability For Ultra Vires Contracts — (I) *In General.* On strictly logical grounds the agent of a corporation who enters into a contract with a third person, professedly on behalf of the corporation, when he has no authority, so that his contract does not bind the corporation, is not himself liable on the contract, if that was not the intention of the parties; but he is liable for damages for the wrong.[75]

(II) *Their Liability on Theory of Breach of Warranty of Agency.* It is often said that he is liable in such a case on the theory of breach of warranty of agency, the meaning being that he impliedly warrants his authority to make the contract on behalf of the corporation. On this theory he would not be liable on a contract previously made, but would be liable on another contract, his implied contract of warranty of his agency.[76]

d. Their Criminal Responsibility — (I) *In General.* The governing principle here is that an officer, agent, or servant of a corporation who does an act forbidden by law is responsible for it in his own person; since the corporation is not presumed to have given him any authority to do such an act.[77] While in some cases this principle may operate to shield the corporation from criminal responsibility,[78] yet in others, as where the punishment is by a pecuniary fine only,[79] the corporation may be proceeded against jointly with the wrong-doing officer or agent.[80]

(II) *Responsible Criminally For Nuisances Jointly With Corporation.* If the corporation carries on a business so offensive and injurious to the inhabitants of the neighborhood as to constitute a nuisance, the managing officers may be proceeded against jointly with the corporation, convicted, and fined under a municipal ordinance; and it is not necessary, in order to sustain such a conviction, that they should be actually at work on the premises.[81]

E. Their Compensation. The regular officers of a corporation, of whatever grade, from director down, presumptively serve without compensation. They cannot recover compensation for services rendered within the scope of their

73. Hewett *v.* Swift, 3 Allen (Mass.) 420; Bath *v.* Caton, 37 Mich. 199. To the same principle are Brown *v.* Lent, 20 Vt. 529; Milligan *v.* Wedge, 12 A. & E. 737, 10 L. J. Q. B. 19, 4 P. & D. 714, 40 E. C. L. 366; Stone *v.* Cartwright, 6 T. R. 411, 3 Rev. Rep. 220; Story Agency, §§ 314, 315 *et seq.*; 2 Thompson Neg. p. 1060, § 1; Wood Master and Servant, §§ 281, 304.

74. Lightner *v.* Brooks, 15 Fed. Cas. No. 8,344, 2 Cliff. 287.

75. Hall *v.* Crandall, 29 Cal. 567, 84 Am. Dec. 64.

76. It has been held that one who assumes to execute a promissory note on behalf of a corporation, without authority, makes himself liable thereon on the theory of breach of warranty of agency, and that when sued upon the note it is for him to show his authority to execute it for the corporation. Harwood *v.* Humes, 9 Ala. 659.

By-laws construed as giving the president the right to execute necessary negotiable paper without the concurrence of the treasurer. Chemical Nat. Bank *v.* Colwell, 16 Daly (N. Y.) 28, 9 N. Y. Suppl. 285, 29 N. Y. St. 726.

77. Com. *v.* Ohio, etc., R. Co., 1 Grant (Pa.) 329.

78. Com. *v.* Ohio, etc., R. Co., 1 Grant (Pa.) 329.

79. See *infra*, X, D, 4, d, (II).

80. As to indictments against corporations see *infra*, XIX, E, 1 *et seq.*

81. People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722, where the managing officers were the president, vice-president, and treasurer.

Liability of directors and officers for a conspiracy to defraud.— Reg. *v.* Brown, 7 Cox C. C. 442; s. c. *sub nom.* Reg. *v.* Esdaile, 1 F. & F. 213. See also Reg. *v.* Burch, 4 F. & F. 407.

official duties upon an implied contract,[82] but any right to compensation for such services must be sought for in an express contract.[83] This does not necessarily apply to extra services clearly outside of the duties of the office, such for example as services as manager of the business of the corporation performed by a director,[84] or where the general manager of a corporation renders valuable services in its behalf outside of his duties as trustee and treasurer;[85] or where the superintendent of a mining company renders unusual and extraordinary services in extinguishing a fire in a mine.[86] Nor should officers of a corporation be deprived of all compensation for their services because the amounts to be received by them were not definitely fixed before they entered upon the discharge of their duties.[87] In short an officer of a corporation may be entitled to compensation under an implied contract, where services clearly outside his ordinary duties as such officer are performed under circumstances showing that it was well understood by the proper corporate officers as well as himself that the services were to be paid for.[88] Decisions are met with which restrain this doctrine especially as to directors who constitute a portion of the governing body, and who are under the temptation to vote compensation to themselves for extra services. One view is that a director of a corporation employed by the board to perform service for the corporation not necessarily incidental to his ordinary duties is not entitled to compensation unless it is fixed by corporate action before the services are rendered.[89] Nor will an officer of a corporation be allowed to receive an increase of his salary in pursuance of a resolution, the adoption of which depended upon and was accomplished by his own vote as trustee, although the increase was a reasonable one.[90]

Statutes making embezzlement and conversion of corporate funds larceny see 4 Thompson Corp. § 4999, where many such statutes are collected. Statutes defining such offenses as embezzlement see 4 Thompson Corp. § 5000 and statutes cited. Statutes making such offenses misdemeanors or high misdemeanors see 4 Thompson Corp. § 5001 and statutes cited. Statutes declaring such offenses a felony but without civil remedies being merged see 4 Thompson Corp. § 5002. Sufficiency of indictments under such statutes see 4 Thompson Corp. § 5003 and citations. Various questions in the interpretation of such statutes see 4 Thompson Corp. § 5004 and citations.

82. Barry *v.* Coffeen Coal, etc., Co., 52 Ill. App. 183.

83. Brown *v.* Valley View Min. Co., 127 Cal. 630, 60 Pac. 424 (mining corporation not liable for services in watching its mine, performed by shareholders chiefly interested therein); Danville, etc., R. Co. *v.* Kase, 39 Atl. 301, 41 Wkly. Notes Cas. (Pa.) 411; McMuller *v.* Ritchie, 64 Fed. 253 (officer of mining company not allowed compensation for buying land, extending market for its ores, etc., where such services were rendered without contract or expectation of payment, and no account of expenses was kept by such officer).

84. Bassett *v.* Fairchild, (Cal. 1900) 61 Pac. 791 [*affirmed* in 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611].

85. Dwight *v.* Williams, 25 Misc. (N. Y.) 667, 55 N. Y. Suppl. 201.

86. Fox *v.* Mackay, 123 Cal. 580, 56 Pac. 434.

87. National Loan, etc., Co. *v.* Rockland Co., 94 Fed. 335, 36 C. C. A. 370.

88. Felton *v.* West Iron Mountain Min. Co., 16 Mont. 81, 40 Pac. 70.

89. Rose *v.* Eclipse Carbonating Co., 60 Mo. App. 28.

90. Wickersham *v.* Crittenden, 103 Cal. 582, 36 Pac. 602.

Officers of a corporation were compelled to account for all sums withdrawn for salaries, together with interest thereon, where they had voted them for the purpose of depriving shareholders of the results of a litigation in case they should be successful, although the officers were paid nominally and partly for services rendered to the company. Eaton *v.* Robinson, 19 R. I. 146, 31 Atl. 1058, 32 Atl. 339, 29 L. R. A. 100.

A director appointed engineer in chief was not entitled to compensation as such, where the resolutions fixing his compensation were reconsidered at the next meeting of the board, and the question of his compensation was postponed until a future time, and was never again called up, since there was no contract to pay compensation, and he was not entitled to it on an implied contract. Savannah Cotton Mills *v.* Cunningham, 100 Ga. 468, 28 S. E. 435; *In re* Steam Dredge No. 1, 87 Fed. 760.

The fact that a corporation is without funds with which to pay salaries does not relieve it of liability for the salary of its secretary, so long as it permits him to remain in office and accepts his services. Mobile, etc., R. Co. *v.* Owen, 121 Ala. 505, 25 So. 612.

In action may make claim in form of an account.— A salaried officer of a corporation elected and serving from year to year, whose yearly compensation is fixed by a resolution of the board of directors, may in an action therefor make out his claim in the form of

XI. RIGHTS AND REMEDIES OF SHAREHOLDERS.

A. Right to Inspect Books and Papers of Corporation — 1. NATURE AND EXTENT OF THIS RIGHT AT COMMON LAW. One of the privileges incident to ownership of stock in a corporation is that of an inspection of the books and condition of the company, and this privilege in general becomes a right when the inspection is sought at proper times and for proper purposes.[91]

2. STATUTES AND CONSTITUTIONAL PROVISIONS AFFIRMING THIS RIGHT. In England and in many of the United States this right has been guaranteed by statute, and these statutes are generally regarded as merely in affirmance of the common law.[92] In some of the states this right has been guaranteed by constitutional provisions.[93] Statutes guaranteeing this right are generally construed as creating a right absolute in its nature, so that the right cannot be withheld unless it is made to appear that the examination is sought for some improper or unlaw-

an account. Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151.

An employment by the year of the secretary of a corporation is not changed to one by the week by a subsequent resolution of the directors changing the compensation to a weekly sum. *In re* Philadelphia Packing, etc., Co., 4 Pa. Dist. 57, 15 Pa. Co. Ct. 650.

That a bill of discovery will not lie to compel the directors to divulge the amounts paid in salaries to the officers, for the reason that such salaries rest in their discretion, see Marshall *v.* American Caramel Co., 9 Pa. Dist. 152.

Unreasonable salaries.— That the directors of corporations will not be upheld in diverting the corporate funds to the payment of unreasonable salaries see Decatur Mineral Land Co. *v.* Palm, 113 Ala. 531, 21 So. 315, 59 Am. St. Rep. 140; Church *v.* Church Cementico Co., 75 Minn. 85, 77 N. W. 548; Freeman *v.* Stine, 15 Phila. (Pa.) 37, 38 Leg. Int. (Pa.) 268; Hubbard *v.* New York, etc., Invest. Co., 14 Fed. 675.

When promise to pay implied.— A resolution of a corporation employing a real estate firm to sell its lots indicates a purpose to pay for such services, notwithstanding that the firm was composed alone of a shareholder and officer of the corporation. Wiano Land, etc., Co. *v.* Webster, 75 Mo. App. 457.

91. *Illinois.*— Mathews *v.* McClaughry, 83 Ill. App. 224.

Iowa.— Ellsworth *v.* Dorwart, 95 Iowa 108, 63 N. W. 588, 58 Am. St. Rep. 427, under Iowa Code, § 1279.

Louisiana.—Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669, 12 So. 837, 40 Am. St. Rep. 243; Cockburn *v.* Union Bank, 13 La. Ann. 289.

New York.— *In re* Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461 [*affirming* 31 N. Y. App. Div. 70, 52 N. Y. Suppl. 343].

Pennsylvania.— Com. *v.* Phœnix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184 [*citing* State *v.* Bienville Oil Works, 28 La. Ann. 204; Angell & A. Corp. § 681; Grant Corp. 311; 2 Phillips Ev. 313; Redfield Railways 227].

Rhode Island.— Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61.

Washington.— State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

United States.— Ranger *v.* Champion Cotton-Press Co., 51 Fed. 61.

England.— Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57; Richards *v.* Pattinson, 1 Barnes Notes 156; *In re* West Devon Great Consols Mine, 27 Ch. D. 106, 51 L. T. Rep. N. S. 841, 32 Wkly. Rep. 890; *In re* Burton, etc., Co., 31 L. J. Q. B. 62, 10 Wkly. Rep. 87; Gery *v.* Hopkins, 7 Mod. 129; Rex *v.* Newcastle F. of H., 2 Str. 1223; Rex *v.* Babb, 3 T. R. 579; Rex *v.* Shelley, 3 T. R. 141, 1 Rev. Rep. 673; Young *v.* Lynch, 1 W. Bl. 27.

See 12 Cent. Dig. tit. "Corporations," § 674.

92. Ellsworth *v.* Dorwart, 95 Iowa 108, 63 N. W. 588, 58 Am. St. Rep. 427 (the right of shareholder to inspect the original stock record, stock and transfer-books, and the record of financial condition of a railway corporation is expressly conferred by Iowa Code, § 1279); People *v.* Lake Shore, etc., R. Co., 11 Hun (N. Y.) 1 [*affirmed* in 70 N. Y. 220].

93. For example La. Const. art. 245, providing that such books shall "be kept for public inspection." Under this provision a shareholder has the right to inspect the books of the corporation for the purpose of discovering the amount of capital stock which has been subscribed, the names of the shareholders, amounts held by them respectively, the number of shares which have been paid for, and by whom, and the transfer of shares, and generally the assets and liabilities of the corporation. State *v.* New Orleans Gas Light Co., 49 La. Ann. 1556, 22 So. 815. The right conferred by this constitutional provision may be exercised by the personal representative of the shareholder after his death. State *v.* Citizens' Bank, 51 La. Ann. 426, 25 So. 318. So under Pa. Const. art. 17, requiring every railroad and canal company to maintain an office where its books shall be kept for inspection by any shareholder. Under this constitutional provision a shareholder in a railroad company is entitled to inspect the books for the purpose of enabling him to counsel with other shareholders and to obtain proxies to be used at the election of managers. Com. *v.* Philadelphia, etc., R. Co., 3 Pa. Dist. 115.

ful purpose.[94] Others have received a reasonable and not an impracticable construction.[95]

3. STATUTES DENOUNCING PENALTIES FOR REFUSING THIS RIGHT — a. In General. The larger number of these statutes denounce a pecuniary penalty or forfeiture against the officer so refusing.[96] Among the many statutes on this subject we may cite statutes enacting a forfeiture of fifty,[97] one hundred, two hundred,[98] two hundred and fifty,[99] and even one thousand dollars.[1] By a statute of New Jersey the forfeiture is "the sum of two hundred dollars, the one-half thereof to the use of the state of New Jersey, and the other moiety to him who will sue for the same, to be recovered by action of debt in any court of record, together with costs of suit."[2] Other statutes denounce a forfeiture for each twenty-four hours' neglect after request.[3]

b. Construction of Such Statutes. In an action to recover the penalty denounced by such a statute, the complaint should show that the officer upon whom the demand for inspection was made had notice that the person making the demand was entitled to the inspection.[4] It should set forth specifically the facts which are relied upon to constitute the offense denounced by the statute.[5] But no injury to the shareholder by reason of such refusal need be shown to enable him to recover the penalty.[6] The action being to recover a penalty denounced against the wrong-doing officer, the corporation is not a necessary party.[7]

c. Statutes Making Refusal of This Right Criminal Offense. Many statutes punish such refusals as criminal misdemeanors,[8] and one has been found which

94. Meysenburg *v.* People, 88 Ill. App. 328, construing Hurd Ill. Stat. (1898), c. 32, § 13.

95. For example a statute, here Md. Code, art. 23, § 5, providing that "the president and directors of every corporation shall keep full, fair and correct accounts of their transactions, which shall be open at all times for the inspection of the stockholders or members," confers upon a shareholder the right to examine the accounts of the transactions of its president and directors at all reasonable times. Weinhenmayer *v.* Bitner, 88 Md. 325, 331, 42 Atl. 245, 45 L. R. A. 446.

Statutory right does not restrict common-law right.— A statute (Mo. Rev. Stat. (1889), § 2503) providing that the transfer-books and the books containing the names of shareholders shall be kept open for inspection for twenty days previous to the election of directors is construed as not restricting the common-law right of a shareholder to examine and inspect the books and records, on the theory that the expression of one is the exclusion of the other. State *v.* Laughlin, 53 Mo. App. 542. Similarly see People *v.* Eadie, 63 Hun (N. Y.) 320, 18 N. Y. Suppl. 53, 43 N. Y. St. 649 [*affirmed* in 133 N. Y. 573, 30 N. E. 1147, 44 N. Y. St. 930].

96. The following may be referred to as an example: Mass. Gen. Stat. p. 386, c. 68, § 10.

For the English statutes see Lindley Comp. L. (5th ed.) 441 *et seq.*

For questions of procedure in an action by a shareholder for such a penalty see Lewis *v.* Brainerd, 53 Vt. 519.

97. R. I. Gen. Stat. (1872), p. 296, § 21.

98. Ala. Rev. Code (1876), § 1897 (officer to furnish transcript); Ida. Rev. Laws, p. 622, § 18; 2 Brightly Purd. Dig. Pa. (1873), p. 1437, § 37 (turnpike bridge and plank-road companies); R. I. Gen. Stat. (1872), p. 319, § 17.

Penalty for failure, two hundred dollars. Ala. Rev. Code, § 1898.

Penalty for refusing to allow an inspection, two hundred dollars. Ala. Rev. Code, § 1900.

99. Mo. Rev. Stat. (1879), § 721; 2 N. Y. Rev. Stat. (Banks & Bros. (6th ed.) 1876), p. 303, § 48 (relating to "moneyed corporations").

1. N. H. Gen. Stat. (1867), p. 277, § 13.

2. N. J. Rev. Stat. (1877), p. 183, § 36. A similar provision is found in the statutes of New York, although the common-law action of debt has long been abolished by statute in that state. 2 N. Y. Rev. Stat. (Banks & Bros. (6th ed.) 1876), p. 398, § 1.

3. Vt. Gen. Stat. (1862, Appendix 1870), p. 551, § 53. See also p. 544, § 8; Wyo. Laws (1869), p. 242, § 23.

4. Williams *v.* College Corner, etc., Gravel Road Co., 45 Ind. 170.

5. Gunst *v.* Goldstein, 30 Misc. (N. Y.) 44, 61 N. Y. Suppl. 707.

6. Kelsey *v.* Pfaudler Process Fermentation Co., 3 N. Y. Suppl. 723, 20 N. Y. St. 733. The penalty here referred to is given by N. Y. Laws (1848), c. 40, § 25.

7. Gunst *v.* Goldstein, 30 Misc. (N. Y.) 44, 61 N. Y. Suppl. 707.

Circumstances under which it was held that the statute should not be construed so strictly as to entitle the shareholder to the penalty therein provided for. Kelsey *v.* Pfaudler Process Fermentation Co., 41 Hun (N. Y.) 20. *Compare* same case, 3 N. Y. Suppl. 723, 20 N. Y. St. 733, where the contrary was held. Construction of a complaint in such an action. Levy *v.* Cohen, 18 N. Y. Suppl. 155, 45 N. Y. St. 278.

8. *California.*— Pen. Code, § 565.

by providing for a term of imprisonment in the penitentiary, assimilates such an offense to a felony.[9]

d. Statutes Punishing Offense as Misdemeanor, Fining Corporation, and Giving Action For Damages Against Corporation. Another class of statutes is found which punish the offending officer as for a misdemeanor, and give a forfeiture and an action for damages to the injured person, both payable out of the money of the corporation.[10]

4. Where Right Is Guaranteed by Statute, Motive For Exercising It Cannot Be Inquired Into. Where the right is guaranteed by statute,[11] the shareholder need not give any reason to the officers of the corporation for demanding it,[12] the rule of law being that where a party has a legal right to do a thing, the motive which may prompt him in demanding such right is not the proper subject even of judicial investigation.[13] It is therefore no defense to a judicial proceeding to compel the granting of this right that the information sought to be obtained might be used for an improper purpose;[14] that, at the time of making the request, the shareholder is accompanied by his attorney who represents him in a litigation against the company, and also by an amanuensis;[15] or that the shareholder making the request is a rival and competitor in the business carried on by the corporation, and desires an examination of its books, documents, and records for the purpose of obtaining information to be used by him in the conduct of his business to the injury and loss of the corporation.[16]

5. Statutory Right Is Qualified Right Unless Given in Absolute Terms. Where the right is not given by statute in absolute terms, it is held to be a qualified right; and one court has gone so far as to say that "it is discretionary with the court whether to issue a writ of mandamus or not; and that this discretion

Maryland.— Rev. Code (1878), p. 324.
Montana.— Code Stat. (1871), p. 409, § 26.
Nevada.— Comp. Laws (1873), § 3403.
New York.— 2 Rev. Stat. (Banks & Bros. (6th ed.) 1876), p. 362, § 318; p. 509, § 60; p. 765, § 14 (relating to hotel companies); p. 793, § 17 (relating to "moneyed corporations").
Utah.— Comp. Laws (1876), p. 635, § 326.

9. Mich. Comp. Laws (1871), § 2220.

10. Md. Rev. Code (1878), p. 324, § 67. See also Mont. Stat. (1871–1872), p. 409, § 26; 2 N. Y. Rev. Stat. (Banks & Bros. (6th ed.) 1876), p. 283, § 134; p. 509, § 60; p. 710, § 25; p. 729, § 45; p. 765, § 14; p. 793, § 17.

11. As for instance under Ala. Code (1886), § 1677, or under Mo. Rev. Stat. (1879), § 720.

12. *Alabama.*— Foster *v.* White, 86 Ala. 467, 6 So. 88.
Louisiana.— State *v.* Bienville Oil Works Co., 28 La. Ann. 204.
Missouri.— State *v.* Sportsman's Park, etc., Assoc., 29 Mo. App. 326; State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.
New Jersey.— Mitchell *v.* Rubber Reclaiming Co., (Ch. 1892) 24 Atl. 407, no set-off.
Ohio.— Cincinnati Volksblatt Co. *v.* Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 Am. St. Rep. 707, 48 L. R. A. 732.
Rhode Island.— Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61, per Stiness, J.
England.— Mutter *v.* Eastern, etc., R. Co., 38 Ch. D. 92, 57 L. J. Ch. 615, 59 L. T. Rep. N. S. 117, 36 Wkly. Rep. 401.

13. "If the charge upon which the party rests his case be free from odium, the general rule is that he is entitled to have that right protected, whatever may be his motive in asking the aid of the court for that purpose." Bird, V. C., in Mitchell *v.* Rubber Reclaiming Co., (N. J. Ch. 1892) 24 Atl. 407 [*citing* Davis *v.* Flagg, 35 N. J. Eq. 491; Morris *v.* Tuthill, 72 N. Y. 575; McDonald *v.* Smalley, 1 Pet. (U. S.) 620, 624, 7 L. ed. 287]. See also People *v.* Goldstein, 37 N. Y. App. Div. 550, 56 N. Y. Suppl. 306, holding that the motive prompting the request of the president of a corporation for an inspection of the stock-book is immaterial, in a proceeding by mandamus to compel the secretary of the corporation to produce the stock-book for his inspection.

14. State *v.* Sportsman's Park, etc., Assoc., 29 Mo. App. 326; State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301, 307; People *v.* Pacific Mail Steamship Co., 50 Barb. (N. Y.) 280.

15. Ellsworth *v.* Dorwart, 95 Iowa 108, 63 N. W. 588, 58 Am. St. Rep. 427.

16. Weinhenmayer *v.* Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446.

Right of shareholder to impart knowledge obtained.— Where the right to inspect the books is an absolute right under a statute, it has been held that the shareholder will not be enjoined from imparting to others the information thus obtained. Rodger Ballast Car Co. *v.* Perrin, 17 Nat. Corp. Rep. 819.

Burden of proving improper motive.— Where the officers of the corporation refuse the request of the shareholder for an inspection of the books and records, on the ground that the purpose of the inspection was not in the interest of the corporation, in an application for a mandamus to compel the granting of this right they have the burden of proving it, there being no presumption that the in-

depends upon the necessity or propriety of granting it under the circumstances shown." [17]

6. Other Questions Under Statutes Giving Such Right of Inspection. Numerous other questions have arisen under statutes conferring upon shareholders the right to inspect the books and records of the corporation, which will be briefly noted in the margin.[18]

7. By-Laws Conferring or Regulating This Right. No doubt this right may be regulated by a corporate by-law, provided it be reasonable,[19] and provided it have a reasonable construction. Thus in a state where the right of inspection is guaranteed by statute, a by-law providing for the closing of the transfer-books thirty days before an election was not subject to the construction that it authorized the closing of them against inspection by a person authorized thereto, but only as limiting the time for transfers of shares, since a contrary interpretation would make the by-law invalid.[20] A by-law established in the absence of a statute conferring the right of inspection, providing that the treasurer should "keep or cause to be kept a full and accurate account of all the business of the company, in suitable books, which books shall at all times be open to the inspection of any of the stockholders," was restrained by construction so as to give the right of inspection of the manufacturing and commercial accounts of the company, and not of a book containing the names of the shareholders.[21]

8. Theory That There Is No Common-Law Right of Inspection Unless There Is a Defined, Distinct Dispute. The English doctrine seems to be that in the absence of a statute or other instrument conferring the right a shareholder has no right to an inspection of the corporate books for the purpose of acquiring a knowledge of facts upon which to create a dispute, but that there must be a defined and distinct dispute already in existence with reference to which the right of inspection is demanded.[22] This does not necessarily mean that a suit should have been instituted, but it is sufficient if there is an existing dispute to be settled by

spection was required for an improper purpose. State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

17. Lyon *v.* American Screw Co., 16 R. I. 472, 475, 17 Atl. 61.

18. Winter *v.* Baldwin, 89 Ala. 483, 7 So. 734 (holding that a state statute conferring this right extends to national banks and gives the right to a mandamus against the cashier of such a bank); People *v.* Pacific Mail Steamship Co., 50 Barb. (N. Y.) 280, 3 Abb. Pr. N. S. (N. Y.) 364, 34 How. Pr. (N. Y.) 193 (no objection to the right that the books have not been correctly kept, or that they contain information to which the shareholder is not entitled); State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566 (the word "accounts" in such a statute not restricted to stock accounts, but includes general accounts); Rex *v.* Wilts, etc., Canal Nav. Co., 3 A. & E. 477, 5 N. & M. 344, 30 E. C. L. 228; Rex *v.* Grand Canal Co., L. R. 1 Ir. 337 (holding that the shareholder must state for what purpose he desires to see the books, which must be a reasonable purpose, and the refusal must proceed from the managing body).

Statute of New York giving penalties for refusing to furnish statements to shareholders. N. Y. Laws (1892), c. 687, § 52. Shareholder cannot require that the statement shall include all the business transactions of the corporation. French *v.* McMillan, 43 Hun (N. Y.) 188, 4 N. Y. St. 357. *Compare* Burden *v.* Burden, 3 N. Y. St. 776. One acquiring stock by bequest has no right to examine the books of account to find out the value of the shares before availing himself of this statute. People *v.* Nassau Ferry Co., 86 Hun (N. Y.) 128, 33 N. Y. Suppl. 244, 66 N. Y. St. 801.

Statute of New Jersey requiring corporate books to be brought into the state for inspection under pain of forfeiture of charter and liability for contempt of court. N. J. Rev. Stat. p. 186, § 50. Order of inspection granted in compliance with statute in Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274, 42 N. J. Eq. 139, 7 Atl. 521. No defense that the petitioner is the president and director of the corporation, and hence presumed to know what the books contain. Mitchell *v.* Rubber Reclaiming Co., (N. J. Ch. 1892) 24 Atl. 407.

19. Cockburn *v.* Union Bank, 13 La. Ann. 289.

20. State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.

21. Lyon *v.* American Screw Co., 16 R. I. 472, 473, 17 Atl. 61. *Compare* People *v.* Eadie, 133 N. Y. 573, 30 N. E. 1147, 44 N. Y. St. 930 [*affirming* 63 Hun (N. Y.) 320, 18 N. Y. Suppl. 53, 43 N. Y. St. 649]; State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566 (holding that a statute conferring this right is salutary and ought not to be construed restrictively).

22. *In re* Burton, etc., Co., 31 L. J. Q. B. 62, 10 Wkly. Rep. 87.

reference to the books.[23] There is neither sense nor justice in this restriction, since every proprietor has the right to know the manner in which his agents are conducting his business.

9. Right Not Allowed For Speculative Purposes, Gratification of Curiosity, or Where It Would Produce Great Inconvenience — a. In General. The judicial decisions either hold or concede that the right of a shareholder to inspect the books of the corporation will not be enforced for speculative purposes or for the gratification of curiosity; since if every shareholder could inspect for such purposes, at his own will, the business of most corporations would be greatly impeded.[24]

b. Contra, That It Is No Answer to Granting of Right That It Will Be Inconvenient to Corporation. A contrary view is that it is no ground for the denial of the right that it will be inconvenient to the corporation or detrimental to the rights of other shareholders, but that if the right of inspection is clear, it cannot be denied on the ground of inconvenience, but the convenience of the corporation and the convenience of the shareholder must to some extent yield to each other.[25]

10. Right to Make Copies and Extracts. The right to inspect is regarded as including, by reasonable implication, the right to make copies, memoranda, or extracts of such copies of the books or records as pertain to the rights or interests of the shareholders.[26]

11. No Answer That Corporation Is Willing to Buy Shares of Shareholder. Where the right of inspection is conferred by statute, it is no answer to the shareholder's demand for permission to exercise the right that the corporation is willing to purchase his shares, but such an answer is impertinent.[27]

12. Shareholder Must Make Inspection in Peaceable and Gentlemanly Manner. Where the shareholder obtains an order of inspection for some purpose connected with a pending litigation, he is bound in making the inspection to conduct himself in a peaceable, decorous, and gentlemanly manner, and not to make public or communicate to strangers to the litigation the contents of the documents which may have been produced to him; and in such a case the court may by process of contempt control the manner of making the inspection so as to compel it to be exercised in a decent and gentlemanly way.[28]

13. Shareholder May Exercise This Right Through Agent, Attorney, or Expert. The shareholder is not confined to a personal inspection by himself, but may exercise the right through an agent, attorney, solicitor, counsel, or expert.[29]

23. Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57. See also Com. *v.* Phœnix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184.

24. Com. *v.* Phœnix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184. See also People *v.* Lake Shore, etc., R. Co., 11 Hun (N. Y.) 1 [*affirmed* in 70 N. Y. 220]. Substantially to the same effect are Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61, and many other cases.

25. State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.

26. Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57; Browning *v.* Aylwin, 7 B. & C. 204, 9 D. & R. 801, 14 E. C. L. 97; Mutter *v.* Eastern, etc., R. Co., 38 Ch. D. 92, 57 L. J. Ch. 615, 59 L. T. Rep. N. S. 117, 36 Wkly. Rep. 401; Rex *v.* Lucas, 10 East 235, 10 Rev. Rep. 283; *In re* Burton, etc., Co., 31 L. J. Q. B. 62, 10 Wkly. Rep. 87; Rex *v.* Newcastle F. of H., 2 Str. 1223.

For cases affirming this right under statutes granting right of inspection see Matter of Martin, 62 Hun (N. Y.) 557, 17 N. Y. Suppl. 133, 42 N. Y. St. 409; Brouwer *v.* Cotheal, 10 Barb. (N. Y.) 216 [*affirmed* in 5 N. Y. 562]; Cincinnati Volksblatt Co. *v.* Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. Rep. 707, 48 L. R. A. 732. But see to the contrary an obviously untenable decision to the effect that a constitutional provision requiring a list of shareholders to be kept at the office of the corporation for inspection of shareholders and creditors does not confer the right to take a copy of the list. Com. *v.* Empire Pass. R. Co., 134 Pa. St. 237, 19 Atl. 629.

27. State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.

28. Williams *v.* Prince of Wales, etc., Co., 23 Beav. 338, 3 Jur. N. S. 55.

29. *Alabama.*— Foster *v.* White, 86 Ala. 467, 6 So. 88.

Georgia.— Ballin *v.* Ferst, 55 Ga. 546.

Iowa.— Ellsworth *v.* Dorwart, 95 Iowa 108, 63 N. W. 588, 58 Am. St. Rep. 427.

14. Illustrative Cases Where Inspections Have Been Granted. Orders have been made, in equity, allowing shareholders to inspect the books of their corporations where the bill alleged fraud on the part of the directors whereby the complaining shareholder has been damnified;[30] on a verified petition by the shareholder stating that a mine owned by the company is being worked at a loss;[31] in an action by a shareholder to hold the directors of a life-insurance company personally responsible for large losses alleged to have been sustained in consequence of making improper payments of money upon policies, and this, although plaintiff appeared to have but a trifling interest in the company, and although it further appeared that he was desirous of injuring it and had published prejudicial statements relating to the matters alleged in his bill.[32] Mandamus or other order to compel inspections has also been granted in the cases noted in the margin.[33]

15. Illustrative Cases Where Inspections Have Been Refused. In his learned note to the decision of the chancery court of New Jersey in Stettauer v. New York, &c., Construction Co.,[34] the late Mr. John H. Stewart, the Reporter of the court, makes the following compressed statement of the cases where orders to enable shareholders to inspect the books and papers of their corporations have been refused: "An inspection will not be allowed to gratify mere idle curiosity;[35] nor because some of the books are necessarily kept in another State, where the main office is, in violation of a statute of Connecticut;[36] nor to fish out a defense;[37] nor upon an allegation of belief that the company's affairs are being

Louisiana.—State *v.* Sportsman's Park, etc., Assoc., 29 Mo. App. 326.

New Jersey.—Mitchell *v.* Rubber Reclaiming Co., (Ch. 1892) 24 Atl. 407.

New York.—People *v.* Nassau Ferry Co., 86 Hun 128, 33 N. Y. Suppl. 244, 66 N. Y. St. 801.

England.—Lindsay *v.* Gladstone, L. R. 9 Eq. 132; Williams *v.* Prince of Wales L., etc., Co., 23 Beav. 338, 3 Jur. N. S. 55; Bonnardet *v.* Taylor, 1 Johns. & H. 383, 7 Jur. N. S. 328, 30 L. J. Ch. 523, 3 L. T. Rep. N. S. 384, 9 Wkly. Rep. 452; Atty.-Gen. *v.* Whitwood Local Bd., 40 L. J. Ch. 592, 19 Wkly. Rep. 1107; *In re* Birmingham Banking Co., 36 L. J. Ch. 150; Hide *v.* Holmes, 2 Molloy 372; Blair *v.* Massey, 5 Ir. Eq. 623. But see Summerfield *v.* Pritchard, 17 Beav. 9, 17 Jur. 361, 22 L. J. Ch. 528, 1 Wkly. Rep. 270; *In re* West Devon Great Consols Mine, 27 Ch. D. 106, 51 L. T. Rep. N. S. 841, 32 Wkly. Rep. 890; Draper *v.* Manchester, etc., R. Co., 3 De G. F. & J. 23, 6 Jur. N. S. 1239, 30 L. J. Ch. 95, 3 L. T. Rep. N. S. 402, 9 Wkly. Rep. 117, 64 Eng. Ch. 18; Bartley *v.* Bartley, 1 Drew. 233, 16 Jur. 1062, 22 L. J. Ch. 47, 1 Wkly. Rep. 48.

Contra, and seemingly untenable, is a holding to the effect that a corporation will not be required to permit the examination of its books by an expert accountant, at the request of a shareholder who alleges misconduct in the management of its affairs. Clarke *v.* Eastern Bldg., etc., Assoc., 89 Fed. 779.

30. Walburne *v.* Ingilby, Coop. t. Brough. 270, 3 L. J. Ch. 21, 1 Myl. & K. 61, 7 Eng. Ch. 61; Stainton *v.* Chadwick, 15 Jur. 1139, 3 Macn. & G. 575, 49 Eng. Ch. 444. *Compare* Bassford *v.* Blakesley, 6 Beav. 131.

31. *In re* West Devon Great Consols Mine, 27 Ch. D. 106, 51 L. T. Rep. N. S. 841, 32 Wkly. Rep. 890.

32. Williams *v.* Prince of Wales L., etc., Co., 23 Beav. 338, 3 Jur. N. S. 55.

33. State *v.* Bienville Oil Works Co., 28 La. Ann. 204 (where the relator desired to acquire knowledge to enable him to vote understandingly at a shareholders' meeting); Phœnix Iron Co. *v.* Com., 113 Pa. St. 563, 6 Atl. 75 (collection of facts showing concealment, oppression, etc.); [for another case involving the same conclusion on the same facts see Com. *v.* Phœnix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184]; *In re* Birmingham Banking Co., 36 L. J. Ch. 150 (company being wound up, permission granted to employ an accountant to prosecute an examination of the books). See also *In re* Emma Silver Min. Co., L. R. 10 Ch. 194, 44 L. J. Ch. 456, 31 L. T. Rep. N. S. 816, 23 Wkly. Rep. 300. In the following cases an inspection was granted expressly upon the showing of a proper cause or of a right given. Cockburn *v.* Union Bank, 13 La. Ann. 289; People *v.* Pacific Mail Steamship Co., 50 Barb. (N. Y.) 280; *In re* Burton, etc., Co., 31 L. J. Q. B. 62, 10 Wkly. Rep. 87. In Cotheal *v.* Brouwer, 5 N. Y. 562, the right was given by a statute imposing a penalty for a refusal of it. In People *v.* Pacific Mail Steamship Co., 50 Barb. (N. Y.) 280, the right was given by charter and was enforced by mandamus. See also Kelsey *v.* Pfaudler Process Fermentation Co., 3 N. Y. Suppl. 723, 20 N. Y. St. 533.

34. 42 N. J. Eq. 46, 49 note, 6 Atl. 303.

35. People *v.* Walker, 9 Mich. 328.

36. Pratt *v.* Meriden Cutlery Co., 35 Conn. 36. See also Cain *v.* Pullen, 34 La. Ann. 511; Ervin *v.* Oregon R., etc., Co., 22 Hun (N. Y.) 566.

37. Birmingham, etc., Junction R. Co. *v.* White, 1 Q. B. 282, 5 Jur. 800, 10 L. J. Q. B. 121, 4 P. & D. 649, 2 R. & Can. Cas. 863, 41 E. C. L. 541; Imperial Gas. Co. *v.* Clarke, 7

conducted improperly and the officers unduly chosen, and alleging mismanagement in some particulars not affecting petitioners, nor then in dispute;[38] nor to furnish materials to the other side for a new trial;[39] nor to ascertain whether petitioner would better accept, with the other shareholders, what was offered her for her holding in an old company which was being wound up, rather than proceed with an arbitration;[40] nor to establish justification in an action against the petitioner for libel imputing insolvency to the company;[41] nor to examine all the books of the company for the preceding fifty years, because petitioner alleges that he is dissatisfied with the management of the company and with the accounts, and on other grounds;[42] nor where the petition does not specify the particular books asked for, and the object of the petitioner in making the application to the officers, and also to the court;[43] nor whether certain allegations in the applicant's affidavit are true; nor whether he has documents in his possession relating to the matters in issue."[44] To this may be added, nor where there is no allegation of mismanagement, but merely an allegation that the company has recently paid no dividends; that the shares have depreciated in market value; that the officers have not distributed to the shareholders reports as to the business condition of the corporation, and that the petitioners desire to inform themselves so as to confer with their fellow-shareholders;[45] or where the purpose of the inspection was to enable the petitioner to file a bill in equity to set aside a lease made by the corporation to another corporation, of all its property and franchises for a long term, and the petitioner desired to obtain a list of the shareholders, so that he might confer with his fellow-shareholders in order that they might join him in the litigation and share expenses with him, but the petition did not allege that any wrong or injury had been inflicted upon the petitioner or his fellow-shareholders through the making of the lease, the court taking the view that the purpose for which the relator desired the mandamus was not a reasonable and proper purpose,[46] and this, although the right of inspection was guaranteed by the constitution of the state; nor where the relator desired the inspection in order to ascertain the facts concerning a loan made by the corporation, to the end of laying them before the attorney-general, that he might use them in making the officers who incurred the loan account for any deficit arising from their misconduct.[47]

16. Directors Cannot Exclude One of Their Own Number From Access to Company's Books. It is well settled that the directors of a corporation have no

Bing. 95, 9 L. J. C. P. O. S. 28, 4 M. & P. 727, 20 E. C. L. 51. See Shoe, etc., Reporter Assoc. *v.* Bailey, 49 N. Y. Super. Ct. 385; Hoyt *v.* American Exch. Bank, 1 Duer (N. Y.) 652.

38. Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57.

39. Pratt *v.* Goswell, 9 C. B. N. S. 706, 3 L. T. Rep. N. S. 669, 99 E. C. L. 706.

40. *In re* Glamorganshire Banking Co., 28 Ch. D. 620, 54 L. J. Ch. 765, 51 L. T. Rep. N. S. 623, 33 Wkly. Rep. 209.

41. Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 146, 5 Jur. N. S. 201. See Opdyke *v.* Marble, 44 Barb. (N. Y.) 64; Collins *v.* Yates, 27 L. J. Exch. 150; Finlay *v.* Lindsay, 7 Ir. C. L. 1.

42. Rex *v.* Grand Canal Co., L. R. 1 Ir. 337.

43. Reg. *v.* London, etc., Docks Co., 44 L. J. Q. B. 4, 31 L. T. Rep. N. S. 588, 23 Wkly. Rep. 136. See Walker *v.* Granite Bank, 44 Barb. (N. Y.) 39; New England Iron Co. *v.* New York Loan, etc., Co., 55 How. Pr. (N. Y.) 351; Central Cross-town R. Co. *v.* Twenty-third St. R. Co., 53 How. Pr. (N. Y.) 45; Forsyth County *v.* Lemly, 85 N. C. 341; Hunt *v.* Hewitt, 7 Exch. 236, 16 Jur. 503, 21 L. J. Exch. 210; Pepper *v.* Chambers, 7 Exch. 226, 16 Jur. 19, 21 L. J. Exch. 81.

44. Rayner *v.* Alnusen, 15 Jur. 1060, 21 L. J. Q. B. 68, 2 L. M. & P. 605. In the following cases an inspection was also denied because the facts did not show that it was necessary for the particular occasion. Hatch *v.* New Orleans City Bank, 1 Rob. (La.) 470; State *v.* Einstein, 46 N. J. L. 479; People *v.* Lake Shore, etc., R. Co., 11 Hun (N. Y.) 1 [*affirmed* in 70 N. Y. 220]; People *v.* Northern Pac. R. Co., 50 N. Y. Super. Ct. 456; Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57; Reg. *v.* Mariquita, etc., Min. Co., 1 E. & E. 289, 5 Jur. N. S. 725, 28 L. J. Q. B. 67, 7 Wkly. Rep. 98, 102 E. C. L. 289.

45. Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61, untenable and unjust decision.

46. Com. *v.* Empire Pass. R. Co., 134 Pa. St. 237, 19 Atl. 629.

47. People *v.* Produce Exch. Trust Co., 53 N. Y. App. Div. 93, 65 N. Y. Suppl. 926.

power to exclude one of their own number from access to the books of the corporation.[48]

17. Inspection of Books of Foreign Corporation. The fact that a corporation is created under the laws of another state and that the right of its shareholders to inspect its books is defined by the laws of such state does not prevent a court of the state having jurisdiction of the person of the *custos* of the books from awarding a mandamus in a proper case to compel him to allow a shareholder to inspect them and to take copies from them.[49]

18. What Person Deemed Shareholder For Purpose of Claiming Right of Inspection. No person can claim the right to inspect the books of the corporation who is not a shareholder as between himself and the company, that is to say, who is not registered as a shareholder on the company's books.[50] Nor does such a right exist where a transaction has been had between the shareholder and another, which has the legal effect of a completed sale of his shares.[51]

19. Right of Inspection Where Corporation Has Passed Into Hands of Receiver. It has been held that an inspection of the books of a corporation in the custody of a receiver will be granted a shareholder who in good faith asks therefor to enable him to determine whether or not a proposed plan of reorganization is desirable, with proper regulations as to time and circumstances, so as not to interfere with the exercise of the receiver's duties or the inspection of other shareholders; and it is not a sufficient answer that the proposed plan meets with the approval of the majority of the shareholders, who have not received such information as is asked for, or that it is commended by the receiver and promises to afford means for an early liquidation of the debts of the company. But it was also held that a shareholder in an insolvent corporation will not be granted an inspection of its books in the hands of the receiver, for the purpose of determining as to the advisability of a proposed plan of reorganization, where he did not become a shareholder until after the appointment of the receiver.[52]

20. Remedies to Enforce Right of Inspection — a. Action at Law For Damages Against Corporation. The correct theory under this head seems to be that the wrong of refusing a shareholder the right to inspect the books and records of the corporation is not a wrong of the corporation itself, but of the officers having the custody of the books and refusing the right. It would seem to follow that an action at law against the corporation will not lie for the refusal of this right by a ministerial officer of the corporation, for example by its secretary.[53] But the rule might be otherwise where the right is denied by those officers who constitute the governing body of the corporation,[54] although the distinction between a denial of the right by a ministerial officer acting under the governing body and denial of it by the governing body itself seems to be shadowy.

b. Mandamus the Usual and Proper Civil Remedy. If this right is denied the shareholder, mandamus is the proper remedy to compel the officers of the

Nor for the purposes stated in Philadelphia Invest. Co. *v.* Eldridge, 2 Pa. Dist. 394.

48. Lindley Comp. L. (5th ed.) 411 [*citing* Turquand *v.* Marshall, L. R. 6 Eq. 112, 37 L. J. Ch. 582, 18 L. T. Rep. N. S. 385, 16 Wkly. Rep. 719 [*reversed* in L. R. 4 Ch. 376, 38 L. J. Ch. 639, 20 L. T. Rep. N. S. 765, 17 Wkly. Rep. 965]; Stuart *v.* Bute, 12 Sim. 460, 35 Eng. Ch. 388; Taylor *v.* Rundell, 1 Y. & Coll. Ch. 128, 20 Eng. Ch. 128 [*affirmed* in 7 Jur. 1073, 13 L. J. Ch. 20, 1 Phil. 222, 19 Eng. Ch. 222].

49. Swift *v.* Richardson, 7 Houst. (Del.) 338, 32 Atl. 143, 40 Am. St. Rep. 127, 6 Atl. 856. And see under a statute Mitchell *v.* Rubber Reclaiming Co., (N. J. Ch. 1897) 24 Atl. 407; Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274, 42 N. J. Eq. 139, 7 Atl. 521.

50. Matter of Reiss, 30 Misc. (N. Y.) 234, 62 N. Y. Suppl. 145.

51. State *v.* Whited, 104 La. Ann. 125, 28 So. 922.

52. Chable *v.* Nicaragua Canal Constr. Co., 59 Fed. 846.

53. Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669, 12 So. 837, 40 Am. St. Rep. 243.

54. Bourdette *v.* Sieward, 52 La. Ann. 1333, 27 So. 724, right refused by the president. See also Lewis *v.* Brainerd, 53 Vt. 510, right refused by the clerk or recording officer.

corporation to grant it.[55] The fact that there is an adequate remedy at law by a mandamus has been held to exclude the jurisdiction of equity to grant such relief.[56]

c. Whether There Is Also Remedy in Equity. Under American theories it seems that a court of equity will not grant a mandatory injunction to the officers of a corporation compelling them to allow such an inspection, because the usual remedy by mandamus in a court of law is equally effective.[57] But in England the conclusion is precisely the reverse, because in that country the prerogative writ of mandamus does not extend to the vindication of rights unless they be of a public nature. There the denial of a right of this character is regarded as presenting simply the case of a statutory right connected with the ownership of private property and of a wrongful interference with that right, and therefore an injunction is allowed to restrain such interference.[58] Statutes also exist in America under which the remedy is by injunction.[59]

d. Who Proper Party Defendant in Proceeding by Mandamus. The writ is properly directed to the person having the possession, custody, and control of the books, the inspection of which is desired by the relator, and is not directed to the corporation.[60] It has been held that whether the corporation itself should be made a party is not a question which can be raised on a motion to quash the writ, but the parties in that behalf should be made to appear in the return.[61] But under the English chancery practice, where an injunction is issued restraining the corporation from denying the right of the shareholder to inspect the books, the corporation itself is the defendant in the action.[62] In one case, where the injunction was granted, the defendants were the directors in the corporation.[63]

21. Appeals and Writs of Error From Orders of Inspection. A peremptory mandamus to allow a shareholder to inspect the books of the corporation is a final judgment which is subject to review on writ of error or on a statutory appeal in

55. *Alabama.*— Foster *v.* White, 86 Ala. 467, 6 So. 88.

Louisiana.— Cockburn *v.* Union Bank, 13 La. Ann. 289.

Missouri.— State *v.* Sportsman's Park, etc., Assoc., 29 Mo. App. 326; State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.

New York.— People *v.* Pacific Mail Steamship Co., 50 Barb. 280.

Pennsylvania.— Phœnix Iron Co. *v.* Com., 113 Pa. St. 563, 6 Atl. 75.

56. Stettauer *v.* New York, etc., Constr. Co., 42 N. J. Eq. 46, 6 Atl. 303. Earlier English decisions proceed upon the view that a mandamus will not be awarded except in cases of a public nature, and will hence not be awarded to adjust rights in a trading corporation. Rex *v.* London Assur. Co., 5 B. & Ald. 899, 1 D. & R. 510, 7 E. C. L. 489; Rex *v.* Bank of England, 2 B. & Ald. 620. But the rule of these decisions has been superseded at least in the United States.

57. Stettauer *v.* New York, etc., Constr. Co., 42 N. J. Eq. 46, 6 Atl. 303.

58. Mutter *v.* Eastern, etc., R. Co., 38 Ch. D. 92, 57 L. J. Ch. 615, 59 L. T. Rep. N. S. 117, 36 Wkly. Rep. 401; Holland *v.* Dickson, 37 Ch. D. 669, 57 L. J. Ch. 502, 58 L. T. Rep. N. S. 845, 36 Wkly. Rep. 320.

59. Cincinnati Volksblatt Co. *v.* Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. Rep. 707, 48 L. R. A. 732. See also Fraternal Mystic Circle *v.* State, 61 Ohio St. 628, 48 N. E. 940, 76 Am. St. Rep. 446; State *v.* Carpenter, 51 Ohio St. 83, 37 N. E. 261, 46 Am. St. Rep. 556; Freom *v.* Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794.

60. *Delaware.*— Swift *v.* Richardson, 7 Houst. 338, 32 Atl. 143, 40 Am. St. Rep. 127, 6 Atl. 856.

Georgia.— Bailey *v.* Strohecker, 38 Ga. 259, 95 Am. Dec. 88.

Massachusetts.—St. Luke's Church *v.* Slack, 7 Cush. 226.

New York.— People *v.* Throop, 12 Wend. 183.

Wisconsin.— State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566.

England.— Reg. *v.* Kendall, 1 Q. B. 366, 10 L. J. Q. B. 137, 41 E. C. L. 580.

61. State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566.

62. Mutter *v.* Eastern, etc., R. Co., 38 Ch. D. 92, 57 L. J. Ch. 615, 59 L. T. Rep. N. S. 117, 36 Wkly. Rep. 401.

63. Holland *v.* Dickson, 37 Ch. D. 669, 57 L. J. Ch. 502, 58 L. T. Rep. N. S. 845, 36 Wkly. Rep. 320.

Other points of practice in this proceeding. — Effect of a motion to quash. State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566. When denial of affidavit in support of petition deemed to be evasive. Matter of Martin, 62 Hun (N. Y.) 557, 17 N. Y. Suppl. 133, 42 N. Y. St. 409 [*affirming* 12 N. Y. Suppl. 844, 25 Abb. N. Cas. (N. Y.) 350]. When the court has power to direct a reference. People *v.* St. Louis, etc., R. Co., 44 Hun (N. Y.) 552, 7 N. Y. St. 415, 19 Abb. N. Cas. (N. Y.) 1. A former proceeding against

the nature of a writ of error,[64] and this, although such an appeal or writ of error may work a supersedeas and render the order absolutely worthless to the petitioner.

B. Remedies of Shareholders in Equity — 1. Shareholders Cannot Sue to Redress Injuries Done to Corporation — a. In General. Neither a single shareholder nor any number of shareholders, even the whole number, have the right to sue in their own names or in the corporate name, either at law or in equity, to recover damages to the corporate property, or to redress or to prevent injuries to the corporation except under conditions hereafter stated;[65] or to defend in their own names actions brought against the corporation; but such right of action or defense rests ordinarily in the corporation itself, to be exercised through its board of directors, or through its other officers who are its agents to that end, and not through its shareholders, who are not in any sense its agents or part owners of its property, but who ordinarily stand as strangers to it.[66] The shareholders cannot as individuals recover on a cause of action vested in the corporation, although all unite in the action.[67] A single shareholder cannot recover in his own behalf his proportionate share of misappropriated funds of a corporation, although the corporation has for years done no business and has no property except the claim for such funds; but recovery must be had in behalf of the corporation.[68] If an individual shareholder has money in his hands accruing from the sale of corporate property, another shareholder cannot recover his proportion of it in an action for money had and received;[69] nor does the fact that the same persons constitute the majority shareholders in each of two companies enlarge the jurisdiction of equity to interfere with the management of one of those corporations in its relation with the other, at the suit of a minority shareholder.[70]

b. This Rule Applicable in Equity as Well as at Law. Subject to exceptions hereafter stated this rule is applicable in equity as well as at law; so that shareholders cannot ordinarily sue in equity to redress wrongs done to the corporation.[71]

the same corporate officers is no bar to the proceeding. State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.

64. People *v.* Kent County, 38 Mich. 351; Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 212; Forsyth County *v.* Lemly, 85 N. C. 341; Lancashire Cottonspinning Co. *v.* Greatorex, 14 L. T. Rep. N. S. 290. See McCargo *v.* Crutcher, 27 Ala. 171; Sage *v.* Lake Shore, etc., R. Co., 70 N. Y. 220; Clyde *v.* Rogers, 24 Hun (N. Y.) 145; Bustros *v.* White, 1 Q. B. D. 423, 45 L. J. Q. B. 642, 34 L. T. Rep. N. S. 835, 24 Wkly. Rep. 721; Saxby *v.* Easterbrook, L. R. 7 Exch. 207, 41 L. J. Exch. 113, 26 L. T. Rep. N. S. 439, 20 Wkly. Rep. 751.

As to the costs of an inspection see Gardner *v.* Daingerfield, 5 Beav. 389; Davey *v.* Pemberton, 11 C. B. N. S. 628, 8 Jur. N. S. 891, 103 E. C. L. 628; Hill *v.* Philp, 7 Exch, 232, 16 Jur. 90, 21 L. J. Exch. 82.

65. *Connecticut.*—Allen *v.* Curtis, 26 Conn. 456.

Kentucky.— Jones *v.* Johnson, 10 Bush 649.

Massachusetts.— Smith *v.* Hurd, 12 Metc. 371, 46 Am. Dec. 690.

New York.— Gardiner *v.* Pollard, 10 Bosw. 674; Bishop *v.* Houghton, 1 E. D. Smith 566.

Texas.— Evans *v.* Brandon, 53 Tex. 56.

66. Smith *v.* Parker, 148 Ind. 127, 45 N. E. 770 (no right of action for a breach of contract with the corporation); Byers *v.* Franklin Coal Co., 14 Allen (Mass.) 470; South-West Natural Gas Co. *v.* Fayette Fuel-Gas Co., 145 Pa. St. 13, 23 Atl. 224, 29 Wkly. Notes Cas. (Pa.) 247. See also Arkansas River Land, etc., Co. *v.* Farmers' L. & T. Co., 13 Colo. 587, 22 Pac. 954.

67. Cutshaw *v.* Fargo, 8 Ind. App. 691, 34 N. E. 376, 36 N. E. 650; Hamilton *v.* James A. Cushman Mfg. Co., 15 Tex. Civ. App. 338, 39 S. W. 641 (cannot in their individual capacity maintain an action on a contract with the corporation, although all or nearly all of the shareholders are represented).

68. Thompson *v.* Stanley, 20 N. Y. Suppl. 317.

69. Hodsdon *v.* Copeland, 16 Me. 314.

For other decisions more or less supporting the text see McNab *v.* McNab, etc., Mfg. Co., 62 Hun (N. Y.) 18, 16 N. Y. Suppl. 448, 41 N. Y. St. 906; Boyd *v.* American Carbon Black Co., 182 Pa. St. 206, 37 Atl. 937, 40 Wkly. Notes Cas. (Pa.) 459.

A shareholder cannot, in the absence of any fraud or collusion in the making of the contract, avoid an executory contract of the corporation, voidable at the instance of the corporation itself, because made between two corporations having a common director. Burden *v.* Burden, 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499.

70. Shaw *v.* Davis, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294.

71. *Alabama.*— Tuscaloosa Mfg. Co. *v.* Cox, 68 Ala. 71.

The ordinary remedy for injuries to the corporation is to be sought primarily through corporate action. If the directors in office will not act in an emergency requiring immediate action, the remedy is for the shareholders to elect a board of directors who will take the proper action.[72] Before the shareholders can be heard in a court of equity in behalf of the corporation, the remedial agencies afforded by charter or other laws of the corporation must be exhausted, and this must be made to appear.[73]

2. SHAREHOLDERS ORDINARILY CANNOT DEFEND FOR CORPORATION IN EQUITY. The rule is equally applicable to cases where the shareholders seek to defend for the company in equity. Subject to exceptions hereafter stated, they cannot appear or answer for the company, since the company would not be bound by their admissions or by their stipulations;[74] but the rule hereafter considered, which opens the doors of courts of equity to shareholders seeking to become complainants in right of the corporation, will equally admit them to become defendants, and where legal and equitable remedies are blended under the modern codes they may, under the proper conditions, appear and defend both at law and in equity.[75]

3. CANNOT MAINTAIN ACTION AT LAW AGAINST DIRECTORS FOR OFFICIAL MISDEMEANORS. In the absence of statute a shareholder cannot for instance maintain an action at law against the directors for any loss sustained by him through the waste of the assets of the corporation, the deprivation of dividends, or the diminution of the value of his shares, in consequence of the mistake, negligence, fraud, or other nonfeasance or malfeasance of the directors in the discharge of the duties of their offices.[76]

Colorado.— Miller *v.* Murray, 17 Colo. 408, 30 Pac. 461.

Georgia.— Colquitt *v.* Howard, 11 Ga. 556.

Maine.— Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173.

Massachusetts.— Abbott *v.* Merriam, 8 Cush. 588 (not if all the shareholders were to unite); Pratt *v.* Bacon, 10 Pick. 123.

Missouri.— Slattery *v.* St. Louis, etc., Transp. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245.

New Jersey.— Brown *v.* Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

New York.— Robinson *v.* Smith, 3 Paige 222, 24 Am. Dec. 212; Forbes *v.* Whitlock, 3 Edw. 446.

Rhode Island.— Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

72. Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y.) 130; Charitable Corporation *v.* Sutton, 2 Atk. 400.

73. Tuscaloosa Mfg. Co. *v.* Cox, 68 Ala. 71; Henry *v.* Elder, 63 Ga. 347; Pittsburgh Fifth Nat. Bank *v.* Pittsburgh, etc., R. Co., 1 Fed. 190; Hare *v.* London, etc., R. Co., 2 Johns. & H. 80, 7 Jur. N. S. 1145, 30 L. J. Ch. 817.

74. Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725.

75. Morrill *v.* Little Falls Mfg. Co., 46 Minn. 260, 48 N. W. 1124.

76. *Connecticut.*— Allen *v.* Curtis, 26 Conn. 456.

Iowa.— Oliphant *v.* Woodburn Coal, etc., Co., 63 Iowa 332, 19 N. W. 212.

Kentucky.— Jones *v.* Johnson, 10 Bush 649.

Louisiana.— Wood's Succession, 30 La. Ann. 1002.

Maine.— Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672.

Massachusetts.— Smith *v.* Hurd, 12 Metc. 371, 46 Am. Dec. 690.

Minnesota.— Hodgson *v.* Duluth, etc., R. Co., 46 Minn. 454, 49 N. W. 197; Mealey *v.* Nickerson, 44 Minn. 430, 46 N. W. 911.

New Jersey.—Conway *v.* Halsey, 44 N. J. L. 462.

New York.— Gardiner *v.* Pollard, 10 Bosw. 674.

Pennsylvania.— South-West Natural Gas Co. *v.* Fayette Fuel-Gas Co., 145 Pa. St. 13, 23 Atl. 224, 29 Wkly. Notes Cas. 247; Craig *v.* Gregg, 83 Pa. St. 19.

Texas.— Evans *v.* Brandon, 53 Tex. 56.

For illustrations of the doctrine see the following cases:

Alabama.— Decatur Mineral Land Co. *v.* Palm, 113 Ala. 531, 21 So. 315, 59 Am. St. Rep. 140.

Louisiana.— Faurie *v.* Millaudon, 3 Mart. N. S. 476, creditor no action against corporate officers for breach of duty to corporation.

Massachusetts.— French *v.* Fuller, 23 Pick. 108, no remedy against treasurer for refusing dividend.

New York.— Gardiner *v.* Pollard, 10 Bosw. 674 (no right of action against directors to recover in severalty his proportion of a general loss sustained by the corporation); Denny *v.* Manhattan Co., 2 Den. 115.

Wyoming.— Wilson *v.* Rogers, 1 Wyo. 51.

Exceptions have occasionally been admitted, as in the case of a wrong done by the directors to a shareholder individually, as by transferring to themselves shares belonging to him (Kimmel *v.* Stoner, 18 Pa. St. 155. See also Crook *v.* Jewett, 12 How. Pr. (N. Y.) 19); or where the directors through fraud and deceit induced a person to purchase

4. No Right of Action For Frauds of Directors or Corporate Agents. Neither can a shareholder maintain in his own name an action against the directors of the company for fraud and deceit practised by them in its promotion,[77] or against its agents for frauds practised upon it in buying property at one price and transferring it to the company at a greater price.[78]

5. Rule Not Varied by Expiration of Charter and Commencement of Liquidation. The rule is not varied by the circumstance that the charter of the corporation has expired, or that it has gone into liquidation; for in such a case the right of action, which was in the corporation itself while it was a going concern, passes to its receiver or other representative.[79] If the assets of the corporation are in the hands of an assignee for creditors and if its managing officer has been guilty of unauthorized acts for which he ought to be held responsible, and if a shareholder requests the assignee to institute an action against him to compel him to account for such acts, under the ninety-fourth equity rule of the federal courts, then on the refusal of the assignee to institute such suit the shareholder may institute and maintain it.[80] But the remedy of the shareholder for a misappropriation of corporate funds by the directors is by petition to the receiver or to the court for the institution of the proper action.[81] It is not enough that the shareholder petitions the receivers to bring the appropriate action, but if they refuse his petition he must carry the matter to the court itself to which the receivers are responsible, and until he does this he will not be allowed to prosecute in another court the cause of action which the receivers should have prosecuted.[82]

6. Distinction Between Actions by Shareholders to Redress Wrongs Done to Corporation and Actions to Redress Wrongs Done to Shareholders Themselves. The distinction between the right of a shareholder to sue or defend for the corporation and his right to sue for the redress of injuries which are personal to himself, whether committed by the corporation or through the malfeasance of its agents, is total and clear. The rule which restrains a shareholder from suing to redress injuries to the corporation does not operate to impose any restraint upon him from suing to redress injuries which are personal to himself[83] or to restrain wrongful acts which are not only wrongs against the corporation but also violations of duties arising from contracts or otherwise and owing directly to the injured shareholders.[84]

7. Shareholder May Sue in Equity Where Corporation Will Not. If the directors are guilty of a breach of trust, injurious to the corporate property or to

shares in the company (Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255). Exceptions also exist under statutes too numerous to be enumerated. Buell *v.* Warner, 33 Vt. 570.

77. McAleer *v.* McMurray, 6 Phila. (Pa.) 244, 24 Leg. Int. (Pa.) 260. See also Colton Imp. Co. *v.* Richter, 26 Misc. (N. Y.) 26, 55 N. Y. Suppl. 486.

78. McAleer *v.* McMurray, 6 Phila. (Pa.) 244, 24 Leg. Int. (Pa.) 260.

79. Howe *v.* Barney, 45 Fed. 668.

80. Streight *v.* Junk, 59 Fed. 321, 8 C. C. A. 137. It has been held that if the assets of the corporation are in the hands of a receiver, the shareholders have ordinarily no standing in court to ask for the removal of this officer when it appears that the corporation has a regularly elected board of directors, a majority of whom are in active sympathy with the shareholders. Pittsburgh Fifth Nat. Bank *v.* Pittsburgh, etc., R. Co., 1 Fed. 190. But the decision is obviously unsound, since the right of action cannot reside in any other official or official body than the receiver.

81. Cunningham *v.* Wechselberg, 105 Wis. 359, 81 N. W. 414.

82. Swope *v.* Villard, 61 Fed. 417. To the same general effect see Egbert *v.* Third Ward Bldg. Assoc. Co., 9 Ohio S. & C. Pl. Dec. 646; Miesse *v.* Loren, 5 Ohio N. P. 307.

83. Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Kimmel *v.* Stoner, 18 Pa. St. 155. See also Crook *v.* Jewett, 12 How. Pr. (N. Y.) 19; Wilson *v.* Cheyenne First Nat. Bank, 1 Wyo. 108.

84. Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50.

When a bill by a majority shareholder will not be dismissed as multifarious because it includes a cause of action in favor of the corporation and also one in favor of himself individually. De Neufville *v.* New York, etc., R. Co., 81 Fed. 10, 26 C. C. A. 306. That it is no objection to a bill by a shareholder to enforce corporate rights that he is interested in the cause of action aside from the status of shareholder see Henry *v.* Pittsburgh, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41.

the rights of the shareholders, or a portion of them, and if the corporation refuses to institute the proper proceedings to restrain or redress such injury, one or more of the shareholders may do it in their individual names.[85] This rule is founded in part upon the consideration that the directors are trustees for the shareholders, and that in any action to redress breaches of trust on the part of the directors as toward the shareholders the shareholders are the real parties in interest.[86]

85. This doctrine was either acted upon or conceded in each of the following cases:

Alabama.— Smith *v.* Prattville Mfg. Co., 29 Ala. 503; St. Marys' Bank *v.* St. John, 25 Ala. 566.

California.— Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Farmers', etc., Bank *v.* Downey, 53 Cal. 466, 31 Am. Rep. 62; Wright *v.* Oroville Gold, etc., Min. Co., 40 Cal. 20.

Colorado.— Miller *v.* Murray, 17 Colo. 408, 30 Pac. 46; Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894.

Connecticut.—Allen *v.* Curtis, 26 Conn. 456.

Georgia.— Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40; Robinson *v.* Lane, 19 Ga. 337; Colquitt *v.* Howard, 11 Ga. 556.

Illinois.— Chetlain *v.* Republic L. Ins. Co., 86 Ill. 220.

Indiana.— Hill *v.* Nisbet, 100 Ind. 341.

Kansas.—Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365.

Louisiana.— Percy *v.* Millaudon, 8 Mart. N. S. 68.

Maine.— Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364.

Maryland.— Mottu *v.* Primrose, 23 Md. 482.

Massachusetts.— Brewer *v.* Boston Theater, 104 Mass. 378; Peabody *v.* Flint, 6 Allen 52.

Minnesota.— Morrill *v.* Little Falls Mfg. Co., 46 Minn. 260, 48 N. W. 1124; Rothwell *v.* Robinson, 39 Minn. 1, 38 N. W. 772, 12 Am. St. Rep. 608.

Mississippi.— Bayless *v.* Orne, Freem. 161.

Missouri.— Slattery *v.* St. Louis, etc., Transp. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245.

Nebraska.— State *v.* Holmes, 60 Nebr. 39, 82 N. W. 109.

New Jersey.— Knoop *v.* Bohmrich, 49 N. J. Eq. 82, 23 Atl. 118; Brown *v.* Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

New York.— Flynn *v.* Brooklyn City R. Co., 158 N. Y. 493, 53 N. E. 520 [*affirming* 9 N. Y. App. Div. 269, 41 N. Y. Suppl. 566, 75 N. Y. St. 955]; Sage *v.* Culver, 147 N. Y. 241, 41 N. E. 513, 69 N. Y. St. 524; Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. 410, 9 L. R. A. 527 [*reversing* 52 Hun 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]; Barr *v.* New York, etc., R. Co., 96 N. Y. 444; Greaves *v.* Gouge, 69 N. Y. 154; Butts *v.* Wood, 37 N. Y. 317; Young *v.* Drake, 8 Hun 61; Gray *v.* New York, etc., Steamship Co., 3 Hun 383; Ives *v.* Smith, 3 N. Y. Suppl. 645, 19 N. Y. St. 556; Brewster *v.* Hatch, 10 Abb. N. Cas. 400; Winter *v.* Baker, 34 How. Pr. 183; Patteson *v.* Baker, 34 How. Pr. 180; Austin *v.* Daniels, 4 Den. 299; Robinson *v.* Smith, 3 Paige 222, 24 Am. Dec. 212; Forbes *v.* Whitlock, 3 Edw. 446.

North Carolina.— Havens *v.* Hoyt, 59 N. C. 115.

Ohio.— Taylor *v.* Miami Exporting Co., 5 Ohio 162, 22 Am. Dec. 785.

Pennsylvania.— South-West Natural Gas Co. *v.* Fayette Fuel-Gas Co., 145 Pa. St. 13, 23 Atl. 224, 29 Wkly. Notes Cas. 247; Watts' Appeal, 78 Pa. St. 370; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Gravenstine's Appeal, 49 Pa. St. 310.

Rhode Island.— Hazard *v.* Durant, 11 R. I. 195; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9.

South Dakota.— Loftus *v.* Farmers' Shipping Assoc., 8 S. D. 201, 65 N. W. 1076.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Deaderick *v.* Wilson, 8 Baxt. 108.

Texas.— Mussina *v.* Goldthwaite, 34 Tex. 125, 7 Am. Rep. 281.

United States.— Detroit *v.* Dean, 106 U. S. 537, 1 S. Ct. 560, 27 L. ed. 300; Hawes *v.* Contra Costa Water Co., 104 U. S. 450, 26 L. ed. 827; Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401; Foster *v.* Mansfield, etc., R. Co., 36 Fed. 627; Forbes *v.* Memphis, etc., R. Co., 9 Fed. Cas. No. 4,926, 2 Woods 323; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347; Pond *v.* Vermont Valley R. Co., 19 Fed. Cas. No. 11,265, 12 Blatchf. 280; Smith *v.* Poor, 22 Fed. Cas. No. 13,093, 3 Ware 148.

England.— Menier *v.* Hooper's Tel. Works, L. R. 9 Ch. 350, 43 L. J. Ch. 330, 30 L. T. Rep. N. S. 209, 22 Wkly. Rep. 396; *In re* Gibraltar, etc., Bank, L. R. 1 Ch. 69, 11 Jur. N. S. 916, 35 L. J. Ch. 49, 13 L. T. Rep. N. S. 386, 14 Wkly. Rep. 69; Gregory *v.* Patchett, 33 Beav. 595; Salomons *v.* Laing, 12 Beav. 339, 14 Jur. 471, 19 L. J. Ch. 225, 6 R. & Can. Cas. 289.

86. Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595; Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468; Richards *v.* New Hampshire Ins. Co., 43 N. H. 263; Butts *v.* Wood, 37 N. Y. 317, 38 Barb. (N. Y.) 181.

The English practice as to shareholders filing such bills in the name of the company where objection is made to their authority may be gathered from Atwood *v.* Merryweather, L. R. 5 Eq. 464 note, 37 L. J. Ch. 35; Macdougall *v.* Gardiner, 1 Ch. D. 13, 45 L. J. Ch. 27.

That foreign shareholders may file such bills in United States courts where the amount in controversy is sufficient to give jurisdiction see Bacon *v.* Robertson, 18 How.

8. When Shareholder's Right of Action Arises — a. In General. In order that this jurisdiction may be invoked in cases not governed by statute three things must ordinarily concur: (1) The matter complained of must be a breach of duty on the part of the directors;[87] (2) the corporation must fail or refuse to demand redress;[88] and (3) there must be an injury to the shareholder.[89]

b. Instances Showing When This Right Arises. This right of action arises where the majority of the shareholders, in control of the corporation, are pursuing a course of action which is plainly oppressive to the minority and in fraud of their rights;[90] where the directors and officers are acting, not in faithful discharge of their trust, but are perverting their official powers to their own personal gain and benefit, and in fraud of the rights of the shareholders;[91] where the managers and a majority of the shareholders are diverting the assets of the corporation from their legitimate purposes to their own use and benefit;[92] where the assets of the corporation have been fraudulently diverted into the hands of individual shareholders;[93] to cancel shares which have been issued by the corporation in violation of law, as being a cloud upon the rights of the lawful shareholders;[94] in case of a corporation reorganized to take over a branch of the business of each of several dealers, to enjoin one of such dealers from a breach of a covenant not to engage in competition with the company, where such shareholders are parties to the agreement, although the new company has been organized;[95] under a statute, to compel an accounting for official misconduct and for property of the corporation which the officers have wrongfully acquired or transferred to others;[96] to enjoin a transaction of the directors which, although lawful in itself and *intra vires*, is concocted by them and the other party in pursuance of a selfish scheme to perpetuate themselves in office, the same being conspicuously unwise and injurious to the corporation and its shareholders;[97] to recover damages from the directors of

(U. S.) 480, 15 L. ed. 499; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401.

87. Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401.

88. Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364; Greaves *v.* Gouge, 69 N. Y. 154; Robinson *v.* Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401.

89. Hill *v.* Nisbet, 100 Ind. 341; Havens *v.* Hoyt, 59 N. C. 115; Hedges *v.* Paquett, 3 Oreg. 77; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401.

That this doctrine is not applicable to charitable corporations see Tyree *v.* Bingham, 100 Mo. 451, 13 S. W. 952.

As to a bill in equity by vendee of lands held in common by corporators to compel delivery of corporate certificate see Hopkins *v.* Smith, 111 Mass. 176.

90. *Montana.*— Forrester *v.* Butte, etc., Consol. Copper, etc., Min. Co., 21 Mont. 544, 55 Pac. 299 [*rehearing denied* in 21 Mont. 565, 55 Pac. 353], to restrain the transfer of all the corporate assets.

New York.— Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. 410, 9 L. R. A. 527 [*reversing* 52 Hun 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]; Barr *v.* New York, etc., R. Co., 96 N. Y. 444; Sage *v.* Culver, 71 Hun 42, 24 N. Y. Suppl. 514, 54 N. Y. St. 297 [*affirmed* in 147 N. Y. 241, 41 N. E. 513, 69 N. Y. St. 524].

Pennsylvania.— Weckerly *v.* Fell, 8 Pa. Dist. 89, 22 Pa. Co. Ct. 209.

United States.— Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517.

Canada.— Earle *v.* Burland, 27 Ont. App. 540, to restrain the majority from accumulating from the profits a reserve fund far in excess of all the liabilities of the business of the concern.

91. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 475, 41 Pac. 328 (shareholders' action against the executors of one who has misappropriated funds of corporation maintainable under California statute); Marcuse *v.* Gullett Gin Mfg. Co., 52 La. Ann. 1383, 27 So. 846 (illegally diverted all corporate funds to themselves as salaries); Watkins *v.* Watkins, etc., Lumber Co., 11 N. Y. App. Div. 517, 43 N. Y. Suppl. 41 (to account for misappropriated corporate funds and to enjoin a threatened sale of the entire assets); Gray *v.* New York, etc., Steamship Co., 3 Hun (N. Y.) 383.

92. Rothwell *v.* Robinson, 39 Minn. 1, 38 N. W. 772, 12 Am. St. Rep. 608. See also People's Sav. Bank *v.* Colorado Min. Exch. Bldg. Co., 8 Colo. App. 354, 46 Pac. 620.

93. Taylor *v.* Miami Exporting Co., 5 Ohio 162, 22 Am. Dec. 785.

94. Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. 1048 [*reversing* 66 Ill. App. 427].

95. McCausland *v.* Hill, 23 Ont. App. 738.

96. Hayt *v.* Malone, 9 N. Y. Suppl. 877, 31 N. Y. St. 739.

97. Wildes *v.* Rural Homestead Co., 53 N. J. Eq. 452, 32 Atl. 676.

the corporation caused by their mismanagement of its affairs, where the corporation is managed and controlled by them;[98] where the directors have suffered the corporate property to be sold under a mortgage for a comparatively small sum in order to bankrupt the corporation and destroy the value of its shares, and are transferring its property to a third person without compensation, and are mortgaging other property belonging to it without the consent of the shareholders, the shareholders' suit taking the form of a single action against the directors and all the other parties to such transactions;[99] where the board of directors of a railroad company have refused to take steps to prevent another company from taking its located route in violation of its rights, and through collusion with the other company;[1] where a particular number of the shareholders, intrenched in power by reason of being able to command a majority of the votes, are committing frauds to the injury of the minority;[2] and in many other cases.[3]

9. To Enjoin Performance of Ultra Vires Acts. This jurisdiction has often been exerted to enjoin the performance of *ultra vires* acts injurious to the complaining shareholders or to the body of shareholders generally, or to the corporation considered as an ideal body;[4] but not where the acts are injurious to no one, or are *ultra vires* in the sense of not having been taken in formal compliance with the law.[5] The fact that the unlawful scheme in which the funds of the company are embarked is profitable does not affect the right of a shareholder to contest it.[6]

10. To Prevent Corporation From Being Wrecked and Absorbed by Another Corporation. Minority shareholders have a standing in a court of equity to pre-

98. Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428.

99. Gray *v.* Fuller, 17 N. Y. App. Div. 29, 44 N. Y. Suppl. 883.

1. Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615.

2. Mason *v.* Harris, 11 Ch. D. 97, 48 L. J. Ch. 589, 40 L. T. Rep. N. S. 644, 27 Wkly. Rep. 699.

3. Other instances where such relief has been granted may be found in the following cases:

Alabama.— Birmingham Min., etc., Co. *v.* Mutual L. & T. Co., 96 Ala. 364, 11 So. 368; St. Marys' Bank *v.* St. John, 25 Ala. 566.

California.— Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Woodroof *v.* Howes, 88 Cal. 184, 26 Pac. 111; Smith *v.* Fagan, 17 Cal. 178.

Connecticut.— *In re* Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

Illinois.—Farwell *v.* Great Western Tel. Co,. 161 Ill. 620 [*affirmed* on rehearing in 161 Ill. 522, 44 N. E. 891]; Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315.

Indiana.— Rogers *v.* Lafayette Agricultural Works, 52 Ind. 296.

Kansas.— Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365.

Missouri.— Hannerty *v.* Standard Theatre Co., 109 Mo. 297, 19 S. W. 82.

New York.— Zeigler *v.* Hoagland, 52 Hun 385, 5 N. Y. Suppl. 305, 24 N. Y. St. 453 (enjoining the spoliation of the corporation by excessive increase of salaries); Dyckman *v.* Valiente, 43 Barb. 131; Aver *v.* Seymour, 15 Daly 249, 5 N. Y. Suppl. 650; Ives *v.* Smith, 3 N. Y. Suppl. 645, 19 N. Y. St. 556 (enjoining the construction of branch line and bridges); Meyer *v.* Staten Island R. Co., 7 N. Y. St. 245.

Ohio.— Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312.

Pennsylvania.— Malone *v.* Lancaster Gaslight, etc., Co., 14 Lanc. L. Rev. 225.

Texas.— People's Invest. Co. *v.* Crawford, (Civ. App. 1898) 45 S. W. 738.

United States.— De Neufville *v.* New York, etc., R. Co., 81 Fed. 10, 26 C. C. A. 306.

England.— Menier *v.* Hooper's Tel. Works, L. R. 9 Ch. 350, 43 L. J. Ch. 330, 30 L. T. Rep. N. S. 209, 22 Wkly. Rep. 396; Fraser *v.* Whalley, 2 Hem. & M. 10, 11 L. T. Rep. N. S. 175.

4. Percy *v.* Millaudon, 8 Mart. N. S. (La.) 68; Wilcox *v.* Bickel, 11 Nebr. 154, 8 N. W. 436; Rabe *v.* Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Gregory *v.* Patchett, 33 Beav. 595.

5. Larwill *v.* Burke, 19 Ohio Cir. Ct. 513, 10 Ohio Cir. Dec. 579. See also Montgomery Light Co. *v.* Lahey, 121 Ala. 131, 25 So. 1006; Stanley *v.* Luse, 36 Oreg. 25, 58 Pac. 75; Spaulding *v.* North Milwaukee Town Site Co., 106 Wis. 481, 81 N. W. 1064; Cunningham *v.* Wechselberg, 105 Wis. 359, 81 N. W. 414; Macdougall *v.* Gardiner, 1 Ch. D. 13, 45 L. J. Ch. 27. When a shareholder and officer of a piano-manufacturing company will not be heard to complain of expenditures to secure the good-will of musical artists as to the value of the musical instruments. Steinway *v.* Steinway, 17 Misc. (N. Y.) 43, 40 N. Y. Suppl. 718.

6. Byrne *v.* Schuyler Electric Mfg. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304.

That a shareholder in such a suit cannot question the right of the corporation to exercise all its granted powers, especially its power to own shares of another corporation, but that such right can be questioned only by

vent the corporation from being wrecked and absorbed by another corporation into whose hands the directors of the victim corporation are playing.[7]

11. DISTINCTION BETWEEN REDRESSING BREACHES OF TRUST AND INFLUENCING CORPORATE ACTION. A distinction has been admitted between the jurisdiction of courts of equity to accord relief at the suit of shareholders where the action is to redress breaches of trust on the part of the directors or to recover damages from the same, and the want of jurisdiction in such courts, where the object of the bill is to influence corporate action, or where in its results it will have this effect.[8] The distinction is refined and unsubstantial, for the reason that the action taken by the directors in the exercise of their powers is necessarily corporate action, the corporation being an ideal and intangible body whose powers are wielded by them. The funds of the corporation are answerable to strangers for their frauds under the principle of *respondeat superior*.[9] If the courts are obliged to stay their hands whenever to move would have the effect of influencing corporate action, it would follow that if the corporation should, by a vote of a majority of the shares, condone the offense of their guilty directors or agents, then the minority would have no standing in court to object. It is almost needless to suggest that this is not the law.[10] But this does not leave the shareholders helpless in case of plain breaches of trust on the part of the directors. These shareholders have the same right as any *cestui que trust* to have the property honestly managed and preserved from waste and misappropriation.[11]

12. EQUITY WILL NOT INTERFERE ON MERE QUESTIONS OF CORPORATE MANAGEMENT OR POLICY. The true distinction is between acts in excess of the powers of the directors and in breach of their trust, and acts which are within their powers and which merely involve an exercise of the discretion committed to them. The rule here is that in the absence of usurpation, of fraud, or of gross negligence, courts of equity will not interfere at the suit of a dissatisfied minority, merely to overrule and control the discretion of the directors on questions of corporate management, policy, or business, but will allow the majority to rule, and will leave the dissatisfied minority to redress their grievances through ordinary corporate methods.[12]

13. ACTIONS BY SHAREHOLDERS AGAINST THIRD PARTIES FOR WRONGS DONE TO CORPORATION. The general rule is that such actions must be brought by and in the name of the corporation itself and not by the shareholders,[13] as for example an action to redress a slander of title of property of the corporation[14] or an

the state, see Willoughby *v.* Chicago Junction R., etc., Co., 50 N. J. Eq. 656, 25 Atl. 277.

7. Peabody *v.* Flint, 6 Allen (Mass.) 52; Menier *v.* Hooper's Tel. Works, L. R. 9 Ch. 350, 43 L. J. Ch. 330, 30 L. T. Rep. N. S. 209, 22 Wkly. Rep. 396.

8. See for instance Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

9. Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92; Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; Oakes *v.* Turquand, L. R. 2 H. L. 325, 344, 36 L. J. Ch. 949, 16 L. T. Rep. N. S. 808, 15 Wkly. Rep. 1201; Scotland Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145, 158 (per Lord Chelmsford).

10. Hazard *v.* Durant, 11 R. I. 195.

11. Rabe *v.* Dunlap, 51 N. J. Eq. 40, 25 Atl. 959.

12. *Alabama.*— Tuscaloosa Mfg. Co. *v.* Cox, 68 Ala. 71 (opinion by Stone, J.); Smith *v.* Prattville Mfg. Co., 29 Ala. 503 (in the absence of a wilful abuse of discretion, or bad faith, or wilful negligence, or a breach of a known duty).

Illinois.— Baker *v.* Backus, 32 Ill. 79.

Minnesota.—Rothwell *v.* Robinson, 44 Minn. 538, 47 N. W. 255.

New Jersey.— Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 232, 23 Atl. 287; Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162 [*affirmed* in 45 N. J. Eq. 244, 19 Atl. 621]; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 241.

New York.— Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. 410, 9 L. R. A. 527 [*reversing* 52 Hun 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]; Gernsheim *v.* Olcott, 10 N. Y. Suppl. 438, 31 N. Y. St. 321.

Pennsylvania.—Chambers *v.* McKee, 185 Pa. St. 105, 39 Atl. 822, 42 Wkly. Notes Cas. 90 (error of judgment in accepting an award of arbitrators is binding on the shareholders); Madden *v.* Penn. Electric Light Co., 7 Pa. Dist. 304.

United States.— McMullen *v.* Ritchie, 64 Fed. 253.

13. Boyd *v.* Sims, 87 Tenn. 771, 11 S. W. 948.

14. Langdon *v.* Hillside Coal, etc., Co., 41 Fed. 609.

action to enjoin the infringing of a trade-mark which is the property of the corporation.[15]

14. When Relief Can Be Had Against Third Parties — a. In General. Relief can be had against third parties in the following among other cases: (1) Where plaintiff is entitled to an injunction against the consummation of a threatened act, in respect of which such third party is concurring with the directors of plaintiff's corporation.[16] (2) Where such an act has been consummated and plaintiff is entitled to have it undone; for instance where the assets of plaintiff's corporation have been unlawfully diverted into the hands of a third person or corporation, plaintiff is entitled to have them restored to his own corporation or its representative;[17] or where persons, acting as agents for the corporation, have received its money and refused to pay it over.[18] But where no relief can be had against the third person or corporation, he or it cannot be dragged into a litigation of this kind, and a bill which attempts to do so is multifarious.[19]

b. Misconduct Complained of Must Work Substantial Injury. Moreover the misconduct complained of on the part of the governing body of the corporation must work a substantial injury to the corporation, or at least to the complaining shareholder.[20] If the injury is slight and inconsiderable, and affects all shareholders alike, and no other shareholder complains, it will not afford ground for equitable relief.[21]

c. When Not Necessary to Allege and Prove Bad Faith on Part of Directors. It is not necessary in all cases to allege and prove bad faith on the part of the directors;[22] but if the directors are making an illegal application of the funds of the corporation the question whether they are acting corruptly or honestly is quite immaterial, and the complaining shareholder need not allege or prove any actual or wilful fraud or collusion on the part of the company, the directors, or others.[23] So if the directors are putting themselves in an attitude where they are tempted to act in violation of their duty, as where the directors of a railroad com-

15. Converse *v.* Hood, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521.

Instances under which a bill in equity may be maintained by a shareholder against his own corporation and another corporation and the trustees of his own corporation, to restore to his own corporation property diverted from it to the other corporation. Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365.

16. Of this nature was the leading case of Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401, where Woolsey, a shareholder residing in Connecticut, of a banking corporation domiciled in Ohio, sustained an action for an injunction against Dodge, a tax-collector of the state of Ohio, restraining him from enforcing a tax laid by the state authorities of Ohio against the banking corporation, in violation of the exemption from taxation conferred by the legislature of Ohio upon it, in its charter, plaintiff having purchased his stock in good faith before the state of Ohio laid the tax, and having requested the directors and officers of the corporation to sue in the courts of Ohio, which they declined to do, because they regarded the action hopeless, and because the law imposed upon them penalties for refusing its execution. Other cases affirming the invalidity of the tax are: Mechanics', etc., Bank *v.* Thomas, 18 How. (U. S.) 384, 15 L. ed. 460; Mechanics', etc., Bank *v.* Debolt, 18 How. (U. S.) 380, 15 L. ed. 458.

Another good illustration of this species of relief is found in a federal case where it was held that a shareholder of a railroad company which has located and partially constructed its line may maintain a bill to enjoin a rival company from appropriating this work to its own use, when he shows that the directors of his own company are acting in sympathy with the rival company, have furnished it with knowledge of certain defects which render their own location invalid, and have refused to resist such appropriation. Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615.

17. Slattery *v.* St. Louis, etc., Transp. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245.

18. Sheridan *v.* Sheridan Electric Light Co., 38 Hun (N. Y.) 396.

19. For an example of such a bill see Mayer *v.* Denver, etc., R. Co., 38 Fed. 197.

20. Hill *v.* Nisbet, 100 Ind. 341; Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865; Albers *v.* St. Louis Merchants' Exch., 45 Mo. App. 206; Havens *v.* Hoyt, 59 N. C. 115.

21. Albers *v.* St. Louis Merchants' Exch., 45 Mo. App. 206.

22. The case of Butts *v.* Wood, 38 Barb. (N. Y.) 181, holding the contrary is quite off the track, unless its language be restrained to the facts before the court.

23. March *v.* Eastern R. Co., 43 N. H. 515.

pany purchase for themselves the controlling interest of another and connecting railroad for the purpose of making contracts more favorable to the other road than to their own corporation, the transaction will be set aside as being opposed to public policy, in that it places the directors in a situation where they are tempted to act in violation of their duty.[24]

15. What Laches Will Deprive Shareholders of This Right to Equitable Relief — a. In General. In these cases, as in others, the shareholders will, by unreasonable delay in bringing their action, lose their right to relief in equity.[25]

b. Application of Principle Where Act Is Ultra Vires. In the application of this doctrine it can make no difference that the act complained of was *ultra vires* in the sense of being beyond the powers of the corporation itself.[26] But it is not an unreasonable conclusion that where the act is not *ultra vires* the shareholder rests under a stronger obligation of objecting to a course of action which is being taken by the managers of the corporation.[27]

c. Laches Not Imputed to Shareholders Who Do Not Join in Action Where Other Shareholders Are Prosecuting It. Where the action is prosecuted by some of the shareholders as representatives of all,[28] those shareholders who do not join as plaintiffs of record in such an action are not subject to the imputation of laches, while one of their number is prosecuting a suit seeking to impeach the action complained of.[29]

d. Doctrine of Laches Analogous to Estoppel In Pais. The doctrine of laches in this relation is analogous to the doctrine of estoppel *in pais*. The meaning is that if a shareholder intends to treat an act of the corporation as illegal, and to hold the directors personally answerable, he must tell them so. He cannot stand by and see it done, objecting to it on other grounds, and then hold them responsible for reasons not alleged in opposition at the time.[30]

16. What Circumstances of Acquiescence, Waiver, or Estoppel Conclude Shareholder — a. In General. Disregarding particulars it may be said that a shareholder may also in many cases be deemed to have acquiesced in the conditions of which he complains, to have waived his right to object, or to have become estopped by his conduct from maintaining a suit in equity, for the purpose of

24. Pearson *v.* Concord R. Corp., 62 N. H. 537, 13 Am. St. Rep. 590.

25. *California.*— Wills *v.* Porter, 132 Cal. 516, 61 Pac. 1109, 64 Pac. 896, under a statute delay of two years fatal to the action.

Georgia.— Alexander *v.* Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337.

Massachusetts.— Dunphy *v.* Traveller Newspaper Assoc., 146 Mass. 495, 16 N. E. 426; Peabody *v.* Flint, 6 Allen 52.

Minnesota.— Pinkus *v.* Minneapolis Linen Mills, 65 Minn. 40, 67 N. W. 643.

Missouri.— Burgess *v.* St. Louis County R. Co., 99 Mo. 496, 12 S. W. 1050, supineness and delay construed into an acquiescence and ratification.

New York.— Marbury *v.* Stone, 160 N. Y. 701, 57 N. E. 1116 [*affirming* 17 N. Y. App. Div. 352, 45 N. Y. Suppl. 184, circumstances under a statute where delay of two years fatal to the action]; Catlin *v.* Green, 120 N. Y. 441, 24 N. E. 941, 31 N. Y. St. 532; Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly 373, 14 Abb. N. Cas. 103; Roberts *v.* New York, etc., R. Co., 31 N. Y. Suppl. 577, 64 N. Y. St. 167 (acquiescence for three years barred equitable relief); Haar *v.* Consolidated Carsen River Dredging Co., 17 N. Y. Suppl. 25, 43 N. Y. St. 1.

Pennsylvania.— Watts' Appeal, 78 Pa. St. 370; Shaaber's Appeal, (1889) 17 Atl. 209.

Tennessee.— Kirtland *v.* Purdy University, 7 Lea 243.

West Virginia.— Boyce *v.* Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 501.

United States.— Jesup *v.* Illinois, etc., R. Co., 43 Fed. 483; Foster *v.* Mansfield, etc., R. Co., 36 Fed. 627; Leo *v.* Union Pac. R. Co., 19 Fed. 283.

England.— Gregory *v.* Patchett, 33 Beav. 595; Graham *v.* Birkenhead, etc., R. Co., 12 Beav. 460, 2 Hall & T. 450, 14 Jur. 494, 20 L. J. Ch. 445, 2 Macn. & G. 146, 6 Eng. L. & Eq. 132, 48 Eng. Ch. 114; Hodgson *v.* Powis, 1 De G. M. & G. 6, 15 Jur. 1022, 21 L. J. Ch. 17, 50 Eng. Ch. 5; Ffooks *v.* London, etc., R. Co., 17 Jur. 365.

26. Burgess *v.* St. Louis County R. Co., 99 Mo. 496, 12 S. W. 1051; Watts' Appeal, 78 Pa. St. 370.

27. Leo *v.* Union Pac. R. Co., 19 Fed. 283.

28. See *infra*, XI, F, 1, b, (III).

29. Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103.

30. Hodges *v.* New England Screw Co., 3 R. I. 9; Graham *v.* Birkenhead, etc., R. Co., 2 Hall & T. 450, 14 Jur. 494, 20 L. J. Ch. 445,

asserting rights in the corporation or of influencing the disposition of its assets.[31]

b. What Circumstances Have Been Held Not to Estop Shareholder. It has been held, but on doubtful grounds, that the acquiescence of the shareholders owning all of the capital stock, in wrongs committed by the directors of the corporation for the benefit of another corporation under their control, does not preclude relief against such wrongs, even if the action to obtain such relief is brought in the name of one of the acquiescing shareholders for the benefit of the corporation.[32]

17. When Action of Shareholders Deemed Ratification. If the act complained of has been acquiesced in by the shareholders, their conduct may amount to a ratification of it, such as will estop the corporation, on a principle hereafter stated,[33] and where the corporation is estopped they will be estopped.[34] And although the act is *ultra vires* an estoppel may arise against the corporation and consequently against the shareholder, on the ground that it has received and retained the benefits of the transaction such as will estop the shareholder unless he offers to restore the benefits so received.[35]

18. What Persons Have Standing of Shareholders to Invoke Equitable Relief — a. Must Be Shareholder — (I) *Rule Stated.* The general rule is that to entitle a party to relief by injunction against illegal or fraudulent proceedings of corporate officers he must be a shareholder of the corporation.[36]

(II) *Creditor of Shareholder.* For instance one who is merely the creditor

2 Macn. & G. 146, 6 Eng. L. & Eq. 132, 48 Eng. Ch. 114.

31. See for the principle Rex *v.* Physicians College, 5 Burr. 2740. For example a shareholder who knows of unauthorized acts by the directors done with the *bona fide* intention of benefiting the corporation will be presumed to have assented to such acts where he does not dissent within a reasonable time, unless his failure to dissent is reasonably explained. St. Louis, etc., Min. Co. *v.* Sandoval, etc., Min. Co., 116 Ill. 170, 5 N. E. 370; Pinkus *v.* Minneapolis Linen Mills, 65 Minn. 40, 67 N. W. 643; Libbey *v.* Packwood, 11 Wash. 176, 39 Pac. 444 [*rehearing denied* in 39 Pac. 647].

Illustrations of this doctrine could be expanded, involving great detail, but a citation of the cases must suffice.

Alabama.— Van Kirk *v.* Adler, 111 Ala. 104, 20 So. 336.

Georgia.— Cole *v.* Dyer, 29 Ga. 434, shareholder voting for directors not allowed to file a quo warranto to oust them.

Illinois.— Perry County *v.* Stebbins, 66 Ill. App. 427, shareholders acquiesced for more than twenty years, making no objection.

Iowa.— Hart *v.* Mt. Pleasant Park Stock Co., 97 Iowa 353, 66 N. W. 190, holding that a shareholder ratifies an arrangement by presiding at the meeting and making no objection thereto.

Michigan.— Boynton *v.* Roe, 114 Mich. 401, 72 N. W. 257.

Missouri.—Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865.

Nebraska.— Clarke *v.* Omaha, etc., R. Co., 4 Nebr. 458, shareholder had attended meeting and voted to carry arrangement into effect.

New York.— Burden *v.* Burden, 159 N. Y. 287, 54 N. E. 17 [*affirming* 8 N. Y. App. Div. 160, 40 N. Y. Suppl. 499, shareholder cannot assail the right of his corporation to hold and own property conveyed to it as part of the scheme of organization entered into to settle differences between himself and his partner]; Skinner *v.* Smith, 134 N. Y. 240, 31 N. E. 911, 47 N. Y. St. 528; McNab *v.* McNab, etc., Mfg. Co., 62 Hun 18, 16 N. Y. Suppl. 448, 41 N. Y. St. 906.

Utah.— Jackson *v.* Crown Point Min. Co., 21 Utah 1, 59 Pac. 238, 81 Am. St. Rep. 651, estopped from questioning the acts of the board he helped to elect.

United States.— Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. ed. 488 (although the complaining shareholder attended the meeting by proxy and dissented, but declined to vote when his vote would have controlled the action of the meeting); Northern Trust Co. *v.* Columbia Straw-Paper Co., 75 Fed. 937.

England.— Whitwam *v.* Watkin, 78 L. T. Rep. N. S. 188, persons who sold to a corporation stock in another corporation, which it was beyond the power of the latter to purchase, cannot, as shareholders, upon purchasing shares in the latter corporation, maintain an action against its directors for the illegal expenditure of the money.

32. Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 41 Nebr. 374, 59 N. W. 838.

33. See *infra*, XV, B, 7, a, (I) *et seq.*

34. Arkansas River Land, etc., Co. *v.* Farmers' L. & T. Co., 13 Colo. 587, 22 Pac. 954.

35. Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21.

36. Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. Suppl. 836, 21 N. Y. St. 439; Roebling *v.* Richmond First Nat. Bank, 30 Fed. 744.

of a shareholder cannot maintain a suit in equity for a decree compelling the corporation to declare and pay dividends upon its shares.[37]

(III) *Policy-Holder in Mutual Insurance Company.* The unascertained interest of a mere policy-holder in a mutual insurance company is insufficient to sustain an equitable action to prevent the corporation from exercising its statutory power of converting itself into a stock corporation.[38]

(IV) *One Who Expects to Become Shareholder.* One who expects to become the owner of shares in a corporation cannot, before becoming such owner, be heard in equity to complain of *ultra vires* acts of the corporation or be permitted to interfere with the affairs of the company.[39]

b. Whether Must Be Registered Shareholder. Ordinarily a person entitled to relief against breaches of trust by the directors and wrongs by the majority of the shareholders must himself be a registered shareholder.[40] But a person who is entitled to be registered as a shareholder cannot be turned out of court and refused a hearing merely because the officers of the corporation wrongfully refuse to register him as such.[41] And on principle the same rule must apply in cases of persons who are contingently so entitled.

c. Pledgees. Thus the pledgee of shares may occupy this position. It has been maintained on unanswerable reasons that a pledgee of corporate shares has a standing in equity to remove a cloud from the title of the corporation to its land,[42] or to call the directors to account for breaches of their trust.[43]

d. One Who Has Not Paid For His Shares. Moreover, the complaining shareholder must occupy a meritorious position as between himself and his corporation. He must have complied with the terms of his subscription by paying for his shares,[44] or otherwise yielding the consideration for which they were issued.[45] If his stock is void under a statute, by reason of not having been fully paid for "to the amount of its par value," he cannot ask the aid of a court of equity, based upon the rights of a shareholder.[46]

e. Equitable Owners. The equitable owner of shares necessarily has a right to have his interests protected by an appeal to a court of equity in proper cases the same as a legal owner has. Thus it has been held that one who has transferred his shares for a formal purpose, for instance for the purpose of facilitating the winding-up of the company, is still the equitable owner of them, and as such may sue as a shareholder to recover unappropriated assets of the corporation.[47] This must be the rule under the modern codes of procedure, which adopt the rule of equity requiring an action to be brought in the name of the real party in interest.[48]

f. Holder of How Many Shares. A shareholder who has a definite right which

37. Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. Suppl. 836, 21 N. Y. St. 439.

38. Grobe *v.* Erie County Mut. Ins. Co., 39 N. Y. App. Div. 183, 57 N. Y. Suppl. 290 [*affirming* 24 Misc. (N. Y.) 462, 53 N. Y. Suppl. 628].

39. Mayer *v.* Denver, etc., R. Co., 38 Fed. 197.

40. Atty.-Gen. *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251; Armstrong *v.* Herancourt Brewing Co., 26 Ohio L. J. 93; Brown *v.* Duluth, etc., R. Co., 53 Fed. 889.

41. Carson *v.* Iowa City Gas-Light Co., 80 Iowa 638, 45 N. W. 1068; Ernst *v.* Elmira Municipal Imp. Co., 24 Misc. (N. Y.) 583, 54 N. Y. Suppl. 116.

42. Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

43. Green *v.* Hedenberg, 159 Ill. 489, 42 N. E. 851, 50 Am. St. Rep. 178; Smith *v.* Smith, etc., Co., 125 Mich. 234, 84 N. W. 144. And see McCaleb *v.* Goodwin, 114 Ala. 615, 21 So. 967; Spokane *v.* Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141.

That pledgees of the capital stock of a corporation are not entitled to notice of the acts of its directors see Havemayer *v.* Bordeaux Co., 8 Nat. Corp. Rep. 127.

44. Landes *v.* Globe Planter Mfg. Co., 73 Ga. 176.

45. Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350.

46. Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21. See also St. Louis, etc., Min. Co. *v.* Sandoval, etc., Min. Co., 116 Ill. 170, shares never paid for, assessments not paid, shares liable to be forfeited.

47. Thompson *v.* Stanley, 20 N. Y. Suppl. 317.

48. Larwill *v.* Burke, 19 Ohio Cir. Ct. 449.

he is entitled to have protected cannot be turned out of a court of equity because he is not the holder of more than a single share;[49] and, although one who has purchased a single share for the purpose of bringing such an action may not have acquired such a standing, yet if it appear that he is the equitable owner of ten other shares in respect of which he would be assessable in favor of creditors the rule may be different.[50]

g. One Entitled to Shares in Corporation Formed by Consolidation. A shareholder in one of four companies which had been consolidated under the provisions of a statute, who had not converted his stock into the stock of the consolidated company as the statute authorized him to do, has no standing to maintain a shareholder's bill against such company.[51]

h. One Who Has Held and Surrendered Trust Certificates. One who has held trust certificates issued by a corporation cannot, after surrendering such certificates in exchange for stock of the company, assert other rights than those of a shareholder, in enforcing rights of the company against those fraudulently conspiring against such rights.[52]

i. One Whose Shares Are Valueless and Cannot Be Made Valuable by Relief He Seeks. A shareholder of an insolvent corporation whose stock is worthless and cannot be made of any value by the granting of the relief prayed for in his bill cannot maintain a suit to set aside an order appointing a receiver and a decree directing a sale of property of the corporation, on the ground that its officers and directors fraudulently colluded with the complainant in the proceeding in which the receiver was appointed and the sale directed, to enable it to obtain the order and decree.[53]

j. When Corporation Is in Hands of Receiver. A shareholder seeking to enforce causes of action vested in the corporation or its receivers must show himself qualified to sue on the rights of one or the other.[54]

k. Shareholder at Time of Transaction Complained of. The shareholder must be such at the time of the transaction of which he complains. One who was not a shareholder or a judgment creditor of the corporation at the time of the transfer of its business to a new corporation had no standing in equity to complain that such transfer was *ultra vires*, as being in violation of the prohibition against transfers in insolvency.[55] So far as the federal courts are concerned this rule is enforced by equity rule ninety-four; but this rule does not apply in the state courts, and one such court has held that a transferee in good faith of corporate shares after the doing of an *ultra vires* act may maintain a suit to annul such act where the former owner of the shares neither voted the shares in favor of the act nor acquiesced in it.[56]

l. Shareholder Must Be Such at Time of Commencement of His Action. But the shareholder must have been such at the time of the commencement of his suit.[57]

m. Shareholder Who Has Lost His Right to Vote For Non-Payment of Dues. It has been held that the mere fact that a shareholder has lost his right to vote on his shares because of the non-payment of dues does not deprive him of the character of a member of the corporation for other purposes under the New York

49. It has been reasoned that the largest shareholder has no more right than the holder of a single share to sue in his own name to enforce corporate rights. Van Kirk *v.* Adler, 111 Ala. 104, 20 So. 336.

50. Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673.

51. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20.

52. Alexander *v.* Donohoe, 68 Hun (N. Y.) 131, 22 N. Y. Suppl. 652, 52 N. Y. St. 21 [*affirmed* in 143 N. Y. 203, 38 N. E. 263, 62 N. Y. St. 153].

53. Darragh *v.* H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609.

54. Holton *v.* Wallace, 77 Fed. 61, 23 C. C. A. 71.

55. Wilson *v.* Mechanical Orguinette Co., 57 N. Y. App. Div. 158, 68 N. Y. Suppl. 173.

56. Forrester *v.* Butte, etc., Consol. Copper, etc., Min. Co., 21 Mont. 565, 55 Pac. 353 [*denying rehearing* in 21 Mont. 544, 55 Pac. 229].

57. Fitchett *v.* Murphy, 46 N. Y. App. Div. 181, 61 N. Y. Suppl. 182 [*reversing* 26 Misc. (N. Y.) 544, 56 N. Y. Suppl. 322].

General Corporation Law, providing that the term "member of a corporation" shall include every person having a right to vote at a meeting of the corporation.[58]

n. Shareholder Without Certificate. As already seen[59] the possession of a certificate is not necessary to make a person a shareholder, that being merely the evidence of his title. Accordingly it has been held that one who has subscribed for the stock of a corporation and paid in his money becomes a shareholder, and is entitled to maintain the rights of that position, although no certificate of stock is issued to him.[60]

o. Holder of Shares Subject to Option of Purchase by Other Shareholders. It has been held that a requirement in the by-laws of a corporation that before a sale of its stock the holder thereof shall offer it in writing, through the treasurer, to the then existing shareholders, is solely for the benefit of such then existing shareholders; and they alone are entitled to object on the ground of a non-compliance therewith.[61]

19. Shareholder Must First Exhaust His Remedy Within Corporation — a. In General. A bill by one or more shareholders in behalf of the general body cannot be maintained unless it shows that plaintiffs have exhausted the means of putting the corporation in motion.[62]

b. Rule Where Grievance Will Admit of Temporary Delay — (I) *In General.* If the grievance will admit of a temporary delay, so that if it can be redressed in no other mode a resort may be had to a corporate election, the shareholders will not be permitted to sue.[63]

(II) *Unless Wrong Is Being Done by Majority of Shareholders.* But if the wrong is being perpetrated by a majority of the shareholders, who can perpetuate it by electing directors in their interest at each successive election, then the minority are entitled to resort to a court of equity for redress.[64]

c. Failure of Corporation to Sue Condition Precedent. Where the complaining shareholders do not sue to redress grievances peculiar to themselves, but proceed in right of the corporation, or what is the same thing in right of all the shareholders, then the failure or refusal of the corporation itself to demand redress is a condition precedent to the right of the shareholders to sue or to

58. Buker *v.* Steele, 43 N. Y. Suppl. 346.

59. See *supra*, VI, H, 7, a.

60. Tennessee Mountain Petroleum, etc., Co. *v.* Ayers, (Tenn. Ch. App. 1897) 43 S. W. 744.

61. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551, 23 Atl. 795.

62. *Alabama.*— Johnson *v.* National Bldg., etc., Assoc., 125 Ala. 465, 28 So. 2; Roman *v.* Woolfolk, 98 Ala. 219, 13 So. 212.

Colorado.— Miller *v.* Murray, 17 Colo. 408, 30 Pac. 46; Beshoar *v.* Chappell, 6 Colo. App. 323, 40 Pac. 244.

Connecticut.— Allen *v.* Curtis, 26 Conn. 456.

Georgia.— Colquitt *v.* Howard, 11 Ga. 556.

Kansas.— Home Min. Co. *v.* McKibben, 60 Kan. 387, 56 Pac. 756.

Kentucky.— Jones *v.* Johnson, 10 Bush 649.

Maine.— Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364.

Massachusetts.— Brewer *v.* Boston Theatre, 104 Mass. 378.

Missouri.— Albers *v.* St. Louis Merchants' Exch., 45 Mo. App. 206.

New York.— Fitchett *v.* Murphy, 46 N. Y. App. Div. 181, 61 N. Y. Suppl. 182 [*reversing* 26 Misc. 544, 56 N. Y. Suppl. 322]; Robinson *v.* Smith, 3 Paige 222, 24 Am. Dec. 212; Forbes *v.* Whitlock, 3 Edw. 446.

Pennsylvania.— Chamberlain *v.* Peoples' Bridge Co., 2 Dauph. Co. Rep. 329.

Rhode Island.— Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9.

South Carolina.— Latimer *v.* Richmond, etc., R. Co., 39 S. C. 44, 17 S. E. 258.

Tennessee.— Deaderick *v.* Wilson, 8 Baxt. 108.

United States.—Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815; Hutton *v.* Joseph Bancroft, etc., Co., 83 Fed. 17 [*citing* Dunphy *v.* Traveller Newspaper Assoc., 146 Mass. 495, 16 N. E. 426; Holton *v.* New Castle R. Co., 138 Pa. St. 111, 20 Atl. 937]; Whitney *v.* Fairbanks, 54 Fed. 985; Putnam *v.* Ruch, 54 Fed. 216.

England.— Foss *v.* Harbottle, 2 Hare 461, 24 Eng. Ch. 461; Orr *v.* Glasgow, etc., R. Co., 6 Jur. N. S. 877, 2 L. T. Rep. N. S. 550, 8 Wkly. Rep. 643; Mozley *v.* Alston, 16 L. J. Ch. 217, 1 Phil. 790, 19 Eng. Ch. 790.

63. Brewer *v.* Boston Theatre, 104 Mass. 378.

64. Brewer *v.* Boston Theatre, 104 Mass. 378.

appear as plaintiffs,[65] unless a state of facts is alleged and proved which makes it apparent that such a demand would be futile.[66] The reason is that if every shareholder were allowed to bring such suits at pleasure, the directors might find themselves harassed by a multiplicity of suits and by endless litigation.[67] The principle is that the shareholder or shareholders seeking to maintain the action must show that they have used in good faith reasonable efforts to obtain redress at the hands of the corporation.[68] Such an effort, it has been well said, must be an earnest, and not a simulated, one.[69]

d. When Demand Must Be Made Upon Directors to Sue — (1) *In General.* This reasonable effort will generally consist in a demand upon the directors to have an action brought and prosecuted in the name of the corporation to redress the grievances complained of.[70]

65. *Alabama.*—Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763.

California.— Bacon *v.* Irvine, 70 Cal. 221, 11 Pac. 646; Cogswell *v.* Bull, 39 Cal. 320.

Colorado.— Miller *v.* Murray, 17 Colo. 408, 30 Pac. 46; Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894.

Connecticut.— Allen *v.* Curtis, 26 Conn. 456.

Georgia.— Alexander *v.* Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; Henry *v.* Elder, 63 Ga. 347.

Kentucky.— Shawhan *v.* Zinn, 79 Ky. 300.

Maine.— Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173; Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364.

Massachusetts.— Brewer *v.* Boston Theatre, 104 Mass. 378.

Missouri.— Albers *v.* St. Louis Merchants' Exch., 45 Mo. App. 206.

New York — Greaves *v.* Gouge, 69 N. Y. 154; Vanderbilt *v.* Garrison, 5 Duer 689.

North Carolina.— Moore *v.* Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Boyd *v.* Sims, 87 Tenn. 771, 11 S. W. 948; Memphis Gayoso Gas Co. *v.* Williamson, 9 Heisk. 314; Black *v.* Huggins, 2 Tenn. Ch. 780.

Texas.— Becker *v.* Gulf City St. R., etc., Co., 80 Tex. 475, 15 S. W. 1094.

West Virginia.— Rathbone *v.* Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570.

Wisconsin.— Doud *v.* Wisconsin, etc., R. Co., 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620.

United States.—Taylor *v.* Holmes, 127 U. S. 489, 8 S. Ct. 1192, 32 L. ed. 179; Quincy *v.* Steel, 120 U. S. 241, 7 S. Ct. 520, 30 L. ed. 624; Memphis *v.* Dean, 8 Wall. 64, 19 L. ed. 326; Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401; Weidenfeld *v.* Allegheny, etc., R. Co., 47 Fed. 11; Allen *v.* Wilson, 28 Fed. 677; Converse *v.* Dimock, 22 Fed. 573; Dannmeyer *v.* Coleman, 11 Fed. 97, 8 Sawy. 51; Morgan *v.* Railroad Co., 17 Fed. Cas. No. 9,806, 1 Woods 15; Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,145, 1 Sawy. 63; Smith *v.* Poor, 22 Fed. Cas. No. 13,093, 3 Ware 148

66. Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Movle *v.* Landers, 83 Cal. 579, 23 Pac. 798; Beach *v.* Cooper, 72 Cal. 99, 13 Pac. 161; Knoop *v.* Bohmrich, 49 N. J. Eq. 82, 23 Atl. 118; Kelsey *v.* Sargent, 40 Hun (N. Y.) 150.

67. Macdougall *v.* Gardiner, 1 Ch. D. 13, 21, 45 L. J. Ch. 27, per James, L. J.

68. Rathbone *v.* Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570.

69. Bacon *v.* Irvine, 70 Cal. 221, 11 Pac. 646; Hawes *v.* Contra Costa Water Co., 104 U. S. 450, 26 L. ed. 827; Dannemeyer *v.* Coleman, 11 Fed. 97, 8 Sawy. 51.

70. *Alabama.*— Decatur Mineral Land Co. *v.* Palm, 113 Ala. 531, 21 So. 315, 59 Am. St. Rep. 140; Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763.

California.— Bacon *v.* Irvine, 70 Cal. 221, 11 Pac. 646.

Connecticut.— Allen *v.* Curtis, 26 Conn. 456.

Georgia.— Alexander *v.* Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337.

Kansas.— Atchison, etc., R. Co. *v.* Sumner County, 51 Kan. 617, 33 Pac. 312, unless it appears that he has in good faith, but without success, attempted to secure action by its directors or managing officers or that demand for their action would be unavailing.

Kentucky.— Shawhan *v.* Zinn, 79 Ky. 300.

Maine.— Ulmer *v.* Maine Real-Estate Co., 93 Me. 324, 45 Atl. 40.

New York.—Vanderbilt *v.* Garrison, 5 Duer 689.

North Carolina.—Moore *v.* Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679.

Tennessee.— Boyd *v.* Sims, 87 Tenn. 771, 11 S. W. 948; Memphis Gayoso Gas Co. *v.* Williamson, 9 Heisk. 314.

Texas.— Becker *v.* Gulf City St. R., etc., Co., 80 Tex. 475, 15 S. W. 1094.

Virginia.— Mount *v.* Radford Trust Co., 93 Va. 427, 25 S. E. 244, without alleging that he has requested the board of directors to bring such suit, or stating facts showing that such request would be unavailing.

West Virginia.— Rathbone *v.* Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570.

Wisconsin.— Doud *v.* Wisconsin, etc., R. Co., 65 Wis. 108, 25 N. E. 533, 56 Am. Rep. 620.

United States.— Taylor *v.* Holmes, 127 U. S. 489, 8 S. Ct. 1192, 32 L. ed. 179; Quincy *v.* Steel, 120 U. S. 241, 9 S. Ct. 520, 30 L. ed. 624; Weidenfeld *v.* Allegheny, etc., R. Co.,

(II) *Refusal of Directors Must Be Wrongful.* Some of the cases moreover emphasize the proposition that it must clearly appear that the refusal of the directors to institute an action in the name of the corporation to redress the grievances complained of was a wrongful refusal,[71] and one of them is to the effect that the refusal must amount to a clear default, involving a breach of duty.[72] But all this is implied in the statement that there are breaches of trust or other grievances to be redressed, and that the directors will not allow an action to be brought in the name of the corporation to redress them; because under such circumstances their refusal is necessarily wrongful.

(III) *Rule Same With Reference to Action Against Assignee For Creditors For Maladministration.* Where the majority of the directors are qualified to sue the assignee for creditors for maladministration, a shareholder's bill seeking the same relief must allege that the shareholder first demanded that the directors bring the suit.[73]

e. If Demand on Directors Futile, Effort Must Be Made to Induce Action on Part of Shareholders. If the demand made upon the directors that they bring the proposed action in the name of the corporation to redress the grievance complained of is refused, then a further effort must be made to induce such action through the body of the shareholders, unless the circumstances are such as to show that such further effort would be futile.[74]

f. Doctrine of Federal Courts on This Subject. The doctrine of the federal courts on this subject was distinctively formulated by Mr. Justice Miller in a case decided in the year 1881, which has continued to be regarded as the leading case on the subject. It is essentially the same as that stated in the preceding paragraph, but recited in detail and with particularity.[75] The federal doctrine is formulated by the supreme court of the United States, in what is known as the ninety-fourth equity rule as follows: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary of the shareholders, and the causes of his failure to obtain such action." [76]

47 Fed. 11; Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,145, 1 Sawy. 63.

71. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

72. Memphis Gayoso Gas Co. *v.* Williamson, 9 Heisk. (Tenn.) 314; Memphis *v.* Dean, 8 Wall. (U. S.) 64, 19 L. ed. 326.

73. State *v.* Mitchell, 104 Tenn. 336, 58 S. W. 365.

74. Wolf *v.* Pennsylvania R. Co., 195 Pa. St. 91, 45 Atl. 936 (stating averments which have been held insufficient to show that the directors would have refused the application); Robinson *v.* West Virginia Loan Co., 90 Fed. 770; Church *v.* Citizens' St. R. Co., 78 Fed. 526.

That the court will presume that it is not impracticable to convene a meeting of the proprietors capable of controlling the directors see Miller *v.* Murray, 17 Colo. 408, 30 Pac. 46; Weidenfeld *v.* Allegheny, etc., R. Co., 47 Fed. 11 (under the ninety-fourth equity rule); Foss *v.* Harbottle, 2 Hare 461.

75. Hawes *v.* Contra Costa Water Co., 104 U. S. 450, 26 L. ed. 827. See also Taylor *v.* Holmes, 127 U. S. 489, 8 S. Ct. 1192, 32 L. ed. 179; Dimpfel *v.* Ohio, etc., R. Co., 110 U. S. 209, 3 S. Ct. 573, 28 L. ed. 121; Detroit *v.* Dean, 106 U. S. 537, 1 S. Ct. 560, 27 L. ed. 300; Huntington *v.* Palmer, 104 U. S. 482, 26 L. ed. 833.

76. This rule has been construed and applied in the court which promulgated it, in a very instructive decision where the allegations of a bill were held insufficient under it; a decision which every pleader should carefully study before attempting to draw a shareholder's bill of this nature to be filed in a circuit court of the United States. The court concluded from an analysis of the bill that the inference that the proceeding was a preconcerted and simulated arrangement to foist upon the circuit court of the United

g. What Is Sufficient Request to Directors Under General Rules of Equity Procedure. As to what is a sufficient request to the corporation to institute suit, it has been held that a request made in any mode, so as to be a legal request to the corporation, is sufficient.[77]

h. Manner in Which Efforts to Induce Action on Part of Corporation Must Be Set Forth in Pleading. If a single shareholder, or a minority of the shareholders, bring such an action, their bill or complaint must set forth in detail and with particularity the efforts made by them to secure the desired action on the part of the corporation, and these allegations must be proved[78] or the suit will be dismissed.[79] It has been held that in a bill in equity by a shareholder against the corporation, charging that the directors have done acts *ultra vires* and in violation of law, and praying for an injunction, an appointment of a receiver, and a winding-up of the affairs of the corporation, the complainant must allege that the directors in office at the time the bill is brought have been asked to act, or that they have refused to act; or that failing with the officers the corporation itself has been asked to protect itself; or that it has refused to do so; or that it is incapable of action; or that the necessary delay in securing corporate action would prejudice the complainant; and where such allegations are not made the bill is demurrable.[80]

20. Circumstances Which Excuse Making of Request to Directors to Sue — a. In General, Where Such Request Would Be Useless. Generally speaking the making of a request or demand upon the directors that they bring the appropriate action is dispensed with, as a preliminary to a shareholder's suit, where a state of facts is averred and proved which shows that the making of such a demand would be useless and that it would not be complied with.[81]

b. Where Directors Would Necessarily Be Opposed to Prosecution of Action — (I) *In General.* The general rule is that where the directors are shown to occupy such a relation to the transaction complained of that they would necessarily be antagonistic to the prosecution of the action which the complaining shareholder requests them to prosecute, a demand that they bring and prosecute the action in the name of the corporation will be dispensed with.[82]

(II) *Where Directors Themselves Are Guilty Parties.* This happens where the object of the suit is to impeach breaches of trust or other fraudulent

States a jurisdiction in a case which did not fairly belong to it was very strong. Quincy *v.* Steel, 120 U. S. 241, 9 S. Ct. 520, 30 L. ed. 624.

For a case where the pleading was held not to comply with the ninety-fourth rule upon facts based upon the judge's private knowledge see Squair *v.* Lookout Mountain Co., 42 Fed. 729. For another case where the allegations of the bill were held insufficient to comply with the ninety-fourth rule of equity see Weidenfeld *v.* Allegheny, etc., R. Co., 47 Fed. 11.

As to what is sufficient request under the ninety-fourth equity rule see Quincy *v.* Steel, 120 U. S. 241, 9 S. Ct. 520, 30 L. ed. 624.

77. Circumstances under which a request made to a committee was sufficient. Hazard *v.* Durant, 11 R. I. 195.

Frequent protests, although made to the directors, not sufficient. Boyd *v.* Sims, 87 Tenn. 771, 11 S. W. 948.

Simulated notice made to lay the foundation of an action not sufficient. Bacon *v.* Irvine, 70 Cal. 221, 11 Pac. 646.

78. Dillon *v.* Lee, 110 Iowa 156, 81 N. W. 245.

79. Albers *v.* St. Louis Merchants' Exch., 45 Mo. App. 206; Robinson *v.* West Virginia Loan Co., 90 Fed. 770.

80. Ulmer *v.* Maine Real-Estate Co., 93 Me. 324, 45 Atl. 40.

81. Smith *v.* Dorn, 96 Cal. 73, 13 Pac. 1024; Brewer *v.* Boston Theatre, 104 Mass. 378. See also Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362; Elred *v.* American Palace-Car Co., 99 Fed. 168 (where it appears that there is no collusion and that a demand on the directors of the corporation to bring the suit would have been useless, notwithstanding United States equity rule ninety-four); Wier *v.* Bay State Gas Co., 91 Fed. 940 (instancing United States equity rule ninety-four); Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347. It was so held where the petition, in an action by a shareholder to recover assets misappropriated by officers holding a majority of the stock, alleged that such shareholders had conspired to wreck the company, and had done *ultra vires* acts, and diverted to their own use large sums of money belonging to the corporation, and had constituted themselves and others who were mere dummies the board of directors and controlling officers of the corporation in pursuance of such conspiracy. Joy *v.* Ft. Worth Compress Co., 24 Tex. Civ. App. 94, 58 S. W. 173.

82. See *infra*, XI, B, 20, b, (II).

acts committed by the directors themselves, in which case they would not be proper parties plaintiff but would be proper parties defendant, and where, if the request were granted the litigation would necessarily be subject to the control of the persons opposed to its success, as where the object of the bill is to restrain the doing of an act which the directors have already resolved to do, such as the restraining of a consolidation with another corporation.[83]

(III) *Where Directors Are Under Control of Parties Whose Acts Are Complained of or Who Are Necessarily Adverse to the Litigation.* This also happens where the directors are the tools or the creatures, or under the control of the shareholders or of third persons, or corporations whose acts are complained of and who are necessarily adverse to the litigation,[84] as where the directors are under control of the shareholder holding a majority of the stock, and the fraud which it is sought to redress has been instigated by this majority shareholder, and the minority shareholders are the parties bringing the action;[85] where the object of the bill is to impeach an unlawful contract, and the directors are under the control of the persons with whom the contract was made;[86] where one corporation has acquired a majority of the shares of a rival corporation, and the object of the bill, brought by a shareholder of the company

83. *Alabama.*—Mack *v.* De Bardeleben Coal, etc., Co., 90 Ala. 396, 8 So. 150, 9 L. R. A. 650; Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

California.— Smith *v.* Dorn, 96 Cal. 73, 30 Pac. 1024; Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Ashton *v.* Dashaway Assoc., 84 Cal. 61, 22 Pac. 660, 7 L. R. A. 809; Moyle *v.* Landers, 78 Cal. 99, 20 Pac. 241, 21 Pac. 1133, 12 Am. St. Rep. 22.

Colorado.— Miller *v.* Murray, 17 Colo. 408, 30 Pac. 46.

Indiana.— Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 27 N. E. 487; Rogers *v.* Lafayette Agricultural Works, 52 Ind. 296.

Iowa.— Schoening *v.* Schwenk, 112 Iowa 733, 84 N. W. 916.

Maryland.— Davis *v.* Gemmell, 70 Md. 356, 17 Atl. 259.

Minnesota.—Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483, 52 N. W. 48.

Missouri.— Hannerty *v.* Standard Theater Co., 109 Mo. 297, 19 S. W. 82, shareholder suing to recover for the corporation property rights that have been lost by the fraudulent misconduct of the directors still in office.

Montana.— Gerry *v.* Bismarck Bank, 19 Mont. 191, 47 Pac. 810, two of the four directors active participants in the wrongs complained of, the other two acquiescing.

Nebraska.— Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46, where the wrongdoers are in control of the corporation, both by owning a majority of the stock and by being the corporate officers.

New Jersey.— Knoop *v.* Bohmrich, 49 N. J. Eq. 82, 23 Atl. 118.

New York.— Nash *v.* Hall Signal Co., 90 Hun 354, 35 N. Y. Suppl. 940, 70 N. Y. St. 655; Anderton *v.* Wolf, 41 Hun 571, 4 N. Y. St. 101; Kelsey *v.* Sargent, 40 Hun 150; Ithaca Gas Light Co. *v.* Treman, 30 Hun 212; Brown *v.* Buffalo, etc., R. Co., 27 Hun 342; Brewster *v.* Hatch, 4 N. Y. St. 617.

Rhode Island.— Eaton *v.* Robinson, 18 R. I. 396, 27 Atl. 595.

Texas.— Baker *v.* Gulf City St. R., etc., Co., 80 Tex. 475, 15 S. W. 1094.

Wisconsin.— Eschweiler *v.* Stowell, 78 Wis. 316, 47 N. W. 361, 23 Am. St. Rep. 411.

United States.— Berwind *v.* Canadian Pac. R. Co., 98 Fed. 158 (where it is alleged in the bill that the corporation is controlled by the defendants, and this notwithstanding equity rule ninety-four); Excelsior Pebble Phosphate Co. *v.* Brown, 74 Fed. 321, 20 C. C. A. 428 (where the corporation is dominated by a president and board of directors who are charged with wrecking the corporation for their own private ends); Barnes *v.* Kornegay, 62 Fed. 671 (to prevent the corporation from submitting to illegal taxation where the state owns three fourths of the shares and casts its vote as a unit, and the directors representing it have a majority, and the president and directors have done all they can do to accomplish such taxation); Ranger *v.* Champion Cotton-Press Co., 52 Fed. 611 (notwithstanding United States equity rule ninety-four); Barr *v.* Pittsburgh Plate-Glass Co., 40 Fed. 412.

Other special circumstances dispensing with the necessity of a demand upon the corporate authorities to bring the action in the name of the corporation. Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. 1048 [*reversing* 66 Ill. App. 427]; Davis *v.* Gemmell, 70 Md. 356, 17 Atl. 259; Averill *v.* Barber, 6 N. Y. Suppl. 255, 25 N. Y. St. 194.

84. Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315; Aiken *v.* Colorado River Irr. Co., 72 Fed. 591 (corporation under the control of directors who are the instruments and tools of the one responsible for the fraud).

85. Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315.

86. Currier *v.* New York, etc., R. Co., 35 Hun (N. Y.) 355.

about to be swallowed up, is to restrain the purchasing corporation from voting at a corporate election in respect of such shares, and it appears that the directors of the victim corporation constitute a majority of the governing board of the victor corporation;[87] where the directors of the corporation are under the control of another corporation whose acts are complained of;[88] where another corporation has assumed full control of the corporation and the directors of the corporation are the mere creatures of such dominant corporation;[89] where another corporation has purchased a majority of the shares of the corporation for the purpose of getting control of it and suppressing its competition, and where it practically controls the governing body of the former corporation;[90] or where the corporation became accommodation indorser on paper on which its president was personally liable, and permitted judgment to go against it by default when it had a good defense, and permitted its property to be advertised for sale under execution on a small judgment, all of which acts were done while a majority of the present board of directors were members of the board.[91]

(iv) *Where Wrong Is That of Corporation and Against Shareholder Personally.* If the right claimed is denied by the corporation, although necessarily through the mouth of its officers, for in such a way only can it speak, and if the wrong is capable of being redressed by an action against the corporation alone, and the right of action rests in the individual shareholder, then of course this rule has no application.[92]

(v) *Instances Where Such Demand Unnecessary.* The preliminary demand upon the directors to bring the appropriate action on the part of the corporation has been held unnecessary where the action was brought by a shareholder alleging that the board of directors in issuing new stock refused to issue to him his due proportion, and seeking to restrain them from issuing any more until they should issue his due proportion to him;[93] also where the object of the action was to compel the corporation to cancel certain shares alleged to have been unlawfully issued, and incidentally to restrain the holders of such shares from voting thereon;[94] and generally where the object of the bill is to restrain the doing of *ultra vires* acts, because a single shareholder has a right to an injunction for that purpose.[95]

c. Where Corporation Has Been Abandoned or Dissolved. It has been so held where the corporation has abandoned its business and ceased to appoint officers;[96] where the corporation has been abandoned or has suffered a *de facto* dissolution by the non-user of its franchises and request made to those who constituted its last board of directors, that they bring and prosecute in the name of the corporation the appropriate action, will generally be dispensed with, as where the corporation has ceased to do business for a long term of years, and its directors are unknown, or all the incorporators are before the court.[97] If in such a case a corporation is or has been in the hands of a receiver the corporation may, notwithstanding federal equity rule ninety-four, sue the receiver to call him to account.[98] But this rule does not apply where, after the expiration of the charter, the corporate existence is continued for the purpose of winding up its affairs.[99]

87. Mack *v.* De Bardeleben Coal, etc., Co., 90 Ala. 396, 8 So. 150, 9 L. R. A. 650.
88. Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 41 Nebr. 374, 59 N. W. 838.
89. Earle *v.* Seattle, etc., R. Co., 56 Fed. 909.
90. George *v.* Central R., etc., Co., 101 Ala. 607, 14 So. 752.
91. Bridgeport Development Co. *v.* Tritsch, 110 Ala. 274, 20 So. 16.
92. Wood *v.* Union Gospel Church Bldg. Assoc., 63 Wis. 9, 22 N. W. 756; Dousman *v.* Wisconsin, etc., Min., etc., Co., 40 Wis. 418.
93. Dousman *v.* Wisconsin, etc., Min., etc., Co., 40 Wis. 418.
94. Wood *v.* Union Gospel C. B. Assoc., 63 Wis. 9, 22 N. W. 756.
95. See *infra*, XI, C, 4, a *et seq.*
96. Thompson *v.* Stanley, 20 N. Y. Suppl. 317; Crumlish *v.* Shenandoah Valley R. Co., 28 W. Va. 623.
97. Tennessee Mountain Petroleum, etc., Co. *v.* Ayers, (Tenn. Ch. App. 1897) 43 S. W. 744.
98. Lafayette Co. *v.* Neely, 21 Fed. 738.
99. Taylor *v.* Holmes, 127 U. S. 489, 8 S. Ct. 1192, 32 L. ed. 179.

d. Requesting Receiver, Etc., to Sue After Insolvency — (I) *In General.* If the corporation, by reason of insolvency, is in the hands of a receiver or other trustee, for the purpose of liquidation, then a request which would have been made upon the directors if the corporation had been a going concern is properly made upon the receiver or trustee, and if it is refused, the shareholder's action may proceed.[1] A shareholder may maintain an action and receive all the assets of the corporation, joining the corporation and necessary parties to assert his rights, without requesting the receiver to bring such an action, where the conduct of the receiver is equivalent to a refusal.[2]

(II) *In Case of Insolvent National Bank.* In case of an insolvent national bank the demand must be made upon the comptroller of the currency,[3] and if it is refused it seems that the shareholder's action may proceed in a state court.[4]

(III) *In Causes Which Have Been Removed From State to Federal Court.* In a shareholder's action commenced in a state court and afterward removed to a court of the United States, the complaint need not set out with particularity the efforts of the complainant to secure action on the part of the managing directors or trustees, since the federal equity rule ninety-four does not apply in such a case; but if the state court had jurisdiction, and if the federal court has the same jurisdiction in succession thereto, and if the entire record anywhere shows that the corporation will not proceed to vindicate the right of the shareholder, he will be allowed to proceed with the prosecution of the suit.[5]

e. When Shareholder May Intervene For Purpose of Defending. Where an action has been brought against a corporation for the use of its president and two of its directors, who constituted a majority of the board, and the corporation in its answer admits plaintiff's collusive action, a shareholder will be permitted to intervene and defend the action without alleging that he requested the officers of the corporation so to do.[6]

f. Request That Corporation Sue Not Necessary to Vindicate Rights Personal to Particular Shareholder. It must be kept in mind that this doctrine, which requires the aggrieved shareholder or shareholders to exhaust all reasonable efforts within the corporation to induce the bringing and prosecution of the proper action by and in the name of the corporation applies only where it is the purpose to vindicate a right belonging to the corporation, or where the object of the suit is to control the management of the corporation, or to defend against, or to redress breaches of trust committed by those having such management. If the right is a right of a particular shareholder, and not a right in respect of which the corporation could bring an action, then it is not necessary to make any request on the governing body of the corporation to have such an action brought, as for example where a shareholder brings an action against directors and against original shareholders, to recover shares which do not belong to the company, but which the original subscribers permitted the company to use as a part consideration for the construction of its works, under an agreement that whatever shares were left should be divided among the promoters and subscribers.[7]

g. Refusal of Corporation to Sue Must Be Averred and Proved — (I) *In General.* The complaint, petition, or bill, by whatever name called, must allege

1. Fisher *v.* Andrews, 37 Hun (N. Y.) 176; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.
2. Farwell *v.* Great Western Tel. Co., 161 Ill. 620 [*affirmed* in 161 Ill. 522, 44 N. E. 891], receiver had retained as counsel the largest creditor.
3. U. S. Rev. Stat. (1872), § 5234.
4. Brinckerhoff *v.* Bostwick, 23 Hun (N. Y.) 237; Nelson *v.* Burrows, 9 Abb. N. Cas. (N. Y.) 280.
5. Evans *v.* Union Pac. R. Co., 58 Fed. 497.
6. Shively *v.* Eureka Tellurium Gold Min. Co., 129 Cal. 293, 61 Pac. 939, opinion by Smith, Commissioner.
7. Krohn *v.* Williamson, 62 Fed. 869, opinion by Taft, J.

that the corporation or its directors have been requested to prosecute the action and have refused so to do.[8]

(11) *Particularity of Averment Under Ninety-Fourth Federal Equity Rule* — (A) *In General.* The complainant must not only allege this, but, under the ninety-fourth rule for the practice of the courts of the United States in equity, he must set forth in detail the efforts which he has made to induce the directors to institute a suit in the name of the corporation to redress the grievances complained of, and with sufficient particularity to show that the effort on his part has been real and earnest and not simulated.[9]

(B) *This Rule Followed in Some State Courts.* And this exacting rule of pleading has been followed in some of the state courts.[10]

(C) *Instances of Sufficient Averments.* The following may be cited as instances of averments of efforts to secure action on the part of the corporation or its directors, which have been held sufficient: That the present board of directors have openly connived at the fraud and approved of the transaction which the shareholders seek to impeach;[11] "that the said defendants, though requested so to do, have wholly neglected and refused to comply with these reasonable expectations and requests of your orator," this being deemed sufficient and sustained by proof of such request made to a committee exercising the powers of the board so far as they could be delegated;[12] and that in consequence of the preponderating number of votes held by one shareholder, under whose influence the directors acted, it was impossible for plaintiffs or any other shareholders to take any steps within defendant company to remedy the acts of the defendant mentioned.[13]

(D) *Instances of Insufficient Averments.* On the other hand the following averments have been held insufficient: That the board of directors consisted "nearly, if not entirely," of the persons who committed the wrong, these allegations not presenting an issuable fact;[14] in a suit by minority shareholders which seeks to prevent the foreclosure of a mortgage on corporate property an averment that the corporate officers are in collusion with the parties seeking the foreclosure, this not excusing a demand on the board of the directors to take steps to prevent the foreclosure;[15] that one of the directors, who is a party defendant, controls a majority of the stock and elects such a board as he may chose;[16] that the board of directors consists of seven members of whom three were elected and controlled by a rival corporation, while the others are independent of this control except

8. Doud *v.* Wisconsin, etc., R. Co., 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620. See to the like effect the following cases:

Alabama.— Mack *v.* De Bardeleben Coal, etc., R. Co., 90 Ala. 396, 8 So. 150, 9 L. R. A. 650; Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, 7 So. 108, 16 Am. St. Rep. 81, 7 L. R. A. 605; Merchants', etc., Line *v.* Waganer, 71 Ala. 581.

California.— Cogswell *v.* Bull, 39 Cal. 320.

Connecticut.—Allen *v.* Curtis, 26 Conn. 456.

Georgia.— Alexander *v.* Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337.

Kentucky.— Shawhan *v.* Zinn, 79 Ky. 300.

Massachusetts.—Dunphy *v.* Traveller Newspaper Assoc., 146 Mass. 495, 16 N. E. 426; Brewer *v.* Boston Theatre, 104 Mass. 378.

New York.— Greaves *v.* Gouge, 69 N. Y. 154; Vanderbilt *v.* Garrison, 5 Duer 689.

North Carolina.— Moore *v.* Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625.

United States.— Dimpfell *v.* Ohio, etc., R. Co., 110 U. S. 209, 3 S. Ct. 573, 28 L. ed. 121; Detroit *v.* Dean, 106 U. S. 537, 1 S. Ct. 560, 27 L. ed. 300; Hawes *v.* Contra Costa Water Co., 104 U. S. 450, 26 L. ed. 827 (leading case); Memphis *v.* Dean, 8 Wall. 64, 19 L. ed. 326; Morgan *v.* New Orleans, etc., R. Co., 17 Fed. Cas. No. 9,806, 1 Woods 15.

England.— Foss *v.* Harbottle, 2 Hare 461, 24 Eng. Ch. 461; Mozley *v.* Alston, 16 L. J. Ch. 217, 1 Phil. 790, 19 Eng. Ch. 790.

9. Quincy *v.* Steel, 120 U. S. 241, 7 S. Ct. 520, 30 L. ed. 624; Foote *v.* Cunard Min. Co., 17 Fed. 46, 5 McCrary 251.

10. Albers *v.* St. Louis Merchants' Exch., 45 Mo. App. 206.

11. Mussina *v.* Goldthwaite, 34 Tex. 125, 7 Am. Rep. 281.

12. Hazard *v.* Durant, 11 R. I. 195.

13. Mason *v.* Harris, 11 Ch. D. 97, 48 L. J. Ch. 589, 40 L. T. Rep. N. S. 644, 27 Wkly. Rep. 699.

14. Cogswell *v.* Bull, 39 Cal. 320.

15. Alexander *v.* Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337.

16. Dunphy *v.* Traveller Newspaper Assoc., 146 Mass. 495, 16 N. E. 426.

one, who is alleged to have been a director before the interest of the rival was acquired, and to have no interest in the corporation;[17] a bill filed by a minority of the shareholders against the corporation and a majority of the directors, seeking to hold them accountable for breaches of their trust, charging them with forming a combination or ring for their own private profit and the expense of the other shareholders, none of which are *ultra vires*, but failing to set forth any attempt to procure redress within the corporation.[18]

(III) *Bill Failing to Aver Such Request and Refusal Bad on Demurrer.* A bill, petition, or complaint, by whatever name called, which fails to aver that the corporation, on request, has refused to bring the proper action, is bad on demurrer,[19] unless circumstances are set out which excuse the making of such a request.

(IV) *Whether Taken Advantage of by Plea in Abatement.* It seems also that the defect, being one which goes to the capacity of the plaintiff or plaintiffs to sue, may be taken advantage of by a plea in abatement.[20]

(V) *Whether Objection Can Be Made by Objecting to Evidence, Demurrer Ore Tenus, Etc.* But it is held that as it goes merely to the capacity of plaintiff to sue it is waived if not demurred to;[21] although in a later case in the same jurisdiction, it is said that the defect may be taken advantage of by objecting to any evidence which is in the nature of a demurrer *ore tenus*.[22]

(VI) *Such Averments, When Dispensed With.* Under principles already considered, the rule which requires this averment in the bill, petition, or complaint is dispensed with where the pleading contains other allegations which show that a request made to the corporation or to its directors to bring an action would have been useless, or which otherwise shows a state of facts dispensing with this requirement.[23]

h. Willingness of Corporation to Sue a Good Defense. Where a shareholder brings the action, and avers a request upon the directors to bring the action in the name of the corporation and the refusal on their part to comply with the request, and defendant pleads to the bill, denying the allegation that the corporation has refused to sue, and alleging that it has commenced a suit to enforce the rights in question, this presents a good defense.[24]

C. Injunctions as Means of Effecting Such Remedies — 1. General Statement of Cases Where Injunctions Granted. The remedies of shareholders in the

17. Mack *v.* De Bardeleben Coal, etc., Co., 90 Ala. 396, 8 So. 150, 9 L. R. A. 650.

18. Merchants', etc., Line *v.* Waganer, 71 Ala. 581. Another court has held that the shareholders of a corporation cannot, without demand upon their own directors and their refusal, bring an action against another corporation on the ground that it is wrongfully interfering with the rights of their own company, simply because a majority of their own directors are shareholders to a larger extent in the defendant corporation than in their own, and that the minority of their own directors are also directors in the defendant company. Boyd *v.* Sims, 87 Tenn. 771, 11 S. W. 948.

19. Brewer *v.* Boston Theatre, 104 Mass. 378; Greaves *v.* Gouge, 69 N. Y. 154; Vanderbilt *v.* Garrison, 5 Duer (N. Y.) 689; Doud *v.* Wisconsin, etc., R. Co., 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620; Macdougall *v.* Gardiner, 1 Ch. D. 13, 45 L. J. Ch. 27; Foss *v.* Harbottle, 2 Hare 461, 24 Eng. Ch. 461; Mozley *v.* Alston, 16 L. J. Ch. 217, 1 Phil. Ch. 790, 19 Eng. Ch. 790; and other cases in the preceding notes.

20. Memphis *v.* Dean, 8 Wall. (U. S.) 64, 19 L. ed. 326. Although in general a denial that shareholders had demanded that the corporation should bring suit against its treasurer on demand due the corporation should be made by plea in abatement, yet, where the plaintiffs alleged that they made the demand, which the defendants denied, the issue was properly raised. Dillon *v.* Lee, 110 Iowa 156, 81 N. W. 245.

21. Wood *v.* Union Gospel Church Bldg. Assoc., 63 Wis. 9, 22 N. W. 756.

22. Doud *v.* Wisconsin, etc., R. Co., 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620.

23. Smith *v.* Dorn, 96 Cal. 73, 30 Pac. 1024; Moyle *v.* Landers, 83 Cal. 579, 21 Pac. 1133, 23 Pac. 798; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347. See also Ashton *v.* Dashaway Assoc., 84 Cal. 61, 23 Pac. 1091, 7 L. R. A. 809; Parrott *v.* Byers, 40 Cal. 614, 620.

Instance of a good complaint by a shareholder of a land company to enjoin issuing of scrip. Rogers *v.* New York, etc., Land Co., 1 N. Y. Suppl. 908, 17 N. Y. St. 131.

24. Memphis *v.* Dean, 8 Wall. (U. S.) 64,

particulars just considered are generally sought for and effectuated through the agency of the writ of injunction. Perhaps the most usual cases where injunctions have been granted may be ranked under four heads: (1) Where the directors or a majority of the shareholders are proceeding to make fundamental changes in the original contract of association contrary to the will of the majority;[25] (2) where the directors or a majority of the shareholders are attempting to divert the joint funds to a purpose outside the objects for which the corporation was organized,[26] which is practically the same thing as the preceding;[27] (3) where the action of the majority of the shareholders, although not *ultra vires*, is plainly a fraud on the minority, or oppressive as against them, and the directors and trustees act with and form a part of the majority;[28] and (4) where the directors of a corporation threaten any other breach of trust injurious to the shareholders, in which case equity will enjoin it before it has been committed, or relieve against it afterward, where possible.[29]

2. NOT GRANTED TO RESTRAIN ILL-ADVISED OR SEEMINGLY UNPROFITABLE ACTION. But this refers to positive breaches of trust. Injunctions are not granted against the directors of corporations merely to restrain ill-advised action, or action apparently unprofitable to the shareholders.[30]

3. INJUNCTION RESTRAINING ILLEGAL AND ULTRA VIRES ACTS. Whether the action is brought by the state or the government through its attorney-general to redress usurpations of power by those in control of the corporation, or whether it is brought by individual shareholders, the relief which is accorded often takes the

19 L. ed. 326; Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,145, 1 Sawy. 63.

25. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Kean *v.* Johnson, 9 N. J. Eq. 401.

That a court of equity will undo such an act after it has been done, where it would have enjoined it before it had been done, in case the rights of innocent third persons do not supervene, see Wright *v.* Oroville Gold, etc., Min. Co., 40 Cal. 20.

26. Marseilles Land, etc., Co. *v.* Aldrich, 86 Ill. 504; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Logan *v.* Courttown, 13 Beav. 22, 20 L. J. Ch. 347; Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1, 15 Jur. 26, 20 L. J. Ch. 169, 3 Eng. L. & Eq. 144; Dumvile *v.* Birkenhead, etc., R. Co., 12 Beav. 444; Salomons *v.* Laing, 12 Beav. 339, 14 Jur. 471, 19 L. J. Ch. 225, 6 R. & Can. Cas. 289; Cohen *v.* Wilkinson, 12 Beav. 125, 13 Jur. 641, 18 L. J. Ch. 378, 1 Hall & T. 554, 14 Jur. 535, 1 Macn. & G. 481, 5 R. & Can. Cas. 758, 47 Eng. Ch. 384; Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513; Graham *v.* Birkenhead, etc., R. Co., 2 Hall & T. 450, 14 Jur. 494, 20 L. J. Ch. 445, 2 Macn. & G. 146, 6 Eng. L. & Eq. 132, 48 Eng. Ch. 114; Carlisle *v.* South Eastern R. Co., 2 Hall & T. 366, 14 Jur. 535, 1 Macn. & G. 689, 6 R. & Can. Cas. 682, 47 Eng. Ch. 546; Bagshaw *v.* Eastern Union R. Co., 7 Hare 114, 13 Jur. 602, 18 L. J. Ch. 193, 6 R. & Can. Cas. 152, 27 Eng. Ch. 114 [*affirmed* in 2 Hall & T. 201, 14 Jur. 491, 19 L. J. Ch. 410, 2 Macn. & G. 389, 6 R. & Can. Cas. 169, 48 Eng. Ch. 300]; Stevens *v.* South Devon R. Co., 15 Jur. 235; Henry *v.* Great Northern R. Co., 4 Kay & J. 1; Mozley *v.* Alston, 16 L. J. Ch. 217, 1 Phil. 790, 19 Eng. Ch. 790; Blain *v.* Agar, 5 L. J. Ch. O. S. 1, 1 Sim. 37, 27 Rev. Rep. 150, 29 Rev. Rep. 110, 2 Eng. Ch. 37; Sharp *v.* Day, 1 Phil. 771, 19 Eng. Ch. 771; Hichens *v.* Congreve, 4 Russ. 562, 4 Eng. Ch. 562; Natusch *v.* Irving, Gow Partn. (3d ed.) 398.

27. Kean *v.* Johnson, 9 N. J. Eq. 401; Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

28. Wright *v.* Oroville Gold, etc., Min. Co., 40 Cal. 20; Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. (N. Y.) 410, 9 L. R. A. 527 [*reversing* 52 Hun (N. Y.) 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409].

29. *Connecticut.*— Sears *v.* Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557.

Massachusetts.— Brewer *v.* Boston Theatre, 104 Mass. 378.

New Hampshire.— March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

South Carolina.— Charleston Ins., etc., Co. *v.* Sebring, 5 Rich. Eq. 342.

United States.— Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401.

England.— Browne *v.* Monmouthshire R., etc., Co., 13 Beav. 32, 15 Jur. 475, 20 L. J. Ch. 497; Bagshaw *v.* Eastern Union R. Co., 7 Hare 114, 13 Jur. 602, 18 L. J. Ch. 193, 6 R. & Can. Cas. 152, 27 Eng. Ch. 114 [*affirmed* in 2 Hall & T. 201, 14 Jur. 491, 19 L. J. Ch. 410, 2 Macn. & G. 389, 6 R. & Can. Cas. 169, 48 Eng. Ch. 300]; Stevens *v.* South Devon R. Co., 15 Jur. 235.

30. Clinch *v.* Financial Corp., L. R. 5 Eq. 450; Gregory *v.* Patchett, 33 Beav. 595; Browne *v.* Monmouthshire R., etc., Co., 13 Beav. 32, 15 Jur. 475, 20 L. J. Ch. 497; Lord *v.* Copper Miners' Co., 1 Hall & T. 85, 12 Jur. 1059, 18 L. J. Ch. 65, 2 Phil. 740, 22 Eng.

form of an injunction restraining illegal or *ultra vires* acts of the directors.[31] This remedy proceeds on one or both of the following grounds: (1) That the shareholders have the right to have the directors restrained from doing a threatened or contemplated act which would subject the franchises of the corporation to forfeiture at the suit of the government;[32] (2) that they have the right to have them restrained from applying the funds of the corporation to objects other than those warranted by the governing instrument of the corporation.[33]

4. Single Shareholder Entitled to Such Injunction — a. Rule Stated. It is therefore a rule of universal recognition that a single shareholder may maintain a suit in equity to restrain the directors and managing officers and agents of the corporation from employing its funds contrary to, or in a manner not authorized by, the charter, governing statute, articles of association, or other constating instrument.[34]

Ch. 740; Foss *v.* Harbottle, 2 Hare 461, 24 Eng. Ch. 461; Mozley *v.* Alston, 16 L. J. Ch. 217, 1 Phil. 790, 19 Eng. Ch. 790; Cunliff *v.* Manchester, etc., Canal Co., 2 Russ. & M. 480 note, 11 Eng. Ch. 480; Ware *v.* Grand Junction Water Works Co., 2 Russ. & M. 470, 11 Eng. Ch. 470.

31. *Connecticut.*— Sears *v.* Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557.

Illinois.— Bradley *v.* Ballard, 55 Ill. 413, 8 Am. Rep. 656.

New Hampshire.— March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New York.— Fisk *v.* Chicago, etc., R. Co., 36 How. Pr. 20; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. 371.

Pennsylvania.— Manderson *v.* Commercial Bank, 28 Pa. St. 379.

England.— Gray *v.* Lewis, L. R. 8 Eq. 526; Atwool *v.* Merryweather, L. R. 5 Eq. 464 note, 37 L. J. Ch. 35; Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1, 15 Jur. 26, 20 L. J. Ch. 169, 3 Eng. L. & Eq. 144; Cohen *v.* Wilkinson, 12 Beav. 125, 13 Jur. 641, 18 L. J. Ch. 378; Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513; Bagshaw *v.* Eastern Union R. Co., 7 Hare 114, 13 Jur. 602, 18 L. J. Ch. 193, 6 R. & Can. Cas. 152, 27 Eng. Ch. 114.

32. Manderson *v.* Commercial Bank, 28 Pa. St. 379; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347; Bloxam *v.* Metropolitan R. Co., L. R. 3 Ch. 337; Hoole *v.* Great Western R. Co., L. R. 3 Ch. 262, 17 L. T. Rep. N. S. 153, 16 Wkly. Rep. 260; Gray *v.* Lewis, L. R. 8 Eq. 526; Clinch *v.* Financial Corp., L. R. 5 Eq. 450; Gregory *v.* Patchett, 33 Beav. 595; Logan *v.* Courtown, 13 Beav. 22, 20 L. J. Ch. 347; Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513; Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 13 Eng. L. & Eq. 506; Beman *v.* Rufford, 15 Jur. 914, 20 L. J. Ch. 537, 1 Sim. N. S. 550, 6 Eng. L. & Eq. 106, 40 Eng. Ch. 550; Gray *v.* Chaplin, 3 L. J. Ch. O. S. 161, 2 Sim. & St. 267; Ware *v.* Grand Junction Water Works Co., 2 Russ. & M. 470, 11 Eng. Ch. 470. But see Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9.

33. Such is the doctrine of many of the preceding cases. See also Pickering *v.* Stephenson, L. R. 14 Eq. 322, 41 L. J. Ch. 493, 26 L. T. Rep. N. S. 608, 20 Wkly. Rep. 654, directors of a foreign corporation restrained from applying its funds in the further payment of the costs of a prosecution for a libel.

Where an agreement between two corporations is not ultra vires as to the one, but is as to the other, only a shareholder in the latter can claim an injunction against its being carried into effect. Maunsell *v.* Midland Great Western R. Co., 1 Hem. & M. 130, 32 L. J. Ch. 513, 8 L. T. Rep. N. S. 347, 11 Wkly. Rep. 768.

Injunction not granted to restrain the payment of a week's extra wages to meritorious employees. Hampson *v.* Price's Patent Candle Co., 45 L. J. Ch. 437, 35 L. T. Rep. N. S. 711, 24 Wkly. Rep. 754.

Under the principle of the text injunctions have been granted where the corporation was created to manufacture pig-iron, and the directors undertook to employ its funds in erecting a corn and flour mill (Cherokee Iron Co. *v.* Jones, 52 Ga. 276); where the directors undertook to employ the funds of a corporation in paying another corporation engaged in the same business for ceasing to exercise its franchises, that is to say, in buying off a competing company (Leslie *v.* Lorillard, 40 Hun (N. Y.) 392); and where the directors of a railroad company had obtained permission from the legislature to extend their railroad beyond the terminus named in the original charter, and where the shareholders had accepted the act authorizing the extension by a majority vote, but against the dissent of plaintiff (Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545).

34. *Alabama.*— Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763; Bliss *v.* Anderson, 31 Ala. 612, 70 Am. Dec. 511.

California.— Wright *v.* Oroville Gold, etc., Min. Co., 40 Cal. 20; Neall *v.* Hill, 16 Cal. 145, 76 Am. Dec. 508.

Georgia.— Cherokee Iron Co. *v.* Jones, 52 Ga. 276; Central R. Co. *v.* Collins, 40 Ga. 582.

Illinois.— Marseilles Land, etc., Co. *v.* Aldrich, 86 Ill. 504.

Iowa.— Teachout *v.* Des Moines Broad-Gauge St. R. Co., 75 Iowa 722, 38 N. W. 145.

b. Reason of Rule. Briefly stated the reason of this rule is that each shareholder has the right to stand upon the contract of con-association and to say the joint funds shall not be applied to objects not therein agreed to or contemplated.[35]

c. And Without Requesting Directors to Sue Themselves. The rule previously stated,[36] which requires the shareholder before bringing such an action to request the directors to bring an action, in the name of the corporation, has no application here; because the very object of the action is to restrain the directors from doing a threatened, unlawful act, and it would be absurd to request them to bring an action to enjoin themselves from doing what they are threatening to do. They would necessarily be the substantial parties on both sides of the action. It would therefore not be an adversary proceeding, but would necessarily be collusive and a mockery of justice.[37]

5. Other Cases to Which Use of Writ of Injunction Extends. Without entering into impracticable details it may be said that the use of injunction at the suit of shareholders has been extended to restraining the trustees and directors of corporations from illegally voting in respect of certain shares whereon they claim the right to vote, when the effect of such vote will be to control the election of directors;[38] to restrain one corporation from voting in respect of shares which it holds in another corporation;[39] to restrain a forfeiture of the shares of a member for the non-payment of an assessment made by persons who were not duly elected to the office of directors, but who have usurped the functions of that office;[40] to enjoin usurping directors, pending a proceeding at law to oust them, from taking any course of action injurious to the corporation, but not in other cases, there

Kentucky.— Botts *v.* Simpsonville, etc., Turnpike Co., 88 Ky. 54, 10 S. W. 134, 10 Ky. L. Rep. 669, 2 L. R. A. 594; Shaw *v.* Campbell Turnpike Road Co., 15 S. W. 245, 12 Ky. L. Rep. 799.

Maryland.—Du Puy *v.* Transportation, etc., Co., 82 Md. 408, 33 Atl. 889, 34 Atl. 910, although owning but a single share.

Minnesota.— Small *v.* Minneapolis Electro Matrix Co., 45 Minn. 264, 47 N. W. 797.

Missouri.— Albers *v.* St. Louis Merchants' Exch., 45 Mo. App. 206.

Nebraska.— Wilcox *v.* Bickel, 11 Nebr. 154, 8 N. W. 436.

New Hampshire.— March *v.* Eastern R. Co., 43 N. H. 515.

New Jersey.— Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171; Kean *v.* Johnson, 9 N. J. Eq. 401.

New York.— Gamble *v.* Queens County Water Co., 52 Hun 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409 [*reversed* on other points in 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 25 Abb. N. Cas. 410, 9 L. R. A. 527]; Leslie *v.* Lorillard, 40 Hun 392; Colles *v.* Trow City Directory Co., 11 Hun 397; Copeland *v.* Citizens' Gas Light Co., 61 Barb. 60; Christopher *v.* New York, 13 Barb. 567; Young *v.* Rondout, etc., Gas Light Co., 15 N. Y. Suppl. 443, 39 N. Y. St. 602. *Compare* Belmont *v.* Erie R. Co., 52 Barb. 637.

Vermont.— Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545.

Virginia.— Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. 40.

United States.— Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. ed. 488; Mechanics', etc., Bank *v.* Thomas, 18 How. 384, 15 L. ed. 460; Mechanics', etc., Bank *v.* Deholt, 18 How. 380, 15 L. ed. 458; Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401; Du Pont *v.* Northern Pac. R. Co., 18 Fed. 467, 21 Blatchf. 534.

35. Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401. For similar statements of the doctrine see Wright *v.* Oroville Gold, etc., Min. Co., 40 Cal. 20; Wilcox *v.* Bickel, 11 Nebr. 154, 8 N. W. 436; March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

36. See *supra*, XI, B, 19, a *et seq.*

37. Davis *v.* Gemmel, 70 Md. 356, 17 Atl. 259. In actions of the kind now under consideration, there is scarcely a trace of the idea that the complaining shareholder must first request the directors to sue; and some of the courts, in stating the rule discussed in previous sections, which requires the shareholder first to request the directors to sue, are careful to state that it applies where the object of the suit is to restrain their action in a matter not *ultra vires*. See for instance Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763. But it may be doubted whether there is any foundation for such a distinction.

38. Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763.

39. Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, 7 So. 108, 16 Am. St. Rep. 81, 7 L. R. A. 605 [*overruled* it seems in the later decision of American Refrigerating, etc., Co. *v.* Linn, 93 Ala. 610, 7 So. 191].

40. Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763; Garden Gully United Quartz Min. Co. *v.* McLister, 1 App. Cas. 39, 33 L. T. Rep. N. S. 408, 24 Wkly. Rep. 744. *Compare* Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

being an adequate remedy at law;[41] to enjoin unlawful and *ultra vires* consolidations with other corporations;[42] to enjoin the directors of a turnpike company which has no authority to consolidate with or to purchase other roads, from purchasing a new road, and paying therefor in the stock of the company, which has no market value, if the effect would be to lessen dividends;[43] to enjoin the transaction of business before due incorporation, by one of the incorporators using the corporate name, since this would make the shareholders liable as partners;[44] to enjoin the enforcement of judgments rendered against the corporation where a statutory winding-up proceeding has been commenced, and where the judgments have been recovered under such circumstances that they would create liens and priorities which would result in a fraudulent diversion of the corporate property from its general creditors;[45] to enjoin the consummation of the lease whereby the entire business of the corporation is transferred to another corporation for a term of years;[46] to enjoin the use of the funds of the corporation in purchasing the shares of another corporation;[47] to enjoin the use of the funds of the corporation in paying a tax illegally levied upon its property, in which case the proper taxing officer of the state may be joined as a defendant;[48] to restrain the corporation from applying for a license and paying the tax or fee imposed by act of congress for conducting the business for which the license is granted;[49] and to enjoin a voluntary dissolution and winding-up which has been agreed upon by the majority of the shareholders, for the purpose of entering upon a scheme of reorganization, provided such scheme gives to the dissenting minority the option of withdrawing their several interests in the old corporation, or of taking a proportionate number of shares in the new one.[50]

6. Circumstances Under Which Such Injunctions Denied. As already seen[51] injunctions are not granted by courts of equity to determine the policy or to manage the business of corporations, but the principle that the majority must rule is adhered to in corporate as well as in political government, under American systems, in the absence of fraud, oppression, or *ultra vires* acts.[52] In pursuance of this view a fundamental change in a charter granted by the legislature, empowering the corporation to engage in a new enterprise, will not be enjoined where sanctioned by a vote of the majority of the shareholders,[53] or, according to the

41. Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763. That a court of equity will decide whether persons assuming to perform functions of a corporate office have a right so to act, for the purposes of a suit before the court only, see Johnston *v.* Jones, 23 N. J. Eq. 216. As in a case where a new board is elected with a view of effecting a consolidation with another corporation, and a bill is filed by a shareholder to enjoin them from so doing. Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747.

42. Nathan *v.* Tompkins, 82 Ala. 437, 2 So. 747; Botts *v.* Simpsonville, etc., Turnpike Co., 88 Ky. 54, 10 S. W. 134, 10 Ky. L. Rep. 669, 2 L. R. A. 594; Shaw *v.* Campbell Turnpike Road Co., 15 S. W. 245, 12 Ky. L. Rep. 799; Young *v.* Rondout, etc., Gas Light Co., 15 N. Y. Suppl. 443, 39 N. Y. St. 602; Maclaury *v.* Hart, 10 N. Y. Suppl. 125, 32 N. Y. St. 1137 (consolidation of two religious corporations); Mills *v.* Hurd, 29 Fed. 410.

43. Shaw *v.* Campbell Turnpike Road Co., 15 S. W. 245, 12 Ky. L. Rep. 799.

44. Ricker *v.* Larkin, 27 Ill. App. 625.

45. Harding *v.* Fiske, 12 N. Y. Suppl. 139, 25 Abb. N. Cas. (N. Y.) 348.

46. Small *v.* Minneapolis Electro Matrix Co., 45 Minn. 264, 47 N. W. 797. So where the directors undertook to lease the property of the corporation, it being a gas company, to another such corporation, for a term of years, with a privilege of renewal, without the unanimous consent of the shareholders. Copeland *v.* Citizens' Gas Light Co., 61 Barb. (N. Y.) 60.

47. Central R. Co. *v.* Collins, 40 Ga. 582.

48. Mechanics', etc., Bank *v.* Thomas, 18 How. (U. S.) 384, 15 L. ed. 460; Mechanics', etc., Bank *v.* Debolt, 18 How. (U. S.) 380, 15 L. ed. 458; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401.

49. Corbus *v.* Alaska Treadwell Gold-Min. Co., 99 Fed. 334.

50. Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490.

51. See *supra*, XI, B, 11.

52. *Kentucky.*— Dudley *v.* Kentucky High School, 9 Bush 576.

Massachusetts.— Converse *v.* Hood, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521.

New Jersey.— Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 241; Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171.

New York.— Bach *v.* Pacific Mail Steamship Co., 12 Abb. Pr. N. S. 373.

Pennsylvania.— Com. *v.* Jarret, 7 Serg. & R. 460.

53. Durfee *v.* Old Colony, etc., R. Co., 5

doctrine of another court, where the change is of such an essential character as results in transferring the whole property to another corporation, will an injunction go to prevent it, if the corporation will indemnify the dissenting shareholder against loss.[54] Mere irregularity in the exercise of corporate power will not afford ground for such relief;[55] nor will such relief be granted at the suit of a complaining shareholder unless it be made to appear that the threatened injury will be of a substantial character.[56]

D. When Such Remedies Extend to Winding-Up and When Not — 1. General Rule That Equity Has No Jurisdiction to Dissolve Corporation and That Shareholder Cannot Maintain Bill in Equity to Wind Up Corporation — a. Rule Stated. In absence of statutes enlarging its powers the general rule is that a court possessed of chancery powers merely has no jurisdiction, either at the suit of the state through its attorney-general, or at the suit of a shareholder or other private person, to dissolve a corporation and decree its winding-up, for the misuser or non-user of its franchises, or for other cause; but that the only proceeding which can be taken to that end is a proceeding by the state, on information in the nature of quo warranto, in a court of common-law jurisdiction.[57] The rule is of ancient derivation, and as applied to modern business corporations is destitute of reason, and has been substantially abolished in England, and in the United States greatly impinged upon by the statute law.[58] Subject to exceptions here and there considered, the general rule, in the absence of statutory authorization, is that a shareholder as such cannot maintain an action in equity to wind up the company, take an account of debts and assets, apply its property to the payment of its liabilities, divide the surplus among the shareholders,[59] and for

Allen (Mass.) 230. But *compare* New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517.

54. Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

55. Dudley *v.* Kentucky High-school, 9 Bush (Ky.) 576.

56. Albers *v.* St. Louis Merchants' Exch., 45 Mo. App. 206. That an injunction will not be granted and a receiver appointed at the suit of a single shareholder see People *v.* Erie R. Co., 36 How. Pr. (N. Y.) 129.

Other instances of injunctions denied.— Dudley *v.* Kentucky High-school, 9 Bush (Ky.) 576; Johnson *v.* Cottingham Ironing Mach. Co., 8 Mo. App. 575 (to enjoin a sale of corporate property under a deed of trust); Small *v.* Minneapolis Electro-Matrix Co., 57 Hun (N. Y.) 587, 10 N. Y. Suppl. 456, 32 N. Y. St. 887 (to restrain them from transferring the assets, business, etc., to another corporation); Woodruff *v.* Dubuque, etc., R. Co., 30 Fed. 91 (to restrain the officers from voting at a corporate meeting in another state).

Circumstances where preliminary injunctions have been granted.— Raleigh *v.* Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1; Young *v.* Rondout, etc., Gas Light Co., 15 N. Y. Suppl. 443, 39 N. Y. St. 443.

Instances where preliminary injunctions have been denied.— Benedict *v.* Columbus Constr. Co., 49 N. J. Eq. 23, 23 Atl. 485 (to restrain a continuation of business); Mackintosh *v.* Flint, etc., R. Co., 32 Fed. 350 (to restrain the preferred shareholders from voting, etc.).

57. Atty.-Gen. *v.* Chenango Bank, Hopk. (N. Y.) 596 (where the chancellor expressly pointed out that the power which he was exercising was a new power conferred by the legislature); Atty.-Gen. *v.* Niagara Bank, Hopk. (N. Y.) 354; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371 (where the subject was considered at length by Chancellor Kent); Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 84 (where the bill was brought by a shareholder and an injunction was denied); S. C. on preliminary application, 2 Paige (N. Y.) 438.

58. This has been pointed out by different judges in the following cases: Pratt *v.* Pratt, 33 Conn. 446, 456 (by Hinman, C. J.); Fougeray *v.* Cord, 50 N. J. Eq. 185, 24 Atl. 499 (approving the other cases here cited); Robinson *v.* Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212 (by Chancellor Walworth).

59. *Alabama.*— Anderson *v.* Buckley, 126 Ala. 623, 28 So. 729, appointment of receiver refused on application of shareholders under special circumstances.

Illinois.— Baker *v.* Backus, 32 Ill. 79.

Kentucky.— Oldham *v.* Mt. Sterling Imp. Co., 103 Ky. 529, 45 S. W. 779, 20 Ky. L. Rep. 207.

Massachusetts.— Folger *v.* Columbian Ins. Co., 99 Mass. 274, 96 Am. Dec. 747; Com. *v.* Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50.

New York.— Denike *v.* New York, etc., Lime, etc., Co., 80 N. Y. 599; Wilmersdoerffer *v.* Lake Mahopac Imp. Co., 18 Hun 387; Gilman *v.* Green Point Sugar Co., 4 Lans. 482; Belmont *v.* Erie R. Co., 52 Barb. 637; Latimer *v.* Eddy, 46 Barb. 61; Howe *v.* Deuel, 43 Barb. 504; Galwey *v.* U. S. Steam Sugar Refining Co., 36 Barb. 256, 13 Abb. Pr. 211; Ramsey *v.* Erie R. Co., 7 Abb. Pr. N. S. 156, 181; Peo-

other incidental relief, such as canceling outstanding bonds issued contrary to law.[60]

b. Statutory Exceptions to This Rule. Statutory exceptions to this rule exist in New York and in other states.[61]

2. Appointing Receiver to Wind Up — a. In General. To say that a court of equity will not ordinarily interfere to dissolve a corporation and to wind it up is tantamount to saying that it will not ordinarily appoint a receiver to take possession of the assets of the corporation and distribute them, because this would be tantamount to dissolving it by a decree in equity.[62] While this principle may not have full application to a mere business company, not exercising franchises of a public nature,[63] such as a manufacturing corporation,[64] a so-called land company,[65] or even a national bank,[66] yet it seems to have full applica-

ple *v.* Erie R. Co., 36 How. Pr. 129; Verplanck *v.* Mercantile Ins. Co., 1 Edw. 84.

Ohio.— North Fairmount Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185; Goebel *v.* Herancourt Brewing Co., 2 Ohio S. & C. Pl. 377, 7 Ohio N. P. 230 (shareholder cannot ask for a receiver of a corporation on allegations of mismanagement of the board of directors).

Pennsylvania.— Thoma *v.* East End Opera House Co., 30 Pittsb. Leg. J. N. S. 230.

Tennessee.— State *v.* Merchants' Ins., etc., Co., 8 Humphr. 235.

Wisconsin.— Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21; Strong *v.* McCagg, 55 Wis. 624, 13 N. W. 895.

60. Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21. *Compare* Benedict *v.* Columbus Constr. Co., 49 N. J. Eq. 23, 36, 23 Atl. 485.

61. 2 N. Y. Rev. Stat. 463, 464. See the statute set out and commented on in Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 84. In Hitch *v.* Hawley, 132 N. Y. 212, there is, in the opinion of the court by Vann, J., an instructive history of the legislation of New York with reference to this subject.

Provisions of the New York Code of Civil Procedure on the subject of dissolving corporations in equity. Hitch *v.* Hawley, 132 N. Y. 212, 30 N. E. 401, 43 N. Y. St. 625 [*affirming* 8 N. Y. Suppl. 319, 322, 28 N. Y. St. 416]. Dissolving an incorporated merchants' exchange under the provisions of the New York Code of Civil Procedure. Hitch *v.* Hawley, 132 N. Y. 212, 30 N. E. 401, 43 N. Y. St. 625.

Provisions and construction of the statute of New Jersey, empowering the chancellor to wind up insolvent corporations on the application of a creditor or a shareholder. Atlantic Trust Co. *v.* Consolidated Electric Storage Co., 49 N. J. Eq. 402, 23 Atl. 934; New Foundland R. Constr. Co. *v.* Schack, 40 N. J. Eq. 222, 1 Atl. 23; Rawnsley *v.* Trenton Mut. L. Ins. Co., 9 N. J. Eq. 95; Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294; Parsons *v.* Monroe Mfg. Co., 4 N. J. Eq. 187; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173. That equity will interfere only where the object of the formation of the corporation is plainly impossible of attainment see Benedict *v.* Columbus Constr. Co., 49 N. J. Eq. 23, 23 Atl. 485. General allegations of insolvency not sufficient under New Jersey statute, but the facts and circumstances showing insolvency must be set out. New Foundland R. Constr. Co. *v.* Shack, 40 N. J. Eq. 222, 1 Atl. 23; Rawnsley *v.* Trenton Mut. L. Ins. Co., 9 N. J. Eq. 95; Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294; Parsons *v.* Monroe Mfg. Co., 4 N. J. Eq. 187.

Where a suit for the winding-up of a corporation is instituted by a shareholder under a state statute in a federal court, it is to be regarded as adversary and not voluntary as to the corporation, for the purposes of federal jurisdiction, and this conclusion is not affected by the fact that the corporation offers little or no resistance to the proceedings. Huntington *v.* Chesapeake, etc., R. Co., 98 Fed. 459. Necessary for the shareholder in such a suit to show that he was the owner of the shares when the acts complained of occurred, not sufficient for him to show that he was the owner of them when the suit was brought. Robinson *v.* West Virginia Loan Co., 90 Fed. 770.

Circumstances under which a hotel company will be dissolved and wound up. O'Connor *v.* Knoxville Hotel Co., 93 Tenn. 708, 28 S. W. 308.

62. Brown *v.* Home Sav. Bank, 5 Mo. App. 1.

63. See *supra*, I, D.

64. Abbott *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578.

65. Fougeray *v.* Cord, 50 N. J. Eq. 185, 24 Atl. 499.

66. Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673, untenable decision that a state court can appoint a receiver on the petition of a shareholder to wind up a national bank which is insolvent, and in a process of voluntary liquidation. See also Robinson *v.* Dolores No. 2 Land, etc., Co., 2 Colo. App. 17, 29 Pac. 750, holding that a single shareholder may maintain an action for the appointment of a receiver. That a receiver may be appointed upon the petition of a minority of the shareholders where the majority have combined with the directors to mismanage the affairs of the company for their own benefit and to freeze out the minority see Hall *v.* Astoria, etc., Lumber Co., 5 R. & Corp. L. J. 412. That any of the petitioners for the dissolution of a corporation

tion to corporations exercising franchises of a public nature, such as a railroad company.[67]

b. Receiver Not Appointed Because of Mere Dissatisfaction With Respect to Corporate Management. On a principle already considered[68] a receiver will not be appointed on the petition of a shareholder, even where the jurisdiction exists, merely because the minority are dissatisfied with the management of the majority, in the absence of fraud or of insolvency.[69]

c. Appointment of Receiver in Case Where Corporation Had Been Dissolved. It seems that where a corporation has been dissolved in a proceeding by quo warranto, the court cannot go forward, in the absence of a statutory authorization, and appoint a receiver on motion of the state's attorney, but that a court of equity would have the power to make such an appointment to administer the assets, upon the application of a creditor or shareholder.[70]

d. Right of Minority Shareholder Upon Dissolution to Have Corporate Property Sold and Distributed. It seems that the general rule with regard to partnerships applies[71] in the case of corporations, which is that upon a dissolution a dissenting shareholder cannot be forced into a reorganization or compelled to accept a calculated or theoretical valuation of his shares, but is entitled to have the property sold and converted into money and to have his distributive share of that money.[72]

E. Further as to Form of Relief — 1. Relief Molded to Reach Justice of Case — a. In General. In this as in other cases a court of equity, when it has the proper parties before it, will mold its decree according to the justice of the particular case, and will not turn the complainant out of court because he may have prayed for a different species of relief from that to which he is really entitled.[73]

b. Preventive Relief, Accounting, Following Corporate Property Into Hands of Third Parties. It has been observed, speaking of this subject: "The relief awarded is often of a preventive character, and, in many cases, the officers have been required to account for a breach of the trust reposed in them, and for the misapplication of the funds and property of the company. If other parties have participated with the officers in such proceedings, they may be joined as defendants, and held to their just responsibility; and property of the company may be followed into their hands."[74] Another court has well stated the principles on which relief may be varied in the following language: "It is often necessary, in order that the plaintiff may obtain full justice, that the relief granted him be as

may withdraw, where the court finds that the petitioners did not own the requisite amount of stock to entitle them to maintain the proceeding, but that upon such withdrawal the court cannot allow another to be substituted in his stead, see Herancourt Brewing Co. *v.* Armstrong, 6 Ohio Cir. Ct. 468. As to the power of the circuit court to appoint a receiver under the South Carolina act of 1869, relating to insolvent banks, see Donaldson *v.* Johnson, 3 S. C. 216. State of evidence sufficient to warrant an injunction against voting upon certain shares of stock and the appointment of a receiver. Ayer *v.* Seymour, 15 Daly (N. Y.) 249, 5 N. Y. Suppl. 650.

67. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637. *Compare* Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 27 N. E. 487, where a receiver was appointed because those owning a majority of the shares had allowed its road to get out of repair, but where the court held that so much of the decree as ordered a sale of its property was erroneous.

68. See *supra*, XI, B, 11.

69. Fluker *v.* Emporia City R. Co., 48 Kan. 577, 30 Pac. 18. *Compare* Wanneker *v.* Hitchcock, 38 Fed. 383, where a petition for a receiver of certain shares of stock was denied on the same ground.

70. Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

71. As to this rule see Dickson *v.* Dickinson, 29 Conn. 600; Sigourney *v.* Munn, 7 Conn. 11; Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243; Briges *v.* Sperry, 95 U. S. 401, 24 L. ed. 390; Rowlands *v.* Evans, 30 Beav. 302; Wild *v.* Milne, 26 Beav. 504; Hale *v.* Hale, 4 Beav. 369; Burdon *v.* Barkus, 4 De G. F. & J. 42, 8 Jur. N. S. 656, 65 Eng. Ch. 42; Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77; Crawshay *v.* Collins, 15 Ves. Jr. 218, 10 Rev. Rep. 61.

72. Mason *v.* Pewabic Min. Co., 133 U. S. 50, 10 S. Ct. 224, 33 L. ed. 524.

73. Pomeroy *v.* Benton, 77 Mo. 64.

74. Black, J., in Slattery *v.* St. Louis, etc., Transp. Co., 91 Mo. 217, 225, 4 S. W. 79, 60 Am. Rep. 245 [*citing* Peabody *v.* Flint, 6 Allen (Mass.) 52; Russell *v.* Wakefield Waterworks Co., L. R. 20 Eq. 474, 44 L. J. Ch. 496, 32 L. T. Rep. N. S. 685, 23 Wkly. Rep. 887].

varied and diversified as the means that have been employed by the defendant to produce the grievance complained of. If a trustee is shown to have been unfaithful, the court may not only compel restitution, but may also restrain him by injunction from similar acts, or, if deemed necessary, may remove him from his trust. If he has called to his aid other confederates, they also may be enjoined from further participation in the acts which infringe upon the rights of the plaintiff. A court of equity will always find the means of enforcing its decrees against a delinquent defendant, and its power in this respect is as extensive as the exigencies of the case."[75]

2. ENJOINING DIRECTORS AND APPOINTING RECEIVER. If the relief takes the drastic form of enjoining the directors from the further exercise of the duties of their office the court will necessarily appoint a receiver to take charge of the assets and administer them as a trust fund, for the creditors first and for the shareholders afterward, under principles hereafter stated.[76] But as courts of equity have in general no jurisdiction to decree the dissolution of corporations, and as the removal of directors and the appointment of a receiver would be tantamount to a dissolution, it may be concluded that where one or more shareholders bring an action in equity to prevent or redress frauds and breaches of trusts in the management of the corporation, the relief which the court will grant will seldom take the radical form of enjoining the directors from the further exercise of the functions of their offices, because this would be tantamount to decreeing a dissolution of the corporation.[77]

3. RELIEF DOES NOT ORDINARILY EXTEND TO REMOVAL FROM CORPORATE OFFICE. The amotion of corporate officers was never a branch of equity jurisdiction. The power over ordinary trusts does not exist to the same extent, in the case of the directors of corporations, unless given by statute. No such power was ever asserted or claimed by the English court of chancery.[78] Generally speaking equity has no superintendence over the officers of corporations except to restrain them and to hold them answerable in cases of fraud and breaches of trust and to compel them to account as trustees.[79] It has no power to award an injunction indefinitely suspending an officer of a corporation from the exercise of his functions.[80]

75. Wickersham *v.* Crittenden, 93 Cal. 17, 32, 28 Pac. 788, opinion by Harrison, J.

76. It has been seemingly well held that if the directors of an insolvent corporation fail to perform their duty of protecting its creditors and applying for a dissolution, a shareholder is entitled to bring an action for the preservation and distribution of its assets; and a receiver if necessary may properly be appointed, although a dissolution of the corporation is not sought. Porter *v.* Industrial Information Co., 5 Misc. (N. Y.) 262, 25 N. Y. Suppl. 328.

77. Tutwiler *v.* Tuskaloosa Coal, etc., Co., 89 Ala. 391, 7 So. 398; Burham *v.* San Francisco Fuse Mfg. Co., 76 Cal. 24, 17 Pac. 940 (injunction against directors, before the coming in of the answer, refused); O'Neil *v.* Progressive Endowment League (circuit court, Baltimore, Md., not reported).

78. Robertson *v.* Bullions, 11 N. Y. 243. See also Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Latimer *v.* Eddy, 46 Barb. (N. Y.) 61; Howe *v.* Deuel, 43 Barb. (N. Y.) 504; Ramsey *v.* Erie R. Co., 7 Abb. Pr. N. S. (N. Y.) 156, 38 How. Pr. (N. Y.) 193; Atty.-Gen. *v.* Clarendon, 17 Ves. Jr. 491 (where it was said by the master of the rolls that the court of chancery "has not jurisdiction with regard either to the election or amotion of corporations of any description"). The doctrine of some of the earlier New York chancery cases, admitting the power of equity to remove or suspend corporate directors or trustees (Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Bowden *v.* McLeod, 1 Edw. (N. Y.) 588; Kniskern *v.* St. John's, etc., Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439) was denied by the court of appeals of that state at a later period. Roberson *v.* Bullions, 11 N. Y. 243. The observation of Harrison, J., in Wickersham *v.* Crittenden, 93 Cal. 17, 32, 28 Pac. 788, that the court may in such a case if deemed necessary remove the director from his trust was a *dictum* merely, as the case arose on a demurrer, and the prayer for relief is no demurrable part of a pleading. Notwithstanding the foregoing, the more than doubtful proposition was advanced in Ramsey *v.* Gould, 57 Barb. (N. Y.) 398 that an action may be maintained by a creditor or shareholder of a railroad corporation against its officers, and that the relief may extend so far as their suspension and removal from office. Davis *v.* Hofer, 38 Oreg. 150, 63 Pac. 56.

79. See Neale *v.* Hill, 16 Cal. 145, 76 Am. Dec. 508.

80. Griffin *v.* St. Louis Vine, etc., Growers

4. Compelling Directors to Account. This is one of the usual forms of relief, under appropriate conditions of fact, in shareholders' suits.[81] This relief has frequently been accorded to a single shareholder who has been wrongfully excluded from his share of the profits of the corporation.[82]

5. Compelling Restoration to Shareholders of What They Have Lost. Where the action proceeds in right of the individual shareholders who bring it, the relief will often take the form of restoring to them what they have lost,[83] as for example their several holdings of shares in the corporation.[84]

6. Other Forms of Relief. Under appropriate conditions of fact relief may be had in the form of canceling a deed as a cloud upon the title of the corporation, where the deed was made by all the directors, although not convened and sitting as a board, but not where it was made by the sole owner of the shares in the corporation, for then it was fraud on its face;[85] of compelling third persons to specifically perform an agreement with the corporation, joining the corporation as defendant;[86] and of restoring to a representative of the corporation, generally a receiver appointed by the court, what the corporation has lost by the misconduct of its unfaithful directors.[87]

Assoc., 4 Mo. App. 595. To the same effect see Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103 note; Mozley *v.* Alston, 16 L. J. Ch. 217, 1 Phil. 790, 19 Eng. Ch. 790; Atty.-Gen. *v.* Clarendon, 17 Ves. Jr. 491; Atty.-Gen. *v.* Dixie, 13 Ves. Jr. 519. See further as to the jurisdiction in New York People *v.* Albany, etc., R. Co., 57 N. Y. 161; Staten Island North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171; Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. (N. Y.) 321, 19 How. Pr. (N. Y.) 245; Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103 note. And see Paynter *v.* Clegg, 9 Phila. (Pa.) 480, 30 Leg. Int. (Pa.) 432.

81. Schoening *v.* Schwenck, 112 Iowa 733, 84 N. W. 916; Davis *v.* Hofer, 38 Oreg. 150, 63 Pac. 56; Weir *v.* Bay State Gas Co., 91 Fed. 940; Adley *v.* Whitstable Co., 17 Ves. Jr. 315, 11 Rev. Rep. 87.

For a bill to compel the managing officers of an unincorporated club to account, and the rulings thereon of Lord Romilly, M. R., see Richardson *v.* Hastings, 7 Beav. 323, 301, 8 Jur. 207, 72, 13 L. J. Ch. 142, 129, 29 Eng. Ch. 323, 301, 11 Beav. 17, 16 L. J. Ch. 322.

What will not defeat bill.—A bill in equity to compel the officers of a corporation to render an account to its shareholders will not be defeated by the remedy which would be afforded by a writ of mandamus to compel the production of the books, since the shareholders are entitled in addition to the information which the officers can supply. Weir *v.* Bay State Gas Co., 91 Fed. 940.

82. Adley *v.* Whitstable Co., 17 Ves. Jr. 315, 11 Rev. Rep. 87. In one case the remedy went so far as to displace the unfaithful directors, appoint a receiver, direct the remaining property of the corporation to be sold, and the complainant's share of the profits to be set apart to him. Fougeray *v.* Cord, 50 N. J. Eq. 135, 24 Atl. 499. *Compare* Wolf *v.* Underwood, 96 Ala. 329, 11 So. 344, where a prayer for the distribution of earnings among shareholders was denied. Such an accounting has been decreed in a shareholder's suit where the directors, by their answer, admitted that they had secured all moneys collected on account of the corporation, did not deny that they had received the amount alleged in the complaint, and did not plead a stated account in bar, or tender the issue of nothing in arrear. Davis *v.* Hofer, 38 Oreg. 150, 63 Pac. 56.

For other cases where accountings against directors were decreed see Whitman *v.* Holmes Pub. Co., 33 Misc. (N. Y.) 47, 68 N. Y. Suppl. 167; Spaulding *v.* North Milwaukee Town Site Co., 106 Wis. 481, 81 N. W. 1064 (judgment rendered only for ten per cent of the profits, all of the shareholders except ten per cent of them having settled and accepted satisfaction); Pendery *v.* Carleton, 87 Fed. 41, 30 C. C. A. 510; Earle *v.* Burland, 27 Ont. App. 540 (in a suit by minority shareholders, court ordered a distribution among the shareholders, as undrawn profits, of the reserved fund except a reasonable sum for carrying on the business). Right of a tontine policy-holder to an account. Pierce *v.* Equitable L. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. That equity will entertain a bill for an accounting, although there may be a remedy at law, where the legal remedy is doubtful or inadequate, see Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291 note, a case of high authority. *Compare* Smiley *v.* Bell, Mart. & Y. (Tenn.) 378, 17 Am. Dec. 813, where it is held that the jurisdiction of equity depends upon whether the accounts are mutual and complicated. To the same effect see Lesley *v.* Rosson, 39 Miss. 368, 77 Am. Dec. 679.

83. Bulkley *v.* Big Muddy Iron Co., 7 Mo. App. 589.

84. Grant *v.* Green, 46 Ill. 469.

85. Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

86. Woodroof *v.* Howes, 88 Cal. 184, 26 Pac. 111.

87. Thompson *v.* Stanley, 20 N. Y. Suppl. 317.

F. Parties to Such Actions — 1. Parties Plaintiff — a. When Single Shareholder May Sue — (I) *To Prevent Doing of Ultra Vires or Illegal Act Injurious to Plaintiff.* A single shareholder is at liberty to bring a preventive action in equity, where the directors and managing officers of the corporation are threatening to do an *ultra vires* act injurious to his rights as a shareholder.[88]

(II) *Where Right Sought to Be Vindicated Is Personal to Particular Shareholder.* Then of course he must sue alone unless the other shareholders have a common interest with him.[89]

(III) *Where Action Is Against Promoter For Fraud and Deceit.* Subscribers to the shares of a proposed corporation are not necessary or proper parties to an action by another subscriber against a promoter of the corporation for fraudulently cheating plaintiff and other subscribers out of the money subscribed and paid to him as promoter.[90]

b. When Not Necessary to Join All Shareholders by Name — (I) *Where Shareholders Are Numerous and Widely Scattered.* Where the shareholders are numerous and scattered so as to render it impossible or very inconvenient to join them all by name as parties plaintiff, a number of them may file a bill in behalf of themselves and all the others standing in the same situation with them; but those who are not joined by name will be allowed to intervene and to join by name upon undertaking to share with the others in the expenses of the litigation, and the decree will be binding upon all, including those who did not join.[91]

(II) *Where Majority Are in Fraudulent Conspiracy Against Rights of Minority.* It will frequently happen that a majority of the shareholders are in the fraudulent conspiracy against the rights of the minority. Here the minority, or one of the minority, suing for himself and the other in like situation with him, may file the bill.[92] Where the bill is thus filed it is not necessary that the shareholders should be made parties by name,[93] nor, under the same circum-

88. Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401 (bill to enjoin the directors from paying an illegal tax); Hoole *v.* Great Western R. Co., L. R. 3 Ch. 262, 17 L. T. Rep. N. S. 153, 16 Wkly. Rep. 260. *Compare* Wood *v.* Draper, 24 Barb. (N. Y.) 187; Hawes *v.* Contra Costa Water Co., 104 U. S. 450, 26 L. ed. 827.

89. Pierce *v.* Equitable L. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433.

90. Jones *v.* Caldwell, 116 Ala. 364, 22 So 456.

91. Wallworth *v.* Holt, 4 Myl. & C. 619, 18 Eng. Ch. 619. See also Jones *v.* Johnson, 10 Bush (Ky.) 649; Mann *v.* Butler, 2 Barb. Ch. (N. Y.) 362; West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181; Smart *v.* Bradstock, 7 Beav. 500, 29 Eng. Ch. 500; Richardson *v.* Hastings, 7 Beav. 323, 8 Jur. 207, 13 L. J. Ch. 142, 29 Eng. Ch. 323; Harvey *v.* Harvey, 4 Beav. 215; Silber Light Co. *v.* Silber, 12 Ch. D. 717, 48 L. J. Ch. 385, 40 L. T. Rep. N. S. 96, 27 Wkly. Rep. 427; Bromley *v.* Smith, 5 L. J. Ch. O. S. 53, 1 Sim. 8, 2 Eng. Ch. 8; Manning *v.* Thesiger, 1 L. J. Ch. O. S. 28, 1 Sim. & St. 106, 1 Eng. Ch. 106; Shuttleworth *v.* Howarth, 4 Myl. & C. 492, 18 Eng. Ch. 492. Mare *v.* Malachy, 1 Myl. & C. 559, 13 Eng. Ch. 559; Hichens *v.* Congreve, 4 Russ. 562, 4 Eng. Ch. 562; Cockburn *v.* Thompson, 16 Ves. Jr. 321; Adair *v.* New River Co., 11 Ves. Jr. 429. But see Robinson *v.* Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Lund *v.* Blanshard, 4 Hare 9, 30 Eng. Ch. 9; Richardson *v.* Larsent, 7 Jur. 691, 2 Y. & Coll. Ch. 507, 21 Eng. Ch. 507; Evans *v.* Stokes, 1 Keen 24, 15 Eng. Ch. 24; Deeks *v.* Stanhope, 14 Sim. 57, 37 Eng. Ch. 57; Long *v.* Yonge, 2 Sim. 369, 2 Eng. Ch. 369.

92. Wood *v.* Draper, 24 Barb. (N. Y.) 187; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347; Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, 1 Woolw. 400, 1 McCahon (Kan.) 214; Menier *v.* Hooper's Tel. Works, L. R. 9 Ch. 350, 43 L. J. Ch. 330, 30 L. T. Rep. N. S. 209, 22 Wkly. Rep. 396; Bloxam *v.* Metropolitan R. Co., L. R. 3 Ch. 337; Salomons *v.* Laing, 12 Beav. 339, 14 Jur. 471, 19 L. J. Ch. 225, 6 R. & Can. Cas. 289; Macbride *v.* Lindsay, 9 Hare 574, 16 Jur. 535, 41 Eng. Ch. 574; Preston *v.* Guyon, 5 Jur. 146, 10 L. J. Ch. 73, 11 Sim. 327, 34 Eng. Ch. 327; Hichens *v.* Congreve, 4 Russ. 562, 4 Eng. Ch. 562; Baldwin *v.* Lawrence, 2 Sim. & St. 18, 1 Eng. Ch. 18. See also Bromley *v.* Smith, 5 L. J. Ch. O. S. 53, 1 Sim. 8, 2 Eng. Ch. 8; Douglas *v.* Horsfall, 2 Sim. & St. 184, 1 Eng. Ch. 184.

93. Dennis *v.* Kennedy, 19 Barb. (N. Y.) 517; Wallworth *v.* Holt, 4 Myl. & C. 619, 18 Eng. Ch. 619; Taylor *v.* Salmon, 4 Myl. & C. 134, 18 Eng. Ch. 134; Hichens *v.* Congreve, 4 Russ. 562, 4 Eng. Ch. 562; Cockburn *v.* Thompson, 16 Ves. Jr. 321.

stances, is it an objection that some of the shareholders have become adversely interested to those filing the bill.[94]

(III) *But Plaintiff Must Join by Name Other Shareholders Having Common Interest With Him, or Else Sue Professedly For Them.* While as already seen[95] the right of the shareholder to maintain the action cannot in many cases be made to depend upon the concurrence of the other shareholders with him, since all the others may be joined in the unlawful conspiracy which he seeks to redress, yet according to the prevailing theory it is indispensable either that those having a common interest with him should be joined as plaintiffs in his bill, or else that without naming them he should bring his bill professedly in his own behalf and in behalf of all other shareholders similarly interested with himself. In the English chancery practice this rule has been regarded as imperative. This was the course adopted in Natusch v. Irving,[96] and nearly all the English authorities are to this effect,[97] and the American authorities generally concur.[98]

94. Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513; Clements *v.* Bowers, 1 Drew. 684.

95. See *supra*, XI, C, 3.

96. Reported in Gow Partn. App. No. VI (3d ed.) p. 398.

97. Gray *v.* Lewis, L. R. 8 Eq. 526; Atwool *v.* Merryweather, L. R. 5 Eq. 464 note, 37 L. J. Ch. 35; Clinch *v.* Financial Corp., L. R. 5 Eq. 450; Stevens *v.* South Devon R. Co., 13 Beav. 48, 9 Hare 313, 15 Jur. 235, 41 Eng. Ch. 313; Browne *v.* Monmouthshire R., etc., Co., 13 Beav. 32, 15 Jur. 475, 20 L. J. Ch. 497; Logan *v.* Courtown, 13 Beav. 22, 20 L. J. Ch. 347; Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1, 15 Jur. 26, 20 L. J. Ch. 169, 3 Eng. L. & Eq. 144; Dumvile *v.* Birkenhead, etc., R. Co., 12 Beav. 444; Salomons *v.* Laing, 12 Beav. 339, 14 Jur. 471, 19 L. J. Ch. 225, 6 R. & Can. Cas. 289; Cohen *v.* Wilkinson, 12 Beav. 125, 13 Jur. 641, 18 L. J. Ch. 378, 1 Hall & T. 554, 14 Jur. 535, 1 Macn. & G. 481, 5 R. & Can. Cas. 758, 47 Eng. Ch. 384; Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513; Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 13 Eng. L. & Eq. 506; Graham *v.* Birkenhead, etc., R. Co., 2 Hall & T. 450, 14 Jur. 494, 20 L. J. Ch. 445, 2 Macn. & G. 146, 6 Eng. L. & Eq. 132, 48 Eng. Ch. 114; Macbride *v.* Lindsay, 9 Hare 574, 16 Jur. 535, 41 Eng. Ch. 574; Bagshaw *v.* Eastern Union R. Co., 7 Hare 114, 13 Jur. 602, 18 L. J. Ch. 193, 6 R. & Can. Cas. 152, 27 Eng. Ch. 114 [*affirmed* in 2 Hall & T. 201, 14 Jur. 491, 19 L. J. Ch. 410, 2 Macn. & G. 389, 6 R. & Can. Cas. 169, 48 Eng. Ch. 300]; Beman *v.* Rufford, 15 Jur. 914, 20 L. J. Ch. 537, 1 Sim. N. S. 550, 6 Eng. L. & Eq. 106, 40 Eng. Ch. 550; Preston *v.* Guyon, 5 Jur. 146, 10 L. J. Ch. 73, 11 Sim. 327, 34 Eng. Ch. 327; Mozley *v.* Alston, 16 L. J. Ch. 217, 1 Phil. 790, 19 Eng. Ch. 790; Gray *v.* Chaplin, 3 L. J. Ch. O. S. 161, 2 Sim. & St. 267; Wallworth *v.* Holt, 4 Myl. & C. 619, 18 Eng. Ch. 619; Taylor *v.* Salmon, 4 Myl. & C. 134, 18 Eng. Ch. 134; Sharp *v.* Day, 1 Phil. 771, 19 Eng. Ch. 771; Hichens *v.* Congreve, 4 Russ. 562, 4 Eng. Ch. 562; Ware *v.* Grand Junction Water Works Co., 2 Russ. & M. 470, 11 Eng. Ch. 470; Douglas *v.* Horsfall, 2 Sim. & St. 184, 1 Eng. Ch. 184; Baldwin *v.* Lawrence, 2 Sim. & St. 18, 1 Eng. Ch. 18; Benson *v.* Heathorn, 1 Y. & Coll. Ch. 326, 20 Eng. Ch. 326.

98. *Connecticut.*— Allen *v.* Curtis, 26 Conn. 456; Sears *v.* Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557.

Georgia.—Young *v.* Moses, 53 Ga. 628; Colquitt *v.* Howard, 11 Ga. 556.

Illinois.— Whitney *v.* Mayo, 15 Ill. 251.

Massachusetts.— Davis *v.* Peabody, 170 Mass. 397, 49 N. E. 750; Brewer *v.* Boston Theatre, 104 Mass. 378; Peabody *v.* Flint, 6 Allen 52; Heath *v.* Ellis, 12 Cush. 601; Abbott *v.* Merriam, 8 Cush. 588.

New Hampshire.— March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New Jersey.— Kean *v.* Johnson, 19 N. J. Eq. 401.

South Carolina.— Charleston Ins., etc., Co. *v.* Sebring, 5 Rich. Eq. 342.

Texas.— Evans *v.* Brandon, 53 Tex. 56.

Vermont.— Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545.

United States.— Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401; Smith *v.* Poor, 22 Fed. Cas. No. 13,093, 3 Ware 148.

Amending the bill so as to let additional shareholders join as plaintiffs. Moyle *v.* Landers, 83 Cal. 579, 23 Pac. 798.

Compliance with rule that all persons interested be made parties.— When shareholders sue for themselves and all others having a like interest, making the corporation defendant of which they are members, there is a compliance in theory at least with the rule that all persons interested in the subject-matter of the suit should be made parties. In theory all such are before the court. They are either actual parties to the record, or are properly represented by those who are parties, and may become plaintiffs, if they are dissatisfied with their position as defendants, as members of the company. March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

If the relief prayed for may by possibility be injurious to any of the parties joined as plaintiffs, those parties must be made defend-

(iv) *Suit Must Be Bona Fide For Those in Like Interest With Plaintiff.* Where the shareholder prosecutes the suit professedly for himself and for other shareholders in like interest with himself, the rule is imperative that plaintiff must prosecute the action *bona fide*, truthfully, and sincerely, for those standing in like interest with himself; and hence if it is made to appear that he is put forward as a dummy for an adverse interest his suit will not be entertained.[99]

c. Any Other Shareholder May Be Joined as Plaintiff. Such being the nature of the action, it necessarily follows that any shareholder other than the plaintiff filing the bill may on his application be joined as plaintiff in the action.[1]

d. Creditor and Shareholder Joining. It has been held that a creditor and a shareholder of a corporation who, upon the refusal of the receiver of the corporation to bring the action, commence an action against the directors of the corporation for loss of corporate funds owing to their neglect, may join as plaintiffs and bring the action for the benefit of all the corporate creditors and shareholders, where they are very numerous and it is impracticable to bring them all before the court.[2] But this does not seem to be sound, since a creditor and a shareholder do not occupy a common relation to the trust fund.[3] It has been held, however, that where some of the shareholders of a dissolved corporation bring a bill against the directors to recover funds lost by their mismanagement and breach of trust, they must bring it not only in behalf of the other shareholders, but also in behalf of the creditors.[4]

2. Parties Defendant — a. When Corporation Necessary Party. Where the object of the action is to prevent or redress a wrong to the corporation, the corporation itself is an indispensable party, either as plaintiff or defendant.[5]

b. When Corporation Should Be Impleaded as Defendant — (i) *In General.* It follows that whenever in such case the directors or other officers who wield the

ants, because, as observed by Lord Lyndhurst, "each and every of them may have a case to make adverse to the interest of the party suing." Mozley *v.* Alston, 16 L. J. Ch. 217, 229, 1 Phil. 790, 19 Eng. Ch. 790.

Where a bill filed by certain shareholders on behalf of themselves and others, for relief against an alleged breach of trust, is demurred to on the ground that some of the parties on whose behalf the plaintiffs profess to sue appear to have been implicated in the transaction complained of, the proper test of such objection is to see whether the bill states facts with respect to those parties, which as against them would amount to a defense to the suit. Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40; Apperley *v.* Page, 11 Jur. 271, 16 L. J. Ch. 302, 1 Phil. 779, 19 Eng. Ch. 779.

Such a bill not multifarious because many shareholders join. Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40. Nor does it create a statutory misjoinder of causes of action. Barr *v.* New York, etc., R. Co., 96 N. Y. 444; Dennis *v.* Kennedy, 19 Barb. (N. Y.) 517.

Allegation of the joinder of parties who are not proper to be joined rejected as surplusage. Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Douglas *v.* Horsfall, 2 Sim. & St. 184, 1 Eng. Ch. 184; Baldwin *v.* Lawrence, 2 Sim. & St. 18, 1 Eng. Ch. 18.

99. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Forrest *v.* Manchester, etc., R. Co., 4 De G. F. & J. 126, 7 Jur. N. S. 887, 4 L. T. Rep. N. S. 666, 9 Wkly. Rep. 818, 65 Eng. Ch. 99; Filder *v.* London, etc., R. Co., 1 Hem. & M. 489. But Lord Langdale, as master of the rolls, held that it did not constitute a sufficient objection to the character of plaintiff that he has filed his bill "at the instigation and request" of a rival company. Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513.

1. Barr *v.* New York, etc., R. Co., 96 N. Y. 444; Wood *v.* Union Gospel Church Bldg. Assoc., 63 Wis. 9, 22 N. W. 756. The fact that the state is a shareholder does not authorize a citizen to be joined. Central R. Co. *v.* Collins, 40 Ga. 582. Construction of a complaint brought on behalf of the plaintiff and all other shareholders and scrip-holders. Rogers *v.* New York, etc., Land Co., 1 N. Y. Suppl. 908, 17 N. Y. St. 131.

2. Miesse *v.* Loren, 5 Ohio N. P. 307 [*citing* Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; Landis *v.* Sea Isle Hotel Co., 53 N. J. Eq. 654, 33 Atl. 964; Ackerman *v.* Halsey, 37 N. J. Eq. 356; Brinckerhoff *v.* Bostwick, 88 N. Y. 52].

3. That a person not a shareholder cannot be joined as plaintiff with a shareholder see Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347. *Contra*, Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

4. Camp *v.* Taylor, (N. J. Ch. 1890) 19 Atl. 968.

5. Cunningham *v.* Pell, 5 Paige (N. Y.) 607; Robinson *v.* Smith, 3 Paige (N. Y.) 222,

power of the corporation refuse to allow the action to proceed in its name as plaintiff, or whenever their relation to the subject of the action is such that it would be improper for the action to proceed in the name of the corporation as plaintiff while the corporation should remain under their control, it is indispensable that it should be joined as defendant.[6]

(II) *In Suit to Restrain or Relieve Against Breaches of Trust by Directors* — (A) *In General.* The corporation is a necessary party defendant to a bill filed against the directors praying for relief against a breach of trust by the directors, or that they may be restrained from using the funds and property of the corporation for the consummation of a breach of trust.[7]

(B) *Or to Restore to Corporation What It Has Lost Through Such Breaches of Trust.* This is the rule where the object of the action is to restore to the corporation assets which its directors and officers have unlawfully converted to their own use,[8] and where it is sought to charge the directors personally in favor of the corporation for losses happening through their mismanagement or neglect.[9]

(III) *In Contests Between Shareholders and Third Persons.* Although the contest may be between shareholders and third persons, or between an alleged shareholder and one to whom shares standing on the books of the corporation have been transferred, yet if any decree which can be rendered will necessarily

24 Am. Dec. 212; Ferris *v.* Strong, 3 Edw. (N. Y.) 127.

6. *California.*— Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Beach *v.* Cooper, 72 Cal. 99, 13 Pac. 161.

Colorado.— Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894.

Georgia.— Colquitt *v.* Howard, 11 Ga. 556.

New Jersey.— Camp *v.* Taylor, (Ch. 1890) 19 Atl. 968.

New York.— Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 9 L. R. A. 527 [*reversing* 52 Hun 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]; Greaves *v.* Gouge, 69 N. Y. 154; Gardiner *v.* Pollard, 10 Bosw. 674; Stromeyer *v.* Combes, 15 Daly 29, 2 N. Y. Suppl. 232, 18 N. Y. St. 154; Carpenter *v.* Roberts, 56 How. Pr. 216; Hand *v.* Atlantic Nat. Bank, 55 How. Pr. 231; Wells *v.* Jewett, 11 How. Pr. 242; Robinson *v.* Smith, 3 Paige 222, 24 Am. Dec. 212.

Ohio.— Taylor *v.* Miami Exporting Co., 5 Ohio 162, 22 Am. Dec. 785.

South Carolina.— Charleston Ins., etc., Co. *v.* Sebring, 5 Rich. Eq. 342.

United States.— Davenport *v.* Dows, 18 Wall. 626, 21 L. ed. 938; Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, Woolw. 400, McCahon (Kan.) 214.

In Mason *v.* Harris, 11 Ch. D. 97, 48 L. J. Ch. 589, 40 L. T. Rep. N. S. 644, 27 Wkly. Rep. 699, the bill was filed by two shareholders, in behalf of themselves and all the shareholders except the persons named as defendants, against the managing director, two other directors, and the company. The bill was sustained.

7. *Connecticut.*— Allen *v.* Curtis, 26 Conn. 456; Sears *v.* Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557.

Georgia.— Colquitt *v.* Howard, 11 Ga. 556.

Kentucky.— Jones *v.* Johnson, 10 Bush 649.

Maine.— Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364.

Massachusetts.— Brewer *v.* Boston Theatre, 104 Mass. 378.

New Hampshire.— March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New York.— Thornton *v.* Wabash R. Co., 81 N. Y. 462; Gardiner *v.* Pollard, 10 Bosw. 674; Robinson *v.* Smith, 3 Paige 222, 24 Am. Dec. 212.

South Carolina.— Charleston Ins., etc., Co. *v.* Sebring, 5 Rich. Eq. 342.

Tennessee.— Deaderick *v.* Wilson, 8 Baxt. 108.

Texas.— Evans *v.* Brandon, 53 Tex. 56.

United States.— Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401.

England.— Silber Light Co. *v.* Silber, 12 Ch. D. 717, 48 L. J. Ch. 385, 40 L. T. Rep. N. S. 96, 27 Wkly. Rep. 427; Carlisle *v.* South Eastern R. Co., 2 Hall & T. 366, 14 Jur. 535, 1 Macn. & G. 689, 6 R. & Can. Cas. 682, 47 Eng. Ch. 546; Bagshaw *v.* Eastern Union R. Co., 7 Hare 114, 13 Jur. 602, 18 L. J. Ch. 193, 6 R. & Can. Cas. 152, 27 Eng. Ch. 114 [*affirmed* in 2 Hall & T. 201, 14 Jur. 491, 19 L. J. Ch. 410, 2 Macn. & G. 389, 6 R. & Can. Cas. 169, 48 Eng. Ch. 300].

But *compare* Kean *v.* Johnson, 9 N. J. Eq. 401.

8. Byers *v.* Rollins, 13 Colo. 22, 21 Pac. 894; Stromeyer *v.* Coombes, 15 Daly (N. Y.) 29, 2 N. Y. Suppl. 232, 18 N. Y. St. 154; Carpenter *v.* Roberts, 56 How. Pr. (N. Y.) 216; Taylor *v.* Miami Exporting Co., 5 Ohio 162, 22 Am. Dec. 785; Charleston Ins., etc., Co. *v.* Sebring, 5 Rich. Eq. (S. C.) 342.

9. Camp *v.* Taylor, (N. J. Ch. 1890) 19 Atl. 968. See also Bagshaw *v.* Eastern Union R. Co., 7 Hare 114, 13 Jur. 602, 18 L. J. Ch. 193, 6 R. & Can. Cas. 152, 27 Eng. Ch. 114. But see Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 13 Eng. L. & Eq. 506.

affect the rights of the corporation the action cannot proceed unless it is made a defendant.[10]

(IV) *Corporation Non-Resident, Suit Dismissed* — (A) *In General.* Where any decree which can be rendered will necessarily affect the rights of the corporation, if the corporation is a non-resident, so that it cannot be impleaded, the suit cannot proceed, but must be dismissed.[11]

(B) *Unless Foreign Corporation Served by Publication.* It seems, however, that a foreign corporation can be served by publication, so as to bring it before the court in such an action, and if this is not done the suit will be dismissed.[12]

(V) *Corporation, if Resident, Must Be Served With Process.* If the corporation is a resident, and there is neither service of process upon it nor a voluntary appearance by it the suit must be dismissed.[13]

(VI) *Exception Where Corporation Is Dissolved or in Liquidation.* An exception to the foregoing rule, rendering it necessary to make the corporation a party defendant, may possibly be admitted where the corporation has suffered a *de facto* dissolution;[14] but it would seem that its presence as a party defendant cannot be dispensed with unless it has suffered such a dissolution as disables it from suing or defending as a corporate body. If there is a statute giving it power to sue and be sued after its dissolution, for the purpose of winding up its affairs, then its presence cannot be dispensed with.[15]

c. When Directors Must Be Made Parties Defendant — (I) *In General.* Those directors against whom relief is sought must of course be made parties defendant.[16]

(II) *Directors Against Whom No Relief Is Sought.* Even where no relief is sought against the directors, and their rights will not be affected by the decree in a different degree from the rights of the shareholders generally, it has been held that they must be made parties defendant.[17] And where the object of the action is to undo a fraud committed by its own directors or officers in collusion with a third party, it has been held that the directors are necessary parties defendant, on the theory that the action is primarily against them.[18]

(III) *Whether Directors Must Be Joined or May Be Sued Separately.* Where the object of the suit is to charge the directors with a liability in behalf of the corporation or the shareholders for breaches of trust, it is not necessary to join as parties all who have concurred in the breaches of trust complained of, but relief may be had against any or all of those who did the wrong.[19]

10. Kendig *v.* Dean, 97 U. S. 423, 24 L. ed. 1061.

11. Barney *v.* Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825; Shields *v.* Barrow, 17 How. (U. S.) 130, 15 L. ed. 158; Dormitzer *v.* Illinois, etc., Bridge Co., 6 Fed. 217; Hannibal First Nat. Bank *v.* Smith, 6 Fed. 215.

12. Cunningham *v.* Pell, 5 Paige (N. Y.) 607. See also March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

13. Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, 1 Woolw. 400, McCahon (Kan.) 214. But see Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

14. Ervin *v.* Oregon R., etc., Co., 20 Fed. 577.

15. Camp *v.* Taylor, (N. J. Ch. 1890) 19 Atl. 968. When one of the shareholders in a national bank may maintain a suit in equity in a state court for the appointment of a receiver, the bank being in process of liquidation, where the corporation alone has been made a defendant. Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673.

16. Griffin *v.* St. Louis Vine, etc., Growers' Assoc., 4 Mo. App. 596; Meyers *v.* Scott, 2 N. Y. Suppl. 753, 20 N. Y. St. 35; Ribon *v.* Chicago, etc., R. Co., 16 Wall. (U. S.) 446, 21 L. ed. 367.

17. Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Woodroof *v.* Howes, 88 Cal. 184, 26 Pac. 111.

18. Slattery *v.* St. Louis, etc., Transp. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245.

19. Mayne *v.* Griswold, 3 Sandf. (N. Y.) 463, 9 N. Y. Leg. Obs. 25; Cunningham *v.* Pell, 5 Paige (N. Y.) 607; Ervin *v.* Oregon R., etc., Co., 20 Fed. 577. See Percy *v.* Millaudon, 3 La. 568; Cazeaux *v.* Mali, 25 Barb. (N. Y.) 578; Gaffney *v.* Colvill, 6 Hill (N. Y.) 567; Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. (N. Y.) 130; Protection Ins. Co. *v.* Dummer [*cited* in Cunningham *v.* Pell, 5 Paige (N. Y.) 607, 612]; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347; Atty.-Gen. *v.* Wilson, Cr. & Ph. 1, 4 Jur. 1174, 10 L. J. Ch. 53, 18 Eng. Ch. 1. See also Van Cott *v.* Van Brunt, 2 Abb. N. Cas. (N. Y.) 283; Coventry *v.* Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; Peck *v.* Ellis, 2 Johns. Ch. (N. Y.) 131;

(iv) *Where Action Is at Law to Charge Directors With Statutory Liability.* So where the action is at law to charge the directors upon a statute liability, as for instance for making dividends except from surplus profits, dividing or reducing the capital stock without the consent of the legislature, making prohibited loans or discounts, or the like,[20] it is not necessary to join all the directors who participated in the act, although the essential nature of the act was such that it would not have been performed by one director alone; but plaintiff may proceed against them separately.[21] In these cases, whether the action is at law or in equity, the governing principle is that the directors who are proceeded against as tort-feasors have no right to be joined, because they are not entitled to contribution as among themselves.[22] "Neither equity nor law is solicitous in regard to contribution between tort-feasors."[23]

d. Whether Shareholders Must Be Made Parties. While in case of unincorporated societies, all the shareholders or directors are necessary parties defendant,[24] yet this rule does not apply in the case of incorporated companies; since as already seen[25] they are in theory of law strangers to the corporation. Special circumstances, however, may exist to render it proper or even essential for a minority of dissenting shareholders proceeding in such a bill to implead as defendants the majority shareholders so far as practicable — which in general means all that can be found within the jurisdiction.[26] Thus if the assets of the corporation have been improperly diverted into the hands of individual shareholders, the complaining shareholders may join them as defendants and pray that they be required to restore the assets thus diverted;[27] and this they may equally do if the assets have been improperly diverted into the hands of strangers.[28] So it has been held that where the shareholders in a corporation are not numerous, and the minority complain, by bill, of the votes and motives of the majority, and of the corporate conduct consequent thereon, it is not improper that all of the shareholders as well as the corporation be made parties.[29] It has been held that a bill by the minority shareholders, the object of which is to take the property of the corporation out of its hands and practically to dissolve it, because of alleged frauds on the part of its officers, cannot be maintained without making the officers and the other shareholders parties.[30] And a court of equity may in its discretion permit a shareholder to become a party defendant for the purpose of protecting his own interest and the interest of such other shareholders as choose to join him in the defense against unfounded or illegal claims against the corporation, where the directors fraudulently refuse to attend to its interests.[31]

e. When Third Parties Must Be Joined as Defendants — (i) *Rule Stated.* Any third person or corporation against whom relief is sought must of course be joined as a defendant; and where a bill seeks to restore corporate assets wasted by breaches of trust of the directors or officers, if other parties have participated

Arnold *v.* Clifford, 1 Fed. Cas. No. 555, 2 Sumn. 238; London Gas-Light Co. *v.* Spottiswoode, 14 Beav. 264; Fussell *v.* Elwin, 7 Hare 29, 27 Eng. Ch. 29.

20. 1 N. Y. Rev. Stat. 589, § 1.

21. Gaffney *v.* Colvill, 6 Hill (N. Y.) 567. It should be stated that the decision was influenced by the language of the statute which used the words "every director," thus indicating that they might be dealt with separately. See also in support of the text Buell *v.* Warner, 33 Vt. 570.

22. Miller *v.* Fenton, 11 Paige (N. Y.) 18; Peck *v.* Ellis, 2 Johns. Ch. (N. Y.) 131; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347; Wilkinson *v.* Parry, 4 Russ. 272, 4 Eng. Ch. 272; Franco *v.* Franco, 3 Ves. Jr. 75, 3 Rev. Rep. 50. See also *supra*, IX, P, 13, a *et seq.*

23. Brewer *v.* Boston Theatre, 104 Mass. 378, 399, opinion by Wells, J.

24. Whitney *v.* Mayo, 15 Ill. 251; Richardson *v.* Hastings, 7 Beav. 301, 8 Jur. 72, 13 L. J. Ch. 129, 29 Eng. Ch. 301. *Compare* Richardson *v.* Hastings, 11 Beav. 17, 16 L. J. Ch. 322.

25. See *supra*, VI, F, 1, a *et seq.*

26. See for instance Ribon *v.* Chicago, etc., R. Co., 16 Wall. (U. S.) 446, 21 L. ed. 367.

27. Taylor *v.* Miami Exporting Co., 5 Ohio 162, 22 Am. Dec. 785.

28. See *infra*, XI, F, 2, e, (i) *et seq.*

29. East Rome Town Co. *v.* Nagle, 58 Ga. 474.

30. Morse *v.* Delaware Bay State Gas Co., 91 Fed. 944.

31. Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 701, 29 S. E. 514.

with them in such breaches of trust, they may, according to the established principles of equity pleading, be joined as parties.[32] And in general any and all persons, natural and artificial, may be made parties who have received the benefit of the illegal act of the directors, and who claim an interest in the maintenance of the illegal act.[33]

(II) *Examples Under This Rule.* Thus where a shareholder seeks to enjoin the performance of a contract between the corporation of which he is a member and another corporation, the latter should also be made a party defendant to the suit; otherwise the former might be put in the position of being restrained from doing that for the non-performance of which the corporation might be subject to an action at law.[34] So where a bill is filed by a non-consenting shareholder of a railroad corporation which has become consolidated with three others to have the consolidation declared void and proceedings under it enjoined, it will be dismissed if the president and directors of the consolidated company are not made defendants.[35]

(III) *Third Parties From Whom Directors Have Derived Secret Profit Need Not Be Joined.* But where the bill seeks only to make faithless directors account for secret profits which they have received in consequence of a breach of trust, other persons in concurrence with whom the fraud was committed are not necessary parties defendant, for example lessees of corporate property.[36]

f. When Shareholders Allowed to Defend For Corporation — (I) *In General.* As a general rule a corporation can appear to defend litigation only in its corporate capacity, represented by its properly constituted officers.[37] But if a suit is brought against the corporation, and the directors, in breach of their trust, fail or refuse to make defense to the same in the name of the corporation, shareholders will be permitted so to do.[38]

(II) *Shareholder May Appear and Defend For Himself and Other Shareholders.* A shareholder, when thus made a party defendant, will be permitted to appear on behalf of other shareholders who may desire to join him in the defense.[39]

(III) *Corporation Not Bound by Decree.* But since the corporation is not before the court it will not be bound by any order or decree rendered against

32. Peabody *v.* Flint, 6 Allen (Mass.) 52; Slattery *v.* St. Louis, etc., Transp. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245; Eldred *v.* American Palace Car Co., 99 Fed. 168.

33. Peabody *v.* Flint, 6 Allen (Mass.) 52; March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Kean *v.* Johnson, 9 N. J. Eq. 401; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Gray *v.* Lewis, L. R. 8 Eq. 526; Clinch *v.* Financial Corp., L. R. 5 Eq. 450; Salomons *v.* Laing, 12 Beav. 339, 14 Jur. 471, 19 L. J. Ch. 225, 6 R. & Can. Cas. 289; Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 13 Eng. L. & Eq. 506; Beman *v.* Rufford, 15 Jur. 914, 20 L. J. Ch. 537, 1 Sim. N. S. 550, 6 Eng. L. & Eq. 106, 40 Eng. Ch. 550.

34. Hare *v.* London, etc., R. Co., 2 Johns. & H. 80, 7 Jur. N. S. 1145, 30 L. J. Ch. 817.

35. Tyson *v.* Virginia, etc., R. Co., 24 Fed. Cas. No. 14,321, 1 Hughes 80. See also Ribon *v.* Chicago, etc., R. Co., 16 Wall. (U. S.) 446, 21 L. ed. 367, where the rule was applied so as to dismiss a bill in equity by reason of the non-joinder of third parties in interest.

36. Brewer *v.* Boston Theatre, 104 Mass. 378, 399 [*citing* Wilson *v.* Moore, 1 Myl. & K. 126, 7 Eng. Ch. 126; Walker *v.* Symonds, 3 Swanst. 1, 19 Rev. Rep. 155].

37. Blackman *v.* Central R., etc., Co., 58 Ga. 189; Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 14; Forbes *v.* Memphis, etc., R. Co., 9 Fed. Cas. No. 4,926, 2 Woods 323.

38. Fitzwater *v.* Seneca Nat. Bank, 62 Kan. 163, 61 Pac. 684, 84 Am. St. Rep. 377 (upon their tender of an answer stating valid matters of defense to the action, and the making of a showing by evidence of reasonable grounds of belief that such defense can be finally proved upon a trial of the case, and that the officers whose duty it is to make it are wrongfully or fraudulently refusing to do so); Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725.

Texas — Intervention by shareholder. — So under the peculiar practice in Texas an interested shareholder may intervene in a suit against the company to protect his rights. Mussina *v.* Goldthwaite, 34 Tex. 125, 7 Am. Rep. 281.

39. Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725.

it, or by any admissions made in the answer or stipulations that might be entered into by the parties or their counsel.[40]

(iv) *When Shareholders Not Allowed to Defend For Corporation.* It is absolutely essential, in order to exhibit a right to appear and defend for the corporation, for the shareholder to aver that the corporation itself has refused to defend, otherwise his answer will be struck out on motion.[41]

g. When Decree Executed Against Those Who Were Not Parties. When a decree has been obtained on behalf of the individuals whose rights have been thus fully and honestly investigated and established, a court, proceeding on the footing of that decree, will carry the directions thereof into execution against other individuals who were not parties.[42]

XII. FORMAL EXECUTION OF CORPORATE CONTRACTS.

A. Authority of Corporate Officers and Agents to Execute Contracts

— 1. Authorization by Shareholders. At common law the shareholders are strangers to the corporation;[43] and unless the charter, the governing statute, the articles of incorporation, the by-laws, or other constating instrument, contains a provision requiring the assent of the shareholders, or of a given number or proportion of them, to the making of a contract, such as a mortgage, a lease, a bill of sale, an assignment for creditors, or the like, no such assent is necessary. It is to be observed that provisions in the governing statutes or other governing instruments of corporations requiring the assent of a stated number of shareholders to the making of contracts of a given description are not uncommon, especially with respect to corporate mortgages.[44]

2. Authorization by Board of Directors. It seems on the one hand that instruments which in order to be valid require the use of the corporate seal require the authorization of the directors;[45] although, where the instrument is otherwise formally executed and the seal is formally affixed, authority to execute it is presumed.[46] But with respect to all those contracts which are made in the ordinary administration of the business of the corporation by its managing officers or contracting agents no anteeedent authorization by the board of directors applicable to each particular case is required, but a general authorization or employment to make contracts of a class which embraces the particular contract will be sufficient.[47]

40. Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725, opinion by Nelson, J.

41. Park *v.* New York, etc., Oil Co., 26 W. Va. 486; Park *v.* Ulster, etc., Petroleum Co., 25 W. Va. 108 (and this although the answer avers that the complaining shareholder has purchased three fourths of the stock of the corporation). Where shareholders intervene in a suit filed against their corporation, and allege that through fraud and collusion the officers and directors refuse to defend the suit, it is not error to refuse to permit the shareholders to defend in the name of the corporation, when they decline to proceed in their own names as shareholders, in behalf of themselves and other shareholders who may see proper to join with them in the defense of the suit. Cornell *v.* Sims, 111 Ga. 828, 36 S. E. 627.

No defense to an action by a corporation that another party has become the owner "of the sole beneficial interest in the rights, property, and immunities of the corporation"; and an answer so alleging may be stricken out on motion. Winona, etc., R. Co. *v.* St. Paul, etc., R. Co., 23 Minn. 359. See also Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 14, for a collection of facts where shareholders were refused permission to intervene and defend.

42. Weale *v.* West-Middlesex Waterworks Co., 1 Jac. & W. 358, 21 Rev. Rep. 183.

43. See *supra*, VI, F, 1, a *et seq.*

44. In Pennsylvania it seems that unanimous consent of the shareholders of a corporation is unnecessary to validate a lease entered into by such corporation, but the votes of a majority are sufficient. O'Neill *v.* Hestonville, etc., R. Co., 9 Pa. Dist. 2.

45. Hoyt *v.* Thompson, 5 N. Y. 320; repeated in Luse *v.* Isthmus Transit R. Co., 6 Oreg. 125, 25 Am. Rep. 506.

46. Schallard *v.* Eel River Steam Nav. Co., 70 Cal. 144, 11 Pac. 590; Hart *v.* Stone, 30 Conn. 94; Eureka Iron, etc., Works *v.* Bresnahan, 60 Mich. 332, 27 N. W. 524. See also *infra*, XII, D, 3, c, (II), (A) *et seq.*

47. Bradstreet *v.* Royalton Bank, 42 Vt. 128.

3. Authority to Do Particular Acts Without Express Authorization From Directors — a. To Employ Counsel. It has been held that where by the terms of the charter all the powers of the corporation are vested in the directors, the president alone has no authority to employ counsel to conduct litigation on behalf of the corporation.[48]

b. To Sign Promissory Notes. A provision in the governing instrument of a corporation that a particular officer shall sign the name of the corporation to particular instruments, for example to promissory notes, does not prevent the directors from authorizing any other corporate officer to perform this function.[49]

4. Failure of Directors to Enter Their Resolution of Record. Where an antecedent authorization by the board of directors is necessary to the making of a given contract, their failure to enter their resolution of record does not affect its validity, but the fact may be proved by parol;[50] and the rule is the same where the contract does not recite the previous authorization.[51] On the other hand, where the contract appears upon the face of the corporate records to have been authorized by the directors, a third person, in the absence of knowledge, or of circumstances putting him upon inquiry, need not look further; but he has the right to presume that the record correctly recites the facts and that the authority was formally given at a board meeting.[52]

5. Authorization at Irregular Board Meeting — a. In General. Nor is it at all necessary in case of a mortgage that the vote or resolution authorizing its execution should be passed at a regular meeting of the directors.[53]

b. Where Corporation Has Received and Retained Benefit of Transaction. The corporation cannot repudiate such a contract on the ground of the want of a resolution of the board,[54] or on the ground that the resolution was irregular, as that it was passed at a board meeting held outside the state,[55] even where the contract conveys lands, unless there is a statute prohibiting the meeting of the directors outside the state.[56]

6. Power of Attorney in Fact Must Appear. As in case of a natural person, where a conveyance of corporate lands is made by an attorney in fact other than by its regular officers, who signs its name and affixes its seal, his power of attorney must appear, and ought to consist of a written authorization from the board of directors or other managing body.[57]

B. Observance of Statutory Formalities — 1. Must Be Observed Unless Construed as Being Directory or Dispensed With by Corporate Usage — a. Rule Stated. Where the governing statute requires certain formalities to be observed in the execution of the contracts of a corporation, then unless those formalities are observed the instrument will be invalid,[58] unless, having reference to the distinction between mandatory and directory statutes, the court gets rid of the operation

48. Bright *v.* Metairie Cemetery Assoc., 33 La. Ann. 58.

49. Cameron *v.* Decatur First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 178 [*affirming* 4 Tex. Civ. App. 309, 23 S. W. 334].

50. *California.*— Yolo Bank *v.* Weaver, (1892) 31 Pac. 160.

Illinois.— Oakford *v.* Fisher, 75 Ill. App. 544.

Maine.— Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674.

New Jersey.— McMichael *v.* Brennan, 31 N. J. Eq. 496.

United States.— Allis *v.* Jones, 45 Fed. 148.

51. Hart *v.* Stone, 30 Conn. 94. Not necessary to record such resolution in the office of the recorder of deeds. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

52. Morisette *v.* Howard, 62 Kan. 463, 63 Pac. 756.

53. Eureka Iron, etc., Works *v.* Bresnahan, 60 Mich. 332, 27 N. W. 524.

54. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 51 Fed. 309, 2 C. C. A. 174. See also Yolo Bank *v.* Weaver, (Cal. 1892) 31 Pac. 160.

55. Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

56. Missouri Lead, Min., etc., Co. *v.* Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. Rep. 746.

57. Ware *v.* Swann, 79 Ala. 330; Standifer *v.* Swann, 78 Ala. 88.

58. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Beatty *v.* Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401. See also Maas *v.* Missouri, etc., R. Co., 11 Hun (N. Y.) 8.

of the statute by construing it as being directory merely,[59] or unless dispensed with by corporate usage; for although the corporation may be authorized by their act of incorporation to act or contract in a particular mode, they may by a course of practice render themselves liable on instruments executed in a different mode.[60]

b. Evidence of Corporate Usage Hence Admissible. Upon the question whether a contract has been executed by the officers of a corporation with the formality necessary to bind the corporation, the usage of the corporation in executing similar contracts is hence material evidence.[61]

c. Usage That Contract Is Complete Although Document Is Not Delivered. For example, although delivery is ordinarily essential to the validity of a deed or other written obligation, yet, as in the case of a policy of insurance, there may be a usage under which it may be retained by the insurance company until called for by the insured under an understanding that it shall be regarded as being in force; so that in case of a loss before the delivery the company may be held liable.[62]

2. Rule Where Statute Requires Contract to Be in Writing — a. In General. Such a statutory rule may be enforced and the contract held invalid so long as

59. *Alabama.*— Bates *v.* State Bank, 2 Ala. 451.

Florida.— Southern L. Ins. etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Illinois.— Moreland *v.* State Bank, 1 Ill. 263.

Minnesota.— Dana *v.* St. Paul Bank, 4 Minn. 385.

New Hampshire.— Union Mut. F. Ins. Co. *v.* Keyser, 32 N. H. 313, 64 Am. Dec. 375.

New York.— U. S. Trust Co. *v.* Brady, 20 Barb. 119; Mott *v.* U. S. Trust Co., 19 Barb. 568.

Pennsylvania.— Northern Liberties Bank *v.* Cresson, 12 Serg. & R. 306.

South Carolina.— State Bank *v.* Hammond, 1 Rich. 281.

Wisconsin.— Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

England.— Prince of Wales L., etc., Assur. Co. *v.* Harding, E. B. & E. 183, 4 Jur. N. S. 851, 27 L. J. Q. B. 297, 96 E. C. L. 183.

60. *Connecticut.*— Hart *v.* Stone, 30 Conn. 94; Witte *v.* Derby Fishing Co., 2 Conn. 260; Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271.

Massachusetts.—New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56.

New York.— Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. 23.

United States.—Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. ed. 488.

England.—Bargate *v.* Shortridge, 2 Eq. Rep. 605, 5 H. L. Cas. 297, 24 L. J. Ch. 457, 3 Wkly. Rep. 423, 31 Eng. L. & Eq. 44.

61. Hood *v.* New York, etc., R. Co., 22 Conn. 502; Stamford Bank *v.* Ferris, 17 Conn. 259; Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475; Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674; Angell & A. Corp. § 237.

62. Keim *v.* Home Mut. F. & M. Ins. Co., 42 Mo. 38, 97 Am. Dec. 291; Brownfield *v.* Phœnix Ins. Co., 35 Mo. App. 54; Mead *v.* Davidson, 3 A. & E. 303, 1 H. & W. 156, 4 L. J. K. B. 193, 4 N. & M. 701, 30 E. C. L. 153. See also Tayloe *v.* Merchants' F. Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187.

Enforcing verbal agreements for policies.— That a statute requiring all policies of insurance to be signed and sealed by certain officers does not disable the insurance company from making verbal agreements to execute policies which will be enforced see the following cases:

Iowa.— Davenport *v.* Peoria M. & F. Ins. Co., 17 Iowa 276 [*citing* Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,920, 1 Wash. 93].

Kentucky.— Franklin F. Ins. Co. *v.* Hewitt, 3 B. Mon. 231.

Massachusetts.— McCulloch *v.* Eagle Ins. Co., 1 Pick. 278.

New York.— Lightbody *v.* North America Ins. Co., 23 Wend. 18; Perkins *v.* Washington Ins. Co., 4 Cow. 645; Carpenter *v.* Mutual Safety Ins. Co., 4 Sandf. Ch. 408.

Ohio.— Palm *v.* Medina County Mut. F. Ins. Co., 20 Ohio 529.

Pennsylvania.—Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339.

United States.— Tayloe *v.* Merchants' F. Ins. Co., 9 How. 390, 13 L. ed. 187; Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6.

But such phraseology is regarded as consisting of enabling words merely. Sanborn *v.* Fireman's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419. See also Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray (Mass.) 204; First Baptist Church *v.* Brooklyn F. Ins. Co., 18 Barb. (N. Y.) 69 [*reversed* in 19 N. Y. 305]; Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636 [*affirming* 2 Curt. (U. S.) 524, 24 Fed. Cas. No. 14,372].

An agreement for a lease of real estate from a corporation is not required to be executed or assented to by the corporation with the same formality as the lease itself. Conant *v.* Bellows Falls Canal Co., 29 Vt. 263.

it continues to be executory,[63] or at least wholly executory,[64] at least where the corporation has pleaded the statute and relied upon it as a defense,[65] but not where it has been executed by one of the parties and the corporation has received the benefit of it;[66] or with respect to foreign corporations unless such corporations are expressly embraced in the statute.[67]

b. Operation of Statute of Frauds. The statute of frauds applies to corporations as well as to individuals; and hence a contract which if made by an individual would be invalid under the statute of frauds because not in writing would be equally invalid if made by a corporation.[68]

C. Presumption of Authority and Regularity of Corporate Acts — 1. GENERALLY. Excluding the operation of express statutes, a very extensive principle of the law of corporations, applicable to every kind of written contract executed ostensibly by a corporation, and to every kind of act done by its officers and agents professedly in its behalf, is that, where the officer or agent is the appropriate officer or agent to execute a contract or to do an act of a particular kind in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce evidence of such authority from the records of the corporation; always provided that the corporation itself had the power, under its charter or governing statute, to execute the contract or to do the act.[69]

2. ILLUSTRATIONS OF THIS PRINCIPLE. Under the operation of this principle a deed or mortgage purporting to have been executed by a corporation, which is signed and acknowledged in its behalf by its president and secretary, will be presumed to have been executed by its authority.[70] It follows from this principle that where a mortgage is given by a corporation to secure a debt which it has the power to contract, the mortgagee, advancing the money in good faith, is not bound to look beyond the mortgage for the authority for its execution.[71] In like manner all loans and discounts made by the officers of an incorporated bank will be presumed to have been made by the directors, until the contrary is shown by the party impeaching such a transaction.[72] So where the governing statute designates the president and cashier as the officers to sign contracts for a banking association their signatures become presumptive if not conclusive evidence that a contract so signed is that of the corporation; and third persons may safely rely upon the presumption.[73] So proof of the signatures of the officers of a corporation to a release under seal, purporting to have been executed by the corporation, is *prima facie*

63. Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Curtis *v.* Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944; Cincinnati *v.* Cameron, 33 Ohio St. 336.

64. Foulke *v.* San Diego, etc., R. Co., 51 Cal. 365.

65. Curtis *v.* Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944.

66. Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Cincinnati *v.* Cameron, 33 Ohio St. 336.

67. Rumbough *v.* Southern Imp. Co., 106 N. C. 461, 11 S. E. 528.

68. Smith *v.* Morse, 2 Cal. 524.

69. The leading case on this principle is U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552, where, notwithstanding a forcible dissent from Marshall, C. J., the principle laid down by the court met with immediate recognition, and has been steadily adhered to by American courts from that time to this. See also Trott *v.* Warren, 11 Me. 227; Episcopal Charitable Soc. *v.* Episcopal Church, 1 Pick. (Mass.) 372; McCulloch *v.* Eagle Ins. Co., 1 Pick. (Mass.) 278; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; All Saints' Church *v.* Lovett, 1 Hall (N. Y.) 191; U. S. *v.* Amedy, 11 Wheat. (U. S.) 392, 6 L. ed. 502.

70. New England Wiring, etc., Co. *v.* Farmington Electric Light, etc., Co., 84 Me. 284, 24 Atl. 848; Gorder *v.* Plattsmouth Canning Co., 36 Nebr. 548, 54 N. W. 830. So in case of a mortgage executed by the president, secretary, and treasurer of the corporation, to secure a debt within the power of the corporation to create. Eureka Iron, etc., Works *v.* Bresnahan, 60 Mich. 332, 27 N. W. 524.

71. Manhattan Hardware Co. *v.* Roland, 128 Pa. St. 119, 18 Atl. 429; Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110, 18 Atl. 428.

72. Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497.

73. Gillett *v.* Campbell, 1 Den. (N. Y.) 520.

evidence of its due execution.[74] So where an undertaking on appeal, purporting to have been executed by the corporation as surety, was signed by its second vice-president and its assistant secretary, with the corporate seal affixed, the authority of the officers to execute the instrument was presumed in absence of evidence to the contrary.[75]

D. Sealed Instruments — 1. When Corporate Seal Necessary and When Not — a. Ancient Rule That Corporation Can Act Only by Its Seal. One of the inherent or implied powers of a corporation at common law was the power to adopt and use a common seal.[76] By the strictness of the ancient common law a corporation could express its will only through its seal.[77]

b. Gradual Relaxation of Ancient Rule — (1) *In General.* The ancient rule that a corporation could act only by its seal[78] has been greatly relaxed in later times, if indeed not wholly abrogated. As explained by Mr. Justice Story in a leading case,[79] the necessity for the relaxation was early felt in the management of matters of minor importance, such as the retention of servants and the like.[80] Gradually the observance of this formality was dispensed with even in the weightier concerns of corporate bodies to such an extent that the acts and contracts of a corporate officer within the scope of his authority, although not under seal, came to be regarded as binding upon the corporation.[81]

74. Josey *v.* Wilmington, etc., R. Co., 12 Rich. (S. C.) 134.

75. Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836. That contracts of officers of a corporation organized under the statutes of the state wherein they are made will be presumed to have been made in pursuance of their authority derived under such statutes rather than of that derived from a foreign incorporation under the same name see Dean *v.* La Motte Lead Co., 59 Mo. 523.

76. 1 Bl. Comm. 475.

77. "For, though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole." 1 Bl. Comm. 475. "The ancient rule of the common law that a corporation could neither act, speak, nor whisper apart from the instrumentality of its common seal." Knapp J., in Crawford *v.* Longstreet, 43 N. J. L. 325, 329. See also the following cases:

Delaware.—Fidelity Ins., etc., Co. *v.* Niven, 5 Houst. 163.

Indiana.— Sheffield School Tp. *v.* Andress, 56 Ind. 157.

Kentucky.— Waller *v.* State Bank, 3 J. J. Marsh. 201.

Maryland.— State University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

New Jersey.— Baptist Church *v.* Mulford, 8 N. J. L. 182; Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212.

New York.—Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. 256.

Ohio.— Sheehan *v.* Davis, 17 Ohio St. 571.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552.

78. 1 Bl. Comm. 475.

79. Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351.

80. Atty.-Gen. *v.* Davy, 2 Atk. 212, West. t. Hardw. 121, 26 Eng. Reprint 531; Manby *v.* Long, 3 Lev. 107; Windsor *v.* Gover, 2 Saund. 302, 305*d* [*citing* 4 Hen. VII, 6; 13 Hen. VII, 17; 13 Hen. VIII, 12].

81. *Alabama.*— Everett *v.* U. S., 6 Port. 166, 30 Am. Dec. 584; Branch Bank *v.* Harrison, 2 Port. 540.

Illinois.— Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595; New England F. Ins. Co. *v.* Schettler, 38 Ill. 166.

Indiana.— White Water Valley Canal Co. *v.* Hawkins, 4 Ind. 474.

Kentucky.— Covington *v.* Covington, etc., Bridge Co., 10 Bush 69; Lee *v.* Flemingsburg, 7 Dana 28.

Louisiana.—Marlatt *v.* Levee Steam Cotton Press Co., 10 La. 583, 29 Am. Dec. 468.

Maine.— Burnham *v.* Webster, 19 Me. 232; Abbot *v.* Hermon, 7 Me. 118.

Massachusetts.— Episcopal Charity Soc. *v.* Episcopal Church, 1 Pick. 372; Canal Bridge *v.* Gordon, 1 Pick. 297, 1 Am. Dec. 170; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143.

Mississippi.— Petrie *v.* Wright, 6 Sm. & M. 647.

Missouri.— Buckley *v.* Briggs, 30 Mo. 452.

New Hampshire.— Eastman *v.* Coos Bank, 1 N. H. 23.

New Jersey.— Antipoeda Baptist Church *v.* Mulford, 8 N. J. L. 182.

New York.— Lyons Bank *v.* Demmon, Lalor 398; Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; Powell *v.* Newburgh, 19 Johns. 284; Dunn *v.* St. Andrew's Church, 14 Johns. 118.

Ohio.—Palm *v.* Medina County Mut. F. Ins. Co., 20 Ohio 529.

(11) *State of Law in England With Regard to Corporate Seals.* In a modern work on corporations[82] the state of law in England with regard to the necessity for the use of seals by corporations is discussed at considerable length with the citation of numerous statutes and judicial authorities, from which it will appear that the judges in that country, according to some of their decisions, are still "fast in the wax," while more recently they have adopted the sensible conclusion that sealing is not required in the case of trading corporations, which designation would it seems include such corporations as our American joint-stock corporations, organized for pecuniary gain.[83]

c. May Appoint Agents and Confer Authority Upon Them, Without Use of Its Seal. Modern courts, instead of pointedly denying that a corporation could act only through its seal, have made the departure from the ancient doctrine by holding that while a corporation in general must act through its common seal yet that it may appoint an agent whose acts, within the scope of his powers, do not require any such appendage to impart to them validity.[84]

Pennsylvania.— Magill *v.* Kauffman, 4 Serg. & R. 317, 8 Am. Dec. 713.

South Carolina.— Colcock *v.* Garvey, 1 Nott & M. 231.

United States.— Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

England.— Rex *v.* Amery, 1 Anstr. 178, 2 Bro. P. C. 336, 1 T. R. 575, 2 T. R. 515, 1 Rev. Rep. 306, 533; Harper *v.* Charlesworth, 4 B. & C. 574, 6 D. & R. 572, 4 L. J. K. B. O. S. 22, 28 Rev. Rep. 405, 10 E. C. L. 708; Wood *v.* Tate, 2 B. & P. N. R. 247, 9 Rev. Rep. 645; Doe *v.* Woodman, 8 East 228, 9 Rev. Rep. 422; Rex *v.* Chipping-Norton, 5 East 239; Rex *v.* Bigg, 2 East P. C. 882, 3 P. Wms. 419, 24 Eng. Reprint 1127.

See 12 Cent. Dig. tit. "Corporations," § 1801.

82. 4 Thompson Corp. §§ 5058, 5059.

83. England Copper Miners' Co. *v.* Fox, 16 Q. B. 229, 15 Jur. 703, 20 L. J. Q. B. 174, 71 E. C. L. 229; Sanders *v.* St. Neots' Union, 8 Q. B. 810, 10 Jur. 566, 15 L. J. M. C. 104, 55 E. C. L. 810; Wells *v.* Kingston-Upon-Hull, L. R. 10 C. P. 402, 44 L. J. C. P. 257, 32 L. T. Rep. N. S. 615, 23 Wkly. Rep. 562; South of Ireland Colliery Co. *v.* Waddle, L. R. 3 C. P. 463, 37 L. J. C. P. 211, 18 L. T. Rep. N. S. 405, 16 Wkly. Rep. 756 [*affirmed* in L. R. 4 C. P. 617, 38 L. J. C. P. 338, 17 Wkly. Rep. 896]; Totterdell *v.* Fareham Blue Brick, etc., Co., L. R. 1 C. P. 674, 12 Jur. N. S. 901, 35 L. J. C. P. 278, 14 Wkly. Rep. 919; *In re* Contract Corp., L. R. 8 Eq. 14, 20 L. T. Rep. N. S. 964; Nicholson *v.* Bradfield Union, L. R. 1 Q. B. 620, 7 B. & S. 747, 35 L. J. Q. B. 176, 14 L. T. Rep. N. S. 830, 14 Wkly. Rep. 731; Church *v.* Imperial Gas Light, etc., Co., 6 A. & E. 846, 7 L. J. Q. B. 118, 3 N. & P. 35, 1 W. W. & H. 137, 33 E. C. L. 443; Beverley *v.* Lincoln Gas Light, etc., Co., 6 A. & E. 829, 7 L. J. Q. B. 113, 2 N. & P. 283, W. W. & D. 519, 33 E. C. L. 434; Stafford *v.* Till, 4 Bing. 75, 13 E. C. L. 407; Denton *v.* East Anglian R. Co., 3 C. & K. 16; Australian Royal Mail Steam Nav. Co. *v.* Marzetti, 3 C. L. R. 1179, 11 Exch. 228, 24 L. J. Exch. 273; London Gas-Light, etc., Co. *v.* Nicholls, 2 C. & P. 365, 12 E. C. L. 620; Reuter *v.* Electric Tel. Co., 6 E. & B. 341, 2 Jur. N. S. 1245, 26 L. J. Q. B. 46, 4 Wkly. Rep. 564, 88 E. C. L. 341; Henderson *v.* Australian Royal Mail Steam Nav. Co., 5 E. & B. 409, 1 Jur. N. S. 830, 24 L. J. Q. B. 322, 3 Wkly. Rep. 571, 85 E. C. L. 409; Haigh *v.* North Bierley Union, E. B. & E. 873, 5 Jur. N. S. 511, 28 L. J. Q. B. 62, 6 Wkly. Rep. 679, 96 E. C. L. 873; Pauling *v.* London, etc., R. Co., 8 Exch. 867, 23 L. J. Exch. 105, 7 R. & Can. Cas. 816; London Fishmongers' Mystery *v.* Robertson, 12 L. J. C. P. 185, 5 M. & G. 131, 6 Scott N. R. 56, 44 E. C. L. 78; Clark *v.* Cuckfield Union, 1 L. & M. 81, 16 Jur. 686, 28 L. J. Q. B. 349.

84. *Alabama.*— Bates *v.* State Bank, 2 Ala. 451; Everett *v.* U. S., 6 Port. 166, 30 Am. Dec. 584.

Florida.— St. Andrew's Bay Land Co. *v.* Mitchell, 4 Fla. 192, 54 Am. Dec. 340.

Illinois.— Board of Education *v.* Greenbaum, 39 Ill. 609.

New Mexico.— Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721.

North Carolina.— Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306.

Pennsylvania.— Wolf *v.* Goddard, 9 Watts 544.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552; Fleckner *v.* U. S. Bank, 8 Wheat. 338, 5 L. ed. 631; Mechanics' Bank *v.* Columbia Bank, 5 Wheat. 326, 5 L. ed. 100; Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

See 12 Cent. Dig. tit. "Corporations," § 1239.

In England trading corporations may appoint attorneys to act for the corporation without affixing the corporate seal to the instrument of appointment. Faviell *v.* Eastern Counties R. Co., 6 D. & L. 54, 2 Exch. 344, 17 L. J. Exch. 297; Reg. *v.* Cumberland, 5 Eng. R. Cas. 332; Thames Haven Dock, etc., Co. *v.* Hall, 7 Jur. 238, 5 M. & G. 274, 3 R. & Can. Cas. 441, 6 Scott N. R. 342, 44 E. C. L. 150. *Compare* Arnold *v.* Poole, 2 Dowl. N. S. 574, 7 Jur. 653, 12 L. J. C. P. 97, 4 M. & G. 860, 5 Scott N. R. 741, 43 E. C. L. 444.

d. May Contract Through Agents Duly Authorized by Corporate Vote. Corporations now generally contract through the intervention of their principal officers, such as their president and secretary, or of other agents specially appointed thereto, and in either case, when duly authorized by a corporate vote, which is generally a vote of the board of directors or trustees, but sometimes as we shall see a vote of the shareholders.[85]

e. Bound by Simple Contracts, Including Negotiable Instruments, and by Implied Contracts, Entered Into by Its Agents Within Scope of Their Authority. It is now the settled American doctrine that a corporation may make promissory notes and simple contracts without affixing its corporate seal, and that it may be bound like an individual by contracts entered into by its agents acting within the scope of their authority, and by contracts implied from a course of dealing or from the circumstances of a transaction.[86]

f. May Act Without Seal Whenever Individual Can — (1) *In General.* The old rule that a corporation cannot make a contract except by the use of its corporate seal is entirely exploded,[87] and the rule is that unless the charter or govern-

85. *Connecticut.*— New Haven Sav. Bank *v.* Davis, 8 Conn. 191.

Kentucky.— Garrison *v.* Combs, 7 J. J. Marsh. 84, 22 Am. Dec. 120.

Maryland.— Kennedy *v.* Baltimore Ins. Co., 3 Harr. & J. 367, 6 Am. Dec. 499; Union Bank *v.* Ridgely, 1 Harr. & G. 324.

Massachusetts.—Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143; Essex Turnpike Corp. *v.* Collins, 8 Mass. 292; Andover, etc., Turnpike Corp. *v.* Hay, 7 Mass. 102.

New York.— Dunn *v.* St. Andrew's Church, 14 Johns. 118.

South Carolina.— Colcock *v.* Garvey, 1 Nott & M. 231.

Virginia.—Legrand *v.* Hampden Sidney College, 5 Munf. 324.

86. *California.*— Smith *v.* Eureka Mills Co., 6 Cal. 1.

Illinois.— New Athens *v.* Thomas, 82 Ill. 259; Columbia Casino Co. *v.* World's Columbian Exposition, 85 Ill. App. 369.

Indiana.— Christian Church *v.* Johnson, 53 Ind. 273; McCabe *v.* Fountain County, 46 Ind. 380; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Hardy *v.* Merriweather, 14 Ind. 203; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Iowa.— Thompson *v.* Lambert, 44 Iowa 239.

Kentucky.— Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171.

Maine.— Came *v.* Brigham, 39 Me. 35.

Massachusetts.— Speirs *v.* Union Drop-Forge Co., 174 Mass. 175, 54 N. E. 497 (contract of employment); Fay *v.* Noble, 12 Cush. 1.

Missouri.— Buckley *v.* Briggs, 30 Mo. 452.

New Jersey.— Lucas *v.* Pitney, 27 N. J. L. 221; Stratton *v.* Allen, 16 N. J. Eq. 229.

New York.— Smith *v.* Law, 21 N. Y. 296; Barnes *v.* Ontario Bank, 19 N. Y. 152; Leavitt *v.* Blatchford, 17 N. Y. 521; Peterson *v.* New York, 17 N. Y. 449; Curtis *v.* Leavitt, 15 N. Y. 9; Ketchum *v.* Buffalo, 14 N. Y. 356; Moss *v.* Averell, 10 N. Y. 449; Partridge *v.* Badger, 25 Barb. 146; Mead *v.* Keeler, 24 Barb. 20; Beers *v.* Phœnix Glass Co., 14 Barb. 358; Conro *v.* Port Henry Iron Co., 12 Barb. 27; Halstead *v.* New York, 5 Barb. 218; Brady *v.* Brooklyn, 1 Barb. 584; McCullough *v.* Moss, 5 Den. 567; Russell *v.* New York, 2 Den. 461; Moss *v.* Rossie Lead Min. Co., 5 Hill 137; Safford *v.* Wyckoff, 4 Hill 442; Kelley *v.* Brooklyn, 4 Hill 263; Moss *v.* Oakley, 2 Hill 265; Tucker *v.* Rochester, 7 Wend. 254; Barker *v.* Mechanics' F. Ins. Co., 3 Wend. 94, 20 Am. Dec. 664; Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; Atty.-Gen. *v.* Life, etc., Ins. Co., 9 Paige 470; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280.

North Carolina.— Craven *v.* Atlantic, etc., R. Co., 77 N. C. 289.

Pennsylvania.— Com. *v.* Pittsburgh, 41 Pa. St. 278; McMasters *v.* Reed, 1 Grant 36.

Rhode Island.— Clarke *v.* School Dist. No. 7, 3 R. I. 199.

United States.— White Water Valley Co. *v.* Vallette, 21 How. 414, 16 L. ed. 154; Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351; Hailey First Nat. Bank *v.* G. V. B. Mining Co., 89 Fed. 439; Bayerque *v.* San Francisco, 2 Fed. Cas. No. 1137, 1 McAll. 175.

England.— Dunn *v.* Sayles, 5 Q. B. 685, D. & M. 579, 8 Jur. 358, 13 L. J. Q. B. 159, 48 E. C. L. 685; Aspdin *v.* Austin, 5 Q. B. 671, D. & M. 515, 13 L. J. Q. B. 155, 48 E. C. L. 671; Whittle *v.* Frankland, 2 B. & S. 49, 8 Jur. N. S. 382, 31 L. J. M. C. 81, 5 L. T. Rep. N. S. 639, 110 E. C. L. 49; Hartley *v.* Cummings, 5 C. B. 247, 57 E. C. L. 247, 2 C. & K. 433, 61 E. C. L. 433, 12 Jur. 57, 17 L. J. C. P. 84; Reg. *v.* Welch, 2 E. & B. 357, 17 Jur. 1007, 22 L. J. M. C. 145, 75 E. C. L. 357; Pilkington *v.* Scott, 15 L. J. Exch. 329, 15 M. & W. 657.

See 12 Cent. Dig. tit. "Corporations," § 1801.

87. *California.*— Crowley *v.* Genesee Min. Co., 55 Cal. 273, under California Civil Code.

Maryland.— Union Bank *v.* Ridgely, 1 Harr. & G. 324.

Massachusetts.— Canal Bridge *v.* Gordon, 1 Pick. 297, 11 Am. Dec. 170; Rumford *v.* Wood, 13 Mass. 193.

ing statute requires it the act of the corporation need not be evidenced by its corporate seal, except where a seal would be required in the case of individuals.[88] If therefore the necessity of affixing a seal to a deed has been abrogated by statute generally, a corporation will not be required to affix its seal to its deed.[89] It is said that the acts of a corporation, evidenced by a vote, written or unwritten, are as completely binding upon it, and are as full authority to its agents as the most solemn acts done under the corporate seal; and that promises and engagements may as well be implied from its acts and the acts of its agents as if it were an individual.[90] In other words a corporation may make a valid contract without using any seal, when not expressly required to contract under its corporate seal.[91]

(II) *Seal Not Required in Banking Transactions.* The use of a corporate seal is not required in indorsing bills of exchange or accepting drafts, or in any of the numerous instruments required in banking transactions.[92]

New York.— Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; Munn *v.* Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Danforth *v.* Schoharie, etc., Turnpike Road, 12 Johns. 227.

Pennsylvania.— Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675.

Virginia.— Banks *v.* Poitiaux, 3 Rand. 136, 15 Am. Dec. 706.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552; Fleckner *v.* U. S. Bank, 8 Wheat. 338, 5 L. ed. 631; Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

England.— Rex *v.* Bigg, 2 East P. C. 882, 3 P. Wms. 419, 24 Eng. Reprint 1127.

See 12 Cent. Dig. tit. "Corporations," § 1801.

88. *Alabama.*— McCullough *v.* Talladega Ins. Co., 46 Ala. 376.

Florida.— Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Illinois.— B. S. Green Co. *v.* Blodgett, 55 Ill. App. 556.

Indiana.— Christian Church *v.* Johnson, 53 Ind. 273; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361; Globe Acc. Ins. Co. *v.* Reid, 19 Ind. App. 203, 47 N. E. 497 [*modified* in 49 N. E. 291].

Iowa.— Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa 112, 52 N. W. 108, 39 Am. St. Rep. 284; Merrick *v.* Burlington, etc., Plank Road Co., 11 Iowa 74; Ring *v.* Johnson County, 6 Iowa 265.

Maine.— Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674.

Missouri.— Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187.

New Mexico.—Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721.

New York.— Watson *v.* Bennett, 12 Barb. 196; Conro *v.* Port Henry Iron Co., 12 Barb. 27; New York, etc., R. Co. *v.* New York, 1 Hilt. 562; Beth Elohim Congregation *v.* Brooklyn Cent. Presb. Church, 10 Abb. Pr. N. S. 484; American Ins. Co. *v.* Oakley, 9 Paige 496, 38 Am. Dec. 561. A deed executed by trustees individually under special statute without corporate seal was held good in De Zeng *v.* Beekman, 2 Hill 489.

Pennsylvania.—Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339; McMasters *v.* Reed, 1 Grant 36.

Texas.— In one case it is said that trading corporations are permitted to do many things in the way of simple contracts, without the common seal of the corporation, which municipal corporations are not allowed to do. San Antonio *v.* Gould, 34 Tex. 49. This refers to the English doctrine referred to in 4 Thompson Corp. § 5059.

Vermont.— Sheldon *v.* Fairfax, 21 Vt. 102.

Wisconsin.— Blunt *v.* Walker, 11 Wis. 334, 349, 78 Am. Dec. 709.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 68, 6 L. ed. 552, per Story, J.

See 12 Cent. Dig. tit. "Corporations," § 1801.

89. East End Bldg., etc., Co. *v.* Hughey, 16 Ohio Cir. Ct. 19.

90. Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552.

91. *Alabama.*— State University *v.* Moody, 62 Ala. 389.

Indiana.— Wolcott Christian Church *v.* Johnson, 53 Ind. 273.

Kentucky.— Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171.

Maine.— Stanley *v.* Brunswick Tontine Hotel Corp., 13 Me. 51, 29 Am. Dec. 485.

Maryland.— Stoddert *v.* Port Tobacco Parish, 2 Gill & J. 227.

New York.— Hoag *v.* Lamont, 60 N. Y. 96; Brady *v.* Brooklyn, 1 Barb. 584; Beth Elohim Congregation *v.* Brooklyn Cent. Presb. Church, 10 Abb. Pr. N. S. 484.

Pennsylvania.— Rathbone *v.* Tioga Nav. Co., 2 Watts & S. 74.

92. Everett *v.* U. S., 6 Port. (Ala.) 166, 30 Am. Dec. 584; Spear *v.* Ladd, 11 Mass. 94; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631; Mechanics' Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100; Morse Banks & Bank. (2d ed.) p. 78. See also Montgomery Branch State Bank *v.* Harrison, 2 Port. (Ala.) 540; Church *v.* Imperial Gas Light, etc., Co., 6 A. & E. 846, 7 L. J. Q. B. 118, 3 N. & P. 35, 1 W. W. & H. 137, 33 E. C. L. 443.

(III) *Seal Not Required in Lease.* As a lease passes in theory of the common law only a chattel interest in land, a seal is not required to give validity to a lease made by a corporation, since it would not be required in the case of an individual.[93] It seems, however, that if a lease made by a corporation is sealed as well as properly signed, the signature and seal carry with them *prima facie* evidence that the instrument is executed by the proper authority as in other cases.[94]

(IV) *Seal Not Required in Agreement to Convey Land.* Such unsealed agreement made by a corporation will be enforced in equity, although not under seal, just as in the case of an individual.[95]

(V) *Corporation May Accept Deed by Parol.* As in the case of an individual,[96] so in the case of a corporation, a deed of grant to a corporation may be accepted by parol.[97]

(VI) *Whether Seal Required in Answers in Chancery Cases.* Anciently a corporation could not answer in chancery except under its corporate seal;[98] and there is one modern decision so holding,[99] but, as corporations have the power to appoint attorneys without the use of their seal (except attorneys to execute sealed instruments for them), there is no propriety in the conclusion that an attorney retained by a corporation to defend a judicial proceeding instituted against it cannot answer for it in precisely the same mode, according to the course of the court, as he might for an individual; and such is believed to be the universal American practice.

g. Cannot Act Without Seal Where Natural Persons Cannot — (I) *In General.* Of course the relaxation of the use of the seal in which corporations have been thus indulged by the law does not exempt a corporation from the use of its seal in cases where a seal would be required if the instrument were executed by an individual in his own behalf instead of by a corporation.[1]

(II) *Cannot Convey or Mortgage Real Property Without Seal.* The manner by which real estate may be transferred by a corporation, either domestic or foreign, is a matter which it is within the power of the state in which such real estate is situated to regulate.[2] It is therefore competent for a state to abolish the use of seals in the conveyance of real estate situated within its limits, whether by individuals or by corporations. But except in those states or terri-

93. Crawford *v.* Longstreet, 43 N. J. L. 325.

Under the Pennsylvania act of May 25, 1887, an action will lie against a corporation on a lease signed by its secretary, but without the corporate seal. Marqueze *v.* Cresswell, 3 Pa. Co. Ct. 559.

94. West Side Auction House Co. *v.* Connecticut Mut. Ins. Co., 85 Ill. App. 497 [*affirmed* in 186 Ill. 156, 57 N. E. 839].

For stronger reasons a seal is not required to validate an agreement by a corporation to lease real estate, but such an unsealed instrument may be subsequently made good by ratification. Conant *v.* Bellows Falls Canal Co., 29 Vt. 263.

95. Banks *v.* Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Legrand *v.* Hampden Sidney College, 5 Munf. (Va.) 324.

96. Swisshelm *v.* Swissvale Laundry Co., 95 Pa. St. 367; Smith's Appeal, 69 Pa. St. 474; Tripp *v.* Bishop, 56 Pa. St. 424.

97. Swisshelm *v.* Swissvale Laundry Co., 95 Pa. St. 367.

98. Rex *v.* Windham, Cowp. 377; Angell & A. Corp. § 665; Cooper Eq. Pl. 325; 1 Daniell Ch. Pr. 876, note 1; 3 Hoffman Ch. Pr. 239; Mitford Pl. 9; 1 Newland Ch. Pr. 131; Story Eq. Pl. 874.

99. Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212.

1. Sandford *v.* Tremlett, 42 Mo. 384; Crawford *v.* Longstreet, 43 N. J. L. 325; State *v.* Senft, 2 Hill (S. C.) 367; Winne *v.* Bampton, 3 Atk. 473, 26 Eng. Reprint 1072.

2. Johnson *v.* California Lustral Co., 127 Cal. 283, 59 Pac. 595; Granite Gold Min. Co. *v.* Maginness, 118 Cal. 131, 50 Pac. 269; Pekin Min., etc., Co. *v.* Kennedy, 81 Cal. 356, 22 Pac. 679; McShane *v.* Carter, 80 Cal. 310, 22 Pac. 178; Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. ed. 369; Brine *v.* Hartford F. Ins. Co., 96 U. S. 627, 25 L. ed. 858; Williams *v.* Gaylord, 102 Fed. 372, 42 C. C. A. 401. See also Brown *v.* New Jersey, 175 U. S. 172, 20 S. Ct. 77, 44 L. ed. 119; Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 20 S. Ct. 33, 44 L. ed. 84; Forsyth *v.* Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. ed. 1095; Cutler *v.* Huston, 158 U. S. 423, 15 S. Ct. 868, 39 L. ed. 1040; Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297; Etheridge *v.* Sperry, 136 U. S. 266, 11 S. Ct. 565, 35 L. ed. 171; Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Wilson *v.* Perrin, 62 Fed. 629, 11 C. C. A. 66 (per Lurton, J.).

tories where this has been done the rule of the common law remains that a deed conveying land, whether in fee or whether by mortgage, in order to be valid and effectual without the aid of equity must be executed by the use of the corporate seal.[3]

(III) *Cannot Execute Formal Bonds Without Seal* — (A) *In General.* Nor can a corporation ordinarily execute a formal bond but by means of its corporate seal countersigned by an officer entitled to affix the same,[4] as for instance a bond given by a private corporation as plaintiff in a suit by attachment.[5]

(B) *Except in States Where Private Seals Are Not Required.* But in a jurisdiction where a private seal is not required to an appeal-bond or recognizance given in a judicial proceeding, if the appellant is a corporation and the bond is executed by its authorized officers in its behalf, it will be valid without the affixing of the corporate seal.[6]

(IV) *Unsealed Bonds, Deeds, Etc., Good in Equity.* But even in cases where a seal is required when the instrument is that of a natural person, a court of equity will not treat the instrument as void when executed by a corporation without the use of its seal, but if necessary will rather compel the corporation to affix its seal.[7] In other words where the principles of equity subsist, an unsealed bond, if the omission of the seal was due to inadvertence, is good, and not bad.[8] So the failure to attach the corporate seal to a mortgage executed by a corporation is not fatal to its validity in equity.[9]

h. Propriety of Using Corporate Seal on Simple Contracts. While it is not necessary, it is not improper, to defer to the ancient rule of the common law by using the corporate seal as a means of evidencing its assent to a simple contract;[10] and we shall see hereafter[11] that according to modern authority the use of a seal by a corporation on an instrument otherwise negotiable does not render it non-negotiable;[12] and so the use of a seal where none is required, as in accepting a proposal, does not raise the contract to the dignity of a specialty or prevent assumpsit instead of covenant from being maintained thereon.[13]

i. Power of Corporate Officer Not Increased by Using Corporate Seal. But if no power exists on the part of an officer of a corporation to make a contract which he assumes to make for it, the contract cannot be vitalized, that is to say, this wanting power cannot be created and put into the contract, by the mere fact that in executing the instrument which is evidence of it the officer used the corporate seal.[14]

3. *Illinois.*— Danville Seminary *v.* Mott, 136 Ill. 289, 28 N. E. 54.

North Carolina.— Duke *v.* Markham, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889, mortgage without seal signed by the president, the secretary, and two shareholders effectual.

Oregon.— Thayer *v.* Nehalem Mill Co., 31 Oreg. 437, 51 Pac. 202.

Texas.— Texas Consol. Compress, etc., Assoc. *v.* Dublin Compress, etc., Co., (Civ. App. 1896) 38 S. W. 404.

United States.— *In re* St. Helen Mill Co., 21 Fed. Cas. No. 12,222, 3 Sawy. 88.

A statute abolishing the use of private seals in written contracts, except the seals of corporations, does not change the rule of the common law with respect to conveyances by corporations. Garrett *v.* Belmont Land Co., 94 Tenn. 459, 29 S. W. 726.

4. South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360.

5. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

6. Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187, where an undertaking for the costs, etc., of an appeal was held valid chiefly on the ground of ratification.

7. Missouri River, etc., R. Co. *v.* Miami County Com'rs, 12 Kan. 482.

8. Solon *v.* Williamsburg Sav. Bank, 114 N. Y. 122, 21 N. E. 168, 23 N. Y. St. 138 [*affirming* 47 Hun (N. Y. 632]. See also Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 607; Bernards Tp. *v.* Stebbins, 109 U. S. 341, 3 S. Ct. 252, 27 L. ed. 956.

9. Allis *v.* Jones, 45 Fed. 148.

10. Central Nat. Bank *v.* Charlotte, etc., R. Co., 5 S. C. 156, 22 Am. Rep. 12.

11. See *infra*, XII, E, 1.

12. Central Nat. Bank *v.* Charlotte, etc., R. Co., 5 S. C. 156, 22 Am. Rep. 12.

13. Levering *v.* Memphis, 7 Humphr. (Tenn.) 553. See also Dunn *v.* Auburn Electric Motor Co., 92 Me. 165, 42 Atl. 389.

14. Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Luse *v.* Isthmus Transit R. Co., 6 Oreg. 125, 25 Am. Rep. 506. See also *infra*, XII, D, 3, c, (II), (D).

j. Effect of Alteration of Corporate Bond After Issue by Affixing Pretended Seal. The alteration by a stranger of a bond issued by a corporation by affixing to them wax impressions of seals, where the corporate seal has been omitted by mistake, will not impair their validity in the hands of a *bona fide* holder for value, in a suit brought against him to cancel them because of the alteration.[15]

k. Unsealed Corporate Obligations Validated by Ratification. Unsealed instruments emitted by corporations, to which the corporate seal should have been affixed, are often validated by subsequent adoption or recognition by the corporation, under the principles hereafter stated, without any formal vote or resolution.[16]

l. Statutory Requirements as to Use of Seal by Corporations Must Be Observed. This is on the principle that corporations derive all their powers from the law, and hence can act only in conformity with the mandate of the law.[17] But judges have sometimes escaped the inconvenience and injustice which have arisen from this severe rule by holding the statute to be directory merely.[18]

2. Manner of Executing Sealed Instruments by Corporations — a. What Is a Sealed Instrument — (I) *In General.* Lord Coke says "*Sigillum est cera impressa; sine impressione, non est sigillum.*"[19] This proposition may be said to have little force at the present time, although there are reported cases in which it has been rigidly adhered to.[20] But we are not at the present day, in the language of Chancellor Halstead, "fast in the wax";[21] and there is now not the slightest doubt, either in England or in this country, that a device intended to be the seal, either of an individual or of a corporation, may be a perfectly good seal, although not impressed in wax or in wafer.[22]

(II) *Impression Indented Into Bare Paper.* Referring back to Lord Coke's definition of a seal, it will be seen that merely fastening wax upon a document did not constitute it a deed. The wax was only auxiliary. The impression thereon was the *sine qua non* of the formality. The impression upon the wax

15. Solon *v.* Williamsburg Sav. Bank, 114 N. Y. 122, 21 N. E. 168, 23 N. Y. St. 138 [*affirming* 47 Hun (N. Y.) 632].

16. See *infra*, XV. See also Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397; Chouteau *v.* Allen, 70 Mo. 290; Kiley *v.* Forsee, 57 Mo. 390, 396 (where it is said: "Not only the appointment, but the authority of the agent of a corporation may be implied from the adoption or recognition of his acts by the corporation").

17. *Alabama.*—Logwood *v.* Planters', etc., Bank, Minor 23.

California.— Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Holland *v.* San Francisco, 7 Cal. 361.

Connecticut.— Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99.

Illinois.— Kinzie *v.* Chicago, 3 Ill. 187, 33 Am. Dec. 443.

Kentucky.— Waller *v.* Commonwealth Bank, 3 J. J. Marsh. 201.

Massachusetts.— Spear *v.* Ladd, 11 Mass. 94; Essex Turnpike Corp. *v.* Collins, 8 Mass. 292. *Compare* Sanborn *v.* Fireman's Ins. Co., 16 Gray 448, 77 Am. Dec. 419.

Missouri.— Henning *v.* U. S. Ins. Co., 47 Mo. 425, 4 Am. Rep. 332.

New Jersey.—Osborne *v.* Tunis, 25 N. J. L. 633.

New York.— Barnes *v.* Ontario Bank, 19 N. Y. 152; Safford *v.* Wyckoff, 4 Hill 442; Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. 31; Dawes *v.* North River Ins. Co., 7 Cow. 462; New York Firemen Ins. Co. *v.* Ely, 2 Cow. 678; People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

Pennsylvania.—Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tennessee.— Talmadge *v.* North American Coal, etc., Co., 3 Head 337.

United States.— Head *v.* Providence Ins. Co., 2 Cranch 127, 2 L. ed. 229.

England.— Williams *v.* Chester, etc., R. Co., 5 Eng. L. & Eq. 497.

The old doctrine was that where the charter or governing statute prescribes the mode in which the officers or agents of a corporation shall exercise its power the mode so pointed out by the legislature must be strictly pursued to render the contracts obligatory upon the corporation. St. Andrews Bay Land Co. *v.* Mitchell, 4 Fla. 192, 54 Am. Dec. 340.

18. See *supra*, XII, B, 1, a.

19. 3 Inst. 169.

20. Perry *v.* Price, 1 Mo. 645; Douglas *v.* Oldham, 6 N. H. 150; Farmers', etc., Bank *v.* Haight, 3 Hill (N. Y.) 493; Rochester Bank *v.* Gray, 2 Hill (N. Y.) 277; Warren *v.* Lynch, 5 Johns. (N. Y.) 239; Beardsley *v.* Knight, 4 Vt. 471.

21. Corrigan *v.* Trenton Delaware Falls Co., 5 N. J. Eq. 52, 56.

22. Sugden Powers (1st Am. ed.) 236.

being therefore the essential circumstance, it obviously can make no difference in fact whether that impression appears at the end of the signature upon wax or indented into the bare paper.[23] It has, however, been denied that this constitutes a valid sealing.[24] The legality of this method of sealing by corporations is established by statute in Connecticut,[25] Georgia,[26] Massachusetts,[27] Minnesota,[28] New Hampshire,[29] New York,[30] Ohio,[31] Oregon,[32] and West Virginia.[33]

(III) *What Devices Are Good as Corporate Seals.* Without indicating in all cases the process by which the conclusion has been reached, it may be said that in many American jurisdictions the following devices in lieu of corporate seals, impressed in wax or wafer, have been held to be good as such: A scrawl made by a pen;[34] a small bit of paper attached by a wafer and set opposite each signature to the instrument, this being regarded as the seal of the corporation as well as of the individual signing, the court saying: "Twenty may sign at the same time with the same seal."[35]

23. *California.*— Connolly *v.* Goodwin, 5 Cal. 220.

Maine.— Woodman *v.* York, etc., R. Co., 50 Me. 549.

Massachusetts.— Hendee *v.* Pinkerton, 14 Allen 381.

New Hampshire.—Allen *v.* Sullivan R. Co., 32 N. H. 446; Carter *v.* Burley, 9 N. H. 558.

New Jersey.— Corrigan *v.* Trenton Delaware Falls Co., 5 N. J. Eq. 52.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9, 90, 17 Barb. 309.

United States.— Pillow *v.* Roberts, 13 How. 472, 14 L. ed. 228 [*reversing* 19 Fed. Cas. No. 11,167, Hempst. 624]; Follett *v.* Rose, 9 Fed. Cas. No. 4,900, 3 McLean 332; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243.

England.— Reg. *v.* St. Paul, 7 Q. B. 232, 53 E. C. L. 232; *In re* Sandilands, L. R. 6 C. P. 411.

24. Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529; Hopewell Tp. *v.* Amwell Tp., 6 N. J. L. 169; Farmers', etc., Bank *v.* Haight, 3 Hill (N. Y.) 493.

25. Conn. Gen. Stat. (1875), p. 438, § 17.

26. Ga. Code (1873), § 5.

27. Mass. Gen. Stat. (1860), p. 51.

28. Minn. Stat. at L. p. 119.

29. N. H. Gen. Stat. (1867), p. 40, § 10.

30. 4 N. Y. Stat. at L. p. 633, c. 197; N. Y. Rev. Stat. (6th ed.) p. 668, § 90.

31. Ohio Rev. Stat. (1880), p. 1845, § 4.

32. Oreg. Gen. Laws (1872), p. 258, §§ 741, 742.

33. 2 W. Va. Rev. Stat. (1879), p. 741, c. 114, § 15.

In the case of seals of courts and public officers the same is permitted by statute in several states.

Arizona.— Comp. Laws (1877), p. 32, § 13.

Arkansas.— Dig. Stat. (1874), § 1148.

California.— Civ. Code, § 14.

Colorado.— Civ. Code, § 385.

Iowa.— Code (1873), p. 8, § 45.

Nevada.— Comp. Laws, § 965.

New York.— 2 Stat. at L. p. 285, § 10; p. 420, § 61.

Vermont.— Gen. Stat. (1860), p. 54, § 13.

Virginia.— Code (1873), p. 145.

34. Reynolds *v.* Glasgow Academy, 6 Dana (Ky.) 37. See also Johnston *v.* Crawley, 25 Ga. 316, 71 Am. Dec. 173. The substitution of the "scroll" or "scrawl" for the seal is permitted by statute in many states. See Conn. Gen. Stat. (1875), p. 438, § 17; Ga. Code (1873), § 5; Ill. Rev. Stat. (1877), p. 270, § 1; Mich. Comp. Laws (1871), p. 1348, § 39; p. 1708, § 80; Minn. Stat. at L. p. 641, § 31; Miss. Rev. Code (1871), p. 483, § 2227; Mo. Rev. Stat. (1879), p. 106, § 662; N. J. Rev. (1877), p. 387, § 52; p. 741, § 1; Ohio Rev. Stat. (1880), p. 184, § 4; Oreg. Gen. Laws (1872), p. 258, §§ 741, 742; Va. Code (1873), p. 195; p. 985, § 2; Wis. Rev. Stat. (1878), p. 636, § 2215. But in Connecticut, Michigan, Virginia, and Wisconsin, the seals of corporations are especially excepted in the foregoing statutes. In some states the use of private seals and scrolls as substitutes therefor is abolished by statute. See Ala. Code (1876), § 2194; 2 Davis Stat. Ind. (1876), p. 147, § 274; Kan. Comp. Laws (1879), p. 209, § 6; Ky. Gen. Stat. (1879), p. 249, § 2; Nebr. Gen. Stat. (1873), p. 100, § 1; Thompson & Steg. Stat. Tenn. (1871), § 1804; Tex. Rev. Stat. (1879), p. 644, art. 4487. See also Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67.

35. *California.*— Gashwiler *v.* Willis, 33 Cal. 11, 91 Am. Dec. 607.

Illinois.— Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35.

Maine.— Porter *v.* Androscoggin, etc., R. Co., 37 Me. 349.

Massachusetts.— Stebbins *v.* Merritt, 10 Cush. 27; Mill Dam Foundery *v.* Hovey, 21 Pick. 417.

New Hampshire.— Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

New Jersey.— Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212.

New York.— Albany South Baptist Soc. *v.* Clapp, 18 Barb. 35.

Ohio.—Western Female Seminary *v.* Blair, 1 Disn. 370, 12 Ohio Dec. (Reprint) 677.

Pennsylvania.—Crossman *v.* Hilltown Turnpike Co., 3 Grant 225.

South Carolina.— St. Philips Church *v.* Zion Presb. Church, 23 S. C. 297.

(iv) *What Device When Corporation Has No Seal.* If the corporation has adopted no common seal, it seems that the trustees may, in directing the president to execute a sealed instrument, such as a mortgage, adopt a seal *pro hac vice* as the seal of the corporation for the time being and for the purpose of the particular instrument, and direct that it be affixed opposite his name;[36] and there are holdings to the effect that a corporation may adopt and make effectual as its seal the individual seals of its officers affixed to its deed when it has no seal of its own.[37] Statutes exist under the operation or construction of which a deed executed by a corporation without affixing its seal will be held good where it is not shown that the corporation had a seal when the instrument was executed;[38] and the requirement of such a statute that where the corporation has no seal to omit the words stating when the deed is sealed by the corporation, and to recite in place of such words that the corporation has no seal, will be regarded as directory, so that if both the seal and the recital are omitted the deed will still be good.[39]

(v) *Seal Printed on Instrument by Printer.* Although a seal printed upon a corporate deed or bond by the printer of the document is not in strictness of common law the corporate seal,[40] yet it will be regarded as such, especially when affixed by the printer by direction of the proper officer of the corporation after the instrument is printed and in order to prepare it to be signed and issued.[41]

(vi) *When Device Presumed to Be Corporate Seal.* When the instrument appears to be executed in behalf of the corporation by the proper officer or officers, the device which is annexed as the corporate seal, whatever it may be, will be *prima facie* presumed to be the common seal of the corporation, which presumption is, however, subject to be overcome by evidence to the contrary.[42]

b. Not Necessary to Recite That Parties Have Affixed Their Seals. In executing a sealed instrument by a corporation it is not necessary to recite that the parties have affixed their seals, nor will the instrument be vitiated because it merely recites that they have affixed their hands. It is sufficient that it should otherwise appear that the seal has been affixed.[43]

c. Sealing When Sufficient Without Signing. Following the well-known rule of the common law,[44] an instrument intended to be the deed of a corporation will be effectual as such although not signed with the corporate name, provided the corporate seal be attached;[45] but this rule has been held not to obtain under

Vermont.— Middlebury Bank *v.* Rutland, etc., R. Co. *v.* Johnson, 30 Vt. 158.

36. Albany South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 35.

37. Taylor *v.* Heggie, 83 N. C. 244; Nicholas *v.* Putnam Mach. Co., 7 Northam. Co. Rep. (Pa.) 137.

38. Turner *v.* Kingston Lumber Co., 106 Tenn. 1, 58 S. W. 854, 59 S. W. 410.

39. Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095.

40. Bates *v.* Boston, etc., R. Co., 10 Allen (Mass.) 251.

41. Royal Bank *v.* Grand Junction R., etc., Co., 100 Mass. 444, 97 Am. Dec. 115. That an action of assumpsit instead of covenant can be maintained upon a policy of life insurance containing merely a printed device in lieu of a seal see Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529. To the same effect see Woodman *v.* York, etc., R. Co., 50 Me. 549 [*citing* Curtis *v.* Leavitt, 15 N. Y. 9].

42. Stebbins *v.* Merritt, 10 Cush. (Mass.) 27; Mill Dam Foundery *v.* Hovey, 21 Pick. (Mass.) 417, 428.

43. Mill Dam Foundery *v.* Hovey, 21 Pick. (Mass.) 417, 428 [*citing* Godard's Case, 2 Coke 5]. "It is not material with what seal the instrument is sealed, for the seal of a stranger is sufficient, and if a corporation seal, there is no need to say, '*Sigillum nostrum commune.*'" Porter *v.* Androscoggin, etc., R. Co., 37 Me. 349, 350 [*citing* Comyns Dig. Fait. (A) 2].

44. Cherry *v.* Heming, 4 Exch. 631, 19 L. J. Exch. 64; Aveline *v.* Whisson, 12 L. J. C. P. 58, 4 M. & G. 801, 43 E. C. L. 414; 2 Bl. Comm. 306; Sheppard Touch-stone (Preston's ed.) 56 note.

45. *Illinois.*— Northwestern Distilling Co. *v.* Brant, 69 Ill. 658, 18 Am. Rep. 631.

Maine.— Decker *v.* Freeman, 3 Me. 338.

Massachusetts.—Sherman *v.* Fitch, 98 Mass. 59; Haven *v.* Adams, 4 Allen 80; Hutchins *v.* Byrnes, 9 Gray 367.

New Hampshire.— Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

New York.— Union Bridge Co. *v.* Troy, etc., R. Co., 7 Lans. 240; St. Peter Episcopal Church *v.* Varian, 28 Barb. 644; Jackson *v.* Walsh, 3 Johns. 226; Lovett *v.* Steam Saw Mill Assoc., 6 Paige 54.

England.—Cooch *v.* Goodman, 2 Q. B. N. S.

a statute by the terms of which it was enacted that deeds of land should be signed and sealed.[46]

d. Manner of Signing Corporate Deeds. The formal manner of signing the deed of a corporation is to sign the name of the corporation, by A B, its president, and C D, its secretary. But according to the good modern theory, if it appears in the body of the deed that the corporation is the grantor, it will not be regarded as the personal deed of the officers merely because they signed their names with their official additions, instead of signing the name of the corporation with the additions, "by A B, its president," and "by C D, its secretary";[47] although it is to be confessed that there is musty authority to the contrary.[48] It has often been held that where a deed is executed under a power, no particular form of words need be used, provided the act is done in the name of the principal; and accordingly that it is immaterial whether such a deed is signed "A B for C D," or "C D by A B."[49] A deed by a corporation is in proper form if expressed to be by the corporation, naming them, by their agent, naming him, and concluding: "In witness whereof, they," naming the company, "by their agent, have hereunto set their seal, and the said agent hath hereunto subscribed his name."[50]

e. Manner of Acknowledging Corporate Deeds. This inquiry is believed to be important only where the deed conveys land, in which case it depends upon the local statute law of the state, territory, or other jurisdiction in which the land is situated. Generally speaking a formal acknowledgment is required only for the purpose of admitting the deed to record in the office of the register or recorder of deeds, or in some other public office. Where the governing statute provides that any deed may be recorded, if it shall be acknowledged by the party who shall have executed it, the officer taking the acknowledgment, being satisfied that such person is the grantor mentioned in the deed, or if it be proved by the subscribing witnesses to it, that such parties signed, sealed, and delivered the same, the acknowledgment of the deed of a corporation aggregate may be made by the representative of the corporation who has authority to execute the deed in its behalf.[51] Where the governing statute requires the officer to acknowledge the

580, 42 E. C. L. 817. See also Wilks *v.* Back, 2 East 142, 6 Rev. Rep. 409.

46. Isham *v.* Bennington Iron Co., 19 Vt. 230. *Compare* McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

47. Chouteau *v.* Allen, 70 Mo. 290. *Compare* McClure *v.* Herring, 70 Mo. 18, 35 Am. Rep. 404.

48. See authorities collected in 4 Thompson Corp. §§ 5074, 5075, 5085.

49. Wilks *v.* Back, 2 East 142, 6 Rev. Rep. 409. The authority of this case has been recognized in American cases too numerous to quote. See for instance Decker *v.* Freeman, 3 Me. 338. An assignment of a mortgage of real estate from a corporation, concluding, "In witness whereof, the said Bristol County Savings Bank, by George Atwood, their treasurer, duly authorized for this purpose, have hereunto set their name and seal," signed, "George Atwood, Tr. Bristol County Savings Bank," and sealed with the corporate seal, is in form executed by the corporation. Hutchins *v.* Byrnes, 9 Gray (Mass.) 367. A deed in this form: "We, the East Warren Lumber Company, in consideration of $5000 to us paid, etc., do give, grant," etc.; "We, the East Warren Lumber Company, do hereby covenant," etc., "If the East Warren Lumber Company shall pay," etc.; and concluding: "In witness whereof we have hereunto set our hands and seals," etc.; "David C. French, President," etc., and seal, "Ephraim S. Calley, Treasurer," etc., and seal, is the deed of the corporation, if the agents who executed the same were authorized to execute it. Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

50. Flint *v.* Clinton Co., 12 N. H. 430. In like manner the following was well executed as the deed of the corporation: "In testimony whereof said party of the first part have caused these presents to be signed by their president, and their common seal to be hereto affixed. Sam'l S. Lewis, President," and corporate seal. Haven *v.* Adams, 4 Allen (Mass.) 80.

When equity will reform a deed signed by the officers in their own names.— It has been held that if the officers of a corporation, having authority to execute a deed of trust upon its property, undertake to do so, but execute it in their own names for the corporation, instead of in the name of the corporation, equity will reform the deed so as to make it conform to the agreement of the parties. West *v.* Madison County Agricultural Board, 82 Ill. 205.

51. Hopper *v.* Lovejoy, 47 N. J. Eq. 573, 21 Atl. 298.

instrument to be the act of the corporation, and the instrument on its face recites that it is the act of the corporation, and the officer acknowledges that he executes it "for the purpose therein expressed," this is tantamount to an acknowledgment that it is the act of the corporation.[52] The most appropriate witness to prove to the commissioner the authenticity of the seal and the propriety of its being affixed to the particular instrument is the officer, generally the secretary of the corporation, who has been intrusted with its custody, and who has affixed it to the instrument; and it has been said that such an officer stands in the character of a subscribing witness to the execution of the deed by the corporation, and may be examined by the commissioner of deeds to prove that the seal affixed by him is the common seal of the corporation, whose deed the conveyance or instrument to which it is affixed purports to be.[53] It has also been held that proof by the officer who executed the deed for the corporation before the commissioner of deeds, in order to enable it to be recorded, that he affixed the seal by the authority of the corporation, is tantamount to proof that he affixed it by the authority of a previous resolution of the board of directors, as required by the governing statute.[54] Where the corporate deed is executed by the president of the corporation and countersigned by its secretary, it is said that the secretary is not the officer who executes the instrument, but is merely the attesting witness who proves its execution before the proper officer, to authorize it to be recorded, and to be given in evidence without further proof, under the provision of the governing statute.[55] Where there is no statutory provision specially relating to the acknowledgment of deeds by a corporation, the officer affixing the seal of the corporation is the party executing the deed, within the meaning of a general statute relating to the acknowledgment of deeds.[56] The acknowledgment will be upheld where the words employed are equivalent in meaning to the statutory words.[57] It is not necessary to recite, in the certificate of acknowledgment, as conveyancers often do out of abundant caution, that the seal hereto annexed is annexed by the proper authority; because as elsewhere seen[58] when the authenticity of the seal is established, it is presumed to have been annexed by the proper authority;[59] and if it is not annexed by the proper authority a recital to that effect does not make it so.[60]

52. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734. In like manner, where, to an assignment for the benefit of creditors, which purported in its body to be executed by a banking corporation, there was appended a notary's certificate that A B, president, and C D, cashier, of the corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained," it was held that this was a sufficient certificate that the corporation acknowledged the instrument. Eppright *v.* Nickerson, 78 Mo. 482, Hough, C. J., and Henry, J., dissenting.

53. Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 54. That the officer who affixes the corporate seal is the proper officer to be examined by the commissioner and to make the statutory affidavit see Bowers *v.* Hechtman, 45 Minn. 238, 47 N. W. 792.

54. Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207.

55. Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207. Where a corporate deed was acknowledged by the treasurer of the corporation, the acknowledgment was certified in like manner as if made by the treasurer as an individual, and the acknowledgment did not state that the seal affixed to the instrument was that of the corporation, or that it was affixed by order of the corporation, it was held sufficient to authorize the deed to be admitted of record. Hoopes *v.* Auburn Water Works, 37 Hun (N. Y.) 568.

56. Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 54; Kelly *v.* Calhoun, 95 U. S. 710, 24 L. ed. 544.

57. Kelly *v.* Calhoun, 95 U. S. 710, 24 L. ed. 544.

58. See *infra*, XII, D, 3, c, (II), (A) *et seq.*

59. There is a note on the subject of acknowledgment of deeds by corporations, collecting English and American authorities, in 20 Am. & Eng. Corp. Cas. 512. There is also a learned note on the subject of the execution of deeds by corporations, by Adelbert Hamilton, Esq., in 26 Centr. L. J. 445.

60. See *supra*, XII, D, 1, i.

Instances of informal acknowledgments of corporate deeds which have been held good. — Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239; Eppright *v.* Nickerson, 78 Mo. 482; Kansas City *v.* Hannibal, etc., R. Co., 77 Mo. 180; Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67; Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426. That it is necessary to use the word "acknowledgment" or some word of an equivalent import see Cabell *v.* Grubbs, 48 Mo. 353. When not necessary to use the word "ac-

f. Delivery of Deed by or to Corporation. The principles governing this subject are the same as in the case of the deeds of individuals. A deed of a corporation does not take effect without delivery; but if the agent of the corporation is instructed to retain possession of the deed until certain conditions are complied with the deed will not be regarded as effectual until such compliance, even though the agent delivers the deed contrary to the instructions.[61] The delivery of an agreement by deed to an agent of the corporation who is duly authorized to negotiate it is a delivery to the corporation, and his acceptance thereof is the acceptance of the corporation.[62] The rule with respect to delivery of a deed in escrow[63] applies in like manner to corporations; so that where a lease was executed on behalf of a corporation as lessee, signed by some of its directors, and left with a third person to procure the signatures of the others, and then to be delivered to the town clerk, it did not take effect until so signed by the other directors.[64] There can of course be no delivery of a deed to a corporation which is not in existence when the attempted delivery is made; and the rule that the acceptance of a deed by the grantee will not be presumed from the beneficial character of the grant does not apply where the deed is made to a corporation *in esse*.[65]

g. Validity of Deed Signed by Directors or Trustees. If as is sometimes the case[66] the directors or trustees are the body which is incorporated, a deed signed by all, or by a quorum of them, might be regarded as well executed; and this has been held in the case of a mortgage signed by all the directors present (presumably a quorum) and sealed with the seal of the corporation and acknowledged by the signers.[67]

h. Effect of Deed of All Shareholders. The shareholders not being joint owners of the property of the corporation,[68] a deed of conveyance of corporate property executed by all the shareholders, reciting that they are the "proprietors and owners of all the shares" will not pass the legal title to the property,[69] although a court of equity may give effect to it.[70] The individuals composing

knowledgment" see Chouteau *v.* Allen, 70 Mo. 290. What surplusage will not vitiate the "acknowledgment" see Crowley *v.* Wallace, 12 Mo. 143. When substantial compliance that the governing statute is sufficient, as where the statute requires the officer taking the acknowledgment to certify that the person acknowledging the deed "was personally known to him" and he certifies that such person is "known to him" see Alexander *v.* Merry, 9 Mo. 514. For an example of an assignment of a mortgage held to have been executed in substantial compliance with the Minnesota statute see Bowers *v.* Hechtman, 45 Minn. 238, 47 N. W. 792. See further as to the acknowledgment of corporate deeds Stanton *v.* Button, 2 Conn. 527; Hartshorn *v.* Dawson, 79 Ill. 108, 111; Merritt *v.* Yates, 71 Ill. 636, 22 Am. Rep. 128; Calumet, etc., Canal, etc., Co. *v.* Russell, 68 Ill. 426; Heinrich *v.* Simpson, 66 Ill. 57; Lindley *v.* Smith, 46 Ill. 523; Tully *v.* Davis, 30 Ill. 103, 83 Am. Dec. 179. Consult a learned and elaborate note in 41 Am. Dec. 168. That an acknowledgment of a chattel mortgage taken before one who is a shareholder and director of the corporation is void, and that the record of an instrument so acknowledged does not constitute constructive notice, was held in Kothe *v.* Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594. For an example of an acknowledgment of a deed of a corporation made by its president which was held good see Banner *v.* Rooser, 96 Va. 238, 31 S. E. 67.

61. Derby Canal Co. *v.* Wilmot, 9 East 360, 9 Rev. Rep. 577.

62. Western R. Corp. *v.* Babcock, 6 Metc. (Mass.) 346.

63. Russell *v.* Freer, 56 N. Y. 67; People *v.* Bostwick, 32 N. Y. 445; Lovett *v.* Adams, 3 Wend. (N. Y.) 380; Pawling *v.* U. S., 4 Cranch (U. S.) 219, 2 L. ed. 601.

64. Whitford *v.* Laidler, 94 N. Y. 145, 46 Am. Rep. 131.

65. Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386.

66. See *supra*, I, A, 6.

67. Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75. See also State University *v.* Detroit Young Men's Soc., 12 Mich. 138, where a written instrument was similarly signed.

68. Spurlock *v.* Missouri Pac. R. Co., 90 Mo. 199, 2 S. W. 219. See also *supra*, VI, F, 1, a *et seq.*

69. Hopkins *v.* Roseclare Lead Co., 72 Ill. 373; Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261; Isham *v.* Bennington Iron Co., 19 Vt. 230; Wheelock *v.* Moulton, 15 Vt. 519; Humphreys *v.* McKissock, 140 U. S. 304, 11 S. Ct. 779, 35 L. ed. 473.

70. Swift *v.* Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336.

the corporation may, however, covenant for themselves and their heirs that the corporation shall do certain acts, in which case they will be personally liable upon such covenant.[71]

i. Power of Attorney to Convey or Mortgage Land. Where a corporation under its corporate seal conferred upon an attorney in fact the power to deal with its property as he saw fit, and he executed a mortgage thereon, in his own name and with his own seal, it was held to be a good mortgage of the corporation.[72] A power of attorney of a corporation, authorizing an agent to convey land by deed in Georgia, signed by the directors and the secretary, and unaccompanied by the seal of the corporation or by proof that the directors and secretary were authorized by the charter to sign for the corporation, is insufficient to authorize the agent so to convey land.[73]

j. Manner of Executing Deed From Corporation to Its President. Where the governing statute authorizes any corporation to convey land by deed under the corporate seal and signed by the president, a deed of a corporation to its president, authorized by the board of directors and signed by the president, conveys a good title.[74]

k. Use of Typewriting in Executing Deeds by Corporations. A deed signed by the president and secretary of a corporation is not defectively executed because the name of the corporation is typewritten as well as the official titles of the officers, whose names only are signed in ink.[75]

l. Assignment of Choses in Action and of Written Instruments. The mode of executing an assignment of a chose in action by a corporation will depend upon the nature of the instrument which it is sought to assign. If it is an evidence of debt, which in case of an individual may be transferred by mere delivery, then a delivery by the managing officer of the corporation will be presumptively a delivery by the corporation.[76] If it is an instrument which in case of an individual may be assigned without the use of the seal, then an assignment may be executed in the name of the corporation without its seal, as for instance in the case of a lease[77] or a mortgage,[78] either of which may be assigned without seal. Under a resolution by the directors of a corporation authorizing "the proper officers" to execute an assignment on behalf of the corporation, the assignment is presumptively well executed by its president and secretary.[79]

3. Evidentiary Matters Connected With Corporate Seal — a. Seals of Private Corporations Not Noticed Judicially, but Must Be Proved. Courts do not take judicial notice of the seals of private corporations, nor do such seals prove them-

71. Tileston *v.* Newell, 13 Mass. 406.

72. First Nat. Bank *v.* Salem Capitol Flour-Mills Co., 39 Fed. 89.

73. Dodge *v.* American Freehold Land Mortg. Co., 109 Ga. 394, 34 S. E. 672. *Compare* Chicago Tip, etc., Co. *v.* Chicago Nat. Bank, 74 Ill. App. 439 [*affirmed* in 176 Ill. 224, 52 N. E. 52].

74. Jones *v.* Hanna, 24 Tex. Civ. App. 550, 60 S. W. 279.

75. Reynolds *v.* Atlanta Nat. Bldg., etc., Assoc., 104 Ga. 703, 30 S. E. 942.

76. Blake *v.* Holley, 14 Ind. 383.

77. Sandford *v.* Tremlett, 42 Mo. 384.

78. Gillett *v.* Campbell, 1 Den. (N. Y.) 520.

79. Carroll *v.* Cone, 40 Barb. (N. Y.) 220. See further as to the proper form of an assignment of a bond and mortgage by a corporation Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267. What will be *prima facie* evidence to the officer taking the acknowledgment of authority on the part of the officer of the corporation executing the assignment to affix the corporate seal see Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140; Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207.

Examples of good assignments by corporations: Lay *v.* Austin, 25 Fla. 933, 7 So. 143 (assignment of mortgage and note); Hutchins *v.* Byrnes, 9 Gray (Mass.) 367 (assignment of mortgage); Musser *v.* Johnson, 42 Mo. 74, 94 Am. Dec. 316 (assignment of right of action under a contract). That an order running, "Please pay Leonard & Atwood my wages from month to month, as they become due, and what now may be due," drawn on the clerk of a corporation, and accepted by him for the corporation, is *prima facie* a mere authority to pay and not an assignment see Carrique *v.* Sidebottom, 3 Metc. (Mass.) 297. Case in which an instrument executed by a municipal corporation in the form of an assignment of a decree was held to operate only as a lease see Paff *v.* Kinney, 1 Bradf. Surr. (N. Y.) 1.

selves; but the fact that what purports to be the seal of a private corporation is its seal must be proved by the testimony of witnesses,[80] that is to say by someone familiar with the seal.[81]

b. Instrument Signed by Proper Officers, Presumption That What Purports to Be Corporate Seal Is Such — (I) *In General.* But this statement must be qualified by the statement that where the instrument is proved to be signed by the proper officers of the corporation proof of their signatures carries with it a presumption of the due execution of the instrument, which included a presumption of the authenticity of the seal.[82]

(II) *Not Necessary to Produce Witness Who Saw Seal Affixed.* It is not moreover required to prove the seal of a corporation in the same manner as the seal of an individual, that is, by producing a witness who saw the seal affixed to the identical instrument; but where a deed purports to be under the seal of a corporation it will be sufficient to show that the seal is the official seal of the corporate body.[83]

(III) *Not Necessary to Set Out Resolution Adopting Device as Corporate Seal.* It will be concluded moreover from what has already preceded, that in order to prove that the device annexed to a deed was the seal of a corporation purporting to execute the deed a resolution of the board of directors adopting such device as the seal of the corporation is not necessary; since a corporation may adopt the seal of another or even an ink impression.[84]

(IV) *Effect of Proof That Signers Delivered Instrument as Their Deed.* Proof that the individuals whose names are subscribed to the deed sealed and delivered the instrument as their deed neither proves the seal of the corporation nor their authority to execute the deed.[85]

c. What Seal Proves When Its Authenticity Is Established — (I) *In General.* When the authenticity of the seal is established, either by proof or by presumptive evidence as already indicated, it carries with it presumptive or *prima facie* proof of everything else which is necessary to the validity of the instrument. Roundly stated it carries with it *prima facie* evidence of the assent of the corporation to the deed.[86] It carries with it the presumption that the seal was right-

80. *New Jersey.*—Vaughn *v.* Hankinson, 35 N. J. L. 79; Osborne *v.* Tunis, 25 N. J. L. 633; Tours *v.* Vreelandt, 7 N. J. L. 352, 11 Am. Dec. 551.

New York.— Jackson *v.* Pratt, 10 Johns. 381; Mann *v.* Pentz, 2 Sandf. Ch. 257.

Pennsylvania.— Farmers', etc., Turnpike Co. *v.* McCullough, 25 Pa. St. 303; Crossman *v.* Hilltown Turnpike Co., 3 Grant 225; Chew *v.* Keck, 4 Rawle 163; Leazure *v.* Hillegas, 7 Serg. & R. 313; Foster *v.* Shaw, 7 Serg. & R. 156.

South Carolina.— Charleston *v.* Moorhead, 2 Rich. 430.

England.— Moises *v.* Thornton, 3 Esp. 4, 8 T. R. 303.

81. Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313; Charleston *v.* Moorhead, 2 Rich. (S. C.) 430; Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

82. *Georgia.*— Solomon's Lodge No. 1, A. F. M. *v.* Montmollin, 58 Ga. 547.

Illinois.— Phillips *v.* Coffee, 17 Ill. 154, 63 Am. Dec. 357; Wagg-Anderson Woolen Co. *v.* Lesher, 78 Ill. App. 678.

Kentucky.— Reynolds *v.* Glasgow Academy, 6 Dana 37.

Maryland.— Susquehanna Bridge, etc., Co. *v.* General Ins. Co., 3 Md. 305, 56 Am. Dec. 740.

Massachusetts.— Stebbins *v.* Merritt, 10 Cush. 27; Mill-Dam Foundery *v.* Hovey, 21 Pick. 417.

Michigan.— Benedict *v.* Denton, Walk. 336.

Missouri.— Chouquette *v.* Barada, 28 Mo. 491; St. Louis Public Schools *v.* Risley, 28 Mo. 415, 75 Am. Dec. 131.

Nevada.— Evans *v.* Lee, 11 Nev. 194.

New York.— Du Bois *v.* Sheppard, 41 N. Y. App. Div. 113, 58 N. Y. Suppl. 563.

North Carolina.—Benlow *v.* Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454.

Pennsylvania.— Pennsylvania Natural Gas Co. *v.* Cook, 123 Pa. St. 170, 16 Atl. 762.

South Carolina.—Josey *v.* Wilmington, etc., R. Co., 12 Rich. 134.

Tennessee.— Levering *v.* Memphis, 7 Humphr. 553.

United States.— Jacksonville, etc., R. etc., Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515.

England.— *In re* Barned's Banking Co., L. R. 3 Ch. 105, 37 L. J. Ch. 81, 17 L. T. Rep. N. S. 269, 16 Wkly. Rep. 193.

83. Foster *v.* Shaw, 7 Serg. & R. (Pa.) 156; Darnell *v.* Dickens, 4 Yerg. (Tenn.) 7.

84. Crossman *v.* Hilltown Turnpike Co., 3 Grant (Pa.) 225.

85. Osborne *v.* Tunis, 25 N. J. L. 633.

86. Reed *v.* Bradley, 17 Ill. 321.

fully affixed to the deed or the other instrument on which it appears.[87] In favor of innocent third parties without notice it cures any antecedent irregularities, such as the fact that the resolution of the directors authorizing the execution of the instrument was passed at a meeting at which less than a quorum was present.[88]

(II) *Is Presumptive Evidence of Authority of Officers Who Signed, Sealed, and Acknowledged It*—(A) *In General.* The seal, accompanied with the signature or signatures of the appropriate corporate officer or officers, becomes *prima facie* evidence that such officer or officers had due authority from the corporation to execute the instrument, such as casts the burden of proof upon any party challenging its validity.[89]

(B) *This Presumption Not Conclusive.* This presumption is not conclusive, but may be rebutted by parol evidence.[90]

87. *Colorado.*— Union Gold Min. Co. *v.* Bank, 2 Colo. 226.

Connecticut.— Hart *v.* Stone, 30 Conn. 94.

Florida.— Union Bank *v.* Call, 5 Fla. 409.

Georgia.— Solomon's Lodge No. 1, A. F. M. *v.* Montmollin, 58 Ga. 547.

Illinois.— Reed *v.* Bradley, 17 Ill. 321; Phillips *v.* Coffee, 17 Ill. 154, 63 Am. Dec. 357.

Louisiana.— Adams *v.* His Creditors, 14 La. 454.

Maryland.— Susquehanna Bridge, etc., Co. *v.* General Ins. Co., 3 Md. 305, 56 Am. Dec. 740.

Massachusetts.— Burrill *v.* Nahant Bank, 2 Metc. 163, 35 Am. Dec. 395; Mill-Dam Foundery *v.* Hovey, 21 Pick. 417; New England Marine Ins. Co. *v.* De Wolf, 8 Pick. 56.

Michigan.— Benedict *v.* Denton, 1 Walk. 336.

Minnesota.— Morris *v.* Keil, 20 Minn. 531.

Missouri.— Musser *v.* Johnson, 42 Mo. 74, 97 Am. Dec. 316; Chouquette *v.* Barada, 28 Mo. 491; St. Louis Public Schools *v.* Risley, 28 Mo. 415, 75 Am. Dec. 131.

Nevada.— Evans *v.* Lee, 11 Nev. 194.

New Hampshire.— Flint *v.* Clinton Co., 12 N. H. 430.

New Jersey.— Manhattan Mfg., etc., Co. *v.* New Jersey Stock Yard, etc., Co., 23 N. J. Eq. 161; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York.— Whitney *v.* Union Trust Co., 65 N. Y. 576; Canandarque Academy *v.* McKechnie, 19 Hun 62; Murray v. Vanderbilt, 39 Barb. 140, 149; Bowen *v.* New York City Irish Presb. Congregation, 6 Bosw. 245; Moore *v.* St. Thomas, 4 Abb. N. Cas. 51; Gillett *v.* Campbell, 1 Den. 520; Vergennes Bank *v.* Warren, 7 Hill 91; Jackson *v.* Campbell, 5 Wend. 572; Lovett *v.* Steam Saw Mill Assoc., 6 Paige 54.

Pennsylvania.— Berks, etc., Turnpike Road *v.* Myers, 6 Serg. & R. 12, 9 Am. Dec. 402.

South Carolina.—Josey *v.* Wilmington, etc., R. Co., 12 Rich. 134.

Tennessee.—Levering *v.* Memphis, 7 Humphr. 553; Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. 403; Union Bank *v.* U. S. Bank, 4 Humphr. 369; Darnell *v.* Dickens, 4 Yerg. 7.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552; Koehler *v.* Black River Falls Iron Co., 2 Black 715, 17 L. ed. 339.

England.— Scott *v.* Colburn, 26 Beav. 276, 5 Jur. N. S. 183, 28 L. J. Ch. 635, 7 Wkly. Rep. 114; Agar *v.* Athenæum L. Assur. Soc., 3 C. B. N. S. 725, 4 Jur. N. S. 211, 27 L. J. C. P. 95, 6 Wkly. Rep. 277, 91 E. C. L. 725; Royal British Bank *v.* Turquand, 5 E. & B. 248, 85 E. C. L. 248; Bateman *v.* Ashton-Under-Lyne, 3 H. & N. 323, 27 L. J. Exch. 458, 6 Wkly. Rep. 829; Australian Auxiliary Steam Clipper Co. *v.* Mounsey, 4 Jur. N. S. 1224, 4 Kay & J. 733, 27 L. J. Ch. 729, 6 Wkly. Rep. 734.

88. Gloucester County Bank *v.* Rudry Merthyr Steam, etc., Co., [1895] 1 Ch. 629, 64 L. J. Ch. 451, 72 L. T. Rep. N. S. 375, 2 Manson 223, 12 Reports 183.

89. *California.*—Crescent City Wharf, etc., Co. *v.* Simpson, 77 Cal. 286, 19 Pac. 426.

Colorado.— Union Gold Min. Co. *v.* Bank, 2 Colo. 226.

Illinois.— Indianapolis, etc., R. Co. *v.* Morganstern, 103 Ill. 149; Reed *v.* Bradley, 17 Ill. 321; West Side Auction House Co. *v.* Connecticut Mut. Ins. Co., 85 Ill. App. 497 [*affirmed* in 186 Ill. 156, 57 N. E. 839]; Wagg-Anderson Woolen Co. *v.* Lesher, 78 Ill. App. 678.

Iowa.— Morse *v.* Beale, 68 Iowa 463, 27 N. W. 461.

Massachusetts.— Burrill *v.* Nahant Bank, 2 Metc. 163, 35 Am. Dec. 395.

Missouri.— Chouquette *v.* Barada, 33 Mo. 249; Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67.

New York.— Lovett *v.* Steam Saw Mill Assoc., 6 Paige 54.

Tennessee.— Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. 403.

West Virginia.— Boyce *v.* Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 501.

United States.—Mickey *v.* Stratton, 17 Fed. Cas. No. 9,530, 5 Sawy. 475.

90. *Nevada.*— Sharon *v.* Minnock, 6 Nev. 377.

New Jersey.— Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York.— Johnson *v.* Bush, 3 Barb. Ch. 207; Lovett *v.* Steam Saw Mill Assoc., 6 Paige 54.

Pennsylvania.— *In re* Roman Catholic Soc., 6 Serg. & R. 498; Berks, etc., Turnpike Road Co. *v.* Myers, 6 Serg. & R. 12, 9 Am. Dec. 402.

United States.— Koehler *v.* Black River Falls, etc., Co., 2 Black 715, 17 L. ed. 339.

(c) *Merely Shifts Burden of Proof.* The effect of it is to shift the burden of overthrowing the deed upon the party objecting to it, and to require him to prove by clear and satisfactory evidence the want of authority to execute it.[91]

(d) *Presence of Corporate Seal Not Estoppel Against Corporation.* The fact of the seal being attached to what purports to be a contract of the corporation does not therefore estop the corporation from challenging the power of its officers to make the contract,[92] since they clearly cannot increase their powers by an unauthorized use of the seal.[93]

(e) *Instrument Need Not Recite Authority to Execute It.* It follows that an instrument executed under a seal of a corporation need not recite the authority to execute it, but that this may be proved by evidence *aliunde*.[94]

(f) *What Evidence Will Overcome This Presumption.* This presumption will not be overcome by evidence of the mere fact that there has been no vote of the directors authorizing the execution of the instrument; since there are other ways of expressing the corporate assent.[95] Quite opposed to this is a holding to the effect that where the only authority claimed for the executing officers was a resolution recorded in the minutes of a meeting of the board, proof that there was not a quorum present at the meeting rebuts the evidence of the valid execution.[96]

d. Authority of President to Execute Not Presumed in Absence of Corporate Seal. The authority of the president of the corporation to execute a mortgage to which the corporate seal is not attached will not be presumed, but must be proved *aliunde*.[97]

4. What Is Deemed Sufficient Authority to Affix Seal — a. Authority From Board of Directors. Where the management of the affairs of a corporation is intrusted by its charter to a board of directors, the corporate seal must be affixed by the authority of the board of directors in order that it may have force as such;[98] but it may be affixed by a less number of directors than is necessary to

England.— D'Arcy *v.* Tamar, etc., R. Co., L. R. 2 Exch. 158; Clarke *v.* Imperial Gas Light, etc., Co., 4 B. & Ad. 315, 2 L. J. K. B. 30, 1 N. & M. 206, 24 E. C. L. 143; Colchester *v.* Lawten, 1 Ves. & B. 226, 12 Rev. Rep. 216.

91. *Georgia.*— Solomon's Lodge, No. 1, A. F. M. *v.* Montmollin, 58 Ga. 547; Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228. That the seal of a corporation affixed to a contract introduced in evidence, accompanied with proof of the signature of the proper officers thereto, raises a presumption sufficient to rebut the allegation of an answer in equity, denying that the contract was signed and sealed by the authority of the corporation, see Solomon's Lodge No. 1, A. F. M. *v.* Montmollin, 58 Ga. 547. So of a deed executed by a banking corporation by its president and cashier. Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228.

Minnesota.— Morris *v.* Keil, 20 Minn. 531.

Missouri.— Musser *v.* Johnson, 42 Mo. 74, 97 Am. Dec. 316; Chouquette *v.* Barada, 28 Mo. 491.

New Hampshire.— Flint *v.* Clinton Co., 12 N. H. 430.

New Jersey.— Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York.—Jourdan *v.* Long Island R. Co., 115 N. Y. 380, 26 N. Y. St. 138, 22 N. E. 153, instrument executed in the name of corporation by its president and secretary, and sealed with its corporate seal, presumptively valid.

West Virginia.— Boyce *v.* Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 501.

United States.— Koehler *v.* Black River Falls, etc., Co., 2 Black 715, 17 L. ed. 339.

Consent of shareholders.— Thus where a deed has been thus executed, if the consent of the shareholders was necessary to the validity of the transfer, and such consent was not had, it devolves on the party attacking the deed to show that fact. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228.

92. Leavenworth *v.* Rankin, 2 Kan. 357.

93. Osborne *v.* Tunis, 25 N. J. L. 633; Jackson *v.* Campbell, 5 Wend. (N. Y.) 572. See also *supra*, XII, D, 1, i.

94. Hart *v.* Stone, 30 Conn. 94.

95. Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

96. Moore *v.* St. Thomas, 4 Abb. N. Cas. (N. Y.) 51.

97. American Sav., etc., Assoc. *v.* Smith, 122 Ala. 502, 27 So. 919. Nor will his authority be presumed from his attaching a common paper seal, but it must be the corporate seal. Raub *v.* Blairstown Creamery Assoc., 56 N. J. L. 262, 28 Atl. 384.

98. Osborne *v.* Tunis, 25 N. J. L. 633; Coryell *v.* New Hope Delaware Bridge Co., 9 N. J. Eq. 457; Van Hook *v.* Somerville Mfg. Co., 5 N. J. Eq. 137; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Hoyt *v.* Thompson, 5 N. Y. 320; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Jackson *v.* Campbell, 5 Wend. (N. Y.) 572;

constitute a legal board of directors, if it be done in pursuance of the direction of a legal board.[99]

b. Formal Power of Attorney Not Necessary — (i) *Resolution Sufficient.* A power of attorney is not necessary to authorize a corporate officer to make a deed on behalf of the corporation; a simple resolution of the board of directors will be sufficient.[1]

(ii) *Authority and Assent of Corporation Inferred From Facts and Circumstances.* The governing principle is that the assent of the corporation to acts done for and on its account may be inferred from facts and circumstances, as in the case of natural persons;[2] so that when an individual does an act as the agent of a corporation, the agency may be shown, either by a corporate act, or inferred from the same evidence which would justify the inference in the case of a natural person.[3]

c. Formal Vote of Directors Need Not Be Shown. Nor is it necessary that this authority be shown by a formal vote of the board or corporation.[4]

5. Conveyances to Corporations — a. Not Necessary to Use Word "Successors." In a conveyance of land to a corporation sole, the use of the word "successors" is necessary; otherwise the deed will carry a life-estate only, to the actual incum-

Com. *v.* St. Mary's Church Roman Catholic Soc., 6 Serg. & R. (Pa.) 507.

A deed not countersigned by the secretary, as required by the by-laws of the company, and executed by the vice-president instead of the president, as directed by the resolution, may nevertheless be a good deed. Smith *v.* Smith, 62 Ill. 493.

99. Van Hook *v.* Somerville Mfg. Co., 5 N. J. Eq. 137; Berks, etc., Turnpike Road Co. *v.* Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402.

1. Beckwith *v.* Windsor Mfg. Co., 14 Conn. 594; Jackson *v.* Brown, 5 Wend. (N. Y.) 590; Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. (Tenn.) 403. Deed executed in pursuance of a vote of proprietors authorizing a committee to sell lands. Decker *v.* Freeman, 3 Me. 338. See also Jackson *v.* Walsh, 3 Johns. (N. Y.) 226. That two of a committee of three directors may seal a deed with the corporate seal in the absence of the third director see Union Bridge Co. *v.* Troy, etc., R. Co., 7 Lans. (N. Y.) 240.

2. State Bank *v.* Comegys, 12 Ala. 772, 46 Am. Dec. 278; Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Bates *v.* State Bank, 2 Ala. 451.

3. State Bank *v.* Comegys, 12 Ala. 772, 46 Am. Dec. 278; Augusta Bank *v.* Earl, 13 Pet. (U. S.) 519, 10 L. ed. 274; Rex *v.* Oxford Canal Nav. Co., 4 B. & C. 74, 6 D. & R. 86, 10 E. C. L. 487.

4. Hart *v.* Stone, 30 Conn. 94.

A parol vote not recorded will be sufficient. Clark *v.* Pratt, 47 Me. 55.

Board meeting need not have been duly convened.— It follows that a deed of a corporation, executed pursuant to the direction of a quorum of the directors, no objection being then or afterward taken by any member of the board, must be considered as a corporate act, whether the meeting was duly convened or not. Samuel *v.* Holladay, 21 Fed. Cas. No. 12,288, Woolw. 400, McCahon (Kan.) 214.

Intention to authorize inferred.— Circumstances from which the intention of the board of directors to authorize the secretary to execute a bond for the submission of a controversy to arbitration was inferred. Madison Ins. Co. *v.* Griffin, 3 Ind. 277.

Assignment of corporate property by president and secretary, without authority, invalid, and not cured by proof of execution before a commissioner. Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140.

Declarations on a corporate contract unnecessarily sealed — allegations respecting the seal rejected as surplusage. State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

Tracing title through a corporation necessary to produce act of incorporation or in some way to prove the existence of a body politic capable of taking and conveying real estate. Lumbard *v.* Aldrich, 6 N. H. 269.

Responsibility of a corporation in damages for the negligent use of its seal, when liability denied on the ground that such negligence was not the proximate cause of the plaintiff's loss. England *v.* Bank of England, 21 Q. B. D. 160, 52 J. P. 580, 57 L. J. Q. B. 418, 36 Wkly. Rep. 880.

When failure of purchaser of corporate bonds to inquire as to whether the seal and signatures were honestly and properly attached does not constitute such a want of care as will prevent him from acquiring a good title. Citizens' Nat. Bank *v.* Cincinnati, etc., Co., 11 Ohio Dec. (Reprint) 703, 29 Cinc. L. Bul. 15.

Deed held to pass no title.— That a deed by three of four executors, one of them a foreign corporation disqualified from doing business in the state, which does not therefore join with the other officers in executing the deed, passes no title see Pennsylvania L. Ins. Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166.

bent, who is the first taker.[5] But in grants to corporations aggregate, the word "successors," although usually inserted, is not necessary to convey a fee simple; for, even if it were admitted that such a simple grant be strictly only an estate for life, yet as the corporation, unless of limited duration, never dies, such estate for life is perpetual.[6]

b. Conveyances to Trustees of Corporations and Associations. Where a conveyance is made to the trustees of a named corporation, without mentioning the names of the trustees, this is in law a conveyance to the corporation.[7] On the other hand where the conveyance is made to certain trustees by name, with the mere addition of their office or trust, as "the trustees of the Methodist Society," and to their heirs and assigns forever, this conveys a title, not to the corporation, but to the trustees, the words following the names of the trustees being regarded merely as a *descriptio personarum*.[8]

c. Deed to Corporation Not Duly Created. It is of course essential to the validity of a conveyance that there should be a grantee; and therefore a deed to a supposed corporation which has not been duly incorporated, and which consequently has no legal existence, is a nullity at law and does not divest the grantor of title.[9] Another statement of the reason of the conclusion is that a deed implies a contract, and that to any contract there must be competent parties.[10] When therefore the deed was to "the people of the County of Otsego" it conveyed nothing, because the people had no capacity to take by grant.[11] So it has been held that a grant to an imaginary corporation is a nullity.[12] But where a mortgage was executed to a building association, which at the date of the mortgage could not sue in its corporate name, and an act was subsequently passed, which the corporation accepted, enabling it so to sue, it was held that it might bring an action in its corporate name to foreclose the mortgage.[13] So in an action of debt on a bond made to the committee or trustees of a corporation, where it did not appear that any of the trustees were named in the bond, and the bond was *solvendum* to the corporation by its true name, it was held that the corporation might declare in its corporate name on the bond, and might allege that the bond was made to it by the description of the committee, etc.[14] The principle stated in this paragraph has no application to the case where the corporation to which the grant is made exists *de facto*, which in the absence of proof to the contrary will be presumed to have the capacity to take a grant of land.[15] It should not escape attention that there is another principle which if properly applied will destroy the effect of some of the decisions cited in this paragraph, which principle is that where a person makes a deed of grant to a body by the use of a name which implies that it is a corporation he will be estopped by his deed from challenging the fact that it is duly incorporated and capable of taking the land, especially after he has received the consideration for the same; but the question whether the corporation is duly organized and capable of taking such a grant will be left to be decided in a contest between the state and the corporation, to oust them of their franchises.[16] Thus while a banking corporation created by a terri-

5. Shaw, C. J., in Boston *v.* Sears, 22 Pick. (Mass.) 122, 126 [*citing* Coke Litt. 8*b*, 9*b*, 94*b*; 4 Cruise Dig. 442].

6. Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

7. Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196, 10 S. W. 32. *Compare* Hager's Town Turnpike Road *v.* Creeger, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495; North St. Louis Christian Church *v.* McGowan, 62 Mo. 279, 230.

8. Tower *v.* Hale, 46 Barb. (N. Y.) 361. *Compare* German Land Assoc. *v.* Scholler, 10 Minn. 331, 338.

9. Harriman *v.* Southam, 16 Ind. 190; Douthitt *v.* Stinson, 63 Mo. 268; German Land Assoc. *v.* Scholler, 10 Minn. 331; Russell *v.* Topping, 21 Fed. Cas. No. 12,163, 5 McLean 194.

10. Russell *v.* Topping, 21 Fed. Cas. No. 12,163, 5 McLean 194.

11. Jackson *v.* Cory, 8 Johns. (N. Y.) 385.

12. Russell *v.* Topping, 21 Fed. Cas. No. 12,163, 5 McLean 194.

13. Stein *v.* Indianapolis Bldg. Loan Fund, etc., Assoc., 18 Ind. 237, 81 Am. Dec. 353.

14. New York African Soc. *v.* Varick, 13 Johns. (N. Y.) 38.

15. Myers *v.* Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562.

16. Myers *v.* Croft, 13 Wall. (U. S.) 291,

torial legislature could not legally exercise its powers until its charter had been approved by congress, yet a conveyance of land made to it, if the charter authorized it to hold land, could not be treated as a nullity by the grantor, who had received the consideration of the grant, no judgment of ouster having been rendered against the corporation at the instance of the government.[17]

d. Deed to Inchoate Corporations. There is judicial authority to the effect that a conveyance of land to an unincorporated company which goes into possession under the deed, vests title in such company after its incorporation, as against one not holding by a superior title.[18] So where a deed conveying land to a corporation was dated subsequently to the date of its charter but before its organization it was held a valid conveyance, on the ground that the acceptance of the deed would be presumed as soon as the corporation was competent to take it, and that the corporation could accept it as soon as it became organized under its charter.[19] So it has been held that a deed conveying lands to a corporation by name before its charter has been obtained, which deed is signed and acknowledged by the grantor but delivered in escrow to a third party, with direction to retain it until the corporation shall have obtained its charter and organized thereunder, and then to deliver it to the corporation, and which deed is, after the corporation has obtained its charter and organized thereunder, delivered by such third person to it, operates as a valid conveyance to the corporation of the land therein described, from the date of the delivery of the deed to it.[20] The governing principle is this, as a general rule, a deed delivered in escrow takes effect from the date of the second delivery; although it is conceded that this general rule does not always apply where justice requires a resort to a fiction. If therefore at the time of the final act from which the deed becomes effectual the grantee is capable of taking it becomes a good deed. All this in conformity with the oft-repeated maxim that it is the duty of the courts to uphold, rather than to destroy, deeds.[21] On the other hand we find a decision to the effect that a deed to designated persons "as incorporators" of a named "company," which had not in fact been incorporated, did not, on the grant of a charter to the company, *ipso facto* operate to pass to it the legal title to the property in the deed described.[22]

E. Negotiable Instruments — 1. Whether Affixing Corporate Seal Makes Such Instrument Specialty and Destroys Its Negotiability. There are old decisions to the effect that to affix the corporate seal to a contract, which otherwise would be a negotiable instrument of the corporation, has the same effect as it would have in the case of an individual, namely, that of changing it from a simple contract into a specialty and of destroying its negotiability.[23] The nonsense of this class of decisions is perceived when it is considered that at common law a corporation could speak only by its seal. If therefore the seal was affixed the instrument was made of a different effect from what the parties intended; and if the seal was not affixed the instrument was a nullity. A more sensible rule was to regard the affixing of a corporate seal to instruments which in the case of indi-

20 L. ed. 562; Smith *v.* Sheeley, 12 Wall. (U. S.) 358, 20 L. ed. 430.

17. Smith *v.* Sheeley, 12 Wall. (U. S.) 358, 20 L. ed. 430.

18. Clifton Heights Land Co. *v.* Randell, 82 Iowa 89, 47 N. W. 905.

19. Rotch's Wharf Co. *v.* Judd, 108 Mass. 224. *Compare* Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386.

20. Spring Garden Bank *v.* Hurlings Lumber Co., 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583.

21. Sherwood *v.* Whiting, 54 Conn. 330, 8 Atl. 80, 1 Am. St. Rep. 116; Shed *v.* Shed, 3 N. H. 432; African M. E. Church *v.* Conover, 27 N. J. Eq. 157; Flagg *v.* Eames, 40 Vt. 16, 94 Am. Dec. 363.

22. McCandless *v.* Inland Acid Co., 112 Ga. 291, 37 S. E. 419. *Compare* Frank *v.* Drenkhahn, 76 Mo. 508.

Manner of proving a covenant of warranty by a corporation see Willis *v.* Burke, 7 Tex. Civ. App. 239, 27 S. W. 217.

23. Conine *v.* Junction, etc., R. Co., 3 Houst. (Del.) 288, 89 Am. Dec. 230; Steele *v.* Oswego Cotton Mfg. Co., 15 Wend. (N. Y.) 265; Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256; Hopkins *v.* Railroad Co., 3 Watts & S. (Pa.) 410; Frevall *v.* Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558. In War-

viduals would be simple contracts merely as mere surplusage,[24] and to uphold the negotiable character of the instrument according to the real intent of the parties. This is especially so when we consider that at common law the affixing of the corporate seal did not necessarily indicate that the instrument was a specialty, but was a mere mode of expressing the assent of the corporation in every case.[25] The view that the presence of a seal destroys the negotiability of an instrument which would otherwise be negotiable is also disproved by numerous cases which hold that the bonds of a corporation, whether public or private, when they employ negotiable words, as when they are made payable to the bearer, to the holder, or to order, possess the ordinary incident of negotiable instruments, although they are issued under seal.[26]

2. Effect of Failure to Use Negotiable Words. The effect of failure to use negotiable words in a written obligation of a corporation is the same as in the case of an individual; it prevents the immunities of negotiable paper from attaching to it, as in case of a mere due-bill which fails to use the word "order" or "bearer."[27]

3. Effect of Order Drawn by Corporation on Its Own Treasurer or Other Fiscal Officer — a. In General. Such an instrument is generally regarded as having the effect of a promissory note of the corporation;[28] although some of the decisions ascribe to it the quality of a bill of exchange or hold that the holder of it may treat it as such.[29] Other courts hold that such an instrument is in fact a bill of exchange drawn by the maker upon himself, which in law is a promissory note.[30]

b. Whether Such Instrument Must Be Presented For Payment and Payment Refused Before Action Can Be Brought Thereon. The manifest intent of the parties to such an instrument is that it shall be presented to the fiscal officer of the corporation upon whom it is drawn, and payment refused, before the corporation shall be deemed to be in default, and before action can be brought thereon. But there is judicial authority to the effect that the drawing of the order is of itself equivalent to a presentment, and that consequently an action may be maintained thereon without a previous presentment or demand of payment upon the officer upon whom it is drawn,[31] thus putting the corporation in default where it has made no default and subjecting it to be disgraced where it has done no wrong.[32]

4. Authority to Execute Commercial Paper. This subject has been discussed in a former subdivision when treating of the powers of ministerial officers and agents of corporations.[33] The authority of a particular officer of a corporation, such as its treasurer, to execute promissory notes in its behalf, will generally be

ren *v.* Lynch, 5 Johns. (N. Y.) 239, it was conceded by counsel on both sides and by the court. Kent, C. J. (afterward chancellor), presiding and delivering the opinion, that a sealed note is not negotiable. In Glyn *v.* Baker, 13 East 509, 12 Rev. Rep. 414, the court of king's bench seems to have hesitated about recognizing India bonds as negotiable, but parliament immediately interfered and declared them negotiable instruments.

24. Jones *v.* Horner, 60 Pa. St. 214.

25. Columbia Cent. Nat. Bank *v.* Charlotte, etc., R. Co., 5 S. C. 156, 22 Am. Rep. 12.

26. See *infra*, XVIII, A, 1, h, (I), (A).

That the effect of a paper seal attached without authority will not be to destroy the negotiability of what would otherwise be a promissory note, but that such a simulated seal will be rejected as "a piece of unnecessary ornament," see Mackay *v.* St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881, 886.

27. Sears *v.* Illinois Wesleyan University, 28 Ill. 183.

28. Indiana, etc., R. Co. *v.* Davis, 20 Ind. 6, 83 Am. Dec. 303; Floyd County *v.* Day, 19 Ind. 450; Marion, etc., R. Co. *v.* Hodge, 9 Ind. 163; Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193; Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606.

29. Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

30. Marion, etc., R. Co. *v.* Dillon, 7 Ind. 404; Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606.

31. Indiana, etc., R. Co. *v.* Davis, 20 Ind. 6; Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193; Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606.

32. One court has had the sense and justice to hold otherwise. Marion, etc., R. Co. *v.* Hodge, 9 Ind. 163; Marion, etc., R. Co. *v.* Dillon, 7 Ind. 404.

33. See *supra*, X.

sought for in its by-laws;[34] and if not found there may be inferred from the custom of the corporation, that is to say, from its uniform habit of acting.[35] And where the directors of a corporation have by a uniform course of conduct held their treasurer out to the public as the fiscal agent of the corporation, and as having the authority to bind it by the execution and indorsement of promissory notes, they will be estopped, as against one acting on the faith of his possessing such power, from denying it, unless the transaction is of a nature so unusual as to put him on inquiry.[36]

5. Rule of "Undisclosed Principal" Does Not Apply in Case of Commercial Paper. The rule which enables a party to a written contract to go behind the contract and to charge the undisclosed principal for whom the party acts does not apply either to bills of exchange or to negotiable promissory notes; but none but the parties named in the instrument, either by name or firm, can be made liable to an action upon it.[37]

6. Negotiable Instruments How Executed, Indorsed, or Accepted so as to Bind Corporation and Exonerate Officer or Agent — a. Effect of Adding Descriptive Terms — (1) *In General.* If therefore the agent of a corporation desire to execute a negotiable instrument in behalf of the corporate body, care must be exercised to make it binding upon the corporation in terms; otherwise parol evidence will not be admitted to add to its effect. It will not be sufficient for the signers of such an obligation to add to their names such descriptive terms as "directors," "trustees," "committee."[38] This is also held to be true as to the lia-

34. Foster *v.* Ohio-Colorado Reduction, etc., Co., 17 Fed. 130, 5 McCrary 329.

35. Foster *v.* Ohio-Colorado Reduction, etc., Co., 17 Fed. 130, 5 McCrary 329.

36. Page *v.* Fall River, etc., R. Co., 31 Fed. 257.

37. Parke, B., in Beckham *v.* Drake, 9 M. & W. 79, 96. See also Yates *v.* Nash, 8 C. B. N. S. 581, 6 Jur. N. S. 1343, 29 L. J. C. P. 306, 2 L. T. Rep. N. S. 430, 8 Wkly. Rep. 764, 98 E. C. L. 581; Ducarry *v.* Gill, 4 C. & P. 121, 19 E. C. L. 436; Lloyd *v.* Ashby, 2 C. & P. 138, 12 E. C. L. 493; Cowie *v.* Stirling, 6 E. & B. 333, 2 Jur. N. S. 663, 25 L. J. Q. B. 335, 4 Wkly. Rep. 543, 88 E. C. L. 333; Storm *v.* Stirling, 3 E. & B. 832, 17 Jur. 788, 23 L. J. Q. B. 298, 77 E. C. L. 832; Eastwood *v.* Bain, 3 H. & N. 738, 28 L. J. Exch. 74, 7 Wkly. Rep. 90; Daniell Neg. Instr. § 303.

38. *Illinois.*— Burlingame *v.* Brewster, 79 Ill. 515, 22 Am. Rep. 177; Powers *v.* Briggs, 79 Ill. 493, 22 Am. Rep. 175.

Indiana.— Hays *v.* Crutcher, 54 Ind. 260; Mears *v.* Graham, 8 Blackf. 144. *Compare* Pitman *v.* Kintner, 5 Blackf. 250, 33 Am. Dec. 461.

Iowa.— Cattron *v.* Manchester First Universalist Soc., 46 Iowa 106.

Kentucky.— Caphart *v.* Dodd, 3 Bush 584, 96 Am. Dec. 258; Trask *v.* Roberts, 1 B. Mon. 201; McBeam *v.* Morrison, 1 A. K. Marsh. 445.

Maine.— Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409; Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68; Fogg *v.* Virgin, 19 Me. 352, 36 Am. Dec. 757.

Massachusetts.— Morell *v.* Codding, 4 Allen 403; Haverhill Mut. F. Ins. Co. *v.* Newhall, 1 Allen 130; Fiske *v.* Eldridge, 12 Gray 474; Jefts *v.* York, 4 Cush. 371, 50 Am. Dec. 791, 10 Cush. 392; Packard *v.* Nye, 2 Metc. 47; Simonds *v.* Heard, 23 Pick. 120, 34 Am. Dec. 41; Bradlee *v.* Boston Glass Manufactory, 16 Pick. 347. *Contra*, Mann *v.* Chandler, 9 Mass. 335 [*overruled* in Barlow *v.* Lee Cong. Soc., 8 Allen 460]; Foster *v.* Fuller, 6 Mass. 58, 4 Am. Dec. 87.

Minnesota.— Bingham *v.* Stewart, 13 Minn. 106.

New Hampshire.— Weare *v.* Gove, 44 N. H. 196; Savage *v.* Rix, 9 N. H. 263; Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82. *Compare* Packets Despatch Line *v.* Bellamy, 12 N. H. 205, 37 Am. Dec. 206.

New York.— De Witt *v.* Walton, 9 N. Y. 571; Barker *v.* Mechanics' F. Ins. Co., 3 Wend. 94, 20 Am. Dec. 664; Hills *v.* Bannister, 8 Cow. 31.

Ohio.— Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612.

Texas.— Gregory *v.* Leigh, 33 Tex. 813.

Vermont.— Pomeroy *v.* Slade, 16 Vt. 220. *Compare* Roberts *v.* Button, 14 Vt. 195.

West Virginia.— Scott *v.* Baker, 3 W. Va. 285.

England.— Dutton *v.* Marsh, L. R. 6 Q. B. 361, 49 L. J. Q. B. 175, 24 L. T. Rep. N. S. 470, 19 Wkly. Rep. 754; Maclae *v.* Sutherland, 2 C. L. R. 1320, 3 E. & B. 1, 18 Jur. 942, 23 L. J. Q. B. 229, 2 Wkly. Rep. 161, 77 E. C. L. 1; Penkivil *v.* Connell, 5 Exch. 381, 19 L. J. Exch. 305; Healey *v.* Story, 3 Exch. 3, 18 L. J. Exch. 8; Bottomley *v.* Fisher, 1 H. & C. 211, 8 Jur. N. S. 895, 31 L. J. Exch. 417, 6 L. T. Rep. N. S. 688, 10 Wkly. Rep. 669; Price *v.* Taylor, 5 H. & N. 540, 6 Jur. N. S. 402, 24 J. P. 470, 29 L. J. Exch. 331, 2 L. T. Rep. N. S. 221, 8 Wkly. Rep. 419.

Compare McWhorter *v.* Lewis, 4 Ala. 198; Klostermann *v.* Loos, 58 Mo. 290.

bility of corporate officers as indorsers,[39] drawers of bills of exchange,[40] and accepters of the same.[41] If the agent or agents introduce their names into the body of the note, they should state that they act as "directors," "trustees," etc., "for," "on account of," or "in behalf of the company."[42]

(II) *Doctrine That This Mode of Signing Lets in Parol Evidence to Show Who Is Bound.* In other cases it is held that the addition to the name signed of the official character of the person so signing is such an indication of

39. *Illinois.*— McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.

Indiana.— Vater *v.* Lewis, 36 Ind. 288, 10 Am. Rep. 29.

Maine. — Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539.

Massachusetts.— Towne *v.* Rice, 122 Mass. 67; Fiske *v.* Eldridge, 12 Gray 474.

New Hampshire.— Nicholas *v.* Oliver, 36 N. H. 218.

New York.— *Contra,* New York City Mar. Bank *v.* Clements, 31 N. Y. 33; Babcock *v.* Beman, 11 N. Y. 200; Clark *v.* Titcomb, 42 Barb. 122; Merchants' Bank *v.* McColl, 6 Bosw. 473; Scott *v.* Johnson, 5 Bosw. 213; Knight *v.* Lang, 2 Abb. Pr. 227; Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; Utica Bank *v.* Magher, 18 Johns. 341.

Pennsylvania.— *Compare* Sharpe *v.* Bellis, 61 Pa. St. 69, 100 Am. Dec. 618.

Wisconsin. — Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543.

United States. — Chillicothe Branch Ohio State Bank *v.* Fox, 5 Fed. Cas. No. 2,683, 3 Blatchf. 431.

40. Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101; Mayhew *v.* Prince, 11 Mass. 54; Rand *v.* Hale, 3 W. Va. 495, 100 Am. Dec. 761. *A fortiori* this is the rule where the signatures of the makers are bald of any designation of agency whatever. See Bass *v.* O'Brien, 12 Gray (Mass.) 477; Bank of British North America *v.* Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390; Leadbitter *v.* Farrow, 5 M. & S. 345, 17 Rev. Rep. 345. *Contra* to the statement in the text is Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Hicks *v.* Hinde, 9 Barb. (N. Y.) 528.

41. Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750; Moss *v.* Livingston, 4 N. Y. 208; Tassey *v.* Church, 4 Watts & S. (Pa.) 346; Alexander *v.* Sizer, L. R. 4 Exch. 102, 38 L. J. Exch. 59, 20 L. T. Rep. N. S. 38.

This liability, however, is only prima facie and may be rebutted by showing that the accepter acted as agent of and by authority of the corporation, and that plaintiff was aware of the fact at the time of taking the draft. Lazarus *v.* Shearer, 2 Ala. 718; Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151 [*affirmed* in 66 N. Y. 616]; Bruce *v.* Lord, 1 Hilt. (N. Y.) 247. See in this connection Okell *v.* Charles, 34 L. T. Rep. N. S. 822 [*cited* in Evans Agency 177, 185]. *Contra* to the foregoing Shelton *v.* Darling, 2 Conn. 435; Amison *v.* Ewing, 2 Coldw. (Tenn.) 366.

If the drawee be addressed in the bill, without anything therein implying that he is to act as an agent in accepting it, he will be personally bound by his acceptance, although he makes use of terms indicating that he accepts as an agent. Bult *v.* Morrell, 12 A. & E. 745, 10 L. J. Q. B. 52, 40 E. C. L. 369; Nicholls *v.* Diamond, 2 C. L. R. 305, 9 Exch. 154, 23 L. J. Exch. 1, 2 Wkly. Rep. 12, 24 Eng. L. & Eq. 403; Ducarry *v.* Gill, 4 C. & P. 121, 1 M. & M. 450, 19 E. C. L. 436; Thomas *v.* Bishop, 2 Str. 955; Mare *v.* Charles, 5 E. & B. 978, 2 Jur. N. S. 234, 25 L. J. Q. B. 119, 4 Wkly. Rep. 267, 85 E. C. L. 978.

On the other hand a bill addressed to a company by its corporate name and accepted by authorized officers of the company in its behalf binds the company and not the accepters personally. Halford *v.* Cameron's Coalbrook Steam Coal, etc., R. Co., 16 Q. B. 442, 15 Jur. 335, 20 L. J. Q. B. 160, 71 E. C. L. 442; Edwards *v.* Cameron's Steam Coal, etc., R. Co., 6 Exch. 269; Jenkins *v.* Morris, 16 M. & W. 877. *Compare* Penrose *v.* Martyr, E. B. & E. 499, 5 Jur. N. S. 362, 28 L. J. Q. B. 28, 96 E. C. L. 499.

But a bill addressed to the treasurer of a company individually and accepted by the company binds neither the company nor its officer. Walker *v.* Bank, 9 N. Y. 582.

42. *Alabama.*— Roney *v.* Winter, 37 Ala. 277.

California. — Blanchard *v.* Kaull, 44 Cal. 440; Haskell *v.* Cornish, 13 Cal. 45.

Indiana.— McHenry *v.* Duffield, 7 Blackf. 41.

Kentucky.— But see McCalla *v.* Rigg, 3 A. K. Marsh. 259.

Maine.— Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521.

Massachusetts.— Shoe, etc., Nat. Bank *v.* Dix, 123 Mass. 148, 25 Am. Rep. 49; Barlow *v.* Lee Cong. Soc., 8 Allen 460; Bradlee *v.* Boston Glass Manufactory, 16 Pick. 347.

Minnesota.— Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

New Hampshire.— Dow *v.* Moore, 47 N. H. 419.

Ohio.— Titus *v.* Kyle, 10 Ohio St. 444.

England.— Dutton *v.* Marsh, L. R. 6 Q. B. 361, 40 L. J. Q. B. 175, 24 L. T. Rep. N. S. 470, 19 Wkly. Rep. 754; Allen *v.* Sea, etc., Assur. Co., 9 C. B. 574, 14 Jur. 870 note, 19 L. J. C. P. 305, 67 E. C. L. 574; Forbes *v.* Marshall, 11 Exch. 166, 24 L. J. Exch. 305, 4 Wkly. Rep. 480; Healey *v.* Story, 3 Exch. 3, 18 L. J. Exch. 8; Lindus *v.* Melrose, 2 H. & N. 293, 3 H. & N. 177, 4 Jur. N. S. 488, 27 L. J. Exch. 326, 6 Wkly. Rep. 441; Aggs *v.* Nicholson, 1 H. & N. 165, 25 L. J. Exch. 348, 4 Wkly. Rep. 776; Bowen *v.* Morris, 2 Taunt. 374.

the representative character of such a person as will warrant a resort to parol evidence to prove extrinsic circumstances, such as to whom the consideration passed and the credit was given, the agent's authority, etc., by which the respective liability of the principal and agent may be determined.[43]

b. Effect of Direction to Place to Account of Some Company. The direction to place to the account of some company named in the body of the bill, coupled with the circumstance that the person signing the bill adds to his name some designation of agency will in general be sufficient to make the draft that of the corporation.[44]

c. Rule Where Name of Corporation Is Set Out in Body of Instrument as Party Promising to Pay. If in the body of the note the corporation is set out as the party promising to pay, although the note is signed by the agents without the name of the corporation in the signature, the intention is plain to bind the corporation instead of the individual signers.[45]

d. Rule Where Note Is Signed in Corporate Name With Name of Agent Following. And so if the note is signed in the corporate name with the name of the agent following it is the note of the corporation and not of the agent.[46]

e. Exception Where Agent Habitually Signs by His Own Name as "Agent." Although as a general rule where such an instrument is signed by a person with the addition of "agent," "trustee," etc., the descriptive word is rejected and the agent is bound,[47] yet it has been held that this is not the case where it is shown that the agent habitually signs for the corporation in that way,[48] a doctrine which necessarily lets in parol evidence to show who is bound.

f. Parol Evidence When Admissible to Explain Who Is Bound. The general rule is that parol evidence is not admissible to show that a party is bound who is not named as such on the face of the instrument.[49] But some courts admit an exception, even in the case of negotiable instruments, to the effect that where the terms of the instrument are so ambiguous, equivocal, uncertain, or unintelligible, that it cannot be definitely known whether the principal or agent was intended to be bound, parol evidence will be heard to solve the difficulty and to show the real intent of the parties.[50] But it should be shown that the payee of the note had knowledge, or at least the full means of knowledge, that the makers of the note were promising as agents, duly authorized, of the

43. *Connecticut.*— Johnson *v.* Smith, 21 Conn. 627; Hovey *v.* McGill, 2 Conn. 680.

Indiana.— Means *v.* Swormstedt, 32 Ind. 87, 2 Am. Rep. 330.

Maryland.— Wyman *v.* Gray, 7 Harr. & J. 409.

Missouri.— McClellan *v.* Reynolds, 49 Mo. 312; Smith *v.* Alexander, 31 Mo. 193.

New Hampshire.— Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Hood *v.* Hallenbeck, 7 Hun 362.

The signers are only prima facie liable in such cases. Drake *v.* Flewellen, 33 Ala. 106; Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139; Fitch *v.* Lawton, 6 How. (Miss.) 371; Brockway *v.* Allen, 17 Wend. (N. Y.) 40.

44. *California.*— Sayre *v.* Nichols, 5 Cal. 487, 7 Cal. 535, 68 Am. Dec. 280.

Connecticut.— Witte *v.* Derby Fishing Co., 2 Conn. 260.

Massachusetts.— Slawson *v.* Loring, 5 Allen 340, 81 Am. Dec. 750; Fuller *v.* Hooper, 3 Gray 334; Tripp *v.* Swanzey Paper Co., 13 Pick. 291.

New York.— Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298 [*affirming* 40 Barb. 179]; Thompson *v.* Tioga R. Co., 36 Barb. 79; Safford *v.* Wyckoff, 1 Hill 11, 4 Hill 442.

England.— Forbes *v.* Marshall, 11 Exch. 166, 24 L. J. Exch. 305, 4 Wkly. Rep. 480.

45. Hall *v.* Crandall, 29 Cal. 467, 89 Am. Dec. 64; Hall *v.* Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75; Shaver *v.* Ocean Min. Co., 21 Cal. 45; Yowell *v.* Dodd, 3 Bush (Ky.) 581, 96 Am. Dec. 256; Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Whitney *v.* Stow, 111 Mass. 368; Shotwell *v.* McKown, 5 N. J. L. 828.

46. Bird *v.* Daggett, 97 Mass. 494; Draper *v.* Massachusetts Steam Heating Co., 5 Allen (Mass.) 338.

47. See *supra*, XII, E, 6, a, (I).

48. Hovey *v.* Magill, 2 Conn. 680.

49. Byles Bills, 37.

50. Sayre *v.* Nichols, 7 Cal. 535, 68 Am. Dec. 280; Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139; Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Gerber *v.* Stuart, 1 Mont. 172.

corporation; for "it is well settled that a man, contracting with another, cannot shield himself as agent, unless he give notice at the time that he is so, or it be known in some other way to the person with whom he deals." [51]

g. When Corporation Estopped to Set Up Informality in Execution. Upon a principle hereafter considered,[52] if the corporation receives the benefit of the transaction with full knowledge, it becomes estopped from setting up that the instrument was not drawn in conformity with its by-laws.[53]

h. Forms Helped Out by Adding Seal of Corporation. There are modern judicial holdings to the effect that, although the instrument does not in its body purport to be the promissory note of a corporation, and although the addition of descriptive words to the name of the person signing it may, under former theories, be rejected as surplusage, yet where the seal of the corporation is added thereto, the seal may be noticed for the purpose of showing the real intent of the instrument, especially where parol evidence shows it to have been affixed by the proper officers of the corporation. The reason being that to impress the proper seal of the corporation upon an instrument is in a sense to sign the corporate name to the instrument.[54]

i. Execution by Agent "For," "on Account," "in Behalf of" Company, Etc. Some doubt has been expressed upon the question whether a signing in the form of words contained in the above head-line, as "for A B, by C D," is a signing which binds the principal or the agent. The better opinion is that such a signing imports exactly what it says: That the signer affixes his signature intending to bind not himself, but the person for whom he professes to sign.[55] If therefore a promissory note contain a stipulation that it is "for," "on account of," or "in behalf of" the company, or words to the like effect, it will be construed as the note of the company, unless it contain other language excluding this interpretation.[56] When therefore an agent of a corporation executes an instrument in his own name, expressing that it is for the company, this will be a good execution by the company.[57] And it is sufficient within this rule that the words "for the company," or "on behalf of the company," are appended to the signature.[58] But of

51. Brockway *v.* Allen, 17 Wend. (N. Y.) 40, 43. See also McIlhenny Co. *v.* Blum, 68 Tex. 197, 4 S. W. 367; Seaber *v.* Hawkes, 5 M. & P. 549.

52. See *infra*, XV, C, 2, e.

53. St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544.

54. Scanlan *v.* Keith, 102 Ill. 634, 40 Am. Rep. 624 (parol evidence also admissible to show the incorporation of the company and the character of its business, for the purpose of making it appear that it was the note of the corporation); Means *v.* Swormstedt, 32 Ind. 87, 2 Am. Rep. 330; Guthrie *v.* Imbrie, 12 Oreg. 182, 6 Pac. 664, 53 Am. Rep. 331. Contrary to these holdings is a case already referred to where the queen's bench division refused to give any effect to the seal of a company on a promissory note, although it seems perfectly plain that the instrument was intended and understood as binding the company only. Dutton *v.* Marsh, L. R. 6 Q. B. 361, 40 L. J. Q. B. 175, 24 L. T. Rep. N. S. 470, 19 Wkly. Rep. 754.

55. Rice *v.* Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; Ballou *v.* Talbot, 16 Mass. 461, 8 Am. Dec. 146; Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160; Alexander *v.* Sizer, L. R. 4 Exch. 102, 38 L. J. Exch. 59, 20 L. T. Rep. N. S. 38; Deslandes *v.* Gregory, 2 E. & E. 602, 6 Jur. N. S. 651, 30 L. J. Q. B. 36, 2 L. T. Rep. N. S. 634, 8 Wkly. Rep. 585, 105 E. C. L. 602. See also Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101, where the subject is discussed by Gray, J.

56. *California.*— Haskell *v.* Cornish, 13 Cal. 45.

Maine.— Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521.

Massachusetts.— Bradlee *v.* Boston Glass Manufactory, 16 Pick. 347.

New Hampshire.— Dow *v.* Moore, 47 N. H. 419.

England.— Healey *v.* Story, 3 Exch. 3, 18 L. J. Exch. 8.

The contrary, decided in McCalla *v.* Rigg, 3 A. K. Marsh. (Ky.) 259, would seem to be without the support of other authority.

57. Northwestern Distilling Co. *v.* Brant, 69 Ill. 658, 18 Am. Rep. 631 (per Sheldon, J.); Mussey *v.* Scott, 7 Cush. (Mass.) 215, 54 Am. Dec. 719; Wilks *v.* Back, 2 East 142, 6 Rev. Rep. 409.

58. Winship *v.* Smith, 61 Me. 118; Sheridan *v.* Carpenter, 61 Me. 83; Atkins *v.* Brown, 59 Me. 90; Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101; Draper *v.* Massachusetts Steam Heating Co., 5 Allen (Mass.) 338; Ballou *v.* Talbot, 16 Mass. 461, 8 Am.

course the same words written in the body of the instrument will have the same effect as when appended to the signature.[59]

j. Notes Executed in Name of Corporation and Signed by Agent Officially. Notes in which the corporation is mentioned in the body of the instrument as the party promising to pay, which are signed by the agent officially, that is to say, for example, with the addition of his official designation after his signature, are generally held to be the obligation of the corporation, and not the personal obligation of the signer.[60]

k. Notes and Bills Made to Order of Treasurer, Cashier, Etc., Import Obligation Payable to Corporation Which May Maintain Action Thereon. A promissory note payable to a person described as the treasurer of a company which is named is a promise to pay to the company, and it may maintain an action thereon.[61] So a bill drawn in favor of a person described as "cashier" is drawn in favor of the bank of which he is cashier.[62]

l. Forms in Which Use of Words "Jointly and Severally" Are Held to Import Individual Liability. In many cases where the instrument is signed by more than one person the use of the words "jointly and severally," in the body of the instrument, is held to be decisive of the meaning of the instrument, and to import an individual liability on the part of the signers; although in some of the cases the form of language is such that but for the use of these words the instrument would import a liability on the part of the corporation merely.[63]

Dec. 146. *Contra*, Morell *v.* Codding, 4 Allen (Mass.) 403.

59. Chipman *v.* Foster, 119 Mass. 189; Lamson, etc., Mfg. Co. *v.* Russell, 112 Mass. 387; Simpson *v.* Garland, 72 Me. 40, 39 Am. Rep. 297; Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22.

Illustrations of the foregoing rule may be found in Simpson *v.* Garland, 72 Me. 40, 39 Am. Rep. 297; Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22 [the opinion of the majority of the court in this case is fortified by a remark of Crompton, J., in Lindus *v.* Melrose, 3 H. & N. 177, 178, 4 Jur. N. S. 488, 27 L. J. Exch. 326, 6 Wkly. Rep. 441]; Ballou *v.* Talbot, 16 Mass. 461, 8 Am. Dec. 146; Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160; Alexander *v.* Sizer, L. R. 4 Exch. 102, 38 L. J. Exch. 59, 20 L. T. Rep. N. S. 38; Allen *v.* Sea, etc., Assur. Co., 9 C. B. 574, 14 Jur. 870 note, 19 L. J. C. P. 305, 67 E. C. L. 574; Lindus *v.* Melrose, 2 H. & N. 293; Aggs *v.* Nicholson, 1 H. & N. 165, 25 L. J. Exch. 348, 4 Wkly. Rep. 776. See also the liberal construction adopted in Okell *v.* Charles, 34 L. T. Rep. N. S. 822. *Compare* Hall *v.* Smith, 1 B. & C. 407, 2 D. & R. 584, 1 L. J. K. B. O. S. 142, and *Ex p.* Clark, 9 Jur. 931, 15 L. J. Bankr. 3, 14 M. & W. 469, 1 Phil. 562, 19 Eng. Ch. 562, and Bank of British North America *v.* Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390. See to the contrary an idiotic decision where a note running "we, as trustees of the Summerfield M. E. Church, for and in behalf of said church, promise to pay," etc., which note was signed by five persons, adding the words after the signature of the list, "trustees Summerfield M. E. Church," was held not to bind the church and to bind the trustees only. Dennison *v.* Austin, 15 Wis. 334. See also Fredendall *v.* Taylor, 23 Wis. 538, 99 Am. Dec. 203, where the preceding case is cited.

60. Shaver *v.* Ocean Min. Co., 21 Cal. 45; Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Shotwell *v.* McKown, 5 N. J. L. 973. See also Yowell *v.* Dodd, 3 Bush (Ky.) 581, 96 Am. Dec. 256; Whitney *v.* Stow, 111 Mass. 368. *Compare* Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64; Hall *v.* Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75. For further discussion of plaintiff's remedy in cases like the foregoing see Lander *v.* Castro, 43 Cal. 497, where the principle of the decision is reaffirmed.

61. Vater *v.* Lewis, 36 Ind. 288, 10 Am. Rep. 29. *Compare* Meikel *v.* German Sav. Fund Soc., 16 Ind. 181; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89.

62. Barney *v.* Newcomb, 9 Cush. (Mass.) 46; Baldwin *v.* Newbury Bank, 1 Wall. (U. S.) 234, 17 L. ed. 534.

63. Healey *v.* Story, 3 Exch. 3, 18 L. J. Exch. 8. See to the same effect Haskell *v.* Cornish, 13 Cal. 45; Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347 (notwithstanding the words "promise to pay," etc., "for the Boston Glass Manufactory," plaintiff in action on the note against the company nonsuited); Dutton *v.* Marsh, L. R. 6 Q. B. 361, 40 L. J. Q. B. 175, 24 L. T. Rep. N. S. 470, 19 Wkly. Rep. 754; Maclae *v.* Sutherland, 2 C. L. R. 1320, 3 E. & B. 1, 37, 18 Jur. 942, 23 L. J. Q. B. 229, 2 Wkly. Rep. 161, 77 E. C. L. 1; Forbes *v.* Marshall, 11 Exch. 166, 24 L. J. Exch. 305, 4 Wkly. Rep. 480; Penkivil *v.* Connell, 5 Exch. 381, 19 L. J. Exch. 305 (although the note ran "for ourselves and other shareholders of the said Company, jointly and severally promise to pay . . for value received on account of the Company"); Bottomley *v.*

7. Acceptance by Corporations — a. Acceptance by Corporate Agent in His Own Name. The rule as already considered, relating to the execution of written contracts by corporations, whereby an agent who merely signs his own name with the addition of a word designating his agency binds himself personally without binding the corporation applies to acceptances.[64] This rule is adhered to in some jurisdictions for the sake of precision in the use of language and of securing that certainty in negotiable paper which is so necessary to commercial transactions.[65] But the propriety of a rule of law which is opposed to ordinary business habits, and which leads to constant injustice, may be questioned. The better opinion is that which lets in parol evidence to explain an acceptance which is ambiguous on

Fisher, 1 H. & C. 211, 8 Jur. N. S. 895, 31 L. J. Exch. 417, 6 L. T. Rep. N. S. 688, 10 Wkly. Rep. 669; Lindus *v.* Melrose, 2 H. & N. 293, 3 H. & N. 177, 4 Jur. N. S. 488, 27 L. J. Exch. 326, 6 Wkly. Rep. 441; Aggs *v.* Nicholson, 1 H. & N. 165, 25 L. J. Exch. 348, 4 Wkly. Rep. 776. See also Trask *v.* Roberts, 1 B. Mon. (Ky.) 201; and *compare* Rice *v.* Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; Weare *v.* Gove, 44 N. H. 196; Savage *v.* Rix, 9 N. H. 263.

For forms of notes held to import a liability on the part of the corporation see the following cases:

California.— Farmers', etc., Bank *v.* Colby, 64 Cal. 352, 28 Pac. 118.

Missouri.— Klostermann *v.* Loos, 58 Mo. 290 (in form the promise of the trustees of a church and signed by the trustees, but held to express sufficiently the fact that it was signed by them as agents); McClellan *v.* Reynolds, 49 Mo. 312 (form of note which did not import the individual contract of a school director, and parol evidence properly admitted to show that he signed it in his official capacity); Musser *v.* Johnson, 42 Mo. 74, 97 Am. Dec. 316 (note signed by Isaac H. Sturgeon, president of a railroad company, and countersigned by the secretary of the company held to be the act of the company, and competent to remove the doubt by parol evidence).

New Hampshire.— Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Hodges *v.* Shuler, 22 N. Y. 114, instrument held to be the promissory note of a railroad corporation and one transferring it by indorsement liable as indorser.

Texas.— McIllhenny Co. *v.* Blum, 68 Tex. 197, 4 S. W. 367, conclusion helped out by parol evidence that the signer was the agent of the corporation and accustomed to sign its obligations in that way.

Form of check and draft importing corporate liability.— Carpenter *v.* Farnsworth, 106 Mass. 561, 562, 8 Am. Rep. 360.

Forms of promissory notes importing a personal liability of the signer.— Burlingame *v.* Brewster, 79 Ill. 515, 22 Am. Rep. 177 ("I promise to pay," signed by three persons with the addition, "as trustees of First Universalist Society," but descriptive words torn off by the payee, which released the signers); Powers *v.* Briggs, 79 Ill. 493, 22 Am. Rep. 175 ("We, the trustees of the Seventh Presbyterian Church, promise," etc., signed by four names with the addition of the word "trustees," and notwithstanding evidence that the defendants were trustees of said church, and that the note was given in part payment for a church organ); Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409 (I promise to pay, signed by a man with the addition of "Treas. St. Paul's Parish"); Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612 (I promise to pay, signed by a person with the addition of "agent"); Titus *v.* Kyle, 10 Ohio St. 444 ("We or either of us, as directors, . . promise to pay"). See also the following cases:

Maine.— Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409; Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68; Fogg *v.* Virgin, 19 Me. 352, 36 Am. Dec. 757.

Massachusetts.— Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101; Morell *v.* Codding, 4 Allen 403.

Mississippi.— Leach *v.* Blow, 8 Sm. & M. 221.

New Hampshire.— Savage *v.* Rix, 9 N. H. 263.

New York.— De Witt *v.* Walton, 9 N. Y. 571; Moss *v.* Livingston, 4 N. Y. 208; Barker *v.* Mechanics' F. Ins. Co., 3 Wend. 94, 20 Am. Dec. 664; Hills *v.* Bannister, 8 Cow. 31.

Compare Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347; Leadbitter *v.* Farrow, 5 M. & S. 345, 17 Rev. Rep. 345.

64. Thus the drawee of a bill of exchange drawn by the Kanawha & Ohio Coal Company, was described as "John A. Robinson, Agent," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co." It was held that the acceptance was a personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant intended to bind the drawer as his principal, and that this was known to the plaintiff when it acquired the paper. Robinson *v.* Kanawha Valley Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829.

65. Barker *v.* Mechanics' F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Thomas *v.* Bishop, 2 Str. 955.

its face.[66] This conclusion would seem to be unavoidably sound, in view of the rule of law that a bill of exchange may be accepted orally, unless there is a statute requiring its acceptance to be in writing;[67] for there can certainly be no great precision or certainty in an oral acceptance.

b. Acceptance by Bank Cashier. By a general custom peculiar to banks and to banking, which may be said to have the force of law, the cashier of a bank accepts paper drawn on it or certifies checks drawn against funds in its hands by merely using his own name, thus, C. H. Smith, Cashier.[68]

c. When Accepter of Commercial Paper Personally Bound. The question under this head is who is the real drawee, and in determining this question the rule is to hold the person on whom the bill is drawn, and who accepts it, to be bound, rejecting any description which he adds to his signature, indicating an agency. Thus, a draft drawn upon "E. T. Loring, Agent," and accepted by him in the same form, was held to bind the accepter personally, although the draft was headed, "Officer of Portage Lake Manufacturing Company," and below was printed, "E. T. Loring, Agent," in very conspicuous type.[69] The same was true in the case of a bill addressed to "John R. Livingston, Jr., President Rosendale M'ng Co.," and accepted in the same form.[70] So also of a draft accepted in this form: "Accepted, John P. Lord, Treasurer Neuvitas M. Co."[71]

d. When Accepter of Commercial Paper Not Personally Liable. But the authority of other cases in this country is directly contrary to the foregoing. Thus a bill addressed to "Noyes Darling, Agent of the Commission Company," and accepted in the form, "Noyes Darling, Agent, C. C.," has been held to be binding upon the company, although the agent received and applied the money to his own use without the knowledge or consent of his principal.[72]

66. Gallagher *v.* Black, 44 Me. 99; Shackelford *v.* Hooker, 54 Miss. 716; Lamon *v.* French, 25 Wis. 37.

67. Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18; Dunavan *v.* Flynn, 118 Mass. 537; Spaulding *v.* Andrews, 48 Pa. St. 411. If a bill with a parol acceptance comes into the hands of a party who does not know of the acceptance at the time, he may nevertheless avail himself of it afterward, when it does come to his knowledge. Spaulding *v.* Andrews, 48 Pa. St. 411. Even the validity of a parol promise to accept an existing or non-existing bill of exchange has been maintained. Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510. But see Bank of Ireland *v.* Archer, 17 Jur. 379, 12 L. J. Exch. 353, 11 M. & W. 383. As to parol promises to accept a bill thereafter to be drawn see Flora First Nat. Bank *v.* Clark, 61 Md. 400, 48 Am. Rep. 114; Franklin Bank *v.* Lynch, 52 Md. 270, 36 Am. Rep. 375; Cook *v.* Baldwin, 120 Mass. 317, 21 Am. Rep. 517; Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Bissell *v.* Lewis, 4 Mich. 450; Coolidge *v.* Payson, 2 Wheat. (U. S.) 66, 4 L. ed. 185; Cassel *v.* Dows, 5 Fed. Cas. No. 2,502, 1 Blatchf. 335.

68. Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008. See also Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457; Robinson *v.* Kanawha Valley Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. St. Rep. 829. See also BANKS AND BANKING.

69. Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750. See also Tassey *v.* Church, 4 Watts & S. (Pa.) 346.

70. Moss *v.* Livingston, 4 N. Y. 208.

71. Bruce *v.* Lord, 1 Hilt. (N. Y.) 247.

Liability only prima facie.— But this liability, according to the rule prevailing in similar cases in New York and some other states, is only *prima facie*. In an action upon such acceptance the accepter may discharge himself by showing that he accepted as agent, and by authority of the company, and that the plaintiff was aware of the fact at the time of taking the draft. This rule is to be commended. By this means the strictness of legal forms is maintained, while the hardship which would frequently result from the technical construction of the language used is tempered. See Lazarus *v.* Shearer, 2 Ala. 718. For further illustration see Walker *v.* State Bank, 9 N. Y. 582; Nicholls *v.* Diamond, 2 C. L. R. 305, 9 Exch. 154, 23 L. J. Exch. 1, 2 Wkly. Rep. 12, 24 Eng. L. & Eq. 403; Mare *v.* Charles, 5 E. & B. 978, 2 Jur. N. S. 234, 25 L. J. Q. B. 119, 4 Wkly. Rep. 267, 85 E. C. L. 978; Thomas *v.* Bishop, 2 Str. 955.

72. Shelton *v.* Darling, 2 Conn. 435. To the same effect see Amison *v.* Ewing, 2 Coldw. (Tenn.) 366. In this case one order was addressed to "John O. Ewing," and two others to "John O. Ewing, Treasurer of the N. & N. W. Railroad Company." All three of the orders were accepted in the following form: "Accepted, payable on return of the March estimates, John O. Ewing, Treas.," and were held not binding upon Ewing personally.

e. Acceptance by President. Circumstances under which a draft drawn upon the president of a corporation personally, and accepted by him, using the words, "payable at First National Bank Milwaukee, Grant Carriage Company, E. W. Grant, President," estopped the corporation and estopped its receiver after its insolvency, are disclosed in the case cited in the margin.[73]

8. Indorsement by Corporations[74] — a. Indorsements by Cashiers of Banks. By a general custom of banking already referred to an indorsement is made by the cashier of a bank by merely signing his name with the addition of the word "cashier" or its abbreviation; and such an indorsement will bind the bank.[75] It will bind the bank in favor of a *bona fide* purchaser for value, although the indorsment may have been merely for an accommodation,[76] the rule being that such an indorsement made by a cashier is *prima facie* evidence of his authority, which dispenses with the necessity of going behind the face of the instrument to discover a precedent authorization.[77]

b. Indorsements to Bank Cashiers Are Indorsements to Bank. So the indorsement of a note to the cashier of a moneyed corporation, by adding the word "cashier" to his name in the indorsement, is a transfer to the corporation, if such be the purpose of the transaction.[78]

F. Parol Contracts by Corporations — 1. Statement of General Doctrine by Supreme Court of the United States. "Wherever a corporation is acting within the scope of the legitimate purpose of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie."[79]

2. Corporations Bound by Parol Engagements of Their Authorized Agents Whenever Individual Would Be so Bound. The meaning is that corporations are bound by the parol engagements of their authorized agents, acting within the scope of the powers of the corporation, whenever an individual would be bound by the engagement of his authorized agent. For instance a valid agreement by the purchaser of land to pay therefor a greater consideration than that expressed in the deed may in the case of an individual be made and proved by parol;[80] and so it may in case of a corporation making such a contract through its authorized agent, especially where the corporation takes possession of the land and afterward sells it.[81]

73. McLaren *v.* Milwaukee First Nat. Bank, 76 Wis. 259, 45 N. W. 223.

74. When corporation liable over to accommodation indorser.— See Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

75. *Maine.*— Cooper *v.* Curtis, 30 Me. 488.

Massachusetts.— Folger *v.* Chase, 18 Pick. 63; Northampton Bank *v.* Pepoon, 11 Mass. 288.

New York.— Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 35 N. Y. 505; State Bank *v.* Muskingum Branch Ohio State Bank, 29 N. Y. 619; Farmers', etc., Bank *v.* Butchers', etc., Bank, 14 N. Y. 623, 16 N. Y. 125, 69 Am. Dec. 678; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Robb *v.* Ross County Bank, 41 Barb. 586; Watervliet Bank *v.* White, 1 Den. 608. See also Claflin *v.* Farmers', etc., Bank, 36 Barb. 540.

Pennsylvania.— Bissell *v.* Franklin First Nat. Bank, 69 Pa. St. 415.

Wisconsin.— Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120; Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

United States.— Chillicothe Branch Ohio State Bank *v.* Fox, 5 Fed. Cas. No. 2,683, 3 Blatchf. 431.

76. Houghton *v.* Elkhorn First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107, opinion by Cole, J.

77. Cooper *v.* Curtis, 30 Me. 488; Farrar *v.* Gilman, 19 Me. 440, 36 Am. Dec. 766; Burnham *v.* Webster, 19 Me. 232; Folger *v.* Chase, 18 Pick. (Mass.) 63.

78. Watervliet Bank *v.* White, 1 Den. (N. Y.) 608.

79. Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 306, 3 L. ed. 351, per Story, J. See also Frankfort Bridge Co. *v.* Frankfort, 18 B. Mon. (Ky.) 41; Blanchard *v.* Maysville, etc., Turnpike Co., 1 Dana (Ky.) 86; Waller *v.* Commonwealth Bank, 3 J. J. Marsh. (Ky.) 201; Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 7 Am. Dec. 194; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222.

80. Belden *v.* Seymour, 8 Conn. 304, 21 Am. Dec. 661; De Forest *v.* Holum, 38 Wis. 516; Horner *v.* Chicago, etc., R. Co., 38 Wis. 165; Hannan *v.* Oxley, 23 Wis. 519; Villers *v.* Beamont, 2 Dyer 146*a*; Washburn Real Prop. (3d ed.) 327.

81. Kickland *v.* Menasha Wooden-Ware Co., 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831.

3. What Corporate Acts Provable by Parol Evidence — a. General Statement of Doctrine. The settled law is now believed to be that the acts of corporations are provable by parol in all cases where under like circumstances the acts of individuals would be so provable, unless a record of the particular transaction is required to be kept by the governing statute or by-laws. In such cases if there be no evidence on the records of the corporation, the act in question may be proved by the testimony of witnesses.[82]

b. Fact That Written Order Was Rescinded Provable by Parol. Thus parol evidence is admissible to prove that a written order entered among the proceedings of the board of directors of a bank was rescinded and annulled by a subsequent verbal order of which no minute in writing was made. The parol proof of such verbal order need not establish the fact that the order was rescinded by the board of directors, at a regular meeting of the board at the ordinary place of meeting, consisting of the president, and not less than the number of directors required by the charter for transacting the ordinary business of the bank; nor need such parol testimony show the day and year on which the order had been rescinded.[83]

c. Corporation When Bound by Verbal Order of Majority of Directors. The corporation will be bound by any verbal order or direction in which a majority of the directors concur in relation to any business deputed to them.[84]

d. This Doctrine Illustrated by Case of Parol Contracts of Insurance. A striking illustration of the doctrine under consideration is found in those decisions which hold that a corporation engaged in the business of insurance may make a valid contract of insurance by parol,[85] unless prohibited by its charter or other valid governing instrument.[86]

e. Written Appointment of Corporate Officers Not Necessary, but Appointment May Be Proved by Parol Evidence and by Circumstances — (i) *In General.* It is a part of this doctrine that an appointment of a ministerial officer of a corporation need not be proved by a writing, but may be shown by parol and evidence of circumstances; so that if a person acts notoriously as such an officer and is recognized as such by the directors, a regular appointment and

82. *California.*— Carey *v.* Philadelphia, etc., Petroleum Co., 33 Cal. 694; Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

Connecticut.— Goodwin *v.* U. S. Annuity, etc., Ins. Co., 24 Conn. 591. *Compare* Waterbury *v.* Clark, 4 Day 198.

Illinois.— Board of Education *v.* Greenbaum, 39 Ill. 609.

Indiana.— Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460.

Kentucky.— Covington *v.* Covington, etc., Bridge Co., 10 Bush 69.

Maryland.— Union Bank *v.* Ridgeley, 1 Harr. & G. 324.

Massachusetts.— Russell *v.* McLellan, 14 Pick. 63; Dedham Bank *v.* Chickering, 3 Pick. 335; Apthorp *v.* North, 14 Mass. 167.

Mississippi.— Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143; Petrie *v.* Wright, 6 Sm. & M. 647.

Missouri.— Southern Hotel Co. *v.* Newman, 30 Mo. 118.

New Hampshire.— Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

New York.— Moss *v.* Averell, 10 N. Y. 449; Lyons Bank *v.* Demmon, Lalor 398; St. Mary's Church *v.* Cagger, 6 Barb. 576.

Pennsylvania.—Magill *v.* Kauffman, 4 Serg. & R. 317, 8 Am. Dec. 713.

Tennessee.—Smiley *v.* Chattanooga, 6 Heisk. 604.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552.

83. Whittington *v.* Farmers' Bank, 5 Harr. & J. (Md.) 489.

84. Stamford Bank *v.* Benedict, 15 Conn. 437; Cram *v.* Bangor House Proprietary, 12 Me. 354. But *compare supra*, IX, E, 1, a *et seq.*

85. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711.

Massachusetts.— Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray 204.

Missouri.— Henning *v.* U. S. Insurance Co., 47 Mo. 425, 4 Am. Rep. 332.

New York.—First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305.

United States.— Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. 318, 15 L. ed. 636.

86. Henning *v.* U. S. Insurance Co., 47 Mo. 425, 4 Am. Rep. 332. *Contra*, that there can be no valid parol contract of insurance see Platho *v.* Merchants', etc., Ins. Co., 38 Mo. 248; Cockerill *v.* Cincinnati Mut. Ins. Co., 16 Ohio 148; Smith *v.* Odlin, 4 Yeates (Pa.) 468.

qualification will be presumed, and his acts, done within the scope of his agency, will bind the corporation, although no written evidence of his appointment be adduced.[87]

(II) *Approval of Bond of Corporate Officer May Be Shown by Parol.* In the absence of contrary provisions in the charter, in the governing statute, or in the by-laws, the fact of the approval of the bond of a corporate officer may be shown by presumptive as well as by written evidence.[88]

(III) *Both Appointment and Authorization Provable by Parol* — (A) *In General.* Unless prohibited by its charter or by its governing statute a corporation may without any writing or record appoint agents and empower them to do all acts necessary or expedient to be done in the ordinary course of its business; and consequently such appointment and authorization may be proved by parol.[89]

(B) *May Confer Authority by Parol to Draw Bills of Exchange.* Thus unless so prohibited the directors of a corporation may confer authority upon their agent to draw and execute bills of exchange on behalf of the company, and

87. *Alabama.*— Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221; Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657; Bates *v.* State Bank, 2 Ala. 451.

California.— Allen *v.* Citizens' Steam Nav. Co., 22 Cal. 28.

Connecticut.— New Haven Sav. Bank *v.* Davis, 8 Conn. 191.

Delaware.— Wilson *v.* Rockland Mfg. Co., 2 Harr. 67.

Illinois.— Board of Education *v.* Greenbaum, 39 Ill. 609; Reed *v.* Bradley, 17 Ill. 321.

Indiana.— Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460.

Kentucky.— Covington *v.* Covington, etc., Bridge Co., 10 Bush 69; Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481; Lee *v.* Flemingsburg, 7 Dana 28; Garrison *v.* Combs, 7 J. J. Marsh. 84, 22 Am. Dec. 120.

Louisiana.— Marlatt *v.* Levee Steam Cotton Press Co., 10 La. 583, 29 Am. Dec. 468.

Maine.— Brown *v.* Donnell, 49 Me. 421, 77 Am. Dec. 266; Trundy *v.* Farrar, 32 Me. 225; Lime Rock Bank *v.* Macomber, 29 Me. 564; Badger *v.* Cumberland Bank, 26 Me. 428; Methodist Chapel Corp. *v.* Herrick, 25 Me. 354; Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674; Maine Stage Co. *v.* Longley, 14 Me. 444; Trott *v.* Warren, 11 Me. 227; Abbot *v.* Hermon Third School Dist., 7 Me. 118.

Maryland.— Northern Cent. R. Co. *v.* Bastian, 15 Md. 494; Kennedy *v.* Baltimore Ins. Co., 3 Harr. & J. 367, 6 Am. Dec. 499; Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

Massachusetts.— Topping *v.* Bickford, 4 Allen 120; Hutchins *v.* Byrnes, 9 Gray 367; Middlesex Husbandmen, etc., Soc. *v.* Davis, 3 Metc. 133; Amherst Bank *v.* Root, 2 Metc. 522; Dedham Bank *v.* Chickering, 3 Pick. 335; Monumoi Great-Beach *v.* Rogers, 1 Mass. 159.

Michigan.— Detroit *v.* Jackson, 1 Dougl. 106.

Missouri.— Williams *v.* Christian Female College, 29 Mo. 250, 77 Am. Dec. 569.

Nebraska.— Columbus Co. *v.* Hurford, 1 Nebr. 146.

New Hampshire.— Nicholas *v.* Oliver, 36 N. H. 218; Goodwin *v.* Union Screw Co., 34 N. H. 378.

New Jersey.— State *v.* Morris, etc., R. Co., 23 N. J. L. 360.

New York.— Peterson *v.* New York, 17 N. Y. 449; Fister *v.* La Rue, 15 Barb. 323; Jackson *v.* New York Cent. R. Co., 2 Thomps. & C. 653; Lyons Bank *v.* Demmon, Lalor 398; Commercial Bank *v.* Kortright, 22 Wend. 348, 34 Am. Dec. 317; Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. 256.

Pennsylvania.— Com. *v.* Ohio, etc., R. Co., 1 Grant 329; Wolf *v.* Goddard, 9 Watts 544; Barrington *v.* Washington Bank, 14 Serg. & R. 405; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

South Carolina.— Planters' Bank *v.* Bivingsville Cotton Mfg. Co., 10 Rich. 95.

United States.— Eureka Clothes Wringing Mach. Co. *v.* Bailey Washing, etc., Co., 11 Wall. 488, 20 L. ed. 209; U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552; Owings *v.* Speed, 5 Wheat. 420, 5 L. ed. 124; Hooe *v.* Alexandria, 12 Fed. Cas. No. 6,666, 1 Cranch C. C. 90.

88. U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552. See also Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335; Apthorp *v.* North, 14 Mass. 167. Those interested in the history of the development of the law on this question will find an exhaustive examination of it in the court of appeals of Maryland, by Buchanan, C. J., in Union Bank *v.* Ridgley, 1 Harr. & G. (Md.) 324. That the omission of a corporate officer to qualify by taking the oath required by the act of incorporation will not affect the validity of his acts or release the sureties on his bond see Hastings *v.* Blue Hill Turnpike Corp., 9 Pick. (Mass.) 80; Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1. And see Panton Turnpike Co. *v.* Bishop, 11 Vt. 198. See further as to the acts of *de facto* officers of corporations *supra*, IX, B, 1 *et seq.*

89. See *supra*, X, D, 1, f, (I) *et seq.*

no action in writing on the part of the board is necessary to vest the agent with such authority.[90]

G. Implied Contracts of Corporations — 1. Corporation Subject to Same Implications as Natural Persons — a. In General — (i) *Rule Stated.* The modern doctrine is that corporations (which can act only through agents, in respect of transactions within their granted powers, and in the absence of express restriction in their charters or governing statutes and always excluding municipal or governmental corporations) incur the same liabilities and are subject to the same implications in consequence of the acts of their agents as arise in the case of natural persons; that the law will imply a duty or obligation on the part of a corporation, subject to the above conditions, whenever it would upon similar facts raise such an implication against an individual; and that, in the absence of formal corporate action, whether evidenced by a vote of the directors duly recorded or by an instrument in writing sealed or unsealed.[91]

(ii) *Assumpsit Lies on Implied Contracts, Recovery Upon Quantum Meruit* — (a) *In General.* It follows that at common law an action of assumpsit will lie against a corporation upon an implied contract and that a recovery may be had upon a *quantum meruit* as in case of an individual.[92]

(b) *Assumpsit For Use and Occupation.* Thus if a railroad corporation occupies land after its agent has been notified by the owner that rent will be charged it is liable in assumpsit for use and occupation.[93]

(c) *Assumpsit For Value of Services* — (1) In General. So a person who renders services to a corporation under an informal contract which could not be enforced so long as it remained executory may recover the reasonable value of his services upon a *quantum meruit*, upon the theory that the corporation having availed itself of the services is bound in conscience to pay to the party rendering them what they were worth to it.[94] So it has been held that where labor has been performed for a corporation with the knowledge of the directors and general managers, and without any dissent on their part, the corporation will be bound to pay a *quantum meruit*, in the absence of any express contract under which the labor was performed.[95]

90. Preston *v.* Missouri, etc., Lead Co., 51 Mo. 43. See also Stamford Bank *v.* Benedict, 15 Conn. 437; Topping *v.* Bickford, 4 Allen (Mass.) 120; Christian University *v.* Jordan, 29 Mo. 68.

91. *Illinois.*— New Athens *v.* Thomas, 82 Ill. 259; Board of Education *v.* Greenbaum, 39 Ill. 609.

Indiana.— Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Iowa.— Merrick *v.* Burlington, etc., Plank Road Co., 11 Iowa 74.

Maine.— Abbot *v.* Hermon Third School Dist., 7 Me. 118.

Maryland.— Kennedy *v.* Baltimore Ins. Co., 3 Harr. & J. 367, 6 Am. Dec. 499.

Massachusetts.— Smith *v.* Lowell First Cong. Meetinghouse, 8 Pick. 178; Canal Bridge *v.* Gordon, 1 Pick. 296, 11 Am. Dec. 170.

Minnesota.—Deane *v.* Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321; Rogers *v.* Hastings, etc., R. Co., 22 Minn. 25.

Mississippi.—Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143; Petrie *v.* Wright, 6 Sm. & M. 647.

Missouri.— Buckley *v.* Briggs, 30 Mo. 452.

New Jersey.— Antiopeda Baptist Church *v.* Mulford, 8 N. J. L. 182.

New York.— Rider *v.* Union India Rubber Co., 5 Bosw. 85; Dunn *v.* St. Andrew's Church, 14 Johns. 118. Where by its charter a corporation was required to publish the accounts of its treasurer it was held liable for the expense of such publication. Tucker *v.* Rochester, 7 Wend. 254.

Pennsylvania.—McMasters *v.* Reed, 1 Grant 36; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Texas.— San Antonio *v.* Lewis, 9 Tex. 69.

Vermont.— Hall *v.* Vermont, etc., R. Co., 28 Vt. 401; Gassett *v.* Andover, 21 Vt. 342; Sheldon *v.* Fairfax, 21 Vt. 102; Stone *v.* East Berkshire Cong. Soc., 14 Vt. 186.

United States.— Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

See also *supra*, X, D, 1, b, (i) *et seq.*

92. Barcus *v.* Hannibal, etc., Plankroad Co., 26 Mo. 102.

93. Illinois Cent. R. Co. *v.* Thompson, 116 Ill. 159, 5 N. E. 117.

That the corporation must first be put in default before it will be liable on implied contract see Seagraves *v.* Alton, 13 Ill. 366.

94. Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Hall *v.* Vermont, etc., R. Co., 28 Vt. 401; Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

95. Goodwin *v.* Union Screw Co., 34 N. H. 378.

(2) Action Supported by Circumstantial Evidence. In such a case the action for the *quantum meruit* will be supported by proof of circumstances from which a promise to pay might ordinarily be inferred in an action against a natural person.[96] In many cases the application of the principle is nothing more than the proof, by circumstantial evidence, of a contract on the part of a corporation; and the evidence must be such as fairly to raise the inference that the parties intended that the rendition of the services should not be gratuitous, but that the corporation should make payment for them; or at least that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them.[97]

(3) Or by Proof of Ratification. In many such cases the right of action to recover the value of services will be supported on the ground of ratification, and it will not therefore be necessary to show a precedent contract. "Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract." [98]

b. Implied Contract to Repay Money Advanced to Pay Corporate Debts. Thus a mining corporation has been held liable to its foreman for moneys advanced to pay corporate debts, where, although there was no precedent request for him to make the advance, there was an acquiescence with full knowledge,[99] which on principles elsewhere explained would constitute a ratification.[1]

c. Contract Implied Where Statute Requires It to Be in Writing. So even where there is a statute providing that no contract shall be binding upon a corporation unless made in writing[2] this, according to one view, does not prevent a corporation from being held liable, as on an implied promise, where benefits or services have been given or rendered to it, on the oral request of its officers, and the company has accepted and had the benefit of them.[3]

d. Rule Validates Informal Contracts After They Have Been Executed. And in the same line of thought it has been reasoned that when a contract is executory a corporation cannot be held bound by it, unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it as well as an implied ratification of the authority of the agent who contracted.[4]

e. Rule Requires That Corporate Vote Shall Be Sometimes Presumed. The courts go further and in aid of justice, in cases where a corporate vote is strictly necessary to the validity of a contract, such a vote will often be presumed.[5]

2. When Contract to Pay For Services or Property Will Be Implied on Part of Corporation in Favor of Director or Officer. An obligation to pay for property or services may be implied on the part of a corporation in favor of a director or officer of the corporation, although it is conceded that the law will scrutinize

96. Barstow *v.* City R. Co., 42 Cal. 465.

97. Pew *v.* Gloucester First Nat. Bank, 130 Mass. 391 [*quoted* with approval in Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608]. A vote of the directors that a committee be appointed to increase the stock subscriptions, with such compensation as the board shall deem proper, not to exceed one per cent, has been held to raise a promise by the corporation to pay a reasonable compensation, within the limit, for labor and money expended by that committee for the company's benefit. Hall *v.* Vermont, etc., R. Co., 28 Vt. 401.

98. Fister *v.* La Rue, 15 Barb. (N. Y.) 323, 324 [*quoted* with approval in Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623]. See also *infra*, XV, C, 2, e.

99. Martin *v.* Victor Mill, etc., Co., 19 Nev. 180, 8 Pac. 161.

1. See *infra*, XV, C, 2, a *et seq.*

2. See *supra*, XII, B, 2, a *et seq.*

3. Foulke *v.* San Diego, etc., R. Co., 51 Cal. 365.

4. San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453.

5. Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180 [*quoted* with approval in Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623]. See also U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552.

jealously a claim of this kind.[6] Thus it has been held that a promise on the part of a railway company may be implied to pay the reasonable value of services rendered by a director, as land commissioner and attorney, outside of his duties as director.[7] So it has been held that where a corporation avails itself of the use of letters-patent for an invention owned by one of its directors and officers, with his consent, he is not precluded from recovering compensation therefor, as upon an implied contract.[8]

3. CONTRACT CANNOT BE IMPLIED WHERE CORPORATION HAD NO POWER TO MAKE EXPRESS CONTRACT. A limitation of the foregoing doctrine is that as in the case of a natural person a contract on the part of a corporation cannot be implied where the corporation had no power to make an express contract to the same effect in a formal manner.[9]

4. CONTRACT CANNOT BE IMPLIED CONTRARY TO EXPRESS AGREEMENT. Another limitation of the doctrine is that as in case of natural persons no contract can be implied contrary to the express agreement of the parties.[10]

5. CONTRACT CANNOT BE IMPLIED IN FAVOR OF CORPORATION AGAINST STATE. Moreover it has been said that no contract can arise by implication between the state and a corporation.[11] But this was said with reference to the principles which should obtain in the construction of grants of franchises to corporations; and it was merely intended to mean that where the instrument embodying the grant is doubtful nothing is implied in favor of the corporation and against the public.[12]

H. Manner of Executing Written Instruments so as to Charge Corporation and Discharge Signers, and Vice Versa — 1. GENERALLY. In the interpretation of written obligations defectively executed by the officers and agents of corporations the courts have in many cases been greatly perplexed to determine, as a question of interpretation, whether the intention of the parties was to bind the corporation or to bind the signers personally; and in some cases, as we shall soon see, parol evidence has been let in to solve the difficulty. Every written instrument intended to bind a corporation ought to name the corporation as the obligor, in other words every contract of a corporation ought to be drawn in the name of the corporation, although there are some well-established exceptions to this rule, founded upon custom as in the case of indorsements by the cashiers of banks.[13]

2. GENERAL GROUNDS OF PERSONAL LIABILITY OF AGENT IN EXECUTING CONTRACTS FOR CORPORATION. These grounds do not differ from the grounds on which agents of individual principals are held personally liable upon contracts which are executed in behalf of their principal, although not so in form. Those grounds are: (1) That the agent has failed to disclose his principal at the time of making the contract, thereby inviting and receiving credit personally from the other contracting party.[14] (2) Where the contract is in writing, that its legal construction imports

6. Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608. See *supra*, IX, Q, 5.

7. Rogers *v.* Hastings, etc., R. Co., 22 Minn. 25.

8. Deane *v.* Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321. See also Rider *v.* Union India Rubber Co., 5 Bosw. (N. Y.) 85. *Compare* McKeever *v.* U. S., 14 Ct. Cl. 396.

9. New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562; Hall *v.* Vermont, etc., R. Co., 28 Vt. 401.

10. Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

11. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

12. It will not escape attention that the fundamental theory of the case of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629, was that there was an implied contract on the part of the grantor not to revoke the grant of corporate franchises which he had made.

13. It will be recalled for example that the circulating notes of the Bank of England are the promises of its cashier in the first person, thus, "I, Frank May, cashier." On the other hand the treasury notes and other paper currency of the United States is in form as it should be, "the promise of the United States of America."

14. 2 Kent Comm. 631; Story Agency, §§ 266, 277; 4 Thompson Corp. § 5028; Wharton Agency, §§ 490, 496.

It is to be kept in mind that the doctrine of undisclosed principal does not apply to

a personal liability on the part of the agent, although the other contracting party knows that it is not the contract of the agent but that of his principal, since otherwise parol evidence would be let in to vary the terms of a written contract not ambiguous on its face.[15] (3) Whenever a person undertakes to do an act as agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will in some form of action be personally responsible to the person with whom he is dealing, for or on account of the principal. This liability is said to arise under three states of fact: (*a*) Where the agent has made a fraudulent representation; (*b*) where the agent has no authority and knows it, but nevertheless undertakes to act for the principal, although he intends no fraud; and (*c*) where, acting as agent under a *bona fide* belief that he has authority, while in point of fact he has no authority, he therefore acts under an innocent mistake.[16]

3. When Neither Corporation Nor Agent Bound. There is another class of cases where the intent of the parties to the instrument was to bind the corporation, and where all of the parties acted under the common mistake that the corporation would be bound by the instrument. Thus if a school director in his official character signs a promissory note for the purpose of raising money to build a school-house, under the impression, participated in by the payee of the note, that the law allows a subdistrict to borrow money for such purpose, whereas such is not the fact, the director who signs the note will not render himself personally liable, although the district is not liable.[17]

4. Manner of Executing Sealed Instruments so as to Bind Corporation and Exonerate Agent — a. Such Instruments Must Be Executed in Name of Corporation — (i) *Rule Stated.* It is a long-established rule of conveyancing that deeds executed by an attorney or agent must be executed in the name of the constituent.[18]

negotiable paper, in which case no person can be charged who is not named in the instrument. Beckham *v.* Drake, 9 M. & W. 79. Thus it has been held that a corporation may adopt, for the purpose of signing its commercial paper, the name of a commercial firm, so as to bind the corporation by a note so signed, as where the name signed was Horace Gray and Company, and the corporation held to be bound was the Boston Iron Company. Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59. See also Rowe *v.* Table Mountain Water Co., 10 Cal. 441; Medway Cotton Manufactory *v.* Adams, 10 Mass. 360; Mead *v.* Keeler, 24 Barb. (N. Y.) 20; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27.

15. Evans Agency 304; Story Agency, § 270; Wharton Agency, § 284 *et seq.*

16. For authority in general support of this doctrine see Evans Agency 302; Story Agency, § 264; Wharton Agency, § 524 *et seq.* See also 4 Thompson Corp. p. 3751, for an extended note on this subject.

The doctrine that the agent impliedly contracts as to the existence of his authority and that for a breach of his implied warranty he may be held liable is now the settled law of England (Godwin *v.* Francis, L. R. 5 C. P. 295, 39 L. J. C. P. 121, 22 L. T. Rep. N. S. 338; Spedding *v.* Nevell, L. R. 4 C. P. 212, 38 L. J. C. P. 133; Cherry *v.* Colonial Bank, L. R. 3 P. C. 24, 38 L. J. P. C. 49, 21 L. T. Rep. N. S. 356, 6 Moore P. C. N. S. 235, 17 Wkly. Rep. 1031, 16 Eng. Reprint 714; Richardson *v.* Williamson, L. R. 6 Q. B. 276, 40 L. J. Q. B. 145; Collen *v.* Wright, 7 E. & B. 301, 3 Jur. N. S. 363, 26 L. J. Q. B. 147, 90 E. C. L. 301 [*affirmed* in 8 E. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647]), and this principle has taken root in this country (Baltzen *v.* Nicolay, 53 N. Y. 467; Dung *v.* Parker, 52 N. Y. 494; White *v.* Madison, 26 N. Y. 117).

17. Humphrey *v.* Jones, 71 Mo. 62 [*citing* Smout *v.* Ilbery, 12 L. J. Exch. 357, 10 M. & W. 1].

18. *Arkansas.*—State *v.* Allis, 18 Ark. 269.

California.— Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602; Morrison *v.* Bowman, 29 Cal. 337; Echols *v.* Cheney, 28 Cal. 157; Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150.

Connecticut.— New Haven Sav. Bank *v.* Davis, 8 Conn. 191.

Florida.— Mitchell *v.* St. Andrew's Bay Land Co., 4 Fla. 200.

Kentucky.—Parks *v.* S. & L. Turnpike Road Co., 4 J. J. Marsh. 456.

Maine.— Female Orphan Asylum *v.* Johnson, 43 Me. 180; Cram *v.* Bangor House Proprietary, 12 Me. 354; Stinchfield *v.* Little, 1 Me. 231, 10 Am. Dec. 65.

Massachusetts.— Huntington *v.* Knox, 7 Cush. 371; Brinley *v.* Mann, 2 Cush. 337, 48 Am. Dec. 669; Damon *v.* Granby, 2 Pick. 345; Elwell *v.* Shaw, 16 Mass. 42, 8 Am. Dec. 126; Fowler *v.* Shearer, 7 Mass. 14; Tippets *v.* Walker, 4 Mass. 595.

(II) *Illustrations of Rule.* A bond was executed by certain parties, who were described, after their signatures and seals, as "trustees of the Baptist Society of the town of Richfield." It was held that they were personally liable, and that the designation affixed to their names was mere *descriptio personarum.*[19] The proprietors of common and undivided lands, who, in New Hampshire were a corporation, voted that their clerk should give a certain person a deed of land in their name; but he executed it in his own name as clerk. It was held that the grantee acquired no title.[20] In Massachusetts an officer of a corporation attempted to make a deed for it by the use of the following frame of words: "Know all men by these presents, that the New England Silk Company, a corporation legally established, by Christopher Colt, jr., their treasurer, . . . do hereby give, grant, . . . &c. In witness whereof, I, the said Christopher Colt, jr., in behalf of said company, and as their treasurer, have hereunto set my hand and seal." This was held, by a perversion of interpretation, not to be the deed of the corporation.[21]

(III) *Exceptions to Rule* — (A) *Instrument Executed by Agent Under His Seal Enforced as Simple Contract of Corporation.* An exception to the above rule is that, although an action of covenant will not lie against the corporation upon an instrument sealed with the private seal of the corporate agent, nevertheless an agreement under the private seal of the agent has been regarded as a simple contract of the corporation, and if otherwise valid binding as such upon the corporation.[22]

(B) *Sealed Instrument Executed by Agent in His Own Name Enforced in Equity Against Corporation.* If the agent had authority to execute a sealed instrument in behalf of the corporation, but executed it in his own name, it may be enforced in equity against the corporation so as to give effect to the real intention of the parties.[23]

Missouri.— Musser *v.* Johnson, 42 Mo. 74, 97 Am. Dec. 316.

Nebraska.— Zoller *v.* Ide, 1 Nebr. 439.

New Hampshire.— Coburn *v.* Ellenwood, 4 N. H. 99.

New York.— Haight *v.* Sahler, 30 Barb. 218; Stanton *v.* Camp, 4 Barb. 274; Townsend *v.* Hubbard, 4 Hill 351; Townsend *v.* Corning, 23 Wend. 435; Lincoln *v.* Crandell, 21 Wend. 101; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. 285; Stone *v.* Wood, 7 Cow. 453, 17 Am. Dec. 529; Randall *v.* Van Vechten, 19 Johns. 60, 10 Am. Dec. 193; Taft *v.* Brewster, 9 Johns. 334, 6 Am. Dec. 280.

Ohio.— Hatch *v.* Barr, 1 Ohio 390.

Oregon.— Eagle Woolen Mills Co. *v.* Monteith, 2 Oreg. 277.

Pennsylvania.— Farmers', etc., Turnpike Co. *v.* McCullough, 25 Pa. St. 303.

Vermont.— Miller *v.* Rutland, etc., R. Co., 36 Vt. 452; Wheelock *v.* Moulton, 15 Vt. 519.

West Virginia.— Rauch *v.* Blennerhassett Oil Co., 8 W. Va. 36.

United States.—Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335; Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

England.—*In re* International Contract Co., L. R. 6 Ch. 525; Hancock *v.* Hodgson, 4 Bing. 269, 5 L. J. C. P. O. S. 170, 12 Moore C. P. 504, 13 E. C. L. 499; Combes' Case, 9 Coke 75; Hall *v.* Bainbridge, 8 Dowl. P. C. 583, 9 L. J. C. P. 281, 1 M. & G. 42, 1 Scott N. R. 151, 39 E. C. L. 634; Appleton *v.* Binks, 5 East 148, 1 Smith K. B. 361, 7 Rev. Rep. 672; Wilks *v.* Back, 2 East 142, 6 Rev. Rep. 409; Frontin *v.* Small, 2 Ld. Raym. 1418, 1 Str. 705; Lowther *v.* Kelly, 8 Mod. 115; White *v.* Cuyler, 6 T. R. 176; McArdle *v.* Irish Iodine Co., 15 Ir. C. L. 146.

19. Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280.

20. Coburn *v.* Ellenwood, 4 N. H. 99. See also Atkinson *v.* Bemis, 11 N. H. 44.

21. Brinley *v.* Mann, 2 Cush. (Mass.) 337, 338, 48 Am. Dec. 669.

22. *Massachusetts.*— Damon *v.* Granby, 2 Pick. 345. This principle and the authority of the last case cited upon this point have been denied. Fullam *v.* West Brookfield, 9 Allen 1.

Michigan.— State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

New York.— Haight *v.* Sahler, 30 Barb. 218; Sherman *v.* New York Cent. R. Co., 22 Barb. 239; Randall *v.* Van Vechten, 19 Johns. 60, 10 Am. Dec. 193.

Vermont.— Warner *v.* Mower, 11 Vt. 385.

United States.— Eureka Clothes Wringing Mach. Co. *v.* Bailey Washing, etc., Co., 11 Wall. 488, 20 L. ed. 209; Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335; Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

England.— See the observation of Tindal, C. J., in Hall *v.* Bainbridge, 8 Dowl. P. C. 583, 9 L. J. C. P. 281, 1 M. & G. 42, 1 Scott N. R. 151, 39 E. C. L. 634.

23. Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602.

(IV) *Sealed Instrument Executed by Agent in His Own Name Enforced Against Him Personally and Descriptive Words Regarded as Surplusage*—(A) *In General.* Less strictness is required when the instrument is not under seal, it being sufficient in such case if the intent to bind the principal appear in any part of the instrument.[24] But if in executing a deed the agent describes himself therein as acting for, or in behalf, or as the attorney of, the principal, or as a committee to contract for, or as trustee, or as an officer of a corporation, etc., if the deed does not bind his principal, and he signs and seals with his own name and seal, the addition to his signature of his official designation will be regarded only as descriptive of his person, and he will be personally responsible upon the instrument as his own deed.[25]

(B) *Forms Held to Be Not Deed of Corporation but of Agent Signing.* An assignment of a lease which in the granting clause purports to be made by the treasurer of a designated corporation, who sets his hand and the corporate seal to the instrument, adding his official title instead of signing by the name of the corporation, is not valid as the act of the corporation.[26] A chattel mortgage purporting to convey corporate property, signed by the president of the corporation as such, with his private seal attached, and also signed by the treasurer and by a shareholder, the seal of the corporation being set opposite to the three names, reciting an indebtedness of the corporation to the mortgagee, "for which he holds my note," to secure the payment of which "I do convey to him," and "if I fail to pay the debt," providing for a sale of the property, and attested, "witness my hand and seal," is the personal conveyance of the president, and not of the corporation acting through him.[27] In the case of a bond by certain persons, "by the name and description of Jacob Brewster, Thaddeus Loomis, and Joseph Coats, trustees of the Baptist Society of the town of Richfield," who acknowledged themselves bound to plaintiff in the sum of —— dollars, to be paid, etc., conditioned that if defendants, as "trustees of the Baptist Society of the town of Richfield," etc., should pay, etc., and the bond was signed and sealed by such trustees respectively, they were held personally liable.[28] A deed recited that the "New England Silk Company, . . . by Christopher Colt, jr., their treasurer, . . . do hereby give, grant, sell, and convey," etc. The concluding clause was: "In witness whereof, I, the said Christopher Colt, jr., in behalf of said company, and as their treasurer, have hereunto set my hand and seal, this," etc. This was signed "Christopher Colt, jr., Treasurer of New England Silk Company." The certificate of acknowledgment stated that "Christopher Colt, jr., treasurer," etc., "acknowl-

24. Huntington *v.* Knox, 7 Cush. (Mass.) 371; Townsend *v.* Corning, 23 Wend. (N. Y.) 435.

25. *California.*—Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150.

Kansas.— Klopp *v.* Moore, 6 Kan. 27.

Massachusetts.— Fullam *v.* West Brookfield, 9 Allen 1; Seaver *v.* Coburn, 10 Cush. 324; Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83; Tippets *v.* Walker, 4 Mass. 595.

New York.— Stone *v.* Wood, 7 Cow. 453, 17 Am. Dec. 529; White *v.* Skinner, 13 Johns. 307, 7 Am. Dec. 381; Taft *v.* Brewster, 9 Johns. 334, 6 Am. Dec. 280.

United States.— Duvall *v.* Craig, 2 Wheat. 45, 4 L. ed. 180.

England.—Appleton *v.* Binks, 5 East 148, 1 Smith K. B. 361, 7 Rev. Rep. 672.

26. Norris *v.* Dains, 52 Ohio St. 215, 39 N. E. 660, 49 Am. St. Rep. 716.

27. Clark *v.* Hodge, 116 N. C. 761, 21 S. E. 562.

28. Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280. See also Stone *v.* Wood, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529. Similarly see Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

Other forms may be collected from the following cases cited in 4 Thompson Corp. §§ 5085, 5086, to wit:

California.— Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150.

Connecticut.— Sterling *v.* Peet, 14 Conn. 245; Magill *v.* Hinsdale, 6 Conn. 464*a*, 16 Am. Dec. 70.

Kansas.— Klopp *v.* Moore, 6 Kan. 27.

Maine.— Stinchfield *v.* Little, 1 Me. 231, 10 Am. Dec. 65.

Maryland.— McDonough *v.* Templeman, 1 Harr. & J. 156, 2 Am. Dec. 510.

Massachusetts.— Fullam *v.* West Brookfield, 9 Allen 1.

New York.— White *v.* Skinner, 13 Johns. 307, 7 Am. Dec. 381.

Ohio.— Hatch *v.* Barr, 1 Ohio 390.

Pennsylvania.— Frazer *v.* Shelley, 6 Phila. 429.

edged the above instrument to be his free act and deed." In another deed this same person described himself in the concluding recital as "treasurer of the New England Silk Company, and duly authorized for that purpose," and in the certificate of acknowledgment it was stated that "in his said capacity" he acknowledged the instrument to be his free act and deed. Neither of these deeds was regarded as made by the "New England Silk Company." In the language of Metcalf, J., who passed upon them, the treasurer "should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company." [29]

b. Disposition to Relax Formal and Rigid Common-Law Requirements so as to Effectuate Intent of Parties — (I) *In General.* In some modern decisions we may discover a disposition on the part of the courts to depart from the formal requirements of the common law, so as to effectuate what the judges know from the reading of the instrument to have been the intent of the parties.[30]

(II) *When Body of Contract Will Control Signature and Seal.* This liberal rule requires that the language employed in the body of the contract, showing it to be the contract of the corporation and not that of the signer, will control both the signature and the seal. If therefore the agent of the corporation enters into a contract in his own name under his individual seal, but states in the body of the contract that he contracts in behalf of the corporation, then under the more enlightened theory the language of the instrument and not the form of the signature will control, so as to give effect to the obvious intention of the parties, and the agent will not be personally liable.[31] Thus, where defendants, who had been duly appointed by a corporation as its building committee, and authorized to contract for a building to be erected for the purposes of its business, entered into a written contract with plaintiff for materials, under their respective hands and seals, describing themselves as "the building committee," and signing it with the same designation, it was held that the corporation was liable on the contract, notwithstanding the fact that the seals of defendants and not that of the corporation were affixed thereto; and there being evidence not only of the proper authorization but of subsequent ratification, it was held that the defendants were not personally liable on the contract.[32]

(III) *Cases Where Neither Corporation Nor Agent Bound.* Decisions are found which support the conclusion that it does not necessarily follow that because a deed is not binding upon the corporation it will therefore be binding upon the agent who executed it. It will not be binding upon the agent, unless, by a fair construction of the language employed, it can be regarded as the contract of the agent.[33]

(IV) *Where Contract Is For Exclusive Benefit of Corporation.* Cases are found which hold that when an agent, whether of a corporation or of an individual, duly authorized to make a contract for his principal, which does not require a seal, makes the contract in his own name and under his private seal, and in terms that purport his private obligation, he is not personally liable for the

England.— Furnival *v.* Coombs, 7 Jur. 399, 12 L. J. C. P. 265, 5 M. & G. 736, 6 Scott N. R. 522, 44 E. C. L. 384.

29. Brinley *v.* Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669.

30. Magill *v.* Hinsdale, 6 Conn. 464*a*, 16 Am. Dec. 70; Chouteau *v.* Allen, 70 Mo. 290; McClure *v.* Herring, 70 Mo. 18, 35 Am. Rep. 404. See also Martin *v.* Almond, 25 Mo. 313.

31. McDonough *v.* Templeman, 1 Harr. & J. (Md.) 156, 2 Am. Dec. 510 [*recognized* as authority in Key *v.* Barnham, 6 Harr. & J. (Md.) 418]. To the contrary see *supra* XII, H, 4, a. (IV), (B).

32. Haight *v.* Sahler, 30 Barb. (N. Y.) 218.

For other inartificial forms where the deed was held to be that of the corporation and not that of the agent signing it see Northwestern Distilling Co. *v.* Brant, 69 Ill. 658, 18 Am. Rep. 631; Whitford *v.* Laidler, 94 N. Y. 145, 46 Am. Rep. 131; Columbia Bank *v.* Patterson, 1 Cranch (U. S.) 299, 3 L. ed. 351.

33. *Connecticut.*— Sterling *v.* Peet, 14 Conn. 245.

Illinois.— Northwestern Distilling Co. *v.* Brant, 69 Ill. 658, 18 Am. Rep. 631.

breach thereof, if the contract be for the exclusive benefit of his principal.[34] This is admitted to be a distinct departure from the principles of the common law.[35] The principle upon which these decisions rest is that when an agent is duly authorized to make a contract for his principal which is not required to be sealed, but the agent nevertheless enters into a contract in his own name and under his private seal for the exclusive benefit of his principal, he is not personally responsible thereon, where such authority is known to the other contracting party, for the reason that the principal would have been liable upon a simple contract made under these circumstances by his agent, and the person contracting with the agent still has the remedy arising out of such a contract against the principal.[36]

c. Agent Not Bound Where He Does Not Personally Promise or Covenant, Provided Corporation Is Disclosed. In another class of informal instruments it has been held that the agent is not bound where the corporation is disclosed, and the instrument contains no expression of the personal undertaking of the agent to perform the contract of the corporation.[37]

d. Statutes Curing Informalities in Executing Sealed Instruments. The extreme technicality of the judges in adhering to common-law rules and disregarding the intention of the parties has induced legislatures in some instances to interpose by enacting statutes such as that of Maine which recited that "all deeds and contracts, executed by an authorized agent for an individual or corporation, either in the name of the principal by such agent, or in the name of such agent for the principal, shall be considered the deed or contract of the corporation."[38] It is plain that this statute was intended to obviate a class of decisions to the effect that, although the deed is, in the body of the instrument, stated to be the deed of the corporation, yet, although it is signed by the proper agents of the corporation, if it is sealed with their own private seals, it ceases for that reason to be the deed of the corporation.[39] Under the operation of this statute anything which the agent executing the deed for the corporation adopts as his seal in so executing it, or as the seal of the corporation for the purposes of the deed, will be deemed the appropriate seal.[40] Under a somewhat similar statute of Vermont a deed of land of a corporation conveyed by its president, sealed with the seal of the president, was a valid corporate deed.[41] A similar statute of Tennessee provides that an instrument in relation to real or personal property, executed by an agent, may be signed by such agent for his principal by simply writing his own name or his

Massachusetts.— Ellis *v.* Pulsifer, 4 Allen 165; Abbey *v.* Chase, 6 Cush. 54 (opinion by Metcalf, J.).

New York.— St. Peter Episcopal Church *v.* Varian, 28 Barb. 644; Townsend *v.* Hubbard, 4 Hill 351; Townsend *v.* Corning, 23 Wend. 435.

Pennsylvania.— Hopkins *v.* Mehaffy, 11 Serg. & R. 126.

United States.— Thayer *v.* Wendell, 23 Fed. Cas. No. 13,873, 1 Gall. 37.

Compare Furnival *v.* Coombs, 7 Jur. 399, 12 L. J. C. P. 265, 5 M. & G. 736, 6 Scott N. R. 522, 44 E. C. L. 384.

34. McDonough *v.* Templeman, 1 Harr. & J. (Md.) 156, 2 Am. Dec. 510; Haight *v.* Sahler, 30 Barb. (N. Y.) 218; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

35. Haight *v.* Sahler, 30 Barb. (N. Y.) 218. See also Fullam *v.* West Brookfield, 9 Allen (Mass.) 1.

36. Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lawrence *v.* Taylor, 5 Hill (N. Y.) 107. See also Evans *v.* Wells, 22 Wend. (N. Y.) 324; Osborne *v.* High Shoals Min., etc., Co., 50 N. C. 177.

37. Sherman *v.* Fitch, 98 Mass. 59; Ellis *v.* Pulsifer, 4 Allen (Mass.) 165; Lyon *v.* Williams, 5 Gray (Mass.) 557; Abbey *v.* Chase, 6 Cush. (Mass.) 54; Sherman *v.* New York Cent. R. Co., 22 Barb. (N. Y.) 239; Hopkins *v.* Mehaffy, 11 Serg. & R. (Pa.) 126. *Compare* Northwestern Distilling Co. *v.* Brant, 69 Ill. 658, 18 Am. Rep. 631; Whitford *v.* Laidler, 94 N. Y. 145, 46 Am. Rep. 131; Haight *v.* Sahler, 30 Barb. (N. Y.) 218; St. Peter Episcopal Church *v.* Varian, 28 Barb. (N. Y.) 644; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351.

38. Me. Rev. Stat. c. 91, § 14.

39. The statute was evidently leveled at such decisions as Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150; Brindley *v.* Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; and Hatch *v.* Barr, 1 Ohio 390.

40. Porter *v.* Androscoggin, etc., R. Co., 37 Me. 349.

41. Warner *v.* Mower, 11 Vt. 385.

principal's name, when the instrument shows on its face that it is executed for the principal. With this statute in force a trust deed executed by a corporation recited that it conveyed the property, and that the surplus, in case of a sale, was to be paid to the company. It was held that it was not invalid as to attaching creditors of the corporation by reason of being signed by "B, President," since the intent to execute a corporate obligation was clearly shown.[42] With this statute in force a trust deed signed by A, President, and B, Secretary, but having a corporate seal attached thereto and which recites that the corporation caused its seal to be attached, and the deed to be signed by the president and secretary, was not the individual act of the officer signing it and was binding upon the corporation both at common law and under the statute which provided that an instrument executed by an agent in his own name shall be binding on the principal, where the instrument shows that it was intended to be executed in a representative capacity.[43]

e. What Form of Words Appropriate to Show That It Is Deed of Corporation. No particular form of words is necessary in order to render an instrument under seal, executed in behalf of the corporation, binding upon it, provided it appears upon the face of the instrument that it was intended to be executed by or on behalf of the corporation, and that the seal affixed to it is that of the corporation and not that of the agent merely. A proper form would seem to be to recite the corporation as the contracting party, by its agent, officer, etc., and to conclude the instrument, which would be signed by the name of the corporation, by the officer or agent with, "In testimony whereof, the common seal of said corporation is hereunto affixed," and then to affix the seal.[44]

f. Seal Must Appear to Be Seal of Corporation, and How. It is not necessary to state in the instrument that the seal used is that of the corporation, if the fact otherwise appear, either presumptively from the language of the deed or by evidence *aliunde*. The fact must appear, however, in some manner; and where the conveyance itself declares the seal to be that of the agent, there is no room for presumption or inquiry upon the subject.[45] The regular mode of assenting to and authenticating the acts of the body which uses a seal is to affix the seal, with the declaration that it is the seal of the body, and to verify the act by the signatures of the president and secretary.[46]

g. Effect of Sealing With Private Seals of Signers — (1) *In General.* In strictness a deed of conveyance by a corporation must be executed not only by using the corporate name in the body of the deed, but it must be sealed with the corporate seal. From this it follows that a deed describing the grantor as a corporation, but which is executed by the president thereof in his own name and under his own seal, describing him as president, will not pass title from the corporation;[47] and unless the seal of the corporation is affixed to the instrument it will not support a common-law action of covenant, although sealed with the private seal of the agent of the corporation executing it;[48] and it has been held, where the deed was thus executed, that, although the corporation may have authorized the committee to contract, and may therefore be liable in some form of action, yet covenant is not the proper remedy.[49]

42. Turner *v.* Kingston Lumber Co., 106 Tenn. 1, 58 S. W. 854.

43. *In re* New Memphis Gaslight Co.'s Cases, 105 Tenn. 268, 60 N. W. 206.

44. Flint *v.* Clinton Co., 12 N. H. 430.

For other forms which have been held effective see Northwestern Distilling Co. *v.* Brant, 69 Ill. 658, 18 Am. Rep. 631; Kinzie *v.* Chicago, 3 Ill. 187, 33 Am. Dec. 443; Sherman *v.* Fitch, 98 Mass. 59; Haven *v.* Adams, 4 Allen (Mass.) 80; Hutchins *v.* Byrnes, 9 Gray (Mass.) 367; Tenney *v.* East Warren Lumber Co., 43 N. H. 343; St. Peter Episcopal Church *v.* Varian, 28 Barb. (N. Y.) 644.

45. Richardson *v.* Scott River Water, etc., R. Co., 22 Cal. 150, 157 (per Cope, C. J.); Eagle Woolen Mills Co. *v.* Monteith, 2 Oreg. 277; *In re* St. Helen Mill Co., 21 Fed. Cas. No. 12,222, 3 Sawy. 88.

46. Kinzie *v.* Chicago, 3 Ill. 187, 33 Am. Dec. 443.

47. Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150; Hatch *v.* Barr, 1 Ohio 390.

48. State *v.* Allis, 18 Ark. 269.

49. Mitchell *v.* St. Andrews Bay Land Co.,

(II) *What if Corporation Has No Seal.* If a corporation has no seal, and is authorized to contract both with and without a seal, the affixing of the private seal of the president to his signature is mere surplusage and harmless.[50]

h. Effect of Affixing Seal Several Times. If it sufficiently appears that the seal, or the scrawl which has been affixed in lieu of a seal, was intended to be the seal of the corporation, it will be immaterial that it has been affixed several times, for example once opposite the name of each signer.[51]

i. Corporate Deed Defectively Executed May Create Color of Title. A deed of a corporation purporting to convey land but which is defectively executed, as where it is sealed with the seal of the clerk of the corporation merely, may nevertheless constitute color of title, which will ripen into a good title by adverse possession under the operation of the statute of limitations.[52]

j. Sufficient if It Appears in Body of Instrument That Corporation Is Contracting Party. If it appears in the body of the instrument that the signer undertakes for another and not for himself, he will not be liable, although he may sign in such a form as would otherwise import an individual liability.[53] Thus if in the body of a sealed instrument the covenants are stated to be made by a corporation directly with plaintiff, without the agency of any one, and the person signing it is not named therein, but signs the instrument and seals it with his own seal, as president of the corporation, and on its behalf, an action cannot be sustained upon it against him individually.[54] So where the undertaking was: "We, two of the directors of the Ark Life Assurance Society by and on behalf of the said society, do hereby promise to pay," etc., and was signed, Charles Nicholson, H. Wood, it was held that the signing directors were not liable personally.[55] So where the instrument ran: "Three months after date, we jointly promise to pay . . . for value received in stock on account of the L. & B. Company," and was signed by the names of three directors of the company with the word "directors" affixed to their names, it was ruled that the directors were not personally liable.[56]

5. Manner of Executing Promissory Notes so as to Bind Corporation and Exonerate Agent Signing Them — a. The One Safe and Proper Way in Which to Execute Such Instruments. To obviate the confusing and often absurd and ridiculous interpretations which have often beset this subject, there is one safe and unequivocal form in which to execute a promissory note on behalf of a corporation so as to bind the corporation and exonerate the agent. That form is to express the name of the corporation in the body of the instrument as the promisor, and to sign the instrument by the name of the corporation with the addition of the name of the agent. Thus, omitting date and formal words, the following will be the essential words of a promissory note, binding the corporation and exonerating the agent: "The Bancroft-Whitney Company promises to pay to the order of John G. Gorman one thousand dollars ($1000). The Bancroft-Whitney Company, by J. Has Brouck, Secretary." [57]

b. Manner of Signing Such Instruments — (I) *Proper Manner.* In respect

4 Fla. 200. *Compare* Lay *v.* Austin, 25 Fla. 933, 7 So. 143. In one case a scrawl in lieu of a seal, attached to each of the names of the signers, was treated as the seal of the corporation, the repetition of it not being regarded as a matter of any importance. Reynolds *v.* Glasgow Academy, 6 Dana (Ky.) 37.

50. Deberry *v.* Holly Springs, 35 Miss. 385.

51. Reynolds *v.* Glasgow Academy, 6 Dana (Ky.) 37; Decker *v.* Freeman, 3 Me. 338 [*distinguishing* Stinchfield *v.* Little, 1 Me. 231, 10 Am. Dec. 65; Elwell *v.* Shaw, 16 Mass. 42, 8 Am. Dec. 126].

52. Thorndike *v.* Barrett, 3 Me. 380.

53. McDonough *v.* Templeman, 1 Harr. & J. (Md.) 156, 2 Am. Dec. 510; Hopkins *v.* Mehaffy, 11 Serg. & R. (Pa.) 126 [*recognized* in Abrams *v.* Musgrove, 12 Pa. St. 292, 295].

54. Hopkins *v.* Mehaffy, 11 Serg. & R. (Pa.) 126.

55. Aggs *v.* Nicholson, 1 H. & N. 165, 25 L. J. Exch. 348, 4 Wkly. Rep. 776.

56. Lindus *v.* Melrose, 3 H. & N. 177, 4 Jur. N. S. 488, 27 L. J. Exch. 326, 6 Wkly. Rep. 441, Crompton and Willes, JJ., dissenting. *Compare* Hills *v.* Bannister, 8 Cow. (N. Y.) 31; Dutton *v.* Marsh, L. R. 6 Q. B. 361, 40 L. J. Q. B. 175, 24 L. T. Rep. N. S. 470, 19 Wkly. Rep. 754.

57. 4 Thompson Corp. § 5127.

of the manner of signing, it is to be observed that such an instrument will be properly signed when signed, "The A B Company, by C D, Attorney," or "The A B Company, by C D, Agent," or "The Empire Mills, by E. C. Hamilton, Treas." [58] And while, according to good precedents [59] as well as common sense, it will be equally well signed if signed thus: "C D, Agent for the A B Company," or "C D, for the A B Company," yet, as this form of execution has provoked judicial controversy,[60] it is better to sign, as before stated, the name of the principal, preceding that of the agent. Even where the corporation is not named in the body of the instrument, but the instrument runs in the words, "We promise to pay," etc., yet if it is properly signed as here indicated, that is, with the name of the corporation followed by the name of the agent with the connecting word "by" or "per" between the name of the corporation and that of the agent, it will be the note of the corporation, and will not be the joint note of the corporation and the agent.[61]

(II) *When Signed so as to Be Obligation of Agent.* But if the corporation is nowhere mentioned as the promisor, and if, according to the grammatical construction of the instrument, the promise is the promise of the signer, then the mere fact that he annexes to his name the word descriptive of the office which he holds in the corporation, as the word "Pres.," meaning president, will not exonerate him, but the added words will, in the absence of evidence to the contrary, be regarded as *descriptio personæ* merely, as much as though he had added the word "Esq." [62]

(III) *When Official Designation Added to Signature Rejected as Surplusage.* The foregoing is in accordance with the weight of authority and with the more general doctrine, which is, that where the note does not contain upon its face an indication that it is the note of a principal or of a corporation, the addition to the name of the person signing it of the words "president," "secretary," "agent," "trustee," and the like, does not make it the note of the principal or corporation, but it remains the note of the individual signer. The general rule equally holds where the addition expresses the name of the principal or corporation.[63] In like manner the signer was held liable on the following promise:

58. Draper *v.* Massachusetts Steam Heating Co., 5 Allen (Mass.) 338; Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160; Walker *v.* State Bank, 9 N. Y. 582.

59. Daniel Neg. Instr. § 298.

60. Rice *v.* Gove, 22 Pick. 158, 33 Am. Dec. 724; Ballou *v.* Talbot, 16 Mass. 461, 8 Am. Dec. 146.

61. Reeve *v.* Glassboro First Nat. Bank, 54 N. J. L. 208, 23 Atl. 853, 33 Am. St. Rep. 675, 16 L. R. A. 143.

62. Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261. See also Colburn *v.* Monroe First Baptist Church, 60 Mich. 198, 26 N. W. 878.

63. The following authorities state and illustrate the rule:

Alabama.— Drake *v.* Flewellen, 33 Ala. 106.

California.— Chamberlain *v.* Pacific Wool-Growing Co., 54 Cal. 103. *Compare* Haskell *v.* Cornish, 13 Cal. 45.

Colorado.— Tannatt *v.* Rocky Mountain Nat. Bank, 1 Colo. 278, 9 Am. Rep. 156.

Connecticut.— Johnson *v.* Smith, 21 Conn. 627; Stamford Bank *v.* Ferris, 17 Conn. 259; Magill *v.* Hinsdale, 6 Conn. 464*a*, 16 Am. Dec. 70; Hovey *v.* Magill, 2 Conn. 680.

Illinois.— Cahokia *v.* Rautenberg, 88 Ill. 219; Burlingame *v.* Brewster, 79 Ill. 515, 22 Am. Rep. 177; Powers *v.* Briggs, 79 Ill. 493, 22 Am. Rep. 175; Chadsey *v.* McCreery, 27 Ill. 253.

Indiana.— Hays *v.* Crutcher, 54 Ind. 260; Mears *v.* Graham, 8 Blackf. 144. *Contra*, Pitman *v.* Kintner, 5 Blackf. 250, 33 Am. Dec. 461.

Iowa.— Thurston *v.* Mauro, 1 Greene 231. *Contra*, Baker *v.* Chambles, 4 Greene 428.

Kentucky.— Burbank *v.* Posey, 7 Bush 372; Caphart *v.* Dodd, 3 Bush 584, 96 Am. Dec. 258. *Compare* Yowell *v.* Dodd, 3 Bush 581, 96 Am. Dec. 256.

Maine.— Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409; Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68; Fogg *v.* Virgin, 19 Me. 352, 36 Am. Dec. 757.

Maryland.— Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139; Sumwalt *v.* Ridgely, 20 Md. 107; Wyman *v.* Gray, 7 Harr. & J. 409.

Massachusetts.— Towne *v.* Rice, 122 Mass. 67; Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101; Morell *v.* Codding, 4 Allen 403; Haverhill Mut. F. Ins. Co. *v.* Newhall, 1 Allen 130; Fiske *v.* Eldridge, 12 Gray 474; Packard *v.* Nye, 2 Metc. 47; Simonds *v.* Heard, 23 Pick.

"I promise to pay James Morrison, . . . being on account of his wages at the Madison Hemp and Flax Spinning Company Manufactory in Madison county." This was signed, "For the Madison Hemp and Flax Spinning Company, W. Macbean, Prest." [64]

(IV) *Rule Where Person Signing Promises "as Trustee."* If persons promise "as trustees," and sign their names with the addition of such designation, this promise is held to be restrictive and not binding upon the signers personally.[65]

6. Manner of Drawing Bills of Exchange so as to Charge Corporation and Exonerate Agent — a. Rule Stated — (I) *In General.* The rule of construction which has so often made the agents of corporations, executing promissory notes in their behalf, personally liable thereon, has been frequently applied, with equal severity, in the case where a bill of exchange is drawn on behalf of a corporation by its agent. Unless he makes the bill say plainly, "I am the mere scribe," he becomes personally liable.[66] In other words, where the contract is made absolutely with the party executing the bill of exchange, it will be binding upon him personally.[67]

(II) *Senseless Illustrations Where Agent Was Held Personally Liable, Although Bill Showed That Corporation Was Intended to Be Bound.* Thus bills concluding as follows: "Place to the account of the Durham Bank, as advised;" [68] "Charge the same to the account of Proprietors of Pem-

120, 34 Am. Dec. 41; Forster *v.* Fuller, 6 Mass. 58, 4 Am. Dec. 87; Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61. *Contra,* Mann *v.* Chandler, 9 Mass. 335. A labored effort was made by the court in Fiske *v.* Eldridge, 12 Gray 474, to distinguish this last case from similar cases holding the contrary; but in Draper *v.* Massachusetts Steam Heating Co., 5 Allen 338, and afterward in Barlow *v.* Lee Cong. Soc., 8 Allen 460, its authority was repudiated.

Michigan.— Detroit *v.* Jackson, 1 Dougl. 106.

Minnesota.—Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261; Pratt *v.* Beaupré, 13 Minn. 187; Bingham *v.* Stewart, 13 Minn. 106; Fowler *v.* Atkinson, 6 Minn. 578.

Mississippi.— Fitch *v.* Lawton, 6 How. 371.

Missouri.— McClellan *v.* Reynolds, 49 Mo. 312; Durfee *v.* Morris, 49 Mo. 55. *Contra,* Klostermann *v.* Loos, 58 Mo. 290; Smith *v.* Alexander, 31 Mo. 193.

New Hampshire.— Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Savage *v.* Rix, 9 N. H. 263; Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82.

New York.— De Witt *v.* Walton, 9 N. Y. 571; Brockway *v.* Allen, 17 Wend. 40; Pentz *v.* Stanton, 10 Wend. 271, 25 Am. Dec. 558; Barker *v.* Mechanics' F. Ins. Co., 3 Wend. 94, 20 Am. Dec. 664; Hills *v.* Bannister, 8 Cow. 31; Stone *v.* Wood, 7 Cow. 453, 17 Am. Dec. 529; Taft *v.* Brewster, 9 Johns. 334, 6 Am. Dec. 280.

Ohio.— Bank *v.* Cook, 38 Ohio St. 442; Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612; Titus *v.* Kyle, 10 Ohio St. 444.

Texas.— Gregory *v.* Leigh, 33 Tex. 813.

Vermont.— Pomeroy *v.* Slade, 16 Vt. 220. *Contra,* Roberts *v.* Button, 14 Vt. 195.

West Virginia.— Scott *v.* Baker, 3 W. Va. 285.

England.— Dutton *v.* Marsh, L. R. 6 Q. B. 361, 40 L. J. Q. B. 175, 24 L. T. Rep. N. S. 470, 19 Wkly. Rep. 754; Price *v.* Taylor, 5 H. & N. 540, 6 Jur. N. S. 402, 24 J. P. 470, 29 L. J. Exch. 331, 2 L. T. Rep. N. S. 221, 8 Wkly. Rep. 419.

64. Macbean *v.* Morrison, 1 A. K. Marsh. (Ky.) 545. It is not perceived on what principle this decision can be supported. It is contrary to Carson *v.* Lucas, 13 B. Mon. (Ky.) 213, and the person signing plainly did so in the capacity of agent. See also Roney *v.* Winter, 37 Ala. 277; Alexander *v.* Sizer, L. R. 4 Exch. 102, 38 L. J. Exch. 59, 20 L. T. Rep. N. S. 38; *Ex p.* Clark, 9 Jur. 931, 5 L. J. Bankr. 3, 14 M. & W. 469, 1 Phil. 562, 19 Eng. Ch. 562.

65. Blanchard *v.* Kaull, 44 Cal. 440; Shoe, etc., Nat. Bank *v.* Dix, 123 Mass. 148, 25 Am. Rep. 49; Barlow *v.* Lee Cong. Soc., 8 Allen (Mass.) 460. *Contra,* an ill-considered case in Kentucky, McCalla *v.* Rigg, 3 A. K. Marsh. (Ky.) 259. In one case it was so held, although the signature contained no official designation. Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502. *Contra* to this case see Titus *v.* Kyle, 10 Ohio St. 444.

66. Leadbitter *v.* Farrow, 5 M. & S. 345, 349, 17 Rev. Rep. 345, where it is said by Lord Ellenborough, C. J.: "Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of a procurator."

67. Mayhew *v.* Prince, 11 Mass. 54.

68. Leadbitter *v.* Farrow, 5 M. & S. 345, 349, 17 Rev. Rep. 345.

broke Iron Works;"[69] or "Charge the same to account of disbursements of barque Dublin,"[70] the signatures of the makers being their names only, bald of any designation of agency, were construed as the signers' personal obligations. Such is said to be the rule even where the agent signs a bill with additions indicating the capacity in which he acts, but not specifically that he does so on account of his principal; as where the bill concluded, "Charge the same to the account of," and was signed, "David Fairbanks & Co., Agts. Piscataqua F. & M. Ins. Co.," and was directed to the "Piscataqua F. & M. Ins. Co., So. Berwick, Me.," and had written across its face, "Accepted for the Treasurer, David Fairbanks, President."[71] This bill had been delivered by the insurance company above mentioned to the payee in satisfaction of the amount of a loss by fire, due on a policy of insurance effected by the payee in this company, which claim was assigned by the payee to plaintiffs, with full knowledge of all circumstances under which the bill was made. Fairbanks & Co. were sued as drawers of this bill. Parol evidence offered by them tending to show that it was not expected nor intended that they should be liable upon the bill, and that it was regarded by the parties as creating a debt against no one but the insurance company, was rejected. This was held to be correct.[72]

b. More Liberal Rule Exonerating Agent Drawing Bill, or Else Admitting Parol Evidence to Explain Intent of Parties. A more liberal rule prevails in other jurisdictions, and is finding increased favor in the courts, in conformity with which bills of exchange so drawn are interpreted in accordance with what the judges know from the face of the bill to have been the real intent of the parties, or else which lets in parol evidence to explain what that intent was, where the frame of language employed in the bill and in the signature leaves the question in substantial doubt. Such was the case where the action was against the defendant as drawer of two bills the form of which was: "Six months after date, please pay to the order of the Elizabethtown and Somerville Railroad Company, five hundred dollars, value received, and charge as ordered." This was signed, "John Kean, President Elizabethtown and Somerville R. R. Co.," and indorsed, "The Elizabethtown and Somerville Railroad Co., by John Kean, President." At the trial parol evidence was offered that the bills in question were intended to be the bills of the corporation of which the defendant was president. The rejection of this evidence and a judgment holding the drawer of the bills, John Kean, to be personally liable on them, were held erroneous.[73] So also in a case often cited defendant drew a draft upon his principal payable to plaintiff. The draft was in payment of a debt owed by the principal to plaintiff. The latter was aware of the authority of defendant to draw this draft, and in fact he signed it, "John Hinde, agent." It was held under these circumstances that the drawing of the draft by the defendant was restrictive, and that the addition of the word "agent" was equivalent to a declaration that he would not be held personally responsible on the draft.[74] In an earlier case in the same state[75] a bill of exchange signed in the same form was held not to be binding upon the principal as drawer, for the reason that the principal was not disclosed to the payee by the agent at the time of giving the draft.

c. Effect of Direction in Bill of Exchange to Charge to Account of Corporation — (i) *GENERALLY BINDS CORPORATION.* The direction to place to the

69. Bank of British North America *v.* Hopper, 5 Gray (Mass.) 567, 66 Am. Dec. 390.

70. Bass *v.* O'Brien, 12 Gray (Mass.) 477. See also Snow *v.* Goodrich, 14 Me. 235; Newhall *v.* Dunlap, 14 Me. 180, 31 Am. Dec. 45. *Contra*, Maher *v.* Overton, 9 La. 115.

71. Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101.

72. *Compare* Dennis *v.* Table Mountain Water Co., 10 Cal. 369.

73. Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182 [*reversing* 20 N. J. L. 425].

74. Hicks *v.* Hinde, 9 Barb. (N. Y.) 528. See also Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27.

75. Pentz *v.* Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558.

account of some company named in the body of the bill, coupled with the circumstance that the person signing the bill adds to his name some designation of the capacity in which he acts, will in general be sufficient to make it the draft of the corporation.[76] Bills concluding as follows have been held to be such: "Place to account of Pompton Iron Works," and signed "W. Burtt, agent";[77] "charge the same to the Swanzey Paper Company," and signed "Joseph Hooper, agent";[78] "place to account of the Derby Fishing Company," and signed "Canfield Gillet, president."[79]

(II) *Especially Where Name of Corporation Appears in Heading of Bill, Although Nowhere Else.* Likewise it will be sufficient if the name of the company appears only in the heading of the bill as: "Office of Portage Lake Manufacturing Company," where the bill concluded, "charge the same to account of this company," and was signed, "I. R. Jackson, Agent";[80] "Adams & Co.'s Express and Banking House," where the bill concluded, "charge same to account of this office," and was signed, "C. P. Nichols, agent";[81] "Farmers' Bank of Seneca County," where the bill concluded, "charge this institution," and was signed, "J. J. Fenton, Cashier";[82] or "Office of the Tioga Navigation Company," the bill concluded, "charge to motive power and account," and was signed, "James R. Wilson, Pres't T. N. Co."[83]

7. Manner of Indorsing Commercial Paper by Corporations — a. Rule That Indorsement in Name of Agent Binds Agent and Words Indicating Agency Rejected as Surplusage. The severe and senseless rule already alluded to, which rejects as surplusage the addition of descriptive words to the signature of a written instrument executed by the agents of corporations and by other agents applies equally to indorsements; and in general what would be held to be merely descriptive language in the former case will be so regarded in the latter. Thus to restate a case before noticed the indorsement, "J S, trustee," is the personal indorsement of "J S," on a note payable to his order and made by him as "trustee of the Sullivan Railroad."[84] So an indorsement of "Lewis Rice, Receiver," on a note payable to "Lewis Rice, Receiver," binds such an indorser personally in an action by the indorsee.[85]

b. Contrary Rule Which Gives Effect to Such Words of Description. A juster and more sensible rule which in the interpretation of such instruments refuses to reject words of description which the parties manifestly intended to have their proper effect and which refuses to pervert the evident intent of the parties has been adopted by some of the courts. Such was the case where the action was upon a note payable "to the order of C. W. Smith, Treasurer of the I. M. B. Co.," which was indorsed, "C. W. Smith, Treasurer of the I. M. B. Co." It was admitted that the abbreviations were used to designate the Indianapolis Machine Brick Company. The courts held that this was the note of the Indianapolis Brick Machine Company.[86] The authority of this last case was reaffirmed in an action upon the following note: "Four months after date we promise to pay to the order of R. Beman, Treas., five hundred dollars, value received." (Signed)

76. Forbes *v.* Marshall, 11 Exch. 166, 24 L. J. Exch. 305, 4 Wkly. Rep. 480.

77. Fuller *v.* Hooper, 3 Gray (Mass.) 334, where the words "Pompton Iron Works," printed across the end of the bill, were held to be a material circumstance indicating whose draft it was.

78. Tripp *v.* Swanzey Paper Co., 13 Pick. (Mass.) 291.

79. Witte *v.* Derby Fishing Co., 2 Conn. 260. See also Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271.

80. Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750, opinion by Bigelow, C. J.

81. Sayre *v.* Nichols, 7 Cal. 535, 68 Am. Dec. 280, 5 Cal. 487.

82. Safford *v.* Wyckoff, 1 Hill (N. Y.) 11, 4 Hill (N. Y.) 442.

83. Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298 [*affirming* 40 Barb. (N. Y.) 179]. See also Thompson *v.* Tioga R. Co., 36 Barb. (N. Y.) 79.

84. Fiske *v.* Eldridge, 12 Gray (Mass.) 474.

85. Towne *v.* Rice, 122 Mass. 67. See Chadsey *v.* McCreery, 27 Ill. 253; Shaw *v.* Stone, 1 Cush. (Mass.) 228; Buffum *v.* Chadwick, 8 Mass. 103.

86. Vater *v.* Lewis, 36 Ind. 288, 10 Am. Rep. 29.

"Adam Smith & Co." This note was indorsed "R. Beman, Treasurer." Beman was treasurer of the "Union Manufacturing Company," and, on account of a debt of that company to the plaintiff and others, the note was indorsed to them by him as follows: "R. Beman, Treasurer." In a suit against the indorser, the court held that this was a qualified indorsement which operated as a transfer of the note, but involved no obligation whatever on the part of the person thus indorsing.[87]

e. Rule Where Corporation Is Designated as Payee and Note Is Indorsed by Proper Officer. It will be observed that in the cases just discussed the indorsers were also payees of the notes. There seems to be no doubt that when the corporation is designated as the payee, and the note is indorsed by its proper officer, and in such manner as to indicate his official capacity, such indorser will be regarded as acting in behalf of the corporation only.[88]

d. Bills of Exchange Drawn Payable to, and Indorsed by, Person Designated as "Cashier." It is also well settled that bills drawn payable to the order of a person named "cashier" are to be regarded as the property of the bank of which such person is the cashier, it being the ordinary course of business among bankers to draw bills in this manner;[89] and for the same reason an indorsement of the name of this officer, with the addition of "cashier" or some recognized abbreviation of that word, will be regarded as his official act, binding upon the bank and operating as a transfer of the bill or note.[90]

e. Commercial Paper of Other Than Banking Corporations Indorsed by Name of Agent Only. The necessity of celerity in the despatch of business has led to the frequent practice in other than banking corporations of indorsing the paper of the corporation by the signature of its agent with a word or words of addition designating the character in which he signs. If the note is in terms payable to the order of the corporation the agent will, by indorsing his own name merely, with an addition describing his office, pass the legal title thereto,[91] and will not incur the risk of personal liability as indorser;[92] and it makes no difference that the agent prefixed to his signature the words "without recourse."[93] In other cases of such indorsements the inquiry may arise whether the intent of the parties was merely to pass the title of the corporation to the paper or in addition thereto to pledge the personal credit of the indorsing officer or agent; and it seems that parol evidence will be admitted to determine this question.[94]

87. Babcock *v.* Beman, 11 N. Y. 200. See also New York City Mar. Bank *v.* Clements, 31 N. Y. 33; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Hicks *v.* Hinde, 9 Barb. (N. Y.) 528; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Scott *v.* Johnson, 5 Bosw. (N. Y.) 213; Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543. *Compare* Knight *v.* Lang, 2 Abb. Pr. (N. Y.) 227.

88. Northampton Bank *v.* Pepoon, 11 Mass. 288; Elwell *v.* Dodge, 33 Barb. (N. Y.) 336.

89. Haynes *v.* Beckman, 6 La. Ann. 224; Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Angelica First Nat. Bank *v.* Hall, 44 N. Y. 395, 4 Am. Rep. 698; State Bank *v.* Ohio State Bank, 29 N. Y. 619 [*overruling* 36 Barb. (N. Y.) 332]; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Watervliet Bank *v.* White, 1 Den. (N. Y.) 608.

90. Cooper *v.* Curtis, 30 Me. 488; Burnham *v.* Webster, 19 Me. 232; Folger *v.* Chase, 18 Pick. (Mass.) 63; Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631; Chillicothe Branch Ohio State Bank *v.* Fox, 5 Fed. Cas. No. 2,683, 3 Blatchf. 431; Wild *v.* Passamaquoddy Bank, 29 Fed. Cas. No. 17,646, 3 Mason 505.

91. McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Nicholas *v.* Oliver, 36 N. H. 218.

92. Babcock *v.* Beman, 11 N. Y. 200. See also State Bank *v.* Ohio State Bank, 29 N. Y. 619.

93. McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.

94. Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550. This case does not differ in principle from the case of a similar indorsement made by an agent of an individual, or by an agent of the government, in which cases the inquiry always is whether it was the real understanding and intention of the parties to the negotiation that the indorser should bind himself, or bind his principal. Macbeath *v.* Haldimand, 1 T. R. 172, 1 Rev. Rep. 177. *Compare* Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83; Rice *v.* Stearns, 3 Mass. 225, 3 Am. Dec. 129; Rathbon *v.* Budlong, 15 Johns. (N. Y.) 1.

8. Manner of Executing Other Simple Contracts so as to Bind Corporations and Discharge Agents Who Sign Them — a. Rule Relating to Execution of Promissory Notes Applied With Respect to Ordinary Written Obligations Not Under Seal. The principle already considered with regard to the execution of negotiable instruments[95] governs the execution of other written obligations of corporations except sealed instruments, the fact of the negotiability of the instrument cutting no figure so far as the manner of drawing it or signing it are concerned.

b. Corporation Not Bound if Not Mentioned in Any Way. If there is nothing upon the face of the written agreement to connect a corporation therewith, and that body has in no manner recognized or ratified the agreement, it will not be considered a party to it, although it is executed by an agent of the corporation.[96]

c. Officer Signing Is Liable Unless Corporation Is Mentioned. On the other hand, unless the contract is so executed as to indicate in some way, either in its body or its signature, that it is the contract of the corporation, then necessarily the officer who signs it renders himself personally liable thereon; otherwise it would be the contract of no one. And where an officer of a corporation in executing a contract describes himself by the title of his office, without indicating the corporation of which he is an officer, he renders himself personally liable thereon.[97] It has even been held that an officer of a corporation who executes an obligation which does not on its face show his representative capacity is personally bound thereby, although the obligation shows that it was executed as a compromise between such corporation and a third party.[98]

d. Officer Liable Unless Instrument in Form Distinctly Indicates That It Is Contract of Corporation. But in the view of many courts as we have seen[99] the officer will be personally liable where the strict letter of the language imports a personal liability, whether the name of the corporation was mentioned or not, unless the instrument is drawn so as to be in form the contract of the corporation.[1]

e. Officer Liable Where Instrument Runs in Name of Signer, and Is Signed With Addition Designating His Agency. Where the instrument runs in the name of the signer or in the first person, the mere addition to the signature of words indicating that he is the agent for a particular person, as "D. H. H., agent of the Churchman,"[2] or "T. R. T., agent for S. T.,"[3] does not according to many holdings exonerate the agent from personal liability.

f. View That Officer Not Liable Where He Indicates in Signature That It Is Contract of Corporation. On the other hand it has been held that if the signer indicates in his signature his office and the corporation of which he is an officer he is not personally liable, although the undertaking is drawn in such a form as to impute a personal liability on its face.[4] In such a case it will be sufficient if it

95. See *supra*, XII, H, 5.

96. Crescent City Bank *v.* Carpenter, 26 Ind. 108. See also Sawyer *v.* Winnegance Mill Co., 26 Me. 122.

97. Wing *v.* Glick, 56 Iowa 473, 9 N. W. 384, 41 Am. Rep. 118.

98. Willson *v.* Nicholson, 61 Ind. 241, 242. In this case the instrument was as follows: "I hereby agree to pay R. H. Craig & Co. three hundred dollars, in consideration of a full and final compromise and settlement this day signed between R. H. Craig & Co. and B. E. Smith & Co., and the I., C., & D. R. R. Co. Payment to be made as soon as work on the line of said road commences west of Crawfordsville. March 6th, 1869. S. C. Willson."

99. See *supra*, XII, E, 6, a, (I) *et seq.*

1. Powers *v.* Briggs, 79 Ill. 493, 22 Am. Rep. 175; Hays *v.* Crutcher, 54 Ind. 260; Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409; Haverhill Mut. F. Ins. Co. *v.* Newhall, 1 Allen (Mass.) 130.

2. De Witt *v.* Walton, 9 N. Y. 571.

3. Tannatt *v.* Rocky Mountain Nat. Bank, 1 Colo. 278, 9 Am. Rep. 156. See also Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Offutt *v.* Ayres, 7 T. B. Mon. (Ky.) 356.

Illustrations to this principle, if such it can be called, will be found in the following cases: Stobie *v.* Dills, 62 Ill. 432; Fullam *v.* West Brookfield, 9 Allen (Mass.) 1; Seaver *v.* Coburn, 10 Cush. (Mass.) 324; Brinley *v.* Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Tippets *v.* Walker, 4 Mass. 595. See Parks *v.* S. & L. Turnpike Road Co., 4 J. J. Marsh. (Ky.) 456. *Compare* Hopkins *v.* Mehaffy, 11 Serg. & R. (Pa.) 126.

4. Lacy *v.* Dubuque Lumber Co., 43 Iowa 510; Klostermann *v.* Loos, 58 Mo. 290; McClellan *v.* Reynolds, 49 Mo. 312; Musser *v.*

can be gathered from the whole instrument, both the body and the signature, that the party describes himself and acts as agent merely, and intends thereby to bind his principal and not himself.[5]

g. Contracts Running in Personal Pronoun of First Person, or in Name of Individual Signing Them. Contracts are sometimes drawn up in such haste that in one portion of the instrument it will appear that the obligation of the signer is personal, and in another will be found language indicating the contrary. In such cases the instrument must be looked at as a whole, and effect given to it according to the results of such survey. The following is an instance: "I will give Mr. Rufus Rogers, eight hundred dollars," etc. "Should we detain him longer than Sept. 1st at boom, we will allow him seven dollars per day for every day after Sept. 1st that he is detained at the boom." This was signed, "L. March, Agent of Fred Boom Co." This signature, and the use of the pronoun "we," were held to be inconsistent with the hypothesis that the company was not designed to be held responsible.[6]

h. Cases of Informal Execution Where Corporation Was Held Bound.[7] A railroad company was held liable upon a written agreement executed by plaintiffs and the engineer of the road, the latter being designated as the party of the second part, which provided for the digging of a well "for the use of the Ohio and Mississippi Railroad."[8] In a suit brought by a bank to recover the amount of a note, a receipt signed by A, who was president of the bank, but who did not sign the receipt as such, for money to be deposited in the bank to the credit of B (a payment by whom was equivalent to a payment by defendant), was evidence, although not conclusive, that the money was to be applied upon the note.[9] A writing acknowledging satisfaction of a judgment in favor of a corporation, which shows upon its face that it was executed by its president in his official capacity, is binding upon the corporation, although not executed in the name or under the seal of the corporation.[10]

9. Admissibility of Parol Evidence to Show Which Party Is Bound — a. In General Not Admitted. The general rule is that parol evidence is not admissible to explain whether it was intended by the parties to the contract that the corporation or the contracting agent should be bound; and this rule is of special force where the evidence would affect the rights of subsequent *bona fide* purchasers for value; but the question is to depend upon the interpretation of the language of the written instrument without such intrinsic aid.[11]

b. Circumstances Under Which Parol Evidence Admitted — (i) *In General.* But according to a numerous class of holdings, where it is uncertain from the

Johnson, 42 Mo. 74, 97 Am. Dec. 316; Smith *v.* Alexander, 31 Mo. 193; Ferris *v.* Thaw, 5 Mo. App. 279 [*affirmed* in 72 Mo. 446]; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285. See also Dwyer *v.* Rathbone, 1 Silv. Supreme (N. Y.) 418, 5 N. Y. Suppl. 505, 24 N. Y. St. 366; Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. (N. Y.) 23; Jenkins *v.* Morris, 16 M. & W. 877.

5. Smith *v.* Alexander, 31 Mo. 193.

6. Rogers *v.* March, 33 Me. 106. So held in Musser *v.* Johnson, 42 Mo. 74, 97 Am. Dec. 316, where the words "we," "us," and "our" occurred in a contract signed "Isaac H. Sturgeon, Prest. North Mo. R. R. Co." *Compare* Savage Mfg. Co. *v.* Worthington, 1 Gill (Md.) 284.

7. **Cases of informal execution where the agent was held personally liable.**— Guernsey *v.* Cook, 117 Mass. 548; Simonds *v.* Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41. *Compare* Pratt *v.* Beaupré, 13 Minn. 187.

8. Ohio, etc., R. Co. *v.* Middleton, 20 Ill. 629.

9. Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. (Pa.) 179.

10. Booth *v.* Farmers', etc., Nat. Bank, 50 N. Y. 396.

For other informal contracts held to be the obligations of the corporation see the following cases:

Maine.— Winship *v.* Smith, 61 Me. 118; Haynes *v.* Hunnewell, 42 Me. 276 (opinion by Tenney, J.).

Maryland.— Vincent *v.* Chapman, 10 Gill & J. 279.

New York.— Bellinger *v.* Bentley, 1 Hun 562, 4 Thomps. & C. 71; Many *v.* Beekman Iron Co., 9 Paige 188.

Pennsylvania.— Passmore *v.* Mott, 2 Binn. 201.

England.— Russel *v.* Reece, 2 C. & K. 669, 61 E. C. L. 669.

11. See *supra*, XII, H, 1 *et seq.*

face of the instrument whether it was intended to bind the principal or the agent, parol evidence is admissible to explain the latent ambiguity and to aid in the interpretation.[12]

(II) *Rule Applicable to Negotiable Instruments.* The rule which thus admits parol evidence to explain such an ambiguity on the face of the instrument is frequently applied in the case of negotiable instruments,[13] although there seems to be more difficulty in applying it in such cases after the instrument has passed into the hands of a *bona fide* taker for value.

(III) *Rule Applicable to Sealed Instruments.* The rule seems to be equally applicable to sealed instruments.[14]

(IV) *Rule Restrained to Latent Ambiguities.* But the principle extends only to what is called by writers upon evidence a latent ambiguity. If the contract plainly shows on its face that either the agent or the corporation was intended to be bound it is a violation of principle to admit parol evidence to contradict the terms of the instrument. This doctrine is frequently expressed by saying that parol evidence is not admissible to raise a latent ambiguity, the real meaning being that parol evidence is not admissible to raise an ambiguity where none exists. For instance parol evidence is not admissible to charge a corporation, on a negotiable promissory note signed by its president in his own name, where there is nothing on the face of the instrument to indicate the capacity in which he signs.[15]

(V) *Necessary Also to Show Power and Authority to Execute Contract.* It must also be borne in mind that in strictness at least it is necessary, in order to cast off the *prima facie* liability of the officer or agent who has executed the instrument, and to throw the liability upon the corporation, to prove something more than would be necessary in case of an agent of an individual seeking to exonerate himself and to charge his principal. Thus it has been held, in an action against an individual on notes which he has signed with the addition of the word "Pres." to his name, that defendant, in order to overcome his *prima facie* personal liability, must not only show that he executed the notes on behalf of the corporation of which he is president, and that plaintiff knew this, but also that the debt evidenced by them was one that the corporation had power to contract, and that it authorized him to contract it.[16]

(VI) *Parol Evidence Admissible to Charge Undisclosed Principal.* Another branch of this doctrine, applicable to simple contracts in writing other than negotiable instruments, but not applicable to negotiable or to sealed instru-

12. Franklin Ave. German Sav. Inst. *v.* Board of Education, 75 Mo. 408; Klostermann *v.* Loos, 58 Mo. 290; Washington Mut. F. Ins. Co. *v.* St. Mary's Seminary, 52 Mo. 480; McClellan *v.* Reynolds, 49 Mo. 312; Musser *v.* Johnson, 42 Mo. 74; Shuetze *v.* Bailey, 40 Mo. 69; Smith *v.* Alexander, 31 Mo. 193; Turner *v.* Thomas, 10 Mo. App. 338.

13. Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139; Klostermann *v.* Loos, 58 Mo. 290; Hood *v.* Hallenbeck, 7 Hun (N. Y.) 362; Metcalf *v.* Williams, 104 U. S. 93, 26 L. ed. 665; Mechanics' Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100.

Parol evidence admissible to explain misnomer of corporation, under proper averments in the pleadings, in an action on a promissory note. State Bank *v.* Burke, 1 Coldw. (Tenn.) 623.

14. When therefore C, the president of a corporation, executed his personal bond to secure advances, not exceeding one hundred thousand dollars, to be made to him on certain conditions therein mentioned, and also a mortgage by the corporation, wherein the counsel who prepared the same described the individual obligations of C as the liability to be secured, instead of the debt of the company, it was held that parol evidence was admissible to show that it was the debt of the corporation, and not that of C, which was intended to be secured by the mortgage. Jones *v.* Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030. So where the agent of the corporation signed his name to an obligation to pay money, with his private seal affixed, it was held that, although the instrument did not become the covenant of the corporation, yet it was evidence of a contract on proof of the agency. Osborne *v.* High Shoals Min., etc., Mfg. Co., 50 N. C. 177.

15. Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714.

16. Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261.

Examples where parol evidence was admitted.— Haile *v.* Peirce, 32 Md. 327, 3 Am.

ments, is that where the contract in point of fact is executed by an agent on behalf of an undisclosed principal, the fact that it was so executed may be proved by parol evidence, so as to charge the undisclosed principal, but not for the purpose of releasing the agent.[17] This rule equally applies whether the unnamed principal is a natural person or a corporation.

(VII) *Parol Evidence With Respect to Usage of Corporation With Reference to Which Contract Was Made.* Where a party enters into a simple contract with a corporation in respect of its public duties, such as carrying him as a passenger, and the party so contracting knows of a regulation, practice, or interpretation of the corporation restricting such contract, such regulation, practice, or interpretation is deemed to enter into the contract and to form a part thereof; because it is in the minds of both parties when the contract is made. If therefore the corporation complies with the contract, in accordance with such known regulation, practice, or interpretation, it will not be liable for breach of contract, although its compliance may vary from the strict letter of the contract itself;[18] and the rule is the same where the terms of the contract are governed by a usage of the corporation, of however recent date, which has existed uniformly for a sufficient length of time to raise a presumption that the contract was made with reference to it, unless the attending circumstances or other facts overcome such presumption.[19] This rule necessarily lets in parol evidence to prove the usage of the circumstances attending the making of the contract.

(VIII) *Parol Evidence to Explain Misnomer of Corporation in Written Contract*— (A) *In General.* A misnomer of the corporation in any species of contract, sealed or unsealed, will not avoid the instrument, where the identity of the corporation intended to be bound can be made out from the instrument itself;[20] and it has been held that a misnomer of the corporation may be explained by parol evidence, under a proper averment in the pleadings, in an action by the corporation on the instrument.[21] No doubt the civil code of California expresses the rule of the common law, where it provides that "the misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended."[22]

(B) *Rule Where Corporation Makes Contract and Then Changes Its Name.* So if a corporation enters into a contract and afterward changes its name, the contract may be enforced against it under its new name;[23] and this neces-

Rep. 139; McCollin *v.* Gilpin, 5 Q. B. D. 390, 44 J. P. 650, 49 L. J. Q. B. 558, 42 L. T. Rep. N. S. 899, 28 Wkly. Rep. 813 [*affirmed* in 6 Q. B. D. 516, 45 J. P. 828, 44 L. T. Rep. N. S. 914, 29 Wkly. Rep. 408].

17. Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Byles Bills 38. And see as confirming this doctrine Story Agency, § 160*a*; Wharton Agency, § 296; and the following cases:

Massachusetts.— Lerned *v.* Jones, 9 Allen 419; Eastern R. Co. *v.* Benedict, 5 Gray 561, 66 Am. Dec. 384; Huntington *v.* Knox, 7 Cush. 371.

New York.— Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388; Dykers *v.* Townsend, 24 N. Y. 57.

Pennsylvania.— Hubbert *v.* Borden, 6 Whart. 79.

United States.— Ford *v.* Williams, 21 How. 287, 16 L. ed. 36.

England.— Calder *v.* Dobell, L. R. 6 C. P. 486, 40 L. J. C. P. 224, 25 L. T. Rep. N. S. 129, 19 Wkly. Rep. 409, 978; Browning *v.* Provincial Ins. Co., L. R. 5 P. C. 263, 28 L. T. Rep. N. S. 853, 21 Wkly. Rep. 587; Trueman *v.* Loder, 11 A. & E. 589, 9 L. J. Q. B. 165, 3 P. & D. 567, 39 E. C. L. 319.

But parol evidence cannot be given by the person so executing the contract in his own name for another to discharge himself from liability when sued on it. Higgins *v.* Senior, 11 L. J. Exch. 199, 8 M. & W. 834.

18. Martindale *v.* Kansas City, etc., R. Co., 60 Mo. 508. See Southwestern Freight, etc., Press Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255; Wann *v.* Western Union Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; Whitmore *v.* Coates, 14 Mo. 9.

19. Martindale *v.* Kansas City, etc., R. Co., 60 Mo. 508. See also Smith *v.* Wright, 1 Cai. (N. Y.) 43, 2 Am. Dec. 162.

20. Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427; Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. (N. Y.) 23; State Bank *v.* Burke, 1 Coldw. (Tenn.) 623.

21. State Bank *v.* Burke, 1 Coldw. (Tenn.) 623.

22. Cal. Civ. Code, § 557. See also Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049.

23. Mt. Palatine Academy *v.* Kleinschnitz,

sarily lets in parol or extrinsic evidence to explain the fact of the change of name.

10. Promise to President and Directors Is Promise to Corporation. A promise to the president and directors of a named corporation, without mentioning such president and directors by name, is a promise to the corporation, and a suit is properly brought on the promise, not in the name of the president and directors, but in the proper name of the corporation.[24]

11. Whether Grant, License, or Sale to Individuals Who Afterward Form Corporation Inures to Corporation. If an individual owning a patent right enters into a contract with a partnership firm, whereby he agrees that the firm shall have the use and benefit of his invention, that will confer no right thereto, upon a corporation subsequently organized by the partners, although the partners may become its sole shareholders.[25] Whether in such a case an assignment by all the individuals composing a partnership firm of all the property of the partnership to the corporation will carry with it the right to use the patented instrument must of course depend upon the nature of the license granted to the partnership. If it was a license of a nature involving a personal trust, and hence not assignable, it would not be passed over to the corporation without the consent of the licenser.[26] But if a right has been assigned to the members of a partnership, which right is in the nature of property and not a mere license or privilege personal to the members of the firm, and they afterward become incorporated and assign all the property of the firm to the corporation, obviously the right will pass with the assignment. Similarly if goods are sold to an individual who is doing business under a corporate name, and long afterward a corporation is created by the same name, by the same individual and others, the corporation will not be liable for the goods, in the absence of a ratification or adoption, even on the footing of having been a *de facto* corporation when the goods were purchased.[27]

12. Informal Instruments May Be Effectual to Convey Personalty, but Not Realty. There is room for the conclusion that an instrument informally executed so as not to operate as the deed of the corporation may nevertheless be effectual as its simple contract so as to convey its personalty, although not its realty, such as an assignment for creditors not sealed with the corporate seal, but only signed and sealed by the treasurer who had been authorized to execute it.[28]

XIII. NOTICE TO CORPORATIONS.

A. What Is Notice to Corporation — 1. General Statement of Doctrine. The general rule is that notice of a fact acquired by an agent while transacting the business of his principal, operates constructively as notice to his principal. As corporations from their nature can never act except through the instrumentality of agents, and can never be acted upon except through the instrumentality of their agents or their property, this principle applies with peculiar force to them.[29]

2. Corporation Can Have Only Constructive Notice. In other words a corpora-

28 Ill. 133; Ecker *v.* Chicago, etc., R. Co., 8 Mo. App. 223.

24. Newport Mechanics' Mfg. Co. *v.* Starbird, 10 N. H. 123, 34 Am. Dec. 145 (variance immaterial in an action brought in the name of the corporation); Bayley *v.* Onondaga County Mut. Ins. Co., 6 Hill (N. Y.) 476, 41 Am. Dec. 759 (mode of declaring, in a suit in the corporate name, on a bond given to its directors, their successors, or assigns); People *v.* Runkle, 9 Johns. (N. Y.) 147; Milford, etc., Turnpike Co. *v.* Brush, 10 Ohio 111, 36 Am. Dec. 78.

25. Locke *v.* Lane, 35 Fed. 289.

26. Such was the conclusion of Sage, J., in the case just cited, although the point does not seem to have been well considered.

27. Bradley Fertilizer Co. *v.* South Pub. Co., 17 N. Y. Suppl. 587, 44 N. Y. St. 119.

28. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

29. *Alabama.*—Frenkel *v.* Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736; Reid *v.* Mobile Bank, 70 Ala. 199.

Connecticut.— Smith *v.* Board of Water Com'rs, 38 Conn. 208.

Kentucky.— Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545.

Louisiana.—Pontchartrain R. Co. *v.* Heirne, 2 La. Ann. 129.

tion from its nature can in a strict sense have only constructive notice or knowledge of facts.[30]

3. Notice to Agent of Corporation When Acting Officially Is Notice to Corporation — a. Rule Stated. The most comprehensive rule with reference to this subject which can be stated is that notice communicated to, or knowledge acquired by, the officers or agents of corporations when acting in their official capacity or within the scope of their agency becomes notice to or knowledge of the corporation for all judicial purposes.[31]

b. Knowledge Must Reach Agent While Acting For Principal — (I) *In General.* Generally speaking notice will not be imputed to the principal unless the knowledge of the fact reaches the agent while acting for his principal, either generally or with reference to the transaction to which the notice relates.[32] So information communicated to an officer of a corporation on the street touching a matter affecting the rights of a corporation is not as matter of law notice to the corporation.[33] So knowledge which comes to a director personally, while not acting as director, is not imputable to the corporation, as where a director sees a newspaper notice of the dissolution of a partnership.[34]

(II) *But Not Necessary in All Cases That Agent Should Be so Acting* — (A) *In General.* But it does not seem to be necessary in all cases that the person desiring to affect the corporation with notice should lie in wait for one of its agents until he can catch him acting about the business of the corporation;[35] but notice to a corporation will always be well communicated when it is communicated to that officer who in most corporations is the official organ of communication between its directors and the outside world; and this officer may

Missouri.— Mechanics' Bank *v.* Schaumburg, 38 Mo. 228.

New York.—Conro *v.* Port Henry Iron Co., 12 Barb. 27.

30. As to what constructive notice is see Plumb *v.* Fluitt, 2 Anstr. 432, 3 Am. Rep. 605; Kennedy *v.* Green, 3 Myl. & K. 699, 10 Eng. Ch. 699.

31. *Connecticut.*— Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 231.

New Hampshire.— Campbell *v.* Merchants', etc., Mut. F. Ins. Co., 37 N. H. 35, 72 Am. Dec. 324; Marsball *v.* Columbian Mut. F. Ins. Co., 27 N. H. 157.

New York.— "It is well settled," said Chancellor Walworth, "that notice to an agent of a party, whose duty it is, as such agent, to act upon the notice, or to communicate the information to his principal, in the proper discharge of his trust as such agent, is legal notice to the principal." Fulton Bank *v.* New York, etc., Canal Co., 4 Paige 127, 137. See also New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. 553; McEwen *v.* Montgomery County Mut. Ins. Co., 5 Hill 101.

Pennsylvania.— Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256; Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151; Hood *v.* Fahnestock, 8 Watts 489, 34 Am. Dec. 489; Boggs *v.* Lancaster Bank, 7 Watts & S. 331.

Wisconsin.— Congar *v.* Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164.

England.— Wing *v.* Harvey, 5 De G. M. & G. 265, 2 Eq. 533, 18 Jur. 394, 23 L. J. Ch. 511, 2 Wkly. Rep. 370, 27 Eng. L. & Eq. 140, 54 Eng. Ch. 210.

32. *Colorado.*— Armstrong *v.* Abbott, 11 Colo. 220, 17 Pac. 517, knowledge acquired by a director when acting as scrivener and acknowledging officer.

Connecticut.— Farrell Foundry *v.* Dart, 26 Conn. 376; Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362.

Illinois.— McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

Kentucky.— Willis *v.* Vallette, 4 Metc. 186.

Louisiana.—Louisiana State Bank *v.* Senecal, 13 La. 525.

Maryland.— General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174.

Missouri.— Ford *v.* French, 72 Mo. 250.

New York.— Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 59 Am. Dec. 478; La Farge F. Ins. Co. *v.* Bell, 22 Barb. 54; Fulton Bank *v.* New York, etc., Canal Co., 4 Paige 127.

Pennsylvania.— Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256; Hood *v.* Fahnestock, 8 Watts 489, 34 Am. Dec. 489.

Texas.—Texas Banking, etc., Co. *v.* Hutchins, 53 Tex. 61, 37 Am. Rep. 750, notice to the secretary of an insurance company on the street.

Wisconsin.— Congar *v.* Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164, notice to a railway station agent in Iowa about the forwarding of goods from Chicago.

33. Texas Banking, etc., Co. *v.* Hutchins, 53 Tex. 61, 37 Am. Rep. 750.

34. National Bank *v.* Norton, 1 Hill (N. Y.) 572.

35. Read the conclusive observations of Vories, J., on this question, in Hayward *v.* National Ins. Co., 52 Mo. 181, 14 Am. Rep. 400.

be either its president who is *ex officio* the chairman of its board of directors,[36] or its secretary, who is generally its officer for conducting its correspondence and keeping its records.[37] And cases are found which hold that although knowledge of a fact comes to an agent while not acting for his principal, yet if he subsequently acted for his principal in a matter wherein it became his duty to communicate the fact, then his knowledge would be imputed to his principal.[38] While the general doctrine that notice must come to an agent while acting for his principal is conceded, yet the exception to that doctrine now under consideration rests upon the ground that "the existence of knowledge in an agent, when acting for his principal, is notice to the principal, however that knowledge may have been acquired. The material fact therefore which binds the principal is the knowledge which the agent possesses when he comes to act, and the principal is bound in such case whether the knowledge is communicated or not, and without regard to the manner in which the agent acquires his knowledge."[39]

(B) *Knowledge Acquired by Agent Short Time Before Agency Begun.* One court has gone so far as to hold that, where the fact of the agency is established, knowledge acquired by the agent, not only during the continuance of his agency, but also that possessed by him so shortly prior to his appointment as necessarily to give rise to the inference that it remained fixed in his memory when the employment began, must be deemed the knowledge of his principal.[40]

(III) *Knowledge Acquired by Corporate Agent When in Act of Defrauding Third Person.* If an officer or agent acting within the general scope of his powers acquires knowledge of a particular fact while committing a fraud upon a third person in a matter pertaining to the business of the corporation, the corporation will be imputable with such knowledge,[41] although such knowledge may have been acquired by the officer or agent in his private capacity; and the corporation will be held to be a party to such unlawful act.[42]

36. Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231 (provided the notice did not relate to a transaction which, to the knowledge of the person giving the notice, it was to the interest of the president to conceal); Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33 (provided he is acting exclusively for the corporation and not for himself); Briggs *v.* Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662.

37. 4 Thompson Corp. § 4696.

38. See for instance Tagg *v.* Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479; Union Bank *v.* Campbell, 4 Humphr. (Tenn.) 394. *Contra*, National Bank *v.* Norton, 1 Hill (N. Y.) 572.

39. Tagg *v.* Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479, 484. See also the following cases:

New Hampshire.— Patten *v.* Merchants', etc., Mut. F. Ins. Co., 40 N. H. 375; Hovey *v.* Blanchard, 13 N. H. 145.

New York.— Ingalls *v.* Morgan, 10 N. Y. 178; U. S. Bank *v.* Davis, 2 Hill 451; Fulton Bank *v.* New York, etc., Canal Co., 4 Paige 127.

Vermont.— Hart *v.* Farmers', etc., Bank, 33 Vt. 252; Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179.

United States.— Harrington *v.* U. S., 11 Wall. 356, 20 L. ed. 167.

England.— Dressor *v.* Norwood, 17 C. B. N. S. 466, 10 Jur. N. S. 851, 34 L. J. C. P. 48, 11 L. T. Rep. N. S. 111, 12 Wkly. Rep. 1030, 112 E. C. L. 466; Mountford *v.* Scott, Turn. & R. 274, 12 Eng. Ch. 274 [*affirming* 3 Madd. 34, 18 Rev. Rep. 189]. *Compare* the earlier decisions of Lord Hardwicke in Warrick *v.* Warrick, 3 Atk. 291, 26 Eng. Reprint 970 [*criticized* by Bradley, J., in Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167].

40. Chouteau *v.* Allen, 70 Mo. 290 [*citing* Hayward *v.* National Ins. Co., 52 Mo. 181, 14 Am. Rep. 400 (as recognizing the principle); Ward Notice, § 687 (as laying down a much broader doctrine in respect of the effect of knowledge previously acquired by an agent)]. But see to the contrary *infra*, XIII, B, 1.

41. *In re* Carew, 31 Beav. 39.

42. New Milford First Nat. Bank *v.* New Milford, 36 Conn. 93; Mechanics' Bank *v.* Schaumburg, 38 Mo. 228; Holden *v.* New York, etc., Bank, 72 N. Y. 286; Fishkill Sav. Inst. *v.* Bostwick, 19 Hun (N. Y.) 354; Van Leuvan *v.* Kingston First Nat. Bank, 6 Lans. (N. Y.) 373; Reynolds *v.* Kenyon, 43 Barb. (N. Y.) 585; Zeigler *v.* Allentown First Nat. Bank, 22 Alb. L. J. 314; Steckel *v.* Allentown First Nat. Bank, 22 Alb. L. J. 313; Barwick *v.* English Joint-Stock Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147, 16 L. T. Rep. N. S. 461, 15 Wkly. Rep. 877; Mackay *v.* New Brunswick Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31, 30 L. T. Rep. N. S. 180, 22 Wkly. Rep. 473. See also Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 231. *Compare In re* Oriental Commercial Bank, L. R. 5 Ch. 358, 39 L. J. Ch.

(IV) *KNOWLEDGE POSSESSED BY CORPORATE AGENT WHEN ENGAGED IN CONSPIRACY TO DEFRAUD HIS OWN PRINCIPAL AND AN INNOCENT THIRD PARTY.* Let us suppose that the teller of a bank is short in his accounts and knows that his cash is about to be counted, and thereupon enters into a fraudulent conspiracy whereby he certifies as good the check of a third party who has no funds in the bank, and then procures, through the intervention of such third party and the connivance of a teller of another bank, a quantity of bills from such other bank which he places with the cash in his hands as teller, and which is counted and approved by the superior officers of the bank without knowledge of the fraud, and the bank whose officer he is comes to a knowledge of the fraud before the falsely certified check has been paid and refuses to pay it. Here the other bank which has cashed the check and which has thus been defrauded out of its money may recover it from the former bank in an action for money had and received. In such a case if necessary to support the action the knowledge of the paying teller of the defendant bank will be deemed constructively the knowledge of the bank itself; and his knowledge of the fraudulent title under which he acquired and held such moneys will be the knowledge of the defendant; and it cannot hold the moneys against the true owner.[43]

4. NOTICE MUST BE TO AGENT WHOSE DUTY IT IS EITHER TO ACT ON INFORMATION OR TO COMMUNICATE IT TO CORPORATION. As between a principal and a third person, there can be no doubt that notice to an agent whose duty it is to act upon the information for his principal, or to communicate it to his principal, is notice to his principal; and that a third person cannot, upon any principle of justice, be affected by the fraud or negligence of the agent concealing the information from his principal.[44]

5. NOTICE TO CORPORATE OFFICER WHO IS ALSO AGENT OF PARTY GIVING NOTICE — a. When Such Notice Effected. It may sometimes happen that the same person may properly act as agent of both parties to a transaction in which case the notice to him will be notice to both parties;[45] and if one of the parties to the transaction is a corporation, the notice to the common agent will be notice to the corporation,[46] unless the notice which reaches him is in the nature of a confidential communication which he is not at liberty to disclose to the corporation;[47] or unless the common agent, while so acting, commits a fraud on one of the parties, in which case a knowledge of the fraud will not be imputed to the defrauded party, since it would be contrary to experience to presume that the defrauding agent would communicate it.[48]

b. A Question of Fact. Whether a corporation having dealings with another party through a common agent will be imputed with notice of all the knowledge acquired by such agent becomes largely a question of fact depending upon the circumstances of each particular case.[49]

588, 22 L. T. Rep. N. S. 422, 18 Wkly. Rep. 474.

43. Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532, Merrick and Bigelow, JJ., dissenting.

44. See the reasoning of the court in Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

45. Le Neve *v.* Le Neve, 3 Atk. 646, 2 White & T. Lead. Cas. 26, 26 Eng. Reprint 1172; Brotherton *v.* Hatt, 2 Vern. 574. See also Mountford *v.* Scott, 3 Madd. 34, 18 Rev. Rep. 189; Toulmin *v.* Steere, 3 Meriv. 210, 17 Rev. Rep. 67. See an extended note on this subject in Pittsburgh Bank *v.* Whitehead, 10 Watts (Pa.) 397, 36 Am. Dec. 186; Gale *v.* Lewis, 9 Q. B. 730, 16 L. J. Q. B. 119, 58 E. C. L. 730; Rolland *v.* Hart, L. R. 6 Ch. 678, 40 L. J. Ch. 701, 25 L. T. Rep. N. S. 191, 19 Wkly. Rep. 962.

46. Gale *v.* Lewis, 9 Q. B. 730, 16 L. J. Q. B. 119, 58 E. C. L. 730.

47. Gale *v.* Lewis, 9 Q. B. 730, 16 L. J. Q. B. 119, 58 E. C. L. 730; Crosse *v.* Smith, 1 M. & S. 545, 14 Rev. Rep. 529.

48. Kennedy *v.* Green, 3 Myl. & K. 699, 10 Eng. Ch. 699.

49. Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

Illustration.— Where the president of a bank, in contracting therewith as the representative of a firm of which he is a member, acts in favor of the bank, his knowledge of a material fact, e. g., of the firm's insolvency, must be considered that of the bank. Other-

6. Notice to One Agent Imputable to Corporation Through Another Agent — a. In General. It has been laid down that where a corporation has two agents of equal power and authority, notice to one is constructive notice to the other, and therefore notice to the corporation.[50]

b. Notice to Improper Agent, by Him Communicated to Proper Agent. Notice to an agent, whose knowledge would not affect the company under the foregoing principle, may become notice to the company, if such agent communicates it to the officer or agent whose duty it is to take action concerning it.[51]

7. Notice to Single Director — a. When Officially Engaged at Place of Business of Corporation — (I) *In General.* It is believed that the rule is that a notice communicated to a single director at the place of business of the corporation, and where he is not acting for himself or adversely to the corporation in the particular transaction, will be imputed to the corporation.[52]

(II) *Existence of Knowledge in Single Director While Sitting in Board.* It seems that the existence, in the breast of a single director while sitting in the board, of a matter of knowledge which he ought to communicate, and which he can properly communicate to his co-directors, is knowledge to the corporation as matter of law.[53]

(III) *Notice to Corporation of Frauds Practised by Single Directors Against Third Persons* — (A) *In General.* As a single director is not unless specially empowered an agent of the corporation, unless he is made such by the act of the shareholders or of the board, in conferring powers upon him outside of his office of director, his frauds, when assuming to act in behalf of the corporation, will not ordinarily be imputed to it, in the absence of circumstances of estoppel or ratification. Excluding such circumstances the essential question is whether the director took part in the proceedings of the board so as to render his fraud effectual or was present at the time the proceedings were had. But this question is irrelevant where the director is specially empowered to act for the corporation, or where, in conformity with a usage of the corporation, he is clothed with all the external *indicia* of authority. In all other cases the question remains material whether some director acted as a member of the board in a given transaction, possessing the knowledge which it is desired to impute to the corporation.[54]

(B) *What if Bank Director Receives Note For Discount and Procures It to Be Discounted For Himself.* There are no cases which show that a bank director, by virtue of his position merely, has authority to receive bills to be laid before the board of discount; therefore, when a person desiring to get a note discounted intrusts it to the care of a director to be laid before the board, he makes

wise if he acts only for his own or the firm's benefit, regardless of the interests of the bank. Seixas *v.* Citizens' Bank, 38 La. Ann. 424.

50. Perry *v.* Simpson Waterproof Mfg. Co., 37 Conn. 520. *Compare Ex p.* Boulton, 1 De G. & J. 163, 3 Jur. N. S. 425, 26 L. J. Bankr. 45, 5 Wkly. Rep. 445, 58 Eng. Ch. 127, where there were two secretaries, one of whom, and the one who had the knowledge, acted in his own matter, and where the court concluded that the company was not affected with notice. And see *Ex p.* Bignold, 3 Deac. 151, 3 Mont. & A. 477.

51. Thus a presentment of claims to the special agent of a railroad company for injury to live stock is sufficient if he makes report (under Ala. Rev. Code, § 1402), although he be not the president, superintendent, or depot agent. South Alabama, etc., R. Co. *v.* Brown, 53 Ala. 651.

52. U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451. See also Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646. *Compare* the opposing observations of Mr. Justice Story (Story Agency, §§ 140*c*, 140*d*), and of Mr. Chancellor Johnson in U. S. Insurance Co. *v.* Shriver, 3 Md. Ch. 381 [*affirmed* in 10 Md. 517, 69 Am. Dec. 174].

That the knowledge of two directors, not communicated to the board, will not affect the corporation see Mercier *v.* Canonge, 8 La. Ann. 37; National Bank *v.* Norton, 1 Hill (N. Y.) 572; Union Bank *v.* Campbell, 4 Humphr. (Tenn.) 394; Porter *v.* Rutland Bank, 19 Vt. 410; Morse Banks & Bank. (2d ed.) 131.

53. Union Bank *v.* Campbell, 4 Humphr. (Tenn.) 394. See also Clerks' Sav. Bank *v.* Thomas, 2 Mo. App. 367. *Compare* Jones *v.* Planters' Bank, 9 Heisk. (Tenn.) 455.

54. Support for the doctrine of the text

such director his agent for transmission of the same to the board; and if the director violates this confidence and gets the note discounted for his own benefit, it is necessary to show either that the director offering the note for discount acted with the board upon the discount, or that some other member of the board having information of his fraudulent designs did so.[55]

(IV) *When Single Director Is Deemed to Be Engaged in Business For Corporation.* Whether a single director may be deemed to be engaged in business for the corporation when not sitting with his co-directors as a board, or in acting with an executive committee appointed by the board, or in acting for the corporation in virtue of some special delegation of agency or authority, so that notice to him will be notice to the corporation, may present questions difficult of solution.[56]

b. Notice to Single Director Not Officially Engaged — (I) *In General.* Notice communicated to or knowledge acquired by a single director, when not officially engaged for the corporation, is not notice to the corporation, unless it is proved as a fact that he has communicated the notice to the board, or to an executive officer of the corporation entitled to receive it, and whose knowledge of the fact would affect the corporation with constructive notice of it.[57]

(II) *Newspaper Publication of Dissolution of Partnership Accidentally Reaching Bank Director.* Upon a similar theory notice of the dissolution of a partnership published in a newspaper, and thus accidentally reaching a bank director, is not equivalent to notice to the bank,[58] although one court has taken a different view of this question.[59]

(III) *Knowledge Possessed by Director Who Participated in Discounting Note.* In conformity to this principle, the courts take a distinction between the knowledge of the illegality or want of consideration of a note, which may be had by a director who acts with the board of directors of a bank in discounting it, and such knowledge on the part of a director who is not present, and who does not act with the board when the discount is made. In the former case the knowledge of the director is the knowledge of the bank; in the latter case it is not.[60]

may be collected from the following cases: Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Union Bank *v.* Campbell, 4 Humphr. (Tenn.) 394.

55. Terrell *v.* Mobile Branch Bank, 12 Ala. 502; National Security Bank *v.* Cushman, 121 Mass. 490; Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24; U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451.

56. See a discussion of this question in 4 Thompson Corp. § 5222.

57. *Connecticut.*— Farrell Foundry *v.* Dart, 26 Conn. 376, knowledge acquired by a director of a defectively executed deed not communicated to the corporation is not notice of the fact to the corporation — a doubtful decision, because the director, in making the investigation, seems to have been acting as agent for the corporation.

Kentucky.— Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545, knowledge of any fact by less than a majority of the board will not amount to notice of the fact to the corporation.

Louisiana.— Mercier *v.* Canonge, 8 La. Ann. 37, private knowledge of two directors of a "tacit mortgage" not notice to the bank unless disclosed to the board.

Maryland.— U. S. Insurance Co. *v.* Shriver, 3 Md. Ch. 381.

Massachusetts.— Sawyer *v.* Pawners' Bank, 6 Allen 207; Housatonic Bank *v.* Martin, 1 Metc. 294 (the fact that a bank director assisted in drawing a mortgage not notice of it to the bank).

Michigan.— *Compare* International Wrecking, etc., Co. *v.* McMorran, 73 Mich. 467, 41 N. W. 510.

Missouri.— Hyde *v.* Larkin, 35 Mo. App. 365.

New York.— Fulton Bank *v.* Benedict, 1 Hall 480; U. S. Bank *v.* Davis, 2 Hill 451; National Bank *v.* Norton, 1 Hill 572.

Pennsylvania.— Custer *v.* Tompkins County Bank, 9 Pa. St. 27; Pittsburgh Bank *v.* Whitehead, 10 Watts 397, 36 Am. Dec. 186.

Vermont.— Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179.

United States. — *Compare* Lawrence *v.* Holmes, 45 Fed. 357.

58. National Bank *v.* Norton, 1 Hill (N. Y.) 572.

59. Union Bank *v.* Campbell, 4 Humphr. (Tenn.) 394.

60. *Connecticut.*— Farrell Foundry *v.* Dart, 26 Conn. 376; Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362.

Massachusetts.— National Security Bank *v.* Cushman, 121 Mass. 490.

New Jersey.— Hightstown First Nat. Bank

(iv) *Knowledge Possessed by Attorney, Who Was Also Trustee of Bank, of Existence of Unrecorded Deed.* In the case indicated by this caption it was held that the bank was not chargeable with the knowledge of its trustee, unless the fact of the existence of the unrecorded deed was in his mind at the time, or unless he was acting for the bank in making the mortgage.[61]

(v) *Knowledge Acquired by Director From Any Source and Stated by Him Before Board.* But when the fact in controversy has been gleaned by a single director from any source, and is stated by him before the board, and made the subject of conversation during the transaction of a piece of business affected by the circumstance, "it is impossible to doubt that the bank is to be affected, because knowledge of the fact material to be known is a part of the *res gestæ*."[62]

(vi) *When New Corporation Is Affected With Knowledge Possessed by Its Promoter With Respect to Title to Lands Which He Conveys to It.* Where a director who had purchased lands from a corporation, united with others in forming a new corporation, he subscribing for almost all of the stock therein, and becoming one of its officers and directors, and on the next day, in pursuance of one entire plan, conveyed the same lands to the new company in payment of his subscription for such stock, it was held that the new company was affected with notice of the circumstances impairing the title of the party so conveying the lands to it, and could not claim to be a *bona fide* purchaser without notice.[63]

8. Facts Which Director Ought to Know Imputable to Corporation. The law will impute to a corporation facts which its directors ought to know, in the exercise of ordinary diligence in the discharge of their official duties, when the imputation of such knowledge to the corporation is necessary to protect the rights of third persons.[64] Upon this principle corporations are often charged with responsibility for the frauds of their ministerial officers.[65]

9. Notice to or Knowledge of Particular Officers of Corporations — a. Notice to President. Notice to the president of a corporation is almost invariably regarded as notice to the corporation, except where, at the time when the notice is communicated to him, he is totally disassociated from its business, as where he is absent on a journey.[66]

v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262.

New York.— Westfield Bank *v.* Cornen, 37 N. Y. 320, 93 Am. Dec. 573; National Bank *v.* Norton, 1 Hill 572.

Ohio.— Loomis *v.* Eagle Bank, 1 Disn. 285, 12 Ohio Dec. (Reprint) 625.

England.— See note to Le Neve *v.* Le Neve, 3 Atk. 646, 2 White & T. Lead. Cas. 26, 26 Eng. Reprint 1172.

61. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

62. Pittsburgh Bank *v.* Whitehead, 10 Watts (Pa.) 397, 403, 36 Am. Dec. 186, per Gibson, C. J. *Compare* Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319, where an exception to the above doctrine was suggested.

63. Hoffman Steam Coal Co. *v.* Cumberland Coal, etc., Co., 16 Md. 456, 77 Am. Dec. 311.

64. Martin *v.* Webb, 110 U. S. 7, 28 L. ed. 49.

65. Fishkill Sav. Inst. *v.* Fishkill Nat. Bank, 80 N. Y. 162, 36 Am. Rep. 595 [*affirming* 19 Hun (N. Y.) 354].

66. *Colorado.*— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248, 1 Colo. 531 [*affirmed* in 96 U. S. 640, 24 L. ed. 648].

Connecticut. — Smith *v.* Norwich Bd. of Water Com'rs, 38 Conn. 208.

Louisiana.— Louisiana State Bank *v.* Senecal, 13 La. 525.

New York.— Getman *v.* Oswego Second Nat. Bank, 23 Hun 498.

Pennsylvania.— Pittsburgh Bank *v.* Whitehead, 10 Watts 397, 36 Am. Dec. 186.

Vermont.— Porter *v.* Rutland Bank, 19 Vt. 410.

England.— *In re* Carew, 31 Beav. 39.

Compare the following decision believed to be untenable: Mathis *v.* Prindham, 1 Tex. Civ. App. 58, 20 S. W. 1015 (holding that notice given to the president pertaining to his individual matters is not knowledge to the corporation unless present in his mind in the transaction where it was sought to impute knowledge); Commonwealth Bank *v.* Craig, 6 Leigh (Va.) 399, 433 (treating the president as a special agent and ignoring the fact of his general superintendency).

See also *supra*, X, A, 1, b, (VII); X, A, 1, b, (XI).

b. Notice to Cashier of Bank. Matters peculiar to banking corporations are not treated in this article,[67] but it may be said that the cashier of a banking corporation sustains such a relation to it that notice imparted to him of any matter touching the business of the bank is notice to the directors, and consequently to the bank,[68] even where he is acting fraudulently as against a third person.[69]

c. Notice to Various Special Agents[70] — Treasurer. As the treasurer of a corporation is regarded as a special agent,[71] a notice to him in order to affect the corporation must relate to a matter within the scope of his special duties as treasurer. Upon this principle notice to him at the time a sum of money is paid to him as to the purpose for which it is paid will be binding on the corporation, especially where it appears that entries have been made in the books of the corporation in accordance with the terms of such notice.[72] For the same reason his knowledge that certain drafts of the corporation have been dishonored is imputable to the corporation.[73]

d. Notice to Mere Servant or Clerk. Notice to a mere servant or clerk will ordinarily not be notice to the corporation, unless he stands in such a relation to it or to the fact communicated that it is his duty to communicate it to his superiors. Thus a fact coming to the knowledge of an attorney of a banking corporation while taking the acknowledgment of a deed to the bank was not imputable to the bank, although it would have been otherwise if the attorney had been employed to obtain the title for the bank by a deed to be drawn by him for that purpose.[74] So knowledge possessed by a mere clerk in a bank of the residence of a party to negotiable paper protested by the bank has been held not imputable to the bank.[75]

67. See, generally, BANKS AND BANKING.

68. *Alabama.*— Huntsville Branch Bank *v.* Steele, 10 Ala. 915.

Georgia.— St. Marys Bank *v.* Mumford, 6 Ga. 44.

Louisiana.— Louisiana State Bank *v.* Senecal, 13 La. 525.

Massachusetts.— Fall River Union Bank *v.* Sturtevant, 12 Cush. 372.

Missouri.—Mechanics' Bank *v.* Schaumburg, 38 Mo. 228.

New Jersey.— Gaston *v.* American Exch. Bank, 29 N. J. Eq. 98; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

New York.— New Hope, etc., Bridge Co. *v.* Phenix Bank, 3 N. Y. 156; Van Leuvan *v.* Kingston First Nat. Bank, 6 Lans. 373; Reynolds *v.* Kenyon, 43 Barb. 585; Gould *v.* Cayuga County Nat. Bank, 56 How. Pr. 505.

Pennsylvania.— Harrisburg Bank *v.* Tyler, 3 Watts & S. 373.

United States.— Tiffany *v.* Boatman's Sav. Inst., 18 Wall. 375, 21 L. ed. 868; Duncan *v.* Jaudon, 15 Wall. 165, 21 L. ed. 142. *Compare* U. S. *v.* Columbus City Bank, 21 How. 356, 16 L. ed. 130.

England.— Mackay *v.* New Brunswick Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31, 30 L. T. Rep. N. S. 180, 22 Wkly. Rep. 473; Swift *v.* Jewsbury, L. R. 9 Q. B. 301, 43 L. J. Q. B. 56, 30 L. T. Rep. N. S. 31, 22 Wkly. Rep. 319 [*reversing* L. R. 8 Q. B. 244, 42 L. J. Q. B. 111, 28 L. T. Rep. N. S. 338, 21 Wkly. Rep. 562].

69. Fishkill Sav. Inst. *v.* Fishkill Nat. Bank, 80 N. Y. 162, 36 Am. Rep. 595. So the bank is affected with private knowledge possessed by the cashier when acting as a member of the discount committee; and in the absence of evidence speaking on the question his presence with such committee will be presumed. Bank of America *v.* McNeil, 10 Bush (Ky.) 54. It would seem from this that certain expressions of opinion in an early case in the same court are considered no longer the law. Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. (Ky.) 545.

70. That notice to the master of transportation of a railway company of the incompetency of an employee affects the corporation see Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111. That notice to the engineer of a bridge company of an alteration in the structure by the builders is notice to the company see Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151. That notice to a railway station agent of an assignment of a chose in action will not affect the company if his duties do not concern such matters see Lambreth *v.* Clarke, 10 Heisk. (Tenn.) 32. When notice to one of several agents of a bank of the residence of an indorser is not notice to the bank see Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150.

71. 4 Thompson Corp. § 4715.

72. New England Car Spring Co. *v.* Union India Rubber Co., 18 Fed. Cas. No. 10,153, 4 Blatchf. 1.

73. Commercial Bank *v.* St. Croix Mfg. Co., 23 Me. 280.

74. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319. In Tucker *v.* Tilton, 55 N. H. 223, it was held that notice of the existence of an unrecorded mortgage upon the property to an officer employed to make an attachment was notice to plaintiff.

75. Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150.

10. Notice to Mere Shareholder. A shareholder, not being in his mere character of shareholder in privity with the corporation, but being a stranger to it, notice to him of a fact which he is not under a special duty of communicating to the corporation is not notice to the corporation.[76]

11. Notice to Corporations of Defects in Their Works Which They Are Bound to Repair. A corporation, private or municipal, which is bound under the principles of the law or under the terms of its charter or governing statute to keep the street, the public highway, or even its own works, in a reasonable state of repair, for the benefit or convenience of the public, is liable for failing to repair within a reasonable time after notice of the defect; and after a considerable time it becomes so liable, without the necessity of proving express notice, because, being under an affirmative duty of inspection and care, negligent ignorance is equivalent to actual knowledge.[77] As this is a branch of the law of negligence under which title it is treated, it will not be pursued here further than to say that express notice of such a defect communicated to the superintendent,[78] or even to the secretary and treasurer of a turnpike company, shown to have some part in the practicable management and superintendence of its road,[79] will be notice to the company.

12. Notice to Corporation Taking Negotiable Paper. This subject belongs more especially to the law of commercial paper[80] and will not be treated here further than to say that the leading doctrine is that notice or knowledge of facts which merely excite suspicion and which ought to put the purchaser on inquiry is not enough; but the test is good faith or bad faith,[81] in other words whether the taking of it was fraudulent as against the original maker.[82]

13. Circumstances Putting Corporation Upon Inquiry. The circumstances which will put a corporation upon inquiry as to the rights or equities of a third person must be the same as those which will put an individual upon inquiry; otherwise the public would be at an enormous disadvantage, not only in dealing with corporations themselves, but in having their rights destroyed where others who are the trustees of such rights deal with corporations.[83]

14. Notice to Corporation Whether Question of Law or Fact. Actual notice is notice in fact; constructive notice is notice in law. Actual notice is purely a fact, and is proved as a fact, and is found as a fact by the jury.[84] But constructive notice is generally a conclusion of law from a state of facts established or admitted.

76. Burt *v.* Batavia Paper Mfg. Co., 86 Ill. 66; Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294; Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 35 N. Y. St. 307, 21 Am. St. Rep. 662 [*affirming* 44 Hun (N. Y.) 532, 9 N. Y. St. 132]; Custer *v.* Tompkins County Bank, 9 Pa. St. 27; Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393; Pittsburgh Bank *v.* Whitehead, 10 Watts (Pa.) 397, 36 Am. Dec. 186.

77. See *supra*, IX, M, 8.

Cases like the following illustrate the liability of private corporations for damages to third persons through suffering their works to become and remain unsafe: Rockwell *v.* Third Ave. R. Co., 64 Barb. (N. Y.) 438; Carpenter *v.* Central Park, etc., R. Co., 4 Daly (N. Y.) 550, 11 Abb. Pr. N. S. (N. Y.) 416; Fash *v.* Third Ave. R. Co., 1 Daly (N. Y.) 148; Lowrey *v.* Brooklyn City, etc., R. Co., 4 Abb. N. Cas. (N. Y.) 32.

78. Quincy Coal Co. *v.* Hood, 77 Ill. 68.

79. Eggleston *v.* Columbia Turnpike Road Co., 82 N. Y. 278.

80. See, generally, Commercial Paper, 7 Cyc. 495.

81. Edwards *v.* Thomas, 66 Mo. 468; Hamilton *v.* Marks, 63 Mo. 167; Mason *v.* Bank of Commerce, 16 Mo. App. 275; Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548; Marshall County *v.* Schenck, 5 Wall. (U. S.) 772, 18 L. ed. 556; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 865; Goodman *v.* Harvey, 4 A. & E. 870, 6 L. J. K. B. 260, 6 N. & M. 372, 31 E. C. L. 381.

82. National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 5 Atl. 488. See also Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Dec. 322; Bird *v.* Daggett, 97 Mass. 494; Mechanics' Banking Assoc. *v.* White Lead Co., 35 N. Y. 505.

83. See for example *supra*, VII, D, 13, *f*, (III); Peck *v.* Bank of America, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826.

84. Muldrow *v.* Robinson, 58 Mo. 331; Vaughn *v.* Tracy, 22 Mo. 415; Beatie *v.* Butler, 21 Mo. 313, 64 Am. Dec. 234; Hill *v.* Tissier, 15 Mo. App. 299; Eyerman *v.* St. Louis Second Nat. Bank, 13 Mo. App. 289 [*affirmed* in 84 Mo. 408]; Masterson *v.* West-End Narrow-Gauge R. Co., 5 Mo. App. 64.

15. Evidence of Notice to Corporate Officer. Whether the officers of a corporation had notice of a particular fact must of course be proved as a fact, although it may be inferred from circumstances, and it is not always necessary to show it by direct proof.[85] There is no presumption of law that a notice contained in a newspaper, subscribed for by a corporation for the use of its officers, has come to the eyes of such officers; and such evidence will not authorize the submission of the question to a jury.[86] But the circumstances and the character of the information thus printed may be such as to create a strong presumption that the officers of the corporation will read it and acquire the information through it. Thus it has been reasoned that while the officers of a marine insurance company may not under all circumstances be presumed to be acquainted with all the intelligence contained in the newspapers taken at their office, yet the general presumption is that they will examine with some care the items of marine intelligence, especially with relation to vessels belonging to their own port.[87]

16. Other Holdings Relating to Notice to Corporations. It has been reasoned that a bank director is presumed to have knowledge of the securities of the bank, but that this presumption may be overcome by proof.[88] Where a corporation loaned money on a mortgage, on the faith of a record of a release of a prior mortgage, which in point of fact had not been paid, the fact that the agent of the corporation through whom the loan was effected acted without knowledge that the prior mortgage had not been paid was held to authorize a finding that the corporation had no such knowledge.[89] Notice to the officers of a corporation of the unauthorized acts of their predecessors in office is notice to the corporation; and if no dissent is expressed a ratification will be presumed, and the acts will become binding upon the corporation and its shareholders.[90]

B. What Is Not Notice to Corporation — 1. Notice Communicated to Agent Before Agency Begun. On the question whether notice imputed to a person who afterward becomes agent of another will be imputed to that other the authorities differ.[91] One court has said that notice to an agent twenty-four hours before the relation has commenced is no more notice to his principal than a notice twenty-four hours after the agency has ceased would be.[92] Another court has taken the view that the safer and better rule would be to hold that the knowledge of the agent acquired prior to his employment as agent will be imputable to his principal under such limitations and conditions as these: "The knowledge must be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it." And the court admitted that "additional modification might be required in some cases."[93]

2. Whether Corporation Continues to Be Affected With Knowledge of Fact Communicated to It by Its Agent After Agent Has Been Superseded by Another Agent. As corporations can be affected with knowledge only through their

85. Toll Bridge Co. *v.* Betsworth, 30 Conn. 380.

86. Vernon *v.* Manhattan Co., 17 Wend. (N. Y.) 524 [*affirmed* in 22 Wend. (N. Y.) 183]; Pittsburgh Bank *v.* Whitehead, 10 Watts (Pa.) 397, 36 Am. Dec. 186.

87. Green *v.* Merchants' Ins. Co., 10 Pick. (Mass.) 402. See further State Bank *v.* Humphreys, 1 McCord (S. C.) 388; Martin *v.* Walton, 1 McCord (S. C.) 16.

88. Proctor *v.* Baldwin, 82 Ind. 370.

89. Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655.

90. Chouteau *v.* Allen, 70 Mo. 290. Notice to company, under English law, of an equitable mortgage of its shares, by a deposit of the certificates, so as to cut off its equities. *Ex p.* Boulton, 1 De G. & J. 163, 3 Jur. N. S. 425, 26 L. J. Bankr. 45, 5 Wkly. Rep. 445, 58 Eng. Ch. 127.

91. See Wharton Agency, § 178 *et seq.*, for authorities.

92. Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256.

93. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 228, 39 Am. Rep. 319, opinion by Peters, J.

agents, this question may be answered in the affirmative; and so it has been answered with respect to notice communicated to the board of directors, the view being that the knowledge thus imputed to the corporation continues after the election of a subsequent board;[94] but one court has held the contrary with respect to notice communicated to a corporation, through its ministerial agent, of the meaning of certain arbitrary shipping marks, holding that such knowledge is not imputed to his successors and through them to the company.[95]

3. Knowledge Acquired by Corporate Officers or Agents in Their Own Private Affairs — a. In General. The knowledge acquired by the officers or agents of a corporation, while not acting for the corporation, but while acting for themselves, is not imputable to the corporation.[96]

b. Unless Knowledge Previously Acquired Was Present in His Mind at Time of Transaction. Under a principle already stated[97] this rule would not apply in a case where the knowledge previously acquired by the corporate officer in his own private affair was present in his mind at the time of the transaction conducted by him for the corporation, and in respect of which it is sought to charge the corporation.[98]

4. Knowledge Acquired by Officer or Agent While Acting For Himself and Adversely to Corporation — a. In General. Such knowledge is not imputable to the corporation, for the reason that the officer or agent is interested in concealing it from his principal; and consequently the law will not presume that he has communicated it.[99]

b. Rule Applies Where Officer Is Acting For Himself in Transaction With Corporation. If a corporate officer or agent acts avowedly for himself in a transaction with the corporation, he is regarded as a stranger to the corporation, dealing as if he had no official relation with it.[1] When therefore an officer, director, or agent of a corporation deals with the corporation for himself in his private capacity, any uncommunicated knowledge which he may have in respect of the

94. Mechanics' Bank *v.* Seton, 1 Pet. (U. S.) 299, 309, 7 L. ed. 152.

95. Great Western R. Co. *v.* Wheeler, 20 Mich. 419.

96. *Kansas.*— Wickersham *v.* Chicago Zinc Co., 18 Kan. 481, 26 Am. Rep. 784.

Maine.— Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

Massachusetts.— Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

Missouri.— Johnston *v.* Shortridge, 93 Mo. 227, 6 S. W. 64; Manhattan Brass Co. *v.* Webster Glass, etc., Co., 37 Mo. App. 145; State Sav. Assoc. *v.* Nixon-Jones Printing Co., 25 Mo. App. 642.

Texas.— Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

A good illustration of the doctrine will be found in Platt *v.* Birmingham Axle Co., 41 Conn. 255.

That a court of justice ought not to tolerate any mixing up or confusing of personal and official relations in determining this question see Mihills Mfg. Co. *v.* Camp, 49 Wis. 130, 5 N. W. 1.

97. See *supra*, XIII, A, 3, b, (II), (A) *et seq.*

98. Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

99. Somerville, J., in Frenkel *v.* Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736. See also the following cases:

Alabama.— Terrell *v.* Mobile Branch Bank, 12 Ala. 502; Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280.

Kansas.— Wickersham *v.* Chicago Zinc Co., 18 Kan. 481, 26 Am. Rep. 784.

Maryland.— Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231.

Massachusetts.— Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, bank director pledged to his bank for his own personal loan a cargo which had been shipped to him by a customer for sale — bank not imputable with notice of the facts.

New York.— Fulton Bank *v.* New York, etc., Canal Co., 4 Paige 127.

1. *Illinois.*— Merrick *v.* Peru Coal Co., 61 Ill. 472.

Massachusetts.— Ward *v.* Salem St. R. Co., 108 Mass. 332; Hayward *v.* Pilgrim Soc., 21 Pick. 270.

Michigan.— Gallery *v.* National Exch. Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149.

Minnesota.— Rhodes *v.* Webb, 24 Minn. 292.

New Jersey.— Stratton *v.* Allen, 16 N. J. Eq. 229.

Pennsylvania.— Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

South Carolina.— Georgia Cent. R., etc., Co. *v.* Claghorn, 1 Speers Eq. 545.

Vermont.— Rogers *v.* Danby Universalist Soc., 19 Vt. 187.

United States.— Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328.

transaction will not be imputed to the latter by reason of his possession of it.[2] If therefore it is desired to charge the corporation with a knowledge of such facts affirmative evidence must be given that the officer has made a disclosure thereof to other and disinterested officers of the corporation, whose knowledge may properly be said to be that of the corporation; or at least that he made such disclosures as ought to have put them on inquiry.[3]

5. Notice of Facts Which Officer or Agent Is Interested In Concealing From Corporation. Knowledge of the corporate officer or agent will not be imputed to the corporation, where the fact is one which the officer or agent is interested in concealing from it,[4] except in cases where a contrary rule is necessary to save the rights of innocent third persons.[5]

6. When Corporation Affected With Notice of Private Dealings Between Officers and Third Persons. A corporation will be affected with constructive notice of private dealings had between its officer and a third person where the officer is its organ of connection with the outside world and is the proper officer to receive and communicate notice of the particular fact to it; since it would be idle for the other party, for the purpose of affecting the corporation with notice of the fact, to communicate it a second time to the officer or agent.[6]

2. *Alabama.*— Frenkel *v.* Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736.

Kansas.— Wickersham *v.* Chicago Zinc Co., 18 Kan. 481, 26 Am. Rep. 784.

Louisiana.— Louisiana State Bank *v.* Senecal, 13 La. 525.

Maryland.— Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231.

Massachusetts.— Commercial Bank *v.* Cunningham, 24 Pick. 270, 35 Am. Dec. 322.

New Jersey.— Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33.

New York.— Westfield Bank *v.* Cornen, 37 N. Y. 320, 93 Am. Dec. 573; La Farge F. Ins. Co. *v.* Bell, 22 Barb. 54; Seneca County Bank *v.* Neass, 5 Den. 329; North River Bank *v.* Aymar, 3 Hill 262; U. S. Bank *v.* Davis, 2 Hill 451.

Ohio.— Loomis *v.* Eagle Bank, 1 Disn. 285, 12 Ohio Dec. (Reprint) 625.

Pennsylvania.— Custer *v.* Tompkins County Bank, 9 Pa. St. 27.

3. *Alabama.*— Terrell *v.* Mobile Branch Bank, 12 Ala. 502; Lucas *v.* Darien Bank, 2 Stew. 280.

Connecticut.—Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362.

Iowa.— Davenport First Nat. Bank *v.* Gifford, 47 Iowa 575, where the president and the cashier of a bank acted together in a private matter without disclosing it to the other directors, and it was held that their knowledge was not imputable to the bank.

Louisiana.— Louisiana State Bank *v.* Senecal, 13 La. 525.

Maryland.— Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231.

Massachusetts.— Commercial Bank *v.* Cunningham, 24 Pick. 270, 35 Am. Dec. 322.

New Jersey.— Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262.

New York.— Westfield Bank *v.* Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Atlantic State Bank *v.* Savery, 18 Hun 36.

England.— Powles *v.* Page, 3 C. P. 16, 10 Jur. 526, 15 L. J. C. P. 217, 54 E. C. L. 16.

What conduct will amount to "acting as a member of the board" seems to be uncertain upon the adjudged cases. In two cases it was held that a director being present at the board, but taking no part in the proceedings, must be considered as not acting. Terrell *v.* Mobile Branch Bank, 12 Ala. 502; Louisiana State Bank *v.* Senecal, 13 La. 525. To the contrary, however, see U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451; Union Bank *v.* Campbell, 4 Humphr. (Tenn.) 394.

4. Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24. See also National Security Bank *v.* Cushman, 121 Mass. 490; Frost *v.* Belmont, 6 Allen (Mass.) 152.

5. So stated by Devens, J., in Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710 [*citing* Loring *v.* Brodie, 134 Mass. 453; Atlantic Nat. Bank *v.* Harris, 118 Mass. 147; *In re* Marseilles Extension R. Co., L. R. 7 Ch. 161, 41 L. J. Ch. 345, 25 L. T. Rep. N. S. 858, 20 Wklv. Rep. 254; *In re* Oriental Commercial Bank, L. R. 5 Ch. 358, 39 L. J. Ch. 588, 22 L. T. Rep. N. S. 422, 18 Wkly. Rep. 474; Cave *v.* Cave, 15 Ch. D. 639, 49 L. J. Ch. 505, 42 L. T. Rep. N. S. 730, 28 Wkly. Rep. 793; Kennedy *v.* Green, 3 Myl. & K. 699, 10 Eng. Ch. 699]. See also Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24; U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451 [*recognized* in North River Bank *v.* Aymar, 3 Hill (N. Y.) 262].

6. Factors', etc., Ins. Co. *v.* Marine Dry Dock, etc., Co., 31 La. Ann. 149 (and the *obiter dicta* of Spencer, J., on page 151, the case turning on another ground); Scripture *v.* Francestown Soapstone Co., 50 N. H. 571; Van Leuvan *v.* Kingston First Nat. Bank, 6 Lans. (N. Y.) 373; Reynolds *v.* Kenyon, 43 Barb. (N. Y.) 585. *Compare* Miller *v.* Illinois Cent. R. Co., 24 Barb. (N. Y.) 312. To the contrary is Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 231 (the language of

7. Where Person Receiving Notice Is Director in Two Corporations. We have seen that one who is a director in two corporations will not be permitted to represent both of them in transactions in which their interests are conflicting.[7] Where a common director of two corporations is thus improperly acting, a notice to him of the affairs of one of the corporations will not be imputable to the other,[8] for the reason that it will not be his duty to disclose it, but the contrary.[9]

8. Rule Where Corporate Officer Agrees Not to Communicate Notice. If through fraud or collusion there is a specific agreement between the corporate officer and the other party to the transaction that no notice of the matter shall be given to the corporation, there is no principle upon which notice can be implied,[10] unless it be necessary to save the rights of innocent third parties.

XIV. ESTOPPELS WITH RESPECT TO CORPORATIONS.

A. Estoppels In Pais Operate Against Corporations Same as Against Individuals. Subject to exceptions in the case of municipal or governmental corporations,[11] which are held to a strict exercise of their powers, the general rule is that corporations quite as much as individuals are held to a careful adherence to truth in their dealings with mankind, and cannot by representations or by silence involve others in onerous engagements and then defeat the just expectations which their conduct has superinduced.[12] A round statement of this doctrine is that estoppels *in pais* operate against corporations in like manner as against natural persons.[13]

B. Operation and Effect of Such Estoppels — 1. Prevent Denial of Validity of Corporate Organization — a. In General. The principle of estoppel prevents the corporation, its officers, and its shareholders, from denying the corporate existence or the validity of the corporate organization under conditions already considered.[14]

Ellsworth, J., is especially noteworthy, at pages 271, 272); *Ex p.* Waithman, 4 Deac. & C. 412, 2 Mont. & A. 364; *Ex p.* Stewart, 4 De G. J. & S. 543, 11 Jur. N. S. 25, 34 L. J. Ch. 6, 11 L. T. Rep. N. S. 554, 13 Wkly. Rep. 356, 69 Eng. Ch. 417; *Ex p.* Harrison, 3 Mont. & A. 506.

For an illustration of this rule where it was held that a company was charged with knowledge of a trust upon which shares in the company had been purchased see *Ex p.* Burbridge, 1 Deac. 131, 38 E. C. L. 577 [*reversing* 4 Deac. & C. 87, 2 Mont. & A. 349].

7. See *supra*, IX, J, 1, a *et seq.*

8. *In re* Marseilles Extension R. Co., L. R. 7 Ch. 161, 41 L. J. Ch. 345, 25 L. T. Rep. N. S. 858, 20 Wkly. Rep. 254. *Compare* Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

9. *In re* Marseilles Extension R. Co., L. R. 7 Ch. 161, 41 L. J. Ch. 345, 25 L. T. Rep. N. S. 858, 20 Wkly. Rep. 254. See also *In re* Contract Corp., L. R. 8 Eq. 14, 20 L. T. Rep. N. S. 964.

10. *Ex p.* Nutting, 5 Jur. 829, 2 Mont. D. & D. 302. See also Sturgis First Nat. Bank *v.* Reed, 36 Mich. 263.

11. See, however, the following cases:

Connecticut.— Savings Soc. *v.* New London, 29 Conn. 174.

Illinois.— Maher *v.* Chicago, 38 Ill. 266; Keithsburg *v.* Frick, 34 Ill. 405.

Ohio.— State *v.* Union Tp., 8 Ohio St. 394.

Wisconsin.— Kneeland *v.* Gilman, 24 Wis. 39.

United States.— Pendleton County *v.* Amy, 13 Wall. 297, 20 L. ed. 579; Moran *v.* Miami County, 2 Black 722, 17 L. ed. 342.

That such estoppels extend to foreign as well as to domestic corporations see Watts-Campbell Co. *v.* Yuengling, 51 Hun (N. Y.) 302, 3 N. Y. Suppl. 869, 21 N. Y. St. 186.

12. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488.

13. Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663; St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69; Currier *v.* Continental L. Ins. Co., 53 N. H. 538; Hale *v.* Union Mut. F. Ins. Co., 32 N. H. 295, 64 Am. Dec. 370.

For an apt illustration see Gowen Marble Co. *v.* Tarrant, 73 Ill. 608.

14. *Connecticut.*— West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66.

Illinois.— U. S. Express Co. *v.* Bedbury, 34 Ill. 459.

Indiana.— Ewing *v.* Robeson, 15 Ind. 26.

Massachusetts.— Howard Mut. Loan, etc., Assoc. *v.* McIntyre, 3 Allen 571.

Ohio.— Callender *v.* Painesville, etc., R. Co., 11 Ohio St. 516.

See also *supra*, I, N, 1, a *et seq.*; VI, P, 6, a, (I), (D) *et seq.*

Agreement held not to create estoppel.— That a traffic agreement between two street railway companies, by which one is restrained

b. Prevent De Facto Corporation From Repudiating Its Contracts After Dissolving and Reorganizing. The same principle prevents a *de facto* corporation from repudiating its contracts after dissolving, upon discovering that it is not properly organized, and legally organizing under a different name.[15] In such a case the dissolution of the *de facto* corporation does not prevent the creditors from following it and holding it liable for the payment of its debts, where there is a statute, such as has been elsewhere considered,[16] allowing a certain time after dissolution to a corporation for winding up its affairs.[17]

2. Validate Contracts Entered Into by Corporations Without Authority of Shareholders. If the directors of a corporation enter into a contract with another person or corporation, which they have no power to make without the consent of their shareholders, but afterward the other contracting party deliberately and publicly offers the corporation the privilege of rescinding such contract, which privilege is refused, such corporation is thereby estopped from afterward setting up a want of power in the directors to make the contract.[18]

3. Validate Acts of Corporations on Ground of Acquiescence by Shareholders. As more fully explained later[19] the same principle validates the voidable acts of corporations, on the theory of a ratification by the acquiescence of all the shareholders; so that after a long delay in which time other rights have supervened or expectations have been founded, upon the faith of an existing state of facts, the shareholders will be precluded from maintaining actions in equity to undo what has been done by the directors or officers without their authority.[20]

4. Prevent Corporation From Denying That Shares Had Been Fully Paid Up, Where Share Certificate Recites That They Have Been Fully Paid — a. In General. If a corporation issues and puts on the market shares which have not been fully paid up, but recites in the certificates that they have been fully paid up, the corporation, and its creditors through it, will be estopped from thereafter asserting, as against innocent purchasers of such shares, that they have not been paid for in full.[21]

b. Shareholders in Like Manner Estopped. Generally speaking when an act done by the directors is in excess of their authority, yet has been done with the *bona fide* intent of benefiting the corporation, and a shareholder knowing thereof does not dissent within a reasonable time, his assent to the act will be presumed and he will be estopped from gainsaying it.[22]

5. Prevent Corporation From Setting Up Want of Power in Its Officers to Make Contract. One of the most frequent applications of the principle of equitable estoppel against corporations is that which arises where the corporation, when rights are asserted against it by virtue of its own contract, sets up a want of power in its officers to make the contract.[23] One of the most frequent illustra-

from competing with the other, does not estop the latter to question the corporate existence of the former, such question not arising out of the contract, see Wilmington City R. Co. *v.* Wilmington, etc., R. Co., (Del. Ch. 1900) 46 Atl. 12.

15. Empire Mfg. Co. *v.* Stuart, 46 Mich. 482, 9 N. W. 527.

16. See *infra*, XXI, G, 8, a *et seq.*

17. Empire Mfg. Co. *v.* Stuart, 46 Mich. 482, 9 N. W. 527.

18. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69.

19. See *infra*, XV, C, 2, a *et seq.*

20. Green *v.* Abietine Medical Co., 96 Cal. 322, 31 Pac. 100; Browning *v.* Mullins, 13 S. W. 427, 12 Ky. L. Rep. 41; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488. See also *supra*, XI, B, 15, a *et seq.*

21. Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657; St. Croix Lumber Co. *v.* Mittlestadt, 43 Minn. 91. *Compare* Sayre *v.* Citizens' Gas-Light, etc., Co., 69 Cal. 207, 7 Pac. 437, 10 Pac. 408. See also *supra*, VI, M, 3, a.

22. Goff *v.* Hawkeye Pump, etc., Co., 62 Iowa 691, 18 N. W. 307; Manhattan Hardware Co. *v.* Roland, 128 Pa. St. 119, 18 Atl. 429; Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110, 18 Atl. 428; Watts' Appeal, 78 Pa. St. 370.

23. The leading American case in illustration of this doctrine is Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488.

The extent to which a corporation is estopped to set up the defense of ultra vires is reserved for future treatment in connection with the general doctrine of *ultra vires*. See *infra*, XVII, F, 2, b, (I) *et seq.*

tions of this principle is presented where a corporation allows an officer, habitually and in the face of the public, to perform for it and in its name certain acts, in which case it will be estopped, as against a member of the public who innocently parts with value on the faith of the officer having the righful power to do such an act, from denying that such is the fact.[24]

6. Prevent Corporation From Repudiating Acts of Its Officers or Agents Within Apparent Scope of Their Powers. The same principle prevents a corporation from repudiating the acts of its officers within the general scope of their powers, in the absence of fraud on the part of the person seeking to charge the corporation, or of collusion between him or his privies, and the officers of the corporation making the contract.[25]

7. Validate Acts of De Facto Officers. The principle of estoppel operates to validate the acts of *de facto* corporate officers, who might have been ousted from their offices under proper proceedings instituted for that purpose.[26]

8. Work Release of Shareholders Whose Rights Have Been Repudiated by Corporation. It has been held that after a banking association has repudiated for years all the arrangements made with one who subscribed for shares, and denied him the rights of a shareholder, the associates cannot be permitted to come in by their receiver, who represents them, and claim defendant as shareholder or partner. They are concluded by their acts.[27]

9. Prevent Corporation From Denying Integrity of Its Own Records as Against Innocent Third Persons. As against innocent third persons a corporation is bound as a guarantor of the integrity of its own records; and if its officers alter upon its record the language of a resolution adopted by its directors, whereby innocent third persons are induced to part with their money, the corporation will be estopped from proving against such third persons what the resolution really was.[28] But the corporation is not bound in such a case as to third persons who have not acted upon or seen or known of the existence of the fraudulent interpolation.[29]

10. Prevent It From Denying Validity of Provisions of Its Charter. The same principle estops a corporation from denying the validity of provisions in its charter which may operate unfavorably to it. It accepts its charter as a whole and takes the burden as well as the benefits. A corporation which proceeds to expropriate land under the powers conferred by its charter is estopped from challenging the constitutionality of a provision therein, relating to the mode of assessing the damages.[30] Nor can the corporation object to the onerous provision of the charter and claim that it shall be exscinded, however incongruous or absurd the result may be.[31]

11. Prevent It From Repudiating Unauthorized Contract, After Accepting Benefits Thereunder — a. In General. As will be more fully explained when treating of ratification by corporations,[32] if an officer of a corporation or other

24. See *supra*, X, D, 1, f, (I) *et seq.*

For illustration of the text see a case where the treasurer of a corporation habitually executed and indorsed promissory notes for it, and finally indorsed a note for the accommodation of a third party, on the faith of which plaintiff parted with value, relying upon the former acts of the treasurer for evidence of his authority, and it was held that the corporation was estopped to deny such authority. Allenton Second Nat. Bank *v.* Potter. etc., Mfg. Co., 56 N. Y. Super. Ct. 216, 2 N. Y. Suppl. 644, 18 N. Y. St. 954.

25. Seeley *v.* San José Independent Mill, etc., Co., 59 Cal. 22. Circumstances under which a manufacturing corporation was estopped from disputing the agency of a person assuming to order goods for it see Electric Supply Co. *v.* Jersey City Electric Light Co., 42 Hun (N. Y.) 659, 4 N. Y. St. 516.

26. Lovett *v.* German Reformed Church, 12 Barb. (N. Y.) 67. See also *supra*, IX, B, 1 *et seq.*

27. Burrows *v.* Smith, 10 N. Y. 550.

28. Holden *v.* Phelps, 141 Mass. 456, 5 N. E. 815; Com. *v.* Reading Sav. Bank, 137 Mass. 431; Holden *v.* Whiting, 29 Fed. 881; Whiting *v.* Wellington, 10 Fed. 810.

29. Holden *v.* Hoyt, 134 Mass. 181.

30. People *v.* Murray, 5 Hill (N. Y.) 468.

31. Darge *v.* Horican Iron Mfg. Co., 22 Wis. 417. For an analogy in the case of private persons see Burrows *v.* Bashford, 22 Wis. 103.

32. See *infra*, XV, C, 2, e.

person assuming to have power to bind the corporation by a given contract enters into the contract for the corporation, and the corporation receives the fruits of the contract and retains them after acquiring knowledge of the circumstances attending the making of the contract, it will thereby become estopped from afterward rescinding or undoing the contract.[33]

b. Prevent Corporation From Pleading Ultra Vires. Speaking generally, and voicing the weight of judicial authority, the corporation is in like manner estopped by retaining with knowledge the fruits of the contract from pleading *ultra vires* as a defense to an action thereon, that is, from setting up a defense to an action to compel the performance of the contract on its part that it was without power to enter into it.[34]

c. Prevent Corporation From Repudiating Engagements of Its Promoters. As already seen[35] the same principle — the fact of receiving and retaining the benefits of a contract with knowledge — prevents a corporation from repudiating the engagements of its promoters. Thus a manufacturing corporation is estopped from denying its liability for work done, under a contract made with its acting president, after the certificate of its incorporation has been signed by its members, but before it has been recorded as required by the governing statute, so as to constitute the coadventurers a *de jure* corporation.[36]

12. No Record of Corporate Assent Necessary. The mere suggestion that the estoppels under consideration belong to the class which are designated estoppels *in pais*, leads to the suggestion that it is quite immaterial to the operation of this rule of estoppel that any formal expression of assent to the unauthorized act is found in the records of the corporation.[37]

13. Operate in Various Other Ways. The principle of estoppel operates in various other ways, as indicated by the references in the margin.[38]

C. Waiver of Rights by Corporation. From the premise that a corporation may become estopped by the acts or omissions *in pais* of its officers and shareholders, the conclusion follows that it may waive its rights and may become estopped from denying that it has waived them. Perhaps the most frequent illustration of this is furnished by the class of decisions which hold insurance companies estopped from insisting upon conditions in their policies, where by a

33. *Illinois.*— Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513.

Missouri.— Brown *v.* Wright, 25 Mo. App. 54.

Vermont.—Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

Wisconsin.— Kneeland *v.* Gilman, 24 Wis. 39.

United States.— New England Car-Spring Co. *v.* Union India Rubber Co., 18 Fed. Cas. No. 10,153, 4 Blatchf. 1.

34. Sherman Center Town Co. *v.* Morris, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134; Goldbeck *v.* Kensington Nat. Bank, 147 Pa. St. 267, 23 Atl. 565. See also *infra*, XV, C, 2, e.

That the knowledge of the body of shareholders is for the purposes of this principle the knowledge of the corporation see *infra*, XV, B, 7, a, (1).

35. See *supra*, I, Q, 4.

36. Baltimore Grape Sugar, etc., Mfg. Co. *v.* Small, 40 Md. 395.

37. Kneeland *v.* Gilman, 24 Wis. 39.

38. Estops a corporation holding shares of another corporation as pledgee and having consequently the power of control over it, from undoing the dishonest acts of its president whom it allows to remain in control. Des Moines Gas Co. *v.* West, 50 Iowa 16. Prevents a railroad company from asserting its exclusive franchise against another company which built its road while the former company stood by and looked on. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663; Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283. Prevents a canal company from diverting its water from a mill, to be there used in generating steam, after it has stood by and seen the diverting pipes laid. Rochdale Canal Co. *v.* King, 16 Beav. 630, 17 Jur. 1001, 22 L. J. Ch. 604. This case has often been cited as an example of an equitable estoppel against a corporation. See for instance Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283. Prevents a quo warranto proceeding against one whom the relator has induced to act as a corporate officer. Reg. *v.* Greene, 2 Q. B. 460, 2 G. & D. 24, 6 Jur. 777, 42 E. C. L. 760. Acceptance of tolls prevents a turnpike company from denying its obligation to keep its road in repair. Com. *v.* Worcester Turnpike Corp., 3 Pick. (Mass.) 327; Nicholl *v.* Allen, 1 B. & S. 916, 31 L. J. Q. B. 283, 6 L. T. Rep. N. S. 699, 10 Wkly. Rep. 741, 101 E. C. L. 916.

course of conduct they have lead the insured to believe that they have waived the same,[39] a subject which lies outside the scope of this article, the cases being cited merely to illustrate a general doctrine.

D. When Corporation Estopped by Acts of Its Officers in Procuring New Legislation. This subject, already considered,[40] which in the days of special charters and of special acts amending the same was fruitful of litigation has ceased to be important in view of the fact that corporations are now for the most part organized under general enabling acts, which provide for their amendment by voluntary corporate action.

XV. RATIFICATION BY CORPORATIONS.

A. Power to Ratify — 1. Corporation May Ratify Act Which It Might Have Done in First Instance — a. Rule Stated. A corporation, like a natural person, may ratify, affirm, and validate any contract made or act done in its behalf which it was capable of making or doing in the first instance.[41]

39. *California.*— Kruger *v.* Western F. & M. Ins. Co., 72 Cal. 91, 13 Pac. 156, 1 Am. St. Rep. 42.

Connecticut.— Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565.

Iowa.— Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

Louisiana.— Pino *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

Massachusetts.— White *v.* Connecticut F. Ins. Co., 120 Mass. 330; Mulrey *v.* Shawmut Mut. F. Ins. Co., 4 Allen 116, 81 Am. Dec. 689.

New Hampshire.— Union Mut. F. Ins. Co. *v.* Keyser, 32 N. H. 313, 64 Am. Dec. 375.

New York.— Richmond *v.* Niagara F. Ins. Co., 79 N. Y. 230; Goodwin *v.* Massachusetts Mut. L. Ins. Co., 73 N. Y. 480; Walsh *v.* Hartford F. Ins. Co., 73 N. Y. 5; Van Schoick *v.* Niagara F. Ins. Co., 68 N. Y. 434; Merserau *v.* Phœnix Mut. L. Ins. Co., 66 N. Y. 274; Church *v.* La Fayette F. Ins. Co., 66 N. Y. 222; McNeilly *v.* Continental L. Ins. Co., 66 N. Y. 23; Bodine *v.* New York City Exch. F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Boehen *v.* Williamsburgh City Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787; Wood *v.* Poughkeepsie Mut. Ins. Co., 32 N. Y. 619; Sheldon *v.* Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213; Carroll *v.* Charter Oak Ins. Co., 1 Abb. Dec. 316, 10 Abb. Pr. N. S. 166; Hotchkiss *v.* Germania F. Ins. Co., 5 Hun 90; Shear *v.* Phœnix Mut. L. Ins. Co., 4 Hun 800; Dean *v.* Ætna L. Ins. Co., 2 Hun 358, 4 Thomps. & C. 497; O'Reilly *v.* Guardian Mut. L. Ins. Co., 1 Hun 460, 3 Thomps. & C. 487; Whitwell *v.* Putnam F. Ins. Co., 6 Lans. 166; Dohn *v.* Farmers' Joint-Stock Ins. Co., 5 Lans. 275; Owen *v.* Farmers' Joint Stock Ins. Co., 57 Barb. 518; Post *v.* Ætna Ins. Co., 43 Barb. 351; Prall *v.* Mutual Protection L. Assur. Soc., 5 Daly 298.

Wisconsin.— Miner *v.* Phœnix Ins. Co., 27 Wis. 693, 9 Am. Rep. 479.

United States.— Brooklyn L. Ins. Co. *v.* Miller, 12 Wall. 285, 20 L. ed. 398; New England Car-Spring Co. *v.* Union Indian Rubber Co., 18 Fed. Cas. No. 10,153, 4 Blatchf. 1.

On this principle an insurance company is estopped from showing a breach of warranty by proof of errors material to the risk in the survey and application, when the survey and application have been made by the agent of the insurer with a full knowledge of the facts. Combs *v.* Hannibal Sav., etc., Ins. Co., 43 Mo. 148, 97 Am. Dec. 383; Rowley *v.* Empire Ins. Co., 36 N. Y. 550; Plumb *v.* Cattaraugus County Mut. Ins. Co., 18 N. Y. 392, 72 Am. Dec. 526. See also Franklin *v.* Atlantic F. Ins. Co., 42 Mo. 456; Horwitz *v.* Equitable Mut. Ins. Co., 40 Mo. 557, 93 Am. Dec. 321.

When waiver by local agent of foreign insurance company is binding on the company see Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

40. See *supra*, I, K, 6, a *et seq.*

41. *Alabama.*— Everett *v.* U. S., 6 Port. 166, 30 Am. Dec. 584.

Connecticut.— Chase's Appeal, 57 Conn. 236, 18 Atl. 96.

Mississippi.— Planters' Bank *v.* Sharp, 4 Sm. & M. 75, 43 Am. Dec. 470.

New Hampshire.— Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Seymour *v.* Spring Forest Cemetery Assoc., 19 N. Y. Suppl. 94, 45 N. Y. St. 520.

North Carolina.— Taylor *v.* Albemarle Steam Nav. Co., 105 N. C. 484, 10 S. E. 897; Greenleaf *v.* Norfolk Southern R. Co., 91 N. C. 33.

Utah.— North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 67 Am. St. Rep. 607, 52 Pac. 168, 40 L. R. A. 851.

Virginia.— West Salem Land Co. *v.* Montgomery Land Co., 89 Va. 192, 15 S. E. 524.

United States.— Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

England.— Church *v.* Imperial Gas Light, etc., Co., 6 A. & E. 846, 7 L. J. Q. B. 118, 3 N. & P. 35, 1 W. W. & H. 137, 33 E. C. L. 443; East London Water Works Co. *v.* Bailey, 4 Bing. 283, 5 L. J. C. P. O. S. 175, 12 Moore C. P. 533, 13 E. C. L. 505; Stafford *v.* Till, 4 Bing. 75, 12 Moore C. P. 260, 13 E. C. L. 407.

b. Corporation Cannot Ratify Contract Which It Had No Power to Make. On the other hand a corporation cannot ratify a contract which it could not have made in the first instance.[42] While the authorities are not in harmony with respect to this question, the general rule is believed to be that a corporate act or contract cannot be validated by ratification, either (1) where the act or contract was wholly in excess of the powers of the corporation, express or implied[43] or (2) where it was prohibited by positive law.[44]

c. Corporate Officers or Agents Cannot Ratify Contract Which They Had No Power to Make. If the officers of a corporation have no power to bind the corporation, by making or authorizing a particular contract, the corporation does not ratify the contract by the mere failure of the officers to repudiate a claim arising out of it and presented against the corporation.[45]

d. When De Facto Officers May Ratify. *De facto* directors may of course ratify the unauthorized act of ministerial officers of a corporation, so as to save the rights of innocent third persons.[46]

e. Power to Ratify Unauthorized Submission to Arbitration. If an agent of a corporation, without authority, submits to arbitration a disputed claim against the corporation, the corporation may ratify the act of the agent so as to make it binding, after the award is made, although the award is favorable to the corporation, and although the circumstances are such that it might have disaffirmed it.[47]

42. Thompson *v.* West, 59 Nebr. 677, 82 N. W. 13, 49 L. R. A. 337; Tullock *v.* Webster Co., 46 Nebr. 211, 64 N. W. 705; Gutta-Percha, etc., Mfg. Co. *v.* Ogalalla, 40 Nebr. 775, 59 N. W. 513, 42 Am. St. Rep. 696.

43. *California.*— McCracken *v.* San Francisco, 16 Cal. 591.

Michigan.— Taymouth Tp. *v.* Koehler, 35 Mich. 22; Hotchin *v.* Kent, 8 Mich. 526.

New Hampshire.— Downing *v.* Mt. Washington, etc., Co., 40 N. H. 230.

New York.— Smith *v.* Newburgh, 77 N. Y. 130 (municipal corporation); Brady *v.* New York, 20 N. Y. 312 (municipal corporation); A. C. Nellis Co. *v.* Nellis, 62 Hun 63, 16 N. Y. Suppl. 545, 41 N. Y. St. 599.

Vermont.— Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

United States.— Central Trans. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Lewis *v.* Shreveport, 108 U. S. 282, 2 S. Ct. 634, 27 L. ed. 728 (municipal corporation); Marsh *v.* Fulton County, 10 Wall. 676, 19 L. ed. 1040 (municipal corporation).

See also *infra*, XVII, F, 1, a.

44. Illustrations.— Thus where there is a statute (in this case N. C. Code, § 683) requiring that corporate contracts involving a liability exceeding one hundred dollars must be in writing and under the corporate seal or signed by some officer authorized thereto, a verbal contract within the statutory description is not validated by a subsequent ratification on the part of an officer who might have originally entered into it in writing. Curtis *v.* Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944. But see *infra*, XV, D, 3, b; and *compare supra*, XII, B, 2, a *et seq.* So where there is a statute (in this case N. Y. Laws (1848), c. 40, § 14) forbidding a loan to a shareholder of the funds of the corporation, such a loan made by the treasurer cannot be ratified by the trustees; and the fact that they foreclose and sell securities hypothecated as security for loans will not estop the company from treating the shareholder's acts as a conversion, and recovering any balance not realized on the sale of the securities. A. C. Nellis Co. *v.* Nellis, 62 Hun (N. Y.) 63, 16 N. Y. Suppl. 545, 41 N. Y. St. 599. The by-laws of a railway company authorized bondholders to vote at shareholders' meetings, and a provision of the bonds undertook to give the bondholders such a right. These provisions were void under the constitution and statute law of the state which required directors to be elected at annual meetings of the shareholders, by a majority in value of the stock, upon a cumulative system of voting and not otherwise. It was held that the illegal provision in the bonds could not be cured by a subsequent ratification by the corporation. Durkee *v.* People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340 [*affirming* 53 Ill. App. 396].

45. Hotchin *v.* Kent, 8 Mich. 526; Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

So the members of an official board acting severally cannot ratify an unauthorized contract made by themselves, because they could not, so acting, have authorized it in the first instance. Taymouth *v.* Koehler, 35 Mich. 22. See also *supra*, IX, E, 1, a *et seq.*

46. Anglo-Californian Bank *v.* Mahoney Min. Co., 1 Fed. Cas. No. 392, 5 Sawy. 255.

47. Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356. If the submission is invalid by reason of not having been made by the agent under seal, yet if the principal attends before the arbitrators and submits his case to them, this will estop him from im-

2. Ratification of Contracts Made by Promoters Prior to Organization of Corporation — a. In General. This subject has been considered in a former subdivision,[48] and we have had occasion to note a divergence of judicial opinion upon the question, some of the courts holding, on a principle of justice or species of estoppel, that a corporation is bound to pay the expenses incurred by its promoters in effecting its organization, on the theory of having received the benefit of those expenditures,[49] provided it was intended when the services were rendered that the future corporation should pay for them;[50] while other courts hold that the corporation is not so bound, unless it has affirmatively ratified and adopted the contract of the promoters,[51] or at least unless it has accepted the benefits accruing therefrom, having the power to reject them.[52] Where the latter view is taken the corporation may, after its organization, make such engagements its own contracts, by adopting them in the same manner as it might adopt original contracts made without its authority by persons assuming to act in its behalf.[53] In one theory this is not in strictness a ratification, such as relates back to the date of the making of the original contract by the promoters, but it is said to create a new contract from the date of the act of adoption;[54] but according to another theory the adoption of such a contract makes it in all respects what it would have been if the requisite power had existed when it was entered into.[55] It has been held that for the purposes of such a ratification formal action of its board of directors is necessary only where it would be necessary to a similar original contract.[56]

b. When Actions Maintainable Against Corporation on Contracts so Ratified. And it seems to be settled in some American jurisdictions that where the projectors of a corporation, prior to its coming into existence, enter into contracts in its behalf, and the corporation, after coming into existence, takes the benefit of such contracts without performing on its part what the projectors undertook that it should perform, an action will lie against it to compel such performance.[57]

peaching the award on the ground of a want of original authority to make the submission. White *v.* Fox, 29 Conn. 570.

48. See *supra*, I, Q, 1 *et seq.* See also Dubuque Female College *v.* Dubuque Dist. Tp., 13 Iowa 555.

49. See *supra*, I, Q, 4. To this effect see Grand River Bridge Co. *v.* Rollins, 13 Colo. 4, 21 Pac. 897; Harrison *v.* Vermont Manganese Co., 1 Misc. (N. Y.) 402, 20 N. Y. Suppl. 894, 49 N. Y. St. 873; Grier *v.* Hazard, 13 N. Y. Suppl. 583, 38 N. Y. St. 462.

50. Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164, 44 Ark. 383. That no recovery can be had from a corporation upon a contract made before its organization, by one claiming to act as its attorney, but not ratified by it after its organization upon full knowledge of the facts, see Oaks *v.* Cattaraugus Water Co., 21 N. Y. Suppl. 851, 50 N. Y. St. 922.

51. See *supra*, I, Q, 1.

52. Buffington *v.* Bardon, 80 Wis. 635, 50 N. W. 776.

53. *Alabama.*— Davis *v.* Montgomery Furnace, etc., Co., (1890) 8 So. 496.

Connecticut.— Stanton *v.* New York, etc., R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110.

Minnesota.— McArthur *v.* Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653; Battelle *v.* Northwestern Cement, etc., Pavement Co., 37 Minn. 89, 33 N. W. 327. *Compare* Porter *v.* Winona, etc., Grain Co., 78 Minn. 210, 80 N. W. 965.

Missouri.— Joy *v.* Manion, 28 Mo. App. 55.

New York.— It has been held that where a promoter of a corporation contracts for the employment of another by the prospective corporation, and is elected to the presidency of the new corporation on its creation, and such other enters on his duties under such agreement, without dissent by the president, such acquiescence constitutes a ratification by the corporation of the contract. Mesinger *v.* Mesinger Bicycle Saddle Co., 44 N. Y. App. Div. 26, 60 N. Y. Suppl. 431.

Tennessee.— Pittsburgh, etc., Copper Min. Co. *v.* Quintrell, 91 Tenn. 693, 20 S. W. 248.

England.— *Compare* North Sydney Invest. Co. *v.* Higgins, [1899] A. C. 263, 68 L. J. P. C. 42, 47 Wkly. Rep. 481, 80 L. T. Rep. N. S. 303, 6 Manson 321; *In re* Johannesburg Hotel Co., [1891] 1 Ch. 119, 60 L. J. Ch. 391, 64 L. T. Rep. N. S. 61, 2 Meg. 409, 39 Wkly. Rep. 260.

54. McArthur *v.* Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653.

55. Stanton *v.* New York, etc., R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110.

56. Battelle *v.* Northwestern Cement, etc., Pavement Co., 37 Minn. 89, 33 N. W. 327.

57. Recognized in Bell's Gap R. Co. *v.* Christy, 79 Pa. St. 54, 21 Am. Rep. 39. So held in Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852; Low *v.* Connecticut, etc., R. Co., 45 N. H. 370. But it has been held that the fact that at a meeting of the directors of a corporation the president called their at-

c. Evidence of Ratification of Contracts of Promoters. As to what will be evidence of a ratification of the precedent contracts of its promoters in its behalf, the cases seem to present no special distinctions from other cases of ratification.[58]

3. Ratification of Contracts Made With Predecessor Corporation. Where a railroad corporation is sold out under a mortgage, and a new corporation is organized to purchase and control it, it is the frequent practice for the new corporation to adopt and carry out the unexecuted contracts of its predecessor, although it is not of course bound in law so to do.[59]

4. Adoption by Corporation of Contracts Made by Precedent Partnership. Such an adoption, it has been held, must be evidenced by a writing, since it is a promise to pay the debt of another, and hence within the statute of frauds.[60]

5. Ratification Must Be in Whole and Not in Part. It is a general principle which applies without regard to the mode of ratification that a voidable engagement cannot be ratified in part so far as it is beneficial to the corporation, and repudiated so far as it is deleterious.[61]

B. Body That Can Ratify — 1. Any Body or Agency That Could Have Acted in First Instance. Speaking generally it may be said that a ratification may be made, whether by formal action or by passive acquiescence, by any corporate agency or body that might have authorized the act in the first instance.

2. Ratification by Managing Agent. An unauthorized contract of a corporation, made within its general powers by a subordinate agent, may be ratified by the managing agent.[62]

3. Ratification by Vice-President. If the president makes a contract without authority, and the vice-president has authority in the premises, he may ratify the unauthorized contract made by the president.[63]

4. Ratification by Railway Superintendent. If a railway station agent, without express authority, engages a surgeon to attend an employee for an injury sustained in the service of the company,[64] and the superintendent of the company knows of the engagement and does not object to it, but tells the surgeon that he will be paid, this will warrant a finding that the company has ratified the employment.[65]

5. Ratification by Attorney. A corporation may by its attorney, in an action against it upon a bond, ratify the execution of the bond by its officers, and no formal vote of ratification is necessary.[66]

6. Ratification by Board of Directors or Trustees — a. In General. The directors or trustees of a business corporation wield its entire power in mere

tention to a claim for services rendered in securing subscriptions to the capital stock, and that the members of the board assented to the validity of the claim, and did not object to it, did not constitute a ratification of a promise by a single promoter to pay for such services. Tift *v.* Quaker City Nat. Bank, 141 Pa. St. 550, 21 Atl. 660.

58. For an example see Bommer *v.* American Spiral Spring Butt Hinge Mfg. Co., 81 N. Y. 468.

Evidence which was held to show an adoption by a corporation of a contract under which services were rendered, prior to its organization, on the works afterward acquired by it, see Frankfort, etc., Turnpike Co. *v.* Churchill, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159 (ratification of promises made to subscribers to capital stock as to location of road); Pittsburgh, etc., Copper Min. Co. *v.* Quintrell, 91 Tenn. 693, 20 S. W. 248.

59. Upon the question what will be evidence of such a ratification sufficient to take the issue to a jury see Walker *v.* Wilmington, etc., R. Co., 26 S. C. 80, 1 S. E. 366. What facts amounted to a ratification by a land company of a scheme devised by its shareholders as members of a precedent company to enable such company to deal in lands. Hull *v.* Glover, 126 Ill. 122, 18 N. E. 198.

60. Georgia Co. *v.* Castleberry, 43 Ga. 187. Somewhat to the same effect see Dingeldein *v.* Third Ave. R. Co., 9 Bosw. (N. Y.) 79.

61. See for example Wayne International Bldg., etc., Assoc. *v.* Moats, 149 Ind. 123, 48 N. E. 793. See also *infra*, XV, C, 2, e.

62. Singer Mfg. Co. *v.* Belgart, 84 Ala. 519, 4 So. 400.

63. Smith *v.* Martin Anti-Fire Car Heater Co., 19 N. Y. Suppl. 285, 47 N. Y. St. 26.

64. As to which see *supra*, X, C, 6, a *et seq.*

65. Cairo, etc., R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299. See further Toledo, etc., R. Co. *v.* Prince, 50 Ill. 26; Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188, 95 Am. Dec. 484.

66. Simmons *v.* Shaw, 172 Mass. 516, 52 N. E. 1087.

matters of business. They may hence, when sitting together as a board,[67] by a solemn act, such as a resolution or a vote passed and entered upon their records, ratify any contract which they had power to make.[68]

b. Of Contract Made by President. Where the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified the act.[69]

c. When Outside State. If the act is not a constituent act, but is a mere business act, with respect to which the directors act as agents of the corporation, the act of ratification may be done outside the state, as in the case of ratifying a mortgage on corporate property.[70]

d. May Ratify Any Act Which They Could Have Done Originally. The directors may of course ratify any act which they might have done originally.[71]

e. Must Take Place on Full Knowledge. A ratification by the board of directors must take place with full knowledge on the part of the board; knowledge on the part of the officers who are concerned in the transaction, although members of the board, or on the part of single directors, not communicated to the board, will not, on grounds elsewhere considered, be such a knowledge as will make it a good ratification.[72]

f. What Corporate Body Cannot Ratify. A meeting of directors, held without notice to one of them, at which meeting a quorum of qualified directors was not present, cannot ratify the unauthorized act of one of the officers of the corporation, such as a general assignment of the assets made by the vice-president and acting manager, without knowledge of, or authority from, the board.[73]

7. Ratification by Shareholders — a. Informal or Unauthorized Acts May Be Cured by Such Ratification — (I) *In General.* Informal or irregular action of the board of directors or of the agents of a corporation, which was within the corporate power, may be cured by the ratification of the shareholders.[74]

(II) *What Acts May Be so Ratified* — (A) *In General.* Speaking generally the shareholders can ratify any act of any other body or agency of the corporation which the shareholders might have authorized in the first instance.

(B) *Constituent Acts.* They may therefore ratify constituent acts done by the directors outside the scope of their powers, by which is meant acts which

67. But not when acting severally, as where it is attempted to ratify in this way an assignment for creditors, void, because executed without authority by a minority of the directors. Calumet Paper Co. *v.* Haskell Show Printing Co., 144 Mo. 331, 45 S. W. 1145. It is scarcely necessary to add that a ratification cannot be effected by the action of a minority of the board, for example two of them when not sitting as a board. East Cleveland R. Co. *v.* Everett, 19 Ohio Cir. Ct. 205, 10 Ohio Cir. Dec. 493.

68. Porter *v.* Lassen County Land, etc., Co., 127 Cal. 261, 59 Pac. 563 (mortgage made by the board without a statutory quorum may be subsequently ratified by the full board); Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590, 17 So. 236 (ratification by board of a conveyance not executed by proper officers); New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 88 Hun (N. Y.) 569, 34 N. Y. Suppl. 890, 69 N. Y. St. 54 (ratification by resolution of act of secretary).

69. Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Indianapolis Rolling Mill Co. *v.* St. Louis, etc., R. Co., 120 U. S. 256, 7 S. Ct. 542, 30 L. ed. 639. Similarly see Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

70. Reichwald *v.* Commercial Hotel Co., 106 Ill. 439.

71. St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 607, 15 Pac. 544, carry out a common agreement to pay salaries to officers. See also *supra*, XV, A, 1, a.

As to the ratification by directors of void contracts for services see Schurr *v.* New York, etc., Invest. Co., 18 N. Y. Suppl. 454, 45 N. Y. St. 645.

72. Pacific Rolling Mill *v.* Dayton, etc., R. Co., 5 Fed. 852, 7 Sawy. 61.

73. Cupit *v.* Park City Bank, 20 Utah 292, 58 Pac. 839.

74. Morisette *v.* Howard, 62 Kan. 463, 63 Pac. 756. See also St. Croix Lumber Co. *v.* Mittlestadt, 43 Minn. 91, 44 N. W. 1079.

change or otherwise affect the fundamental basis of the organization of the corporation itself, and which do not pertain to its ordinary business.[75]

(c) *Acts Done by Board of Directors Not Lawfully Constituted.* The shareholders may also ratify and cure acts done by their board of directors not properly constituted, as where the board consists of less[76] or more[77] than the statutory or charter number.

(d) *Acts Done by Officers Who Are Such De Facto but Not De Jure.* The principle which upholds the acts of *de facto* officers of corporations so as to save the rights of the innocent public rests largely upon the theory of a ratification of the fact of their holding the offices into which they have intruded, made by the acquiescence of the elective body, that is to say the body which might have elected them in the first instance, the shareholders.[78]

(e) *Irregular or Unauthorized Transfers, Assignments, or Encumbrances of Corporate Property.* The most usual case in which the assent and acquiescence of the shareholders have been held to amount to a ratification of an act done by the directors or by inferior agents has been the case where the property of the corporation has been transferred, assigned, or encumbered.[79]

(f) *Contracts Between Corporation and Its Directors, Which Corporation Is Entitled to Avoid*—(1) In General. Contracts between the corporation and its own directors which under a principle already considered[80] the corporation is entitled to avoid may be ratified; and this does not necessarily require any independent and substantive act of ratification, but the contract may become finally established as a valid contract by the acquiescence of the other directors and the body of the shareholders, and the right to avoid it may be thereby waived.[81]

(2) Ratification by Shareholders Who Are Interested in Contract. Where a proposition comes before a meeting of the shareholders to ratify a purchase of property from themselves, which they as directors have assumed to make, the shareholders will not be disqualified from voting upon it, from the fact that they may have a personal interest in the matter apart from their interest as members of the corporation;[82] although, if they vote for the purpose of subserving their own separate interests to the prejudice of a minority of the shareholders, the latter may have redress in equity, under principles already considered.[83]

b. Ratification by Formal Action at Shareholders' Meetings. Ratifications frequently take place by formal action at shareholders' meetings.[84]

c. Ratification by Express Assent, Although Not Formally Evidenced. It has been held that a ratification by a corporation of an unauthorized act of its officers

75. See *supra*, I, J, 7, b; I, K, 6, a; IX, C, 7.

76. Martin *v.* Niagara Falls Paper Mfg. Co., 44 Hun (N. Y.) 130 [*affirmed* in 122 N. Y. 165, 25 N. E. 303, 33 N. Y. St. 318].

77. Hax *v.* R. T. Davis Mill Co., 39 Mo. App. 453.

78. Hax *v.* R. T. Davis Mill Co., 39 Mo. App. 453.

79. Stokes *v.* Detrick, 75 Md. 256, 23 Atl. 846 (order of directors selling and conveying all the property of the corporation); The Lyceum *v.* Ellis, 8 N. Y. Suppl. 867, 30 N. Y. St. 242; Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551 (transfer and delivery of personal property by the manager); Wood *v.* Corry Water Works Co., 44 Fed. 146, 12 L. R. A. 168 (ratification of a mortgage executed without the constitutional notice to the shareholders, all of the shareholders assembling and voting for it). See also Hull *v.* Glover, 126 Ill. 122, 18 N. E. 198; Wells *v.* Gates, 18 Barb. (N. Y.) 554.

80. See *supra*, IX, I, 1 *et seq.*

81. Kelley *v.* Newburyport, etc., R. Co., 141 Mass. 496, 6 N. E. 745; Union Pac. R. Co. *v.* Credit Mobilier, 135 Mass. 367; Welch *v.* Importers', etc., Nat. Bank, 122 N. Y. 177, 25 N. E. 269, 33 N. Y. St. 452; Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103; Ashhurst's Appeal, 60 Pa. St. 290; Omaha Hotel Co. *v.* Wade, 97 U. S. 13, 24 L. ed. 917; West Virginia Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328.

82. Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483, 52 N. W. 48. See also 4 Thompson Corp. § 4461.

83. See *supra*, XI, B, 1, a *et seq.*

84. Bassett *v.* Fairchild, 132 Cal. 637, 64 Pac. 1082, 61 Pac. 791, immaterial that one shareholder was interested, if a majority of

in executing a deed of trust of its property, for the benefit of its creditors, may be ratified by the express sanction of all the shareholders and directors, although no formal resolution to that effect is passed.[85]

d. Ratification by Execution of Instrument of Ratification by All Shareholders. An auction sale of property of a corporation has been held to be validated by a ratification made in this mode.[86]

e. Ratification by Acquiescence, Laches, or Supineness of Shareholders. The most usual form in which ratifications by shareholders take place is presented where they lie by and fail to take action to undo the unauthorized or unlawful act until it is too late to put the other party to the transaction *in statu quo*, and especially where the corporation has received and retains the benefit of the transaction.[87] And even where the act complained of is *ultra vires* the company, the shareholders collectively, or a minority of them, may lose by their supineness the right to have the aid of a court of equity in undoing the act, under the operation of the equitable doctrine of laches.[88] Where a voidable act may be ratified by the shareholders, by taking a course of conduct with reference to it, upon full knowledge of the facts, it is immaterial that they proceed in ignorance of the legal effect of such facts.[89]

f. Corporate Action Taken With Proviso That It Be Ratified by Shareholders. It sometimes happens that power is conferred by the directors of a corporation upon a committee of their own number to do a certain act, for example to make a sale of certain of its assets, but subject to a ratification by the shareholders. Here, the agency being special, the other party to the transaction must take notice of the extent of it at his peril, especially where he knows that it is based upon an authorization which is in writing. Here, unless there is a ratification by the shareholders, the transaction will not, in the absence of circumstances of estoppel, be binding on the corporation, and this, although the option in pursuance of which the sale took place said nothing about the necessity of such a ratification.[90]

g. When Need Not Be By Unanimous Consent of Shareholders. A ratification by shareholders does not require their unanimous consent where the act might have been authorized by a majority of them in the first instance, for example a transaction between the corporation on the one hand and certain promoters and directors on the other hand, whereby the latter gain a personal benefit.[91]

h. Effect of Ratification by Shareholders. The effect of a ratification by the shareholders is substantially the same as the effect of any other ratification. It cures the want of precedent authority and is tantamount to a precedent authorization.[92]

C. Manner of Ratifying and Evidence of Ratification — 1. Written Instruments — Doctrine That Written Instrument Defectively Executed Can Be Ratified Only by Instrument of Equal Dignity. This doctrine, laid down by Story[93] and followed by Freeman,[94] that a written instrument defectively executed can be ratified only by an instrument of equal dignity, applies to corporations in so far as it applies to natural persons. It does not mean that a writing defectively executed must be ratified by a writing well executed or not at all; or that a contract required to be under seal must be ratified by a sealed instrument or not at all; it

disinterested shareholders voted for the resolution of ratification.

85. Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176.

86. Robinson Mineral Spring Co. *v.* De Bautte, 50 La. Ann. 1281, 23 So. 865.

87. This species of ratification is reserved for separate treatment. See *infra*, XV, C, 2, e.

88. Burgess *v.* St. Louis County R. Co., 99 Mo. 496, 12 S. W. 1050.

89. Kelley *v.* Newburyport, etc., R. Co., 141 Mass. 496, 6 N. E. 745. That a corporation may be estopped by the consent of its sole shareholder see Parsons *v.* Hayes, 14 Abb. N. Cas. (N. Y.) 419.

90. Kelsey *v.* New England St. R. Co., 60 N. J. Eq. 230, 46 Atl. 1059.

91. Urner *v.* Sollenberger, 89 Md. 316, 43 Atl. 810.

92. Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176.

93. Story Agency, §§ 49, 242.

94. 27 Am. Dec. 344.

does not exclude ratifications of engagements which have been thus entered into, by acts or neglects *in pais*, such as acquiescence or accepting the benefits with knowledge.[95] But it means that whenever it is attempted to ratify an obligation entered into by a corporation by an instrument defectively executed, the ratifying instrument must be one of equal dignity. Thus if it is attempted to ratify an obligation entered into by an instrument necessarily under seal, defective because the corporate seal was omitted, the ratifying instrument must be under seal.[96]

2. Ratification by Acts and Neglects In Pais — a. By Acquiescence After Knowledge. Acquiescence for a considerable time by a corporation, through its efficient agencies and the body of its shareholders, in a state of facts, after knowledge or after such a length of time and such a condition of circumstances that knowledge is to be inferred, will operate as a ratification[97] in pursuance of the well-settled principle in the law of agency that a principal may ratify the unauthorized act of his agent by acquiescence or even by silence, after being fully informed of the facts and circumstances attending the unauthorized act.[98] This

95. For instance where an appeal-bond, given in a judicial proceeding, was defectively executed by the corporation appellant, by reason of the failure to affix its seal, and yet the corporation through its counsel prosecuted the appeal for two years, this was held a ratification of the defective execution of the bond. Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187. It should not escape attention that the court reasoned that a precedent resolution of the directors would dispense with the necessity of affixing the seal, and that a subsequent ratification would have the same effect.

96. Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lawrence *v.* Taylor, 5 Hill (N. Y.) 107; Evans *v.* Wells, 22 Wend. (N. Y.) 324; Hanford *v.* McNair, 9 Wend. (N. Y.) 54.

97. *Iowa.*— Thompson *v.* Lambert, 44 Iowa 239.

Kansas.— Sherman Center Town Co. *v.* Swigart, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137.

Maine.— Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Missouri.— Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Tyrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294.

Nebraska.— Hastings German Nat. Bank *v.* Hastings First Nat. Bank, 59 Nebr. 7, 80 N. W. 48.

New York.— Holmes *v.* Willard, 125 N. Y. 75, 25 N. E. 1083, 34 N. Y. St. 455, 11 L. R. A. 170.

Pennsylvania.— Moller *v.* Keystone Fibre Co., 187 Pa. St. 553, 41 Atl. 478; Watts' Appeal, 78 Pa. St. 370.

England.— Evans *v.* Smallcombe, L. R. 3 H. L. 249, 19 L. T. Rep. N. S. 207; Gregory *v.* Patchett, 33 Beav. 595.

What amounts to an acquiescence on the part of the directors of an insurance company in the pledge of the stock of the company to secure a promissory note, such as will amount to a ratification. Bezou *v.* Pike, 23 La. Ann. 788. Passive acquiescence of corporate trustees in a declaration or statement, how far binding on corporation. Williams *v.* Christian Female College, 29 Mo. 250, 77 Am. Dec. 569. The act of the trustees of a Masonic lodge in indorsing a note payable to its order is ratified by the failure of the lodge, after learning of the transaction, to repudiate their act, tender back the consideration, and demand the return of the note. Mayer *v.* Old, 57 Mo. App. 639. The rule of the text applies to shareholders as well as to corporations; so that one who purchases shares in a corporation after a mismanagement of its affairs by its officers has been long known and has been acquiesced by it cannot complain of such mismanagement. Erny *v.* G. W. Schmidt Co., 197 Pa. St. 475, 47 Atl. 877.

98. *Alabama.*— Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

Georgia.— Owsley *v.* Woolhopter, 14 Ga. 124.

Illinois.— Louisville R. Co. *v.* Carson, 151 Ill. 444, 38 N. E. 140.

Indiana.— Haggerty *v.* Juday, 58 Ind. 154.

Kansas.—Lewis *v.* Bourbon County Com'rs, 12 Kan. 186.

Louisiana.— Pitts *v.* Shubert, 11 La. 286, 30 Am. Dec. 718; Guimbillot *v.* Abat, 6 Rob. 284; Lartigue *v.* Peet, 5 Rob. 91; Bonneau *v.* Poydras, 2 Rob. 1.

Maryland.— Maddux *v.* Bevan, 39 Md. 485.

Massachusetts.— Amory *v.* Hamilton, 17 Mass. 103.

New York.— Hazard *v.* Spears, 2 Abb. Dec. 353, 4 Keyes 469.

Pennsylvania.— Hall *v.* Vanness, 49 Pa. St. 457; Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Massey *v.* Insurance Co., 3 Phila. 200, 15 Leg. Int. 317.

Texas.— Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611.

West Virginia.— Curry *v.* Hale, 15 W. Va. 867.

United States.— Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549.

rule applies where the principal is a corporation, provided the unauthorized act of the agent is within the powers of the corporation.[99]

b. By Failing to Disavow Promptly After Knowledge. An intensified expression of the doctrine of the preceding paragraph is to say that where an agent has done an act not authorized by his principal, if the principal would disaffirm he must act at once upon obtaining knowledge of the unauthorized act.[1]

c. By Failing to Dissent Within Reasonable Time — (I) *In General.* The meaning of the preceding paragraph is that the corporation must dissent with reasonable promptness, or within a reasonable time, or as soon as it may be reasonably done after acquiring knowledge of the unauthorized act.[2]

(II) *Whether Reasonableness of Time Is Question of Fact or Law.* What will be a reasonable time within the meaning of this rule will be generally

99. *Kentucky.*— Pittsburgh, etc., R. Co. *v.* Woolley, 12 Bush 451, unauthorized employment of an attorney ratified by the continued silence of a single director to whom notice of the fact had been communicated.

Missouri.— Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187; Chouteau *v.* Allen, 70 Mo. 290 (failing to dissent for more than six years).

New Hampshire.— Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Sheldon Hat Blocking Mach. Co. *v.* Eickemeyer Hat Blocking Mach. Co., 90 N. Y. 607, 64 How. Pr. 467; Story *v.* Furman, 25 N. Y. 214; Hoyt *v.* Thompson, 19 N. Y. 207; Cunningham *v.* Massena Springs, etc., R. Co., 63 Hun 439, 18 N. Y. Suppl. 600, 44 N. Y. St. 723; Lee *v.* Pittsburgh Coal, etc., Co., 56 How. Pr. 373.

Pennsylvania.— Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

United States.— Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157 (unauthorized contract of president ratified by failing to dissent within a reasonable time); Augusta, etc., R. Co. *v.* Kittel, 52 Fed. 63, 2 C. C. A. 615.

1. *Illinois.*— McGeoch *v.* Hooker, 11 Ill. App. 649; Meister *v.* Cleveland Dryer Co., 11 Ill. App. 227 (and cases cited); Johnston *v.* Berry, 3 Ill. App. 256 (and cases cited).

Louisiana.— Kehlor *v.* Wemble, 26 La. Ann. 713; Pitts *v.* Shubert, 11 La. 286, 30 Am. Dec. 718 (citing civil-law authorities).

Massachusetts.— Foster *v.* Rockwell, 104 Mass. 167.

Mississippi.— Crane *v.* Bedwell, 25 Miss. 507.

Missouri.— Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397; Christian *v.* Jordan, 29 Mo. 68.

New York.— Story *v.* Furman, 25 N. Y. 214.

Pennsylvania.— Kelsey *v.* Crawford County Nat. Bank, 69 Pa. St. 426; Pennsylvania Bank *v.* Reed, 1 Watts & S. 101; Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75; Bredin *v.* Dubarry, 14 Serg. & R. 27.

Tennessee.— Hart *v.* Dixon, 5 Lea 336; Fort *v.* Coker, 11 Heisk. 579; Williams *v.* Storm, 6 Coldw. 203.

United States.— Augusta, etc., R. Co. *v.* Kittel, 52 Fed. 63, 2 C. C. A. 615, unauthorized mortgage executed by president ratified by failing to disavow promptly, where there were other circumstances of laches.

2. *Alabama.*— Mobile, etc., R. Co. *v.* Jay, 65 Ala. 113.

Illinois.— Williams *v.* Merritt, 23 Ill. 623; Follansbe *v.* Kilbreth, 17 Ill. 522, 65 Am. Dec. 691; McGeoch *v.* Hooker, 11 Ill. App. 649; McDermid *v.* Cotton, 2 Ill. App. 297. And see Miller *v.* Excelsior Stone Co., 1 Ill. App. 273.

Louisiana.— Raymond *v.* Palmer, 41 La. Ann. 425, 6 So. 692, 17 Am. St. Rep. 398, unauthorized act of president ratified by the failure of the directors to dissent for two months.

Massachusetts.— Brigham *v.* Peters, 1 Gray 139; Pratt *v.* Putnam, 13 Mass. 361.

Mississippi.— Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617.

New Hampshire.— Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319.

New York.—Vianna *v.* Barclay, 3 Cow. 281; Cairnes *v.* Bleecker, 12 Johns. 300.

Tennessee.—Walker *v.* Walker, 7 Baxt. 260.

Wisconsin.— Saveland *v.* Green, 40 Wis. 431.

United States.— Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Indianapolis Rolling Mill Co. *v.* St. Louis, etc., R. Co., 120 U. S. 256, 7 S. Ct. 542, 30 L. ed. 639; Colorado Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; West Virginia Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328; Marsh *v.* Whitmore, 21 Wall. 178, 22 L. ed. 482; Harwood *v.* Cincinnati, etc., R. Co., 17 Wall. 78, 21 L. ed. 588; Badger *v.* Badger, 2 Wall. 87, 17 L. ed. 836; Law *v.* Cross, 1 Black 533, 17 L. ed. 185; Abbe *v.* Rood, 1 Fed. Cas. No. 6, 6 McLean 106; Norris *v.* Cook, 18 Fed. Cas. No. 10,305, 1 Curt. 464.

England.— Prince *v.* Clark, 1 B. & C. 186, 2 D. & R. 266, 1 L. J. K. B. O. S. 69, 25 Rev. Rep. 352; Wentworth *v.* Lloyd, 32 Beav. 467; Vigers *v.* Pike, 8 Cl. & F. 562, 8 Eng. Reprint 220.

What delay has been held unreasonable under particular circumstances. Mallory *v.* Mallory Wheeler Co., 61 Conn. 131, 23 Atl. 708 (seven months); Silsby *v.* Strong, 38 Oreg. 36, 62 Pac. 633 (trustees took possession of the property and held it for over thirteen months without any expression of dissent); Indianapolis Rolling Mill Co. *v.* St. Louis, etc., R. Co., 120 U. S. 256, 7 S. Ct. 542, 30 L. ed. 639 (six months).

a question of fact for a jury in a case at law, or for the chancellor in a case in equity, to be determined in view of all the circumstances of the case.[3] But in many cases where the facts are established or undisputed the act of ratification may appear to be of such an unequivocal character that the question may be decided as a mere question of law, as where the principal accepts the fruits of the misconduct of the agent with full knowledge,[4] under a principle hereafter stated.[5] But where the facts on which the conclusion of law depends are equivocal or doubtful, they must of course be decided by a jury in a case at law.[6]

d. Doctrine That Silence After Knowledge Is Merely Presumptive Evidence of Ratification. There is a middle doctrine that silence after knowledge is not *per se* ratification, but is merely presumptive evidence of a ratification.[7]

e. Ratification by Receiving and Retaining Benefit of Voidable Transaction After Knowledge. A leading principle in the law relating to this subject is that where a contract is made by one assuming to act in behalf of a corporation, and for a purpose authorized by its charter, and the corporation, after knowledge of the facts attending the transaction is brought home to its proper officers, receives and retains the benefit of it without objection, it thereby ratifies the unauthorized act and estops itself from repudiating it. The reason is that it must exercise its option of affirming or disaffirming in whole and not in part; that it cannot disaffirm so much of the unauthorized act as is onerous, while retaining so much of it as is beneficial; that it cannot keep the advantage, while repudiating the burden; that it cannot disaffirm the contract, while keeping the consideration.[8]

3. Fisher *v.* Stevens, 16 Ill. 397; McDermid *v.* Cotton, 2 Ill. App. 297; Middleton *v.* Kansas City, etc., R. Co., 62 Mo. 579; Iron Mountain Bank *v.* Murdock, 62 Mo. 70. *Compare* German Bank *v.* Dunn, 62 Mo. 79; Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

4. Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96; Crooker *v.* Appleton, 25 Me. 131.

5. See *infra*, XV, C, 2, e.

6. Pennsylvania, etc., Steam Nav. R. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; Hortons *v.* Townes, 6 Leigh (Va.) 47.

7. Delafield *v.* State, 2 Hill (N. Y.) 159, 26 Wend. (N. Y.) 192.

8. *California.*— Foulke *v.* San Diego, etc., R. Co., 51 Cal. 365; Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Roseborough *v.* Shasta River Canal Co., 22 Cal. 556; Allen *v.* Citizens' Steam Nav. Co., 22 Cal. 28; Fraylor *v.* Sonora Min. Co., 17 Cal. 594; Argenti *v.* San Francisco, 16 Cal. 255; San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453.

Connecticut.— Union Hardware Co. *v.* Plume, etc., Mfg. Co., 58 Conn. 219, 20 Atl. 455.

Georgia.— Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

Illinois.— West Side Auction House Co. *v.* Connecticut Mut. L. Ins. Co., 76 Ill. App. 635.

Iowa.— Merchants' Union Barb Wire Co. *v.* Rice, 70 Iowa 14, 29 N. W. 784; Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa 607.

Kentucky.— Frankfort, etc., Turnpike Co. *v.* Churchill, 6 T. B. Mon. 427, 17 Am. Dec. 159.

Massachusetts.— Episcopal Charitable Soc. *v.* Dedham Episcopal Church, 1 Pick. 372.

Mississippi.— Planters' Bank *v.* Sharp, 4 Sm. & M. 75, 43 Am. Dec. 470.

Missouri.—Trenton First Nat. Bank *v.* Badger Lumber Co., 60 Mo. App. 255; Brown *v.* Wright, 25 Mo. App. 54. The case of Vogel *v.* St. Louis Museum, etc., Gallery, 8 Mo. App. 587, of which an abstract only is given in the official report, seems to proceed in violation of the principle stated in the foregoing paragraph.

Nebraska.— Alexander *v.* Culberston Irr., etc., Co., 61 Nebr. 333, 85 N. W. 283 (error to withdraw evidence of such a ratification from the jury); Stough *v.* Ponca Mill Co., 54 Nebr. 500, 74 N. W. 868.

New Hampshire.—Low *v.* Connecticut, etc., R. Co., 45 N. H. 370; Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey.— Pomeroy *v.* New York Smelting, etc., Co., (Ch. 1901) 48 Atl. 395; Blake *v.* Domestic Mfg. Co., (Ch. 1897) 38 Atl. 241.

New York.— Jourdan *v.* Long Island R. Co., 115 N. Y. 380, 22 N. E. 153, 26 N. Y. St. 138; Fister *v.* La Rue, 15 Barb. 323; Simis *v.* Davidson, 54 N. Y. Super. Ct. 235; Smith *v.* Martin Anti-Fire Car Heater, 19 N. Y. Suppl. 285, 45 N. Y. St. 26; Schurr *v.* New York, etc., Co., 16 N. Y. Suppl. 210, 41 N. Y. St. 90; Moss *v.* Rossie Lead Min. Co., 5 Hill 137; Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652; Utica Ins. Co. *v.* Kip, 8 Cow. 20; Randall *v.* Van Vechten, 19 Johns. 60, 10 Am. Dec. 193.

Ohio.— Cincinnati *v.* Cameron, 33 Ohio St. 336.

Pennsylvania.— Hughes *v.* Waynesburg First Nat. Bank, 110 Pa. St. 428, 1 Atl. 417; Goldbeck *v.* Kensington Nat. Bank, 48 Leg. Int. 76 [*affirmed* in 147 Pa. St. 267, 23 Atl. 565].

South Dakota.— Dedrick *v.* Ormsby Land, etc., Co., 12 S. D. 59, 80 N. W. 153, applica-

f. Ratification Can Take Place Only With Full Knowledge — (I) *In General.* The general rule in respect of the ratification or confirmation of voidable acts is that a ratification or confirmation by the party having the power to disaffirm, in order to bind him, must take place with full knowledge of the circumstances.[9] If therefore he assent while in ignorance of the attending facts he may disaffirm when informed of such facts.[10]

(II) *This Means Knowledge of Facts, Not of Law.* Hence if the body capable of disaffirming acquiesces after full knowledge of the material facts, its ratification will bind the corporation, although it may have proceeded in ignorance of the legal effect of such facts.[11]

(III) *Knowledge of Board of Directors When Necessary* — (A) *In General.* Where it would be necessary to have the concurrent official action of the board of directors in order to a precedent authority to do the particular act, that knowledge which is essential to a ratification must obviously be the knowledge of the board of directors.[12]

(B) *How Far Knowledge of Directors Presumed* — (1) In General. For the purpose of conserving the rights of innocent third parties, the knowledge of the directors of those affairs of the corporation, which, in the proper exercise of their official functions it is their duty to know, is often conclusively presumed,[13]

tion of a statute in affirmation of the common-law rule.

Texas.— Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98.

Virginia.— Owens *v.* Boyd Land Co., 95 Va. 560, 28 S. E. 950, corporation which accepts part of the contract price of its capital stock which the subscriber is induced to take on false representations made without authority by an agent of the corporation cannot repudiate the agency.

Wisconsin.— Moody, etc., Co. *v.* Port Washington M. E. Church, 99 Wis. 49, 74 N. W. 572; Witter *v.* Grand Rapids Flouring Mill Co., 78 Wis. 543, 47 N. W. 729.

United States.— Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Colorado Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. ed. 488; Merchants' Bank *v.* Columbia Bank, 5 Wheat. 326, 5 L. ed. 100; Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351; G. V. B. Mining Co. *v.* Hailey First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633 [*affirming* 89 Fed. 439]; Prentiss Tool, etc., Co. *v.* Godchaux, 66 Fed. 234, 13 C. C. A. 420; Bensiek *v.* Thomas, 66 Fed. 104, 13 C. C. A. 457 (cannot repudiate the transaction without restoring the benefit); Hitchcock *v.* Barrett, 50 Fed. 653.

9. *California.*— Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235.

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565.

Georgia.— Hardeman *v.* Ford, 12 Ga. 205.

Iowa.— Thompson *v.* Des Moines Driving Park, 112 Iowa 628, 84 N. W. 678.

Kansas.— Getty *v.* C. R. Barnes Milling Co., 40 Kan. 281, 19 Pac. 617. Also consult the able discussion of this subject by Brewer, J., in Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

Maryland.— Busby *v.* North American L. Ins. Co., 40 Md. 572, 17 Am. Rep. 634; Adams Express Co. *v.* Trego, 35 Md. 47; Cumberland Coal, etc., Co. *v.* Sherman, 20 Md. 117; Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

Massachusetts.— Murray *v.* Nelson Lumber Co., 143 Mass. 250, 9 N. E. 634.

Michigan.— Hotchin *v.* Kent, 8 Mich. 526.

Minnesota.— Allen *v.* American Bldg., etc., Assoc., 49 Minn. 544, 52 N. W. 144, 32 Am. St. Rep. 574.

Missouri.— Hyde *v.* Larkin, 35 Mo. App. 365.

New York.— Caldwell *v.* Mutual Reserve Fund L. Assoc., 53 N. Y. App. Div. 245, 65 N. Y. St. 826; Ives *v.* Smith, 3 N. Y. Suppl. 645, 19 N. Y. St. 645.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Gazzam, 32 Pa. St. 340.

Vermont.— Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

United States.— Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347; Pacific Rolling-Mill Co. *v.* Dayton, etc., R. Co., 5 Fed. 852, 7 Sawy. 61.

10. Adams Express Co. *v.* Trego, 35 Md. 47; Cumberland Coal, etc., Co. *v.* Sherman, 20 Md. 117; Combs *v.* Scott, 12 Allen (Mass.) 493.

11. Kelley *v.* Newburyport, etc., R. Co., 141 Mass. 496, 6 N. E. 745.

12. Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

13. *Kansas.*— German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60.

Massachusetts.— Arlington *v.* Peirce, 122 Mass. 270.

Nebraska.— Rich *v.* Lincoln State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382; Merchants' Bank *v.* Rudolf, 5 Nebr. 527.

New York.— Dunn *v.* St. Andrew's Church, 14 Johns. 118.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552.

the rule being one of public policy.[14] Other decisions regard the presumption of such knowledge as a presumption of fact, a mere mode of proving knowledge by evidence of facts from which knowledge may properly be inferred, such as the lapse of a considerable time with full means of knowledge.[15] This theory makes it a question of fact for a jury and prevents the judge from instructing them that knowledge is presumed as matter of law.[16]

(2) THIS PRESUMPTION WHEN DENIED WITH RESPECT TO MINISTERIAL OFFICERS. This presumption of knowledge on the part of the corporation, derived from a knowledge of its ministerial officers, does not apply so as to charge the corporation with knowledge of fraudulent or unauthorized acts of such an officer, for example the cashier of a bank, done for his own benefit, where the directors have no actual knowledge of the transactions.[17]

(c) *Knowledge of Single Director or Trustee.* For this purpose the knowledge of a single director or trustee will not be sufficient, but the fact or facts must come to the notice of, or be possessed by, the directors when sitting as a board.[18]

(d) *Knowledge of President, Although Director or Trustee.* The knowledge of the president, although always a director or trustee, with respect to his own unauthorized act, is not imputed to the corporation, otherwise the act itself would carry with it a ratification, because his knowledge would be the knowledge of the board.[19]

3. RATIFICATION OF ACTS OF INTERMEDDLING STRANGERS. It is said that the presumption of a ratification by acquiescence is much stronger when an agency actually exists than where the act is done by an intermeddling stranger.[20] There is some authority for the proposition that a person or corporation for whom an intermeddler has assumed to do acts will not as a general rule be put in the position of having ratified them unless the ratification assumes the form of express or affirmative action.[21] But it may be doubted whether there is any serious distinction between the two cases; since where an intermeddler assumes to be the agent of a corporation it is obviously competent for the corporation to sanction that assumption by acquiescence after knowledge, so as to estop itself in favor of innocent third persons to deny the relation of agency; and as we have already seen this principle of estoppel is one of the recognized modes of proving agency.[22] In either case the doctrine of ratification applies only in the case where one person has assumed to act for another, and then a subsequent ratification is equivalent to an original authorization.[23]

4. RATIFICATION PRESUMED ON SLIGHT EVIDENCE WHERE ACT IS BENEFICIAL. A presumption of ratification will arise on very slight evidence, where the act is plainly for the benefit of the principal.[24]

14. Brewer, J., in Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

15. Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187.

16. Murray *v.* Nelson Lumber Co., 143 Mass. 250, 9 N. E. 634. And for a case closely similar see Hyde *v.* Larkin, 35 Mo. App. 365.

17. Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

18. Constant *v.* St. Albans' Church, 4 Daly (N. Y.) 305, 312. See Rowan *v.* Hyatt, 45 N. Y. 138; Westfield Bank *v.* Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Smith *v.* Tracy, 36 N. Y. 79; Murray *v.* Bininger, 3 Abb. Dec. (N. Y.) 336, 3 Keyes (N. Y.) 107, 33 How. Pr. (N. Y.) 425; National Bank *v.* Norton, 1 Hill (N. Y.) 572. See also *supra*, XIII, A, 7, b, (I) *et seq.*

19. Murray *v.* Nelson Lumber Co., 143 Mass. 250, 9 N. E. 634; Hyde *v.* Larkin, 35 Mo. App. 365. See also *supra*, XIII, A, 9, a.

20. Hallett, C. J., in Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248. See also Breed *v.* Central City First Nat. Bank, 4 Colo. 481; Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Saveland *v.* Green, 40 Wis. 431; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

21. Searing *v.* Butler, 69 Ill. 575; Ward *v.* Williams, 26 Ill. 447, 79 Am. Dec. 385.

22. See *supra*, X, D, 1, f, (I) *et seq.*

23. Hamlin *v.* Sears, 82 N. Y. 327.

24. Washington Sav. Bank *v.* Butchers', etc., Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; Pierce City Nat. Bank *v.* Hughlett, 84 Mo. App. 268; Fleming *v.* Marine Ins. Co., 4 Whart. (Pa.) 59, 33 Am. Dec. 33.

5. So Where There Has Been Merely Deviation or Informality in Mode of Executing Power. The rule is the same where the agent of a corporation had power to do a particular act, but in doing it fell into a deviation or informality involving possibly an excess or misuse of his authority, as where the treasurer of a corporation having power to execute promissory notes for it affixes the corporate seal to them, in which case slight evidence of a ratification will be sufficient;[25] it being the duty of the corporation to disaffirm it at once on acquiring knowledge of the fact.[26]

6. What Acts Will Be Ratification Where Transaction Is Formally Reported — a. In General. If an unauthorized contract or transaction, made by an officer of a corporation, is formally reported by him to the directors, and they take no action thereon but allow the matter to stand and the execution of the contract to proceed as though there had been a precedent authority to make it, this will be tantamount to a ratification by the company, provided the act was within the power of the directors and of the corporation.[27] And if, after such a formal report is made, the corporation receives and appropriates the benefit of the transaction, this will be a ratification, although the minutes showing the making of the report are not signed so as to constitute in strictness a corporate record.[28] If the act is reported to the body having the power to affirm or disaffirm it, and the report is formally approved by each member, as shown by its minutes, it will be regarded as a formal act of ratification by the corporation.[29]

b. Formal Ratification Not Necessary in Case of Loss of Instrument. A contract is not rescinded by the loss of an instrument by which it is evidenced; and hence where a resolution of the board of directors of a corporation authorized the execution of a deed of trust, which was lost in the mail before delivery, it was held that a ratification of a duplicate deed was unnecessary.[30]

7. Ratification by Part Payment. Part payment under a voidable contract made by an officer of a corporation having the power to audit and settle claims against it will in general afford evidence of a ratification, provided such officer acts with full knowledge of the transaction.[31]

8. Ratification of Voidable Contract by Settling Accounts Thereunder. On the same principle a voidable contract, such as a lease of a railway bridge, is ratified by the periodical settlement of accounts for tolls or rents thereunder.[32]

9. Evidence Tending to Show Ratification. Ratifications may be inferred, in the case of a sale of corporate assets, from the fact that the corporation subsequently dealt with the purchaser as the owner of the property;[33] in the case of a lease by an officer of a corporation assuming to act in its behalf, by authorizing the payment of a year's rent in advance;[34] in the case of an unauthorized lease,

25. St. James' Parish *v.* Newburyport, etc., R. Co., 141 Mass. 500, 6 N. E. 749.

26. Harrod *v.* McDaniels, 126 Mass. 413; Foster *v.* Rockwell, 104 Mass. 167; Brigham *v.* Peters, 1 Gray (Mass.) 139.

27. Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 159.

28. West Salem Land Co. *v.* Montgomery Land Co., 89 Va. 192, 15 S. E. 524.

29. Hayward *v.* Pilgrim Soc., 21 Pick. (Mass.) 270. See also St. James' Parish *v.* Newburyport, etc., R. Co., 141 Mass. 500, 6 N. E. 749; New York, etc., R. Co. *v.* Dixon, 114 N. Y. 80, 21 N. E. 110, 22 N. Y. St. 684.

30. Bassett *v.* Monte Cristo Gold, etc., Min. Co., 15 Nev. 293.

31. West *v.* Averill Grocery Co., 109 Iowa 488, 80 N. W. 555 (ratification of an arbitration by making a partial payment of the award); St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544; Poche *v.* New Orleans Home Invest. Co., 52 La. Ann. 1287, 27 So. 797 (ratification of a sale of corporate property by the board of directors, by agreeing, after full knowledge, to receive payment of interest on a note representing part of the purchase-price, and to extend the note); Prentiss Tool, etc., Co. *v.* Godchaux, 66 Fed. 234, 13 C. C. A. 420 (pledge of corporate property is ratified by partial payments made upon the debt under authority from the corporation).

32. Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 159.

33. Hastings German Nat. Bank *v.* Hastings First Nat. Bank, 59 Nebr. 7, 80 N. W. 48.

34. Independent Brewing Assoc. *v.* Powers, 80 Ill. App. 471.

invalid for the want of a vote of the shareholders, by evidence of a formal ratification by the board of directors;[35] in the case of an unauthorized contract made by the president of a corporation, by evidence showing that he told the directors of the contract while they were not sitting as a board and that they took no action to interfere with its execution;[36] in the case of a disputed promissory note made by the secretary and business manager of a corporation, by evidence that he was in the habit of issuing notes in the name of the corporation and with the knowledge of the president and some of the directors;[37] by the admission of the president of the corporation, not that he ratified the act, but that the company had ratified it;[38] and under the facts of the cases cited in the marginal note.[39]

10. Facts Not Amounting to Ratification. The following facts have been held not sufficient to show a ratification: The fact that two directors were present in an unofficial capacity at an interview between a contractor and one who was the agent of the corporation for a particular purpose, where the question was whether this was a ratification of an arrangement made between the agent and the contractor in excess of his powers;[40] an action of contract by a corporation against a third person to whom its treasurer has loaned its funds in breach of his trust, this not ratifying the act of the treasurer in such a manner as to discharge him from liability to the corporation;[41] payments of commissions made to an employee and charged to his account, or the fact that the general agent of the corporation did not disclaim its liability for the commissions in an interview, the contract not having been brought to his attention or to that of any officer or director until about

35. Mt. Washington Hotel Co. *v.* Marsh, 63 N. H. 230.

36. Henry *v.* Colorado Land, etc., Co., 10 Colo. App. 14, 51 Pac. 90.

37. Topeka Capital Co. *v.* March, 10 Kan. App. 40, 61 Pac. 876.

38. Merrick *v.* Burlington, etc., Plank Road Co., 11 Iowa 74.

39. Seeley *v.* San José Independent Mill, etc., Co., 59 Cal. 22 (ratification of a note given for a loan to a director); Shaver *v.* Hardin, 82 Iowa 378, 48 N. W. 68 (ratification of an unauthorized mortgage made subject to a prior mortgage); Lannan *v.* Smith, 7 Gray (Mass.) 150; Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395 (ratification of a mortgage made by a committee of the directors).

Ratification of a settlement by paying interest on the notes given thereunder, and accepting reports in which they were referred to as outstanding obligations. Kelley *v.* Newburyport, etc., R. Co., 141 Mass. 496, 6 N. E. 745.

Corporate vote interpreted as a ratification of the votes passed at previous meetings. Howard Ins. Co. *v.* Hope Mut. Ins. Co., 22 Conn. 394, showing further when a subsequent vote is not admissible in evidence to rebut the presumption that the last vote was a ratification of a previous one.

That the holder of a corporate note may prove that the cash system established by its constitution and by-laws had been abandoned. Dow *v.* Moore, 47 N. H. 419.

Unauthorized charter amendment validated by subsequent elections of the number of trustees therein provided for. Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778.

That it is not necessary to plead a ratification in order to introduce evidence of it was held in Collins *v.* Life Assoc. of America, 3 Mo. App. 586.

40. Barcus *v.* Hannibal, etc., Plankroad Co., 26 Mo. 102.

41. Goodyear Dental Vulcanite Co. *v.* Caduc, 144 Mass. 85, 10 N. E. 483. Circumstances where a renting by two directors, of a committee of three, had not been ratified, the corporation never having occupied the premises. Corn Exch. Bank *v.* Cumberland Coal Co., 1 Bosw. (N. Y.) 436. That a contract made by a minority of a committee appointed for that purpose, and not assented to by a majority, nor by the corporation, does not bind the latter see Trott *v.* Warren, 11 Me. 227. See also Beatty *v.* Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401. That a corporation is not rendered liable for a debt of one of its incorporators for goods sold to him under a name identical with its corporate name, by the receipt, acknowledgment, and retention by its officers without objection of a statement of account for such goods. Bradley Fertilizer Co. *v.* South Pub. Co., 17 N. Y. Suppl. 587, 44 N. Y. St. 119. It has been held that the fact that the cashier of a bank suggested to its teller to have a post-dated check protested, which the teller had agreed without authority would be paid by the bank on the day of its date, will not amount to a ratification by the bank of the teller's promise, when at the time there was no available deposit from which to pay it and the cashier in fact declined to pay it, especially when the suggestion of protest was due to a desire to save the holder's recourse against his indorser. Averell *v.* Second Nat. Bank, 19 D. C. 246, 19 Wash. L. Rep. 86. Other facts viewed as not amounting to a ratification. Tracey *v.* Guthrie County Agricultural Soc., 47 Iowa 27.

a year after it was made;[42] the fact that a majority of the shares of the corporation were controlled by the directors who assumed to purchase for the corporation property in which they were personally interested, without disclosing their interest, this not being equivalent to a ratification of the purchase.[43]

D. Effect of Ratification — 1. Equivalent to Antecedent Authority. When a ratification has taken place in any of the recognized modes it relates back and is equivalent to an antecedent authority.[44]

2. Estops Corporation — a. In General. It estops the corporation from afterward repudiating the contract which it has thus ratified.[45] It is upon this ground of estoppel that corporations which have received the benefit of an authorized transaction are not allowed, while retaining the benefit, to repudiate the transaction.[46]

b. Prevents Subsequent Rescission Where Other Party Cannot Be Put In Statu Quo. In the absence of fraud, where a corporation has adopted an unauthorized contract, and thereafter such a time has elapsed as to render it impossible to restore the parties to their former position, the right to rescind the contract will be lost.[47]

3. Validates Defective Execution of Corporate Powers — a. In General. It is often said that a ratification validates the defective or informal exercise of corporate power.[48] One of the meanings of this proposition is that where the directors of a corporation have defectively exercised a power conferred upon them their act may become valid by subsequent acts of acquiescence and recognition, which will bind the company, its officers and shareholders, as effectively as though the instrument in question had been executed with a rigid observance of all the required formalities.[49]

b. Validates Contracts Not Made in Writing as Required by Statute. A ratification — generally by accepting and retaining the benefits of the transaction — validates executed contracts not made in writing as required by the applicatory statute, the rule of such a statute being operative only while the contract is wholly executory.[50] Such a statute does not apply in those cases where the law implies a contract from the duty of paying for benefits rendered to the corporation and received and appropriated by it; but the action is brought, not upon the express oral contract, but upon the implied promise raised by the intendment of the law.[51]

42. Deffenbaugh *v.* Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197.

43. Stanley *v.* Luse, 36 Oreg. 25, 58 Pac. 75.

44. Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187.

45. Flynn *v.* Des Moines, etc., R. Co., 63 Iowa 490, 19 N. W. 312; St. Croix Lumber Co. *v.* Mittlestadt, 43 Minn. 91, 44 N. W. 1079 (ratification by all the shareholders).

46. Jourdan *v.* Long Island R. Co., 115 N. Y. 380, 22 N. E. 153, 26 N. Y. St. 138. See also *supra*, XV, C, 2, e.

For further illustrations see Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 33 N. Y. St. 318, 25 N. E. 303; Seymour *v.* Spring Forest Cemetery Assoc., 19 N. Y. Suppl. 94, 25 N. Y. St. 520; Universal Beer Keg Co. *v.* Brown, 9 N. Y. St. 91.

47. Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, 68 L. J. Ch. 699, 81 L. T. Rep. N. S. 334, 48 Wkly. Rep. 74.

48. Chouteau *v.* Allen, 70 Mo. 290 (resolution of directors authorized a deed of trust to secure corporate bonds, conveying four hundred thousand acres — deed, as executed, conveyed four hundred and five thousand acres — defect cured by acquiescence after lapse of time); Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75 (mortgage authorized at a special meeting convened without notice).

49. *Massachusetts.*— Peabody *v.* Flint, 6 Allen 52.

Missouri.— Chouteau *v.* Allen, 70 Mo. 290.

New York.— Hoyt *v.* Thompson, 19 N. Y. 207, 5 N. Y. 320 [*reversing* 3 Sandf. 416].

Pennsylvania.— Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

Vermont.— Woodbridge *v.* Addison, 6 Vt. 204.

Virginia.— Enders *v.* Public Works, 1 Gratt. 364.

Wisconsin.— Walworth County Bank *v.* Farmers' L. & T. Co., 16 Wis. 629.

50. Foulke *v.* San Diego, etc., R. Co., 51 Cal. 365; Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Cincinnati *v.* Cameron, 33 Ohio St. 336.

51. Foulke *v.* San Diego, etc., R. Co., 51 Cal. 365.

c. Validates Instruments Executed Without Corporate Seal. A ratification will extend to the curing of instruments which ought to be under seal, but which are defectively executed by a corporation without the use of its seal;[52] although there is one early and misconceived decision to the contrary.[53]

d. Validates Defective Acknowledgment of Deed. It seems that the informal acknowledgment of a deed may be validated by a subsequent acquiescence on the part of the directors and shareholders, in like manner as the want of a precedent authority to execute the deed.[54]

4. Supplies Want of Precedent Power — a. In General. A ratification also supplies the want of a precedent power, for example the want of a power regularly conferred by a resolution of the board of directors.[55]

b. Validates Failure to Confer Precedent Power in Regular Manner. When the courts say that a ratification will validate the informal execution of a corporate power they generally refer to the failure of the body of shareholders or the board of directors to confer the power in a regular, formal, and proper manner, as for instance to the act of appointing an agent to commence suits at a meeting not regularly warned;[56] or the failure of the directors to secure the formal assent of the shareholders to the execution of a mortgage, where such assent is required;[57] or where the president of a railroad company assumes to

52. Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187.

53. Perry *v.* Price, 1 Mo. 664, 14 Am. Dec. 316.

English doctrine on this subject.—Sir Nathaniel Lindley in his work on Partnership (since changed to "Company Law") expresses the English doctrine thus: "A distinction was at one time supposed to exist between executed and executory contracts; but except where the equitable doctrines of part performance are applicable, a corporation is no more bound by a contract, not under its seal, of which it has had the benefit, than it is by a similar contract which has not been acted upon by either party." 1 Lindley Partn. (4th ed.) 353 [*citing* Paine *v.* Guardians of Poor, 8 Q. B. 326, 10 Jur. 308, 15 L. J. M. C. 89, 55 E. C. L. 326; Kidderminster *v.* Hardwick, L. R. 9 Exch. 13, 43 L. J. Exch. 9, 29 L. T. Rep. N. S. 612, 22 Wkly. Rep. 160; Arnold *v.* Poole, 2 Dowl. N. S. 574, 7 Jur. 653, 12 L. J. C. P. 97, 4 M. & G. 860, 5 Scott N. R. 741, 43 E. C. L. 444; Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137, 20 L. J. Exch. 193, 6 R. & Can. Cas. 790; Diggle *v.* London, etc., R. Co., 5 Exch. 442, 14 Jur. 937, 19 L. J. Exch. 308, 6 R. & Can. Cas. 590; Cope *v.* Thames Haven Dock, etc., Co., 3 Exch. 841, 18 L. J. Exch. 345, 6 R. & Can. Cas. 83; Lamprell *v.* Guardians of Poor, 3 Exch. 283, 18 L. J. Exch. 282; Ranger *v.* Great Western R. Co., 5 H. L. Cas. 72; Ludlow *v.* Charlton, 9 C. & P. 242, 4 Jur. 657, 10 L. J. Exch. 75, 6 M. & W. 815, 38 E. C. L. 151]. Courts of equity even have afforded no relief in such cases. Crampton *v.* Varna Ry. Co., L. R. 7 Ch. 562, 41 L. J. Ch. 817, 20 Wkly. Rep. 713; Ambrose *v.* Dunmow Union, 9 Beav. 508; Gooday *v.* Colchester, etc., R. Co., 15 Eng. L. & Eq. 596; Jackson *v.* North Wales R. Co., 1 Hall & T. 75, 13 Jur. 69, 18 L. J. Ch. 91, 6 R. & Can. Cas. 112; Nixon *v.* Taff Vale R. Co., 7 Hare 136, 27 Eng. Ch. 136; Midland Great Western R. Co. *v.* Johnson, 6 H. L. Cas. 798, 4 Jur. N. S. 643, 6 Wkly. Rep. 510; Kirk *v.* Bromley Union, 12 Jur. 85, 17 L. J. Ch. 127, 2 Phil. 640, 22 Eng. Ch. 640; Leominster Canal Co. *v.* Shrewsbury, etc., R. Co., 3 Jur. N. S. 930, 3 Kay & J. 654, 26 L. J. Ch. 764, 5 Wkly. Rep. 868. *Compare* with this last clause Williams *v.* St. George's Harbour Co., 2 De G. & J. 547, 4 Jur. N. S. 1066, 27 L. J. Ch. 691, 6 Wkly. Rep. 609, 59 Eng. Ch. 431; Stanley *v.* Chester, etc., R. Co., 1 R. & Can. Cas. 58, 9 Sim. 264, 16 Eng. Ch. 264. Plainly this doctrine does not express the American law as laid down in Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351, and in numerous cases approving that decision. The English cases on this subject will not therefore be further pursued.

54. Chouteau *v.* Allen, 70 Mo. 290, where, however, the acknowledgment was a statutory acknowledgment, and it did not appear that the deed was not executed in such a manner as to be a good deed at common law.

55. *Colorado.*— McCormick *v.* Bittinger, 13 Colo. App. 170, 57 Pac. 736, ratification of an unauthorized transfer of negotiable paper by its secretary.

New Jersey.— Flaherty *v.* Atlantic Lumber Co., 58 N. J. Eq. 467, 44 Atl. 186.

New York.— Hoyt *v.* Thompson, 19 N. Y. 207.

Pennsylvania.—Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

Vermont.— Woodbridge *v.* Addison, 6 Vt. 204.

Virginia.— Enders *v.* Board of Public Works, 1 Gratt. 364.

Wisconsin.— Walworth County Bank *v.* Farmers' L. & T. Co., 16 Wis. 629.

56. Woodbridge *v.* Addison, 6 Vt. 204.

57. Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364.

transfer property of the company in payment of its debt without a precedent authority conferred by the board of directors.[58]

c. But Does Not Create Presumption of Want of Antecedent Authority. A subsequent formal ratification by the directors of an act done by an officer of the corporation does not have the effect of creating the presumption that the act was originally done without authority.[59]

5. Does Not Affect Intervening Rights of Third Persons. A ratification does not affect the rights of innocent third persons which intervene between the date of the unauthorized act and the date of the ratification.[60] Thus a ratification by an insolvent corporation of an unauthorized assignment does not affect the right of a creditor who had before such ratification commenced garnishment proceedings against the assignee.[61] So where there is a statute providing that the deed of a corporation to be good must be countersigned by the secretary as well as signed by the president, the ratification of such a deed, before it had been countersigned by the secretary, will not affect the lien of an intervening judgment recovered against the corporation by its creditors.[62]

6. Successive Ratifications Furnish Evidence of General Authority to Make Similar Contracts. Another principle is that successive ratifications by a corporation of a series of unauthorized acts performed by its agent become evidence on which innocent third persons may confidently act in dealing with the corporation through the agent, and on which they may confidently assume that the corporation has authorized him to perform acts of the kind thus ratified, this being one of the customary modes of proving agency.[63]

XVI. Franchises, Privileges, and Exemptions.

A. Nature of Franchises in General — 1. What Is a Franchise — a. In General. The legal idea of a franchise seems to be a power or privilege conferred by the state upon an individual, upon a collection of individuals, or upon an incorporated body, not possessed by the inhabitants of the state as of common right.[64]

b. Distinction Between Franchises and Licenses Granted by Municipal Corporations. In some of the decisions distinctions are attempted between a franchise granted by the legislature of the state and licenses granted by municipal corporations, the theory being that a municipal corporation cannot grant a fran-

58. Walworth County Bank *v.* Farmers' L. & T. Co., 16 Wis. 629. For a further illustration see Mobile, etc., R. Co. *v.* Owen, 121 Ala. 505, 25 So. 612.

59. Wagg-Anderson Woolen Co. *v.* Lesher, 78 Ill. App. 678.

60. Galloway *v.* Hamilton, 68 Wis. 651; Cook *v.* Tullis, 18 Wall. (U. S.) 332, 21 L. ed. 933. See also Taylor *v.* Robinson, 14 Cal. 396.

61. Calumet Paper Co. *v.* Haskell Show-Printing Co., 144 Mo. 303, 45 S. W. 1115.

62. Galloway *v.* Hamilton, 68 Wis. 651, 32 N. W. 636.

63. McDonald *v.* Chisholm, 131 Ill. 273, 23 N. E. 596 [*affirming* 30 Ill. App. 176]; Sparks *v.* Despatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351; Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303, 33 N. Y. St. 318; Merrill *v.* Consumers' Coal Co., 114 N. Y. 216, 21 N. E. 155, 23 N. Y. St. 114. To the contrary that a special authority given to an agent to make a contract outside of his ordinary powers can confer upon him no power to subsequently make another such contract unless again specially authorized so to do see Stanley *v.* Sheffield Land, etc., Co., 83 Ala. 260, 5 So. 34.

64. Franchises have been defined to be "branches of the royal prerogative, subsisting in the hands of the subject by grant from the King." Cruise Dig. 278. This is substantially the definition of Blackstone. 2 Bl. Comm. 37. It has been observed that under our American systems of government and laws this definition is not strictly correct; since our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit as well as of individual advantage. State *v.* Real Estate Bank, 5 Ark. 595, 599, 41 Am. Dec. 109, 112, per Lacy, J. A franchise is defined by Bouvier as certain "privileges conferred by grant from government, and vested in individuals." 1 Bouvier L. Dict. There is a note on the subject of franchises, including a discussion of what are deemed to be such, in 1 L. R. A. 133.

For other definitions see Fietsam *v.* Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; State *v.* Western Irrigating Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep.

chise, but can grant only a license.[65] The distinction is believed to be untenable, since in either case the grant proceeds from the legislature, in the first case directly, in the second case mediately through the municipal corporation; and in both cases the grant is equally a privilege not possessed by the inhabitants as of common right, and is equally protected under the constitution of the United States and of the state.[66]

c. Distinction Between Franchise and Mere Personal Privilege. Another distinction exists between a franchise vested in a corporation, or in its members as corporators, and a mere personal privilege annexed by statute or charter to membership in a corporation, such as the privilege of being exempt from jury duty. Such an exemption is regarded by some courts as a mere personal privilege,[67] but by others as a franchise granted to the corporation.[68]

d. Whether Vests in Corporation or in Individuals Who Compose It. The franchise of being a corporation vests in the individuals who compose the corporation;[69] but where they are termed secondary franchises, that is to say, those franchises which are vendible, they may and often do vest in the corporation as an artificial body.[70]

2. Whether Existence of Franchise Can Be Challenged Collaterally — a. Where Corporation Affirmatively Asserts Franchise or Privilege. If a corporation in any action asserts a right against another corporation or person, based upon an assumed franchise or power, the corporation or person against whom the right is so asserted may as a defense deny the existence of such franchise or power.[71]

b. Where Individuals Assert Rights Against Corporation. But on the other hand when a party other than the state seeks to establish rights against a corporation, and it defends the action on the ground of its being possessed of certain franchises with which the action is incompatible, it is sufficient that it appears that it is in fact in possession of the franchises claimed. Whether or not it is rightfully in possession of them is a question which can be determined only in a proceeding in which some person or corporation who claims a better title is a party.[72]

166; Gantt, J., in Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416, 420; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; 3 Kent Comm. 458; 2 Morawetz Priv. Corp. § 923; 4 Thompson Corp. § 5335.

65. Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673.

66. That the state may file a petition in quo warranto against a street railway company to set the question whether its franchise, granted by a city, is exercised in contravention of law see State *v.* East Cleveland R. Co., 6 Ohio Cir. Ct. 318.

67. Neely *v.* State, 4 Lea (Tenn.) 316.

68. Johnson *v.* State, 88 Ala. 176, 7 So. 253; Zimmer *v.* State, 30 Ark. 677.

That such an exemption accorded to members of a quasi-public corporation may become a vested right which cannot be taken away by subsequent legislation see *Ex p.* Goodin, 67 Mo. 637 [*overruling In re* Powell, 5 Mo. App. 220]. *Compare Ex p.* Rust, 43 Ga. 209; Bloom *v.* State, 20 Ga. 443; *Ex p.* House, 36 Tex. 83.

That it is a personal privilege and is subject to legislative revocation or control see *In re* Scranton, 74 Ill. 161, exemption from jury duty to a member of the fire department accorded by the charter of Chicago, limited to members in active service. See also Bragg *v.* People, 78 Ill. 328; Beamish *v.* State, 6 Baxt. (Tenn.) 530. That a statute exempting members of an incorporated fire-insurance company from serving on juries is not unconstitutional see McGunnegle *v.* State, 6 Mo. 367.

Other cases upholding such exemptions in consideration of the rendition of public services are as follows:

Illinois.— Dunne *v.* People, 94 Ill. 120, 34 Am. Rep. 213.

Massachusetts.— Com. *v.* Walton, 17 Pick. 403, members of the legislature.

Nevada.— State *v.* Cohn, 9 Nev. 179.

North Carolina.— State *v.* Whitford, 34 N. C. 99; State *v.* Williams, 18 N. C. 172 (postmasters).

Pennsylvania.— Piper's Case, 2 Browne 59.

Texas.— *Ex p.* House, 36 Tex. 83.

69. Fietsam *v.* Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492.

70. It has been said that such a franchise is not a corporate franchise strictly so-called, or in any sense, except that of being property of the corporation. State *v.* Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

71. Zanesville *v.* Zanesville Gas-Light Co., 47 Ohio St. 1, 23 N. E. 55.

72. Weaverville, etc., Wagon Road R. Co. *v.* Board of Supervisors, 64 Cal. 69, 28 Pac. 496. See also *supra*, I, P, 1 *et seq.*

3. Whether Corporate Franchise Is Divisible. It is plain that a primary franchise, that is to say the franchise of being a corporation, cannot be divided, except by the power which granted it — the state; but it is not true as was said in one case[73] that both primary and secondary franchises inhere together in such a manner as to be indivisible; since, as we shall see, a secondary franchise may be alienated, while the primary franchise of being a corporation remains; and a corporation may alien some of its secondary franchises while retaining others.[74]

4. Whether Corporation Organized Under General Laws Can Receive Additional Franchises Through Special Laws. Under constitutional provisions permitting the formation of corporations under general laws, but prohibiting their creation by special acts of legislation, the obviously sound doctrine is that a corporation formed under a general law cannot receive additional franchises by a special act.[75]

5. Forfeiture and Revocation of Franchise — a. Can Be Forfeited Only by Sovereign Power — (I) *In General.* A franchise can be forfeited only by the sovereign power by which it was conferred.[76]

(II) *Exception Where Franchise Is Granted on Condition of Being Exercised Within Stated Time.* To this principle an exception exists, according to one view, in the case where a franchise is granted upon the condition that the grant shall be void unless the franchise is exercised in a stated manner and within a stated time, in which case, unless it is exercised within the time prescribed in the grant, it is *ipso facto* forfeited, and the fact of such forfeiture may be determined in a collateral proceeding.[77]

b. Under General Power to Alter, Revoke, or Repeal. The reservation of such a power necessarily implies that it may be exerted at the pleasure of the legislature.[78] A police regulation imposed upon corporations, such as one requiring the payment of wages weekly, may be regarded as an exercise of the general reservation of power of amendment or repeal of acts of incorporation.[79] So of a statute making a railway company liable for fire caused by its locomotives or the acts of its servants on its right of way, where the company has accepted an amendment to its original charter, which subjects it to the laws in force, which laws make the charter subject to amendment, alteration, or repeal.[80] On the other hand it has been held that a constitutional reservation to the legislature of the power to alter, revoke, or annul charters when deemed injurious to the citizens of the state, but in such manner that "no injustice shall be done to the incorporators," does not extend to the exercise of the police power in regulating the transaction of a corporate business.[81] Where there is a general reservation in the constitution of the state of such a power, it reads itself into every subsequent corporate charter, and it is not necessary that it should be expressly included therein.[82] Such a reservation, whether contained in the charter, in the constitu-

A long and undisputed possession will be evidence of rightful possession, even in a quo warranto proceeding. State *v.* Gordon, 87 Ind. 171.

73. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

74. See *infra*, XVI, C, 1 *et seq.*

75. San Francisco *v.* Spring Valley Water Works, 48 Cal. 493 [*overruling* California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398]; Low *v.* Marysville, 5 Cal. 214; *Ex p.* Pritz, 9 Iowa 30; Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241; State *v.* Cincinnati, 20 Ohio St. 18; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

76. Elizabethtown Gas-Light Co. *v.* Green, 46 N. J. Eq. 118, 18 Atl. 844.

77. Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181. *Contra*, see New York, etc., Bridge Co. *v.* Smith, 148 N. Y. 540, 42 N. E. 1088 [*affirming* 90 Hun (N. Y.) 312, 35 N. Y. Suppl. 920, 70 N. Y. St. 586].

78. Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963.

79. State *v.* Brown, etc., Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856.

80. McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440.

81. Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68.

82. Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778.

tion of the state, or in a general statute, is not repugnant to the grant of the franchise, but is a constitutional limitation of the powers granted.[83]

c. Forfeiture of Franchise Does Not Work Escheat of Property. The forfeiture of a franchise of a corporation does not work an escheat of its property.[84] Thus if the legislature prohibits a corporation from owning land, but fixes no penalty for a violation of the prohibition, and if the corporation in violation of it assumes to purchase land the land is not thereby subject to confiscation or escheat by the state, although the franchises of the offending corporation may be forfeited therefor.[85]

d. Waiver by State of Right to Forfeit Franchise. The state may of course waive the right to have the franchise of a corporation forfeited.[86]

6. Acquisition of New Franchise. Unless the charter of a corporation is in terms restrictive there is no rule of construction which will prevent the corporation from acquiring, in any lawful mode, new franchises, as by amending its articles of incorporation, provided the new franchises are not incompatible with those originally granted. For example a corporation organized to supply gaslight to a certain city, in pursuance of the terms of a certain ordinance of the city, may acquire the new franchise of supplying the city with gas.[87]

7. Duration of Franchises — a. In General. A corporation may receive a grant of a franchise for a term of years extending beyond the life of the corporation.[88]

b. Lapse of Franchise by Non-User. It has been held that where a news-gathering corporation had taken to itself in its articles of incorporation the power to conduct a telegraph and telephone business, and also the right of eminent domain, but has never exercised this power or this right for a long period of time, the right has lapsed by non-user.[89]

B. Construction of Grants of Franchises — 1. Grants of Franchises Strictly Construed — a. In General. Grants of franchises, being against common right, are strictly construed in favor of the grantor and against the grantee, so that nothing passes by implication, where the meaning is doubtful or where the implication is not necessary.[90]

b. But Construed According to Plain Meaning of Plain Words. But it does not follow from this that such a grant is to be construed so strictly as to wrest the meaning of words from their common and well-understood significance; but such a grant, like every other instrument, public or private, is to be construed

83. State *v.* Brown, etc., Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856. A constitutional provision repealing a corporate charter is self-enforcing and terminates the existence of the corporation. Putnam *v.* Ruch, 54 Fed. 216. Circumstanees under which the repeal by a constitutional provision of an exclusive right conferred by a charter does not extinguish the corporation or entirely repeal its charter. Putnam *v.* Ruch, 54 Fed. 216. The right of amendment or repeal reserved to the state in a general law is operative except so far as there is a contract or agreement divesting the state of the power to alter or repeal. Com. *v.* Covington, etc., Bridge Co., 21 S. W. 1042, 14 Ky. L. Rep. 836. In the exercise of such a power the legislature may withdraw one or more of the privileges granted to a corporation, without revoking its entire charter. Wilmington *v.* Addicks, (Del. 1900) 47 Atl. 366. That such a reservation does not extend to special legislation applicable only to a single city or corporation see Central Trust Co. *v.* Citizens' St. R. Co., 80 Fed. 218. That the mere collecting of tolls, in conformity with reduced rates fixed by a statute, does not show an assent by a turnpike company to the exercise by the legislature, at will, of the power to alter or repeal its charter see Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560.

84. See *infra*, XXI, G, 6, a.

85. Com. *v.* New York, etc., R. Co., 132 Pa. St. 591, 19 Atl. 291, 25 Wkly. Notes Cas. (Pa.) 404, 7 L. R. A. 634.

86. State *v.* Morris, 73 Tex. 435, 11 S. W. 392.

87. Keith *v.* Johnson, 109 Ky. 421, 59 S. W. 487, 22 Ky. L. Rep. 947.

88. Keith *v.* Johnson, 109 Ky. 421, 59 S. W. 487, 22 Ky. L. Rep. 947.

89. State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151.

90. *California.*— Bartram *v.* Central Turnpike Co., 25 Cal. 283.

Connecticut.— Talcott Mountain Turnpike Co. *v.* Marshall, 11 Conn. 185. The same doctrine applies in the ease of a grant by the public to an individual. Hollister *v.* Union Co., 9 Conn. 436, 25 Am. Dec. 36.

according to the plain meaning of the words, where they are free from ambiguity and doubt.[91]

c. **Not Construed as Extending to Foreign Corporations.** A statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state, and over which it possesses the power of visitation and control.[92]

2. **Proviso Not Construed so as to Defeat Grant.** When matters in a proviso in a grant of corporate franchises are made or intended to be essential conditions of the enjoyment of the charter, the privileges granted must be enjoyed subject to those conditions or not at all.[93]

3. **Grants of Franchises Not Construed as Exclusive** — a. **In General.** After the legislature of a state has by the grant of a charter vested in a corporation or in the individuals who compose a corporation certain privileges, it cannot by a subsequent statute divest the corporation or the corporators of those privileges, unless the power to do so has been reserved in some recognized way; yet a subsequent grant of the same or of similar franchises to another corporation does not impair the obligation of the contract involved in the precedent grant.[94]

b. **Grant of Franchise of Toll-Bridge Not Impaired by Grant of Franchise For Railway Bridge.** Thus the exclusive privilege of maintaining a toll-bridge for ordinary passage over a stream between defined limits is not impaired by the subsequent grant of the right to erect a railway bridge over the same stream in the immediate vicinity of the toll-bridge.[95]

Indiana.— Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539.

Maine.— Rockland Water Co. *v.* Camden, etc., Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 338.

Nebraska.— Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

New York.— New York *v.* Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494, 60 N. Y. St. 352 [*reversing* 25 N. Y. Suppl. 860, 56 N. Y. St. 58].

Texas.— East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

United States.— Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560 (if susceptible of two meanings, construed in the way which works the least harm to the state); Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837.

Illustration of strict construction — Plank-road company not allowed to appropriate whole of highway.— Under this rule of strict construction, it has been held that authority conferred upon a plank-road company by the legislature to construct a plank-road between two designated points does not imply the right to appropriate to that purpose the whole of a public highway, without express words of permission. Pike County Justices Inferior Ct. *v.* Griffin, etc., Plank-Road Co., 9 Ga. 475.

91. Birmingham, etc., R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Riker *v.* Leo, 133 N. Y. 519, 30 N. E. 598, 44 N. Y. St. 63 [*affirming* 15 N. Y. Suppl. 966, 39 N. Y. St. 984]; Citizens' St. R. Co. *v.* Jones, 34 Fed. 579.

92. *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 49 N. Y. St. 658, 18 L. R. A. 713.

93. West Branch Boom Co. *v.* Pennsylvania Joint Lumber, etc., Co., 121 Pa. St. 143, 15 Atl. 509, 22 Wkly. Notes Cas. (Pa.) 303, 6 Am. St. Rep. 766; Whitaker *v.* Delaware, etc., Canal Co., 87 Pa. St. 34 (grant of franchise to construct a dam so as to leave the channel "as safe and as convenient for the descent of rafts as it now is"); Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527 (grant to a bridge company of authority to erect a bridge over a navigable river, so as not to "injure, stop, or interrupt the navigation," etc.); Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 365, 67 Am. Dec. 471 (grant to a railroad company of the privilege of occupying a public street, so as not to impede public travel); Dugan *v.* Bridge Co., 27 Pa. St. 303, 67 Am. Dec. 464.

94. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454, 44 Am. Dec. 556; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716; Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1056, 26 N. E. 893, 8 L. R. A. 539; Crawfordsville, etc., Turnpike Co. *v.* Smith, 89 Ind. 290; White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938.

95. *Massachusetts.*— Inland Fisheries Com'rs *v.* Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247.

Nevada.— Lake *v.* Virginia, etc., R. Co., 7 Nev. 294.

New Jersey.— Passaic, etc., River Bridges *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 81 [*affirmed* in 1 Wall. (U. S.) 116, 17 L. ed. 571].

New York.— Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige 554; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. 625.

C. Vendibility of Corporate Franchises — 1. Franchise of Being Corporation Not Alienable. Keeping in mind the distinction between primary and secondary franchises, it may be said at the outset that the primary franchise of a corporation, or more strictly speaking of its corporators, that is to say, the franchise of being a corporation, is not alienable without the consent of the state.[96] But a mortgage deed which professes and manifests an intent to convey the franchise of being a corporation will not be for that reason entirely void, but will be operative to convey the property, and perhaps also the secondary franchises, being void only so far as it undertakes to convey the corporate capacity of the mortgagor.[97]

2. Franchises of Corporations Having Public Duties to Perform Not Alienable — a. In General. The franchises of corporations having public duties to perform, such as railway companies, canal companies, turnpike companies, gaslight companies, and the like, cannot be alienated or seized under judicial process by creditors, without the consent of the legislature, because this would disable them from discharging the public duties which they have assumed, and in consideration of which their franchises have been granted to them.[98]

North Carolina.— McRee *v.* Wilmington, etc., R. Co., 47 N. C. 186.

Compare Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454, 44 Am. Dec. 556, where the contrary seems to have been the theory of the court.

96. *Illinois.*— Fietsam *v.* Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; Hays *v.* Ottawa, etc., R. Co., 61 Ill. 422.

Kentucky.— Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. 199, 81 Am. Dec. 541.

Maine.— Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 59 Me. 9; Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395.

Maryland.—State *v.* Consolidation Coal Co., 46 Md. 1.

Massachusetts.— Richardson *v.* Sibley, 11 Allen 65, 87 Am. Dec. 700; East Boston Freight R. Co. *v.* Hubbard, 10 Allen 459 note; Com. *v.* Smith, 10 Allen 448, 87 Am. Dec. 672.

Mississippi.— Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Nebraska.— Clarke *v.* Omaha, etc., R. Co., 4 Nebr. 458.

New Hampshire.— Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127; Pierce *v.* Emery, 32 N. H. 484.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126; Stewart's Appeal, 56 Pa. St. 413; Wood *v.* Bedford, etc., R. Co., 8 Phila. 94.

United States.— Pearce *v.* Madison, etc., R. Co., 21 How. 441, 16 L. ed. 184.

The rule has been expressed by saying that a corporation cannot "sell or convey its corporate name, or its right to maintain and defend judicial proceedings, or to make and use a common seal." State *v.* Western Irrigating Canal Co., 40 Kan. 96, 99, 19 Pac. 349, 10 Am. St. Rep. 166.

Illustration.— In the case of a railway mortgage it conveys only secondary franchises (Eldridge *v.* Smith, 34 Vt. 484) and conveys no corporate capacity whatever (Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21). Purchasers at sale by assignee in bankruptcy of railway franchises do not acquire the faculty of being a corporation. Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201, *semble*. *Compare* Com. *v.* Central Pass. R. Co., 52 Pa. St. 506.

97. Butler *v.* Rahm, 46 Md. 541. See also Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35. In Fietsam *v.* Hay, 122 Ill. 293, 294, 13 N. E. 501, 3 Am. St. Rep. 492, the petition of the assignee of a banking corporation for leave to sell "all the rights, privileges, powers and immunities which were granted by the said act incorporating said bank" was refused, on the ground that it was tantamount to a request for an order to sell the franchise of being a corporation, which was not vendible.

98. *Illinois.*— Hays *v.* Ottawa, etc., R. Co., 61 Ill. 422.

Indiana.— Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

Kentucky.— Anderson *v.* Cincinnati Southern R. Co., 86 Ky. 44, 5 S. W. 49, 9 Ky. L. Rep. 303, 9 Am. St. Rep. 263.

Massachusetts.— Com. *v.* Smith, 10 Allen 448, 87 Am. Dec. 672; Treadwell *v.* Salisbury Mfg. Co., 7 Gray 393, 66 Am. Dec. 490.

Nebraska.— Chollette *v.* Omaha, etc., R. Co., 26 Nebr. 159, 41 N. W. 1106, 4 L. R. A. 135.

New Hampshire.— Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127; Pierce *v.* Emery, 32 N. H. 484.

Pennsylvania.— Susquehanna Canal Co. *v.* Bonham, 9 Watts & S. 27, 42 Am. Dec. 315; Ammant *v.* New Alexandria, etc., Turnpike Road, 13 Serg. & R. 210, 15 Am. Dec. 593.

Texas.— International, etc., R. Co. *v.* Eckford, 71 Tex. 274, 8 S. W. 679; International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484; East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

Virginia.—Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 S. E. 688; Naglee *v.* Alexandria, etc., R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308.

United States.— Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979 (corporation cannot put itself in a position where it will be compelled to make the

b. Franchise of Constructing and Operating Railway Not Alienable — (I) *In General.* The prevailing doctrine therefore is that the secondary franchises of a railway company, that is to say, the franchise of constructing and the franchise of operating its railway, are not alienable in any form, whether by sale, lease, or mortgage, without the express consent of the legislature.[99]

(II) *But Railway Company Remains Liable For Torts of Successor Company.* If therefore a railroad company aliens its railroad, its properties, and franchises by lease, mortgage, or in any other way, to another corporation, and substitutes that other corporation in its own place, and devolves upon it the performance of its own public duties, without statutory authority so to do, it will remain liable for the torts of the successor company, committed against third persons while so operating its road.[1]

(III) *Remains Liable to Perform Its Contracts* — (A) *In General.* A railway corporation is not released from the obligations of a contract binding upon itself, its successors, and assigns, by going into liquidation and turning over all its property and franchises to another company, which also assumes all its obligations, where the avowed purpose of both corporations and the effect of the transactions between them is merely to reorganize under a new corporate name.[2]

(B) *But Successor Corporation Also Liable.* But the successor railway company will also be liable to perform the contracts of its predecessor. Thus a successor to the property and the franchises of a railway company is bound by a contract entered into by it on behalf of itself and its successors and assigns for the

public accommodation subservient to its private interests); Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; New York, etc., R. Co. *v.* Winans, 17 How. 31, 15 L. ed. 27; Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745, 1 McCrary 188, 541.

England.— Macgregor *v.* Dover, etc., R. Co., 18 Q. B. 618, 17 Jur. 21, 22 L. J. Q. B. 69, 7 R. & Can. Cas. 227, 83 E. C. L. 618; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 16 Jur. 249, 21 L. J. C. P. 23, 73 E. C. L. 775; Beman *v.* Rufford, 15 Jur. 914, 20 L. J. Ch. 537, 1 Sim. N. S. 550, 40 Eng. Ch. 550.

Exception in the case of ferry franchises. — An exception to the doctrine of the text exists in the case of the franchise of owning and operating a public ferry, which was always assignable at common law. See in confirmation of this Peter *v.* Kendal, 6 B. & C. 703, 5 L. J. K. B. O. S. 282, 30 Rev. Rep. 504, 13 E. C. L. 316.

99. *Massachusetts.*— Richardson *v.* Sibley, 11 Allen 65, 87 Am. Dec. 700; Com. *v.* Smith, 10 Allen 448, 87 Am. Dec. 672; Worcester *v.* Western R. Corp., 4 Metc. 564.

Mississippi.— Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

New Hampshire.— Pierce *v.* Emery, 32 N. H. 484.

United States.— Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 25 L. ed. 55; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837 [*reversing* 22 Fed. 245, 10 Sawy. 464, 23 Fed. 232, 10 Sawy. 472]; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; New York, etc., R. Co. *v.* Winans, 17 How. 31, 15 L. ed. 27.

England.— Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 113, 3 Jur. N. S. 775, 26 L. J. Ch. 482.

Unless there is an enabling statute otherwise providing the franchise conferred upon a corporation of building a railroad cannot therefore be sold before the railroad has been built (Clarke *v.* Omaha, etc., R. Co., 4 Nebr. 458), especially to a private person, so as to enable him to build a railroad for his own private purposes (Stewart's Appeal, 56 Pa. St. 413). And so a statute which empowers a company to lease its railroad will not authorize it to transfer the franchise of completing it before it has been built. Wood *v.* Bedford, etc., R. Co., 8 Phila. (Pa.) 94.

Isolated cases holding railway franchises alienable.— In a few isolated cases it has been held that the franchise of operating a railroad, being in the nature of property, is alienable at common law without the special or expressed consent of the legislature. Miller *v.* Rutland, etc., R. Co., 36 Vt. 452; Middlebury Bank *v.* Edgerton, 30 Vt. 182; Hall *v.* Sullivan R. Co., 11 Fed. Cas. No. 5,948, 1 Brunn. Col. Cas. 613.

1. Anderson *v.* Cincinnati Southern R. Co., 86 Ky. 44, 5 S. W. 49, 9 Ky. L. Rep. 303, 9 Am. St. Rep. 263; Chollette *v.* Omaha, etc., R. Co., 26 Nebr. 159, 41 N. W. 1106, 4 L. R. A. 135; International, etc., R. Co. *v.* Eckford, 71 Tex. 274, 8 S. W. 679; International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484; East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834; Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 S. E. 688; Naglee *v.* Alexandria, etc., R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308.

2. Canal, etc., R. Co. *v.* St. Charles St. R. Co., 44 La. Ann. 1069, 11 So. 702. So in case of a coke company which purchases and takes possession of the plant of another company, agreeing to assume its contracts. McKeefrey *v.* Connellsville Coke, etc., Co., 56 Fed. 212, 5 C. C. A. 482.

use of the tracks, depots, and terminal facilities of another railway company, where it has been furnished with the use of such tracks and facilities in accordance with the terms of such contract.[3]

(IV) *But Railway Company May Alienate Its Personal Property Not Necessary For Performance of Its Public Duties.* But a railway company may alienate its personal property, such as its locomotives and cars, or at least so much thereof as may not be necessary for the performance of its public duties.[4]

(V) *Power of Railway Company to Transfer Its Franchise to Operate Line of Telegraph.* Where a railroad company is authorized to construct, in connection with its railroad, a telegraph line, to manage and control the same, and to fix the rates of charges thereon, a contract by which, without the consent of the legislature, it undertakes to divest itself of this public duty by transferring the privilege to another company, is *ultra vires* and void.[5]

c. Gaslight Company Cannot so Alienate Its Franchises. A gaslight company which possesses and exercises the right to lay its pipes in the public streets cannot sell, lease, or assign its corporate rights and privileges to another gas company, without the consent of the legislature.[6]

d. No Power to Lease Property and Franchises Dedicated to Public Duties — (I) *In General.* As leases are frequently made for great lengths of time, even for nine hundred and ninety-nine years, so that they are tantamount to a total alienation, it is a reasonable conclusion that any rule of decision which disables a corporation from alienating a franchise will equally disable it from parting with it for a term of years by a deed of lease.[7]

(II) *Railway Company Cannot Lease Its Property and Franchises Without Legislative Authorization.* While there is a conflict of decision on the question, it seems to be settled by the best judicial authority in England and America that a railway company cannot, without legislative authority, by a lease or any other contract or arrangement, turn over to another company its road and the right to use its franchises in respect of the same, and thereby exempt itself from the responsibility of the conduct and management of the road, and from the performance of its public duties in connection therewith.[8]

3. Jacksonville, etc., R. Co. *v.* Louisville, etc., R. Co., 150 Ill. 480, 37 N. E. 924 [*affirming* 47 Ill. App. 414].

4. Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105 (case of an unauthorized railway lease); Pierce *v.* Emery, 32 N. H. 484; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

5. Central Branch Union Pac. R. Co. *v.* Western Union Tel. Co., 3 Fed. 417, 1 McCrary 551; Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 1, 1 McCrary 581; Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745, 1 McCrary 188, 541. *Compare* Western Union Tel. Co. *v.* Kansas Pac. R. Co., 4 Fed. 284; Western Union Tel. Co. *v.* St. Joseph, etc., R. Co., 3 Fed. 430, 1 McCrary 565; Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 423, 1 McCrary 558.

6. Brunswick Gas Light Co. *v.* United Gas Fuel, etc., Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385. For a transaction by which a so-called heat, light, and power corporation made an assignment of its franchises to another corporation, which was held to be valid and effectual, see Kalamazoo *v.* Kalamazoo Heat, etc., Co., 124 Mich. 74, 82 N. W. 811 [*reversing* 122 Mich. 489, 81 N. W. 426], where the question related merely to the sufficiency of the record.

7. Middlesex R. Co. *v.* Boston, etc., R. Co., 115 Mass. 347; Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455 [*reversing* 22 N. J. Eq. 130]; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

8. *Illinois.*— Archer *v.* Terre Haute, etc., R. Co., 102 Ill. 493; Ottawa, etc., R. Co. *v.* Black, 79 Ill. 262.

New York.— Troy R. Co. *v.* Kerr, 17 Barb. 581, *semble.*

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Bedford, etc., R. Co., *81 Pa. St. 104.

West Virginia.— Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 354.

United States.— Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837 [*reversing* 22 Fed. 245, 10 Sawy. 464, 23 Fed. 232, 10 Sawy. 472]; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

England.— Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 17 Jur. 1015, 22 L. J. Ch. 921, 52 Eng. Ch. 710; South York-

(III) *Such Leases May Be Abandoned at Any Time Before Fully Executed.* As leases of this kind are void on the ground of being against public policy it is not only right, but it is the duty of both parties to them, to abandon them upon becoming aware of their illegality, and the unexpired portion of them will not stand good for the protection of rights acquired under them; nor can damages be recovered for a non-performance of the contract.[9]

3. Transferring Corporate Franchises to Foreign Corporation. A corporation cannot, without the unanimous consent of its shareholders, sell all its property to a foreign corporation organized through its procurement, having a majority of non-resident trustees, such corporation being organized for the purpose of stepping into the shoes of the vendor company, of taking over all its assets, and of carrying on its business;[10] and it cannot do this by the device of transferring all its shares to the foreign corporation, taking the shares of the latter in payment, where the law of the domicile of the vendor corporation forbids the purchase of shares of any other corporation, notwithstanding the transaction may be valid in the state of the residence of the vendee corporation.[11]

4. Legislature May Authorize Alienation of Franchises — a. In General. The legislature which creates a corporation and confers upon it its franchises may of course authorize it to alien those franchises.[12]

b. May Ratify Such an Act. As the legislature may authorize such acts, so it may ratify and confirm them when done without precedent authority.[13]

shire R., etc., Co. *v.* Great Northern R., etc., Co., 3 De G. M. & G. 576, 22 L. J. Ch. 761, 1 Wkly. Rep. 203, 52 Eng. Ch. 448; Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035; Great Northern R. Co. *v.* Eastern Counties R. Co., 9 Hare 306, 41 Eng. Ch. 306; Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 113, 3 Jur. N. S. 775, 26 L. J. Ch. 482; Beman *v.* Rufford, 15 Jur. 914, 20 L. J. Ch. 537, 1 Sim. N. S. 550, 40 Eng. Ch. 550 (holding that dissenting shareholders might file a bill on behalf of themselves and the other shareholders, against the company and its directors, to have it declared void). That such an arrangement is not enforceable by injunction see Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 17 Jur. 1015, 22 L. J. Ch. 921, 52 Eng. Ch. 710. Somewhat to the same effect see South Yorkshire R., etc., Co. *v.* Great Northern R. Co., 3 De G. M. & G. 576, 22 L. J. Ch. 761, 1 Wkly. Rep. 203, 52 Eng. Ch. 448.

9. Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837 [*reversing* 22 Fed. 245, 10 Sawy. 464, 23 Fed. 232, 10 Sawy. 472]; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

10. People *v.* Ballard, 134 N. Y. 269, 32 N. E. 54, 48 N. Y. St. 166, 17 L. R. A. 737 [*rehearing denied* in 136 N. Y. 639, 48 N. Y. St. 846, 32 N. E. 611].

11. Ambler *v.* Archer, 1 App. Cas. (D. C.) 94.

12. *Iowa.*— Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437.

Massachusetts.— East Boston Freight R. Co. *v.* Eastern R. Co., 13 Allen 422.

North Carolina.— State *v.* Richmond, etc., R. Co., 72 N. C. 634.

Ohio.— State *v.* Sherman, 22 Ohio St. 411.

United States.— Willamette Woolen Mfg. Co. *v.* British Columbia Bank, 119 U. S. 191.

What words in a statute have been held to authorize the alienation of franchises. Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541, statute authorizing a railway mortgage, and using the words "railroad with all its rights and privileges." For language in a statute which did not authorize the pledge of the franchise of being a corporation, but which did authorize the pledge of the franchise of maintaining and operating a railway, see Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518. Somewhat to the same effect see Trask *v.* Maguire, 18 Wall. (U. S.) 391, 21 L. ed. 938. That a franchise granted to an individual and his assignee is alienable see California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398. To the contrary see Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700, where the statute employed the words "lessees and assigns." For words which were construed to restrain the leasing or selling of a railroad to some other incorporated company, withholding the power to sell its franchises or certain portions of its property detached from its franchises as separate subjects of sale, see Upson County R. Co. *v.* Sharman, 37 Ga. 644. For language of a statute which was held to give the judicial courts the power to order a sale both of the property and the franchises see Randolph *v.* Larned, 27 N. J. Eq. 557.

13. Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127. That an act restricting the charges of a railway company passed after an unauthorized lease will not be such a ratification see Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

c. Legislative Power to Sell Includes Power to Mortgage. A corporation which is authorized to sell its franchises is authorized to mortgage them, since a mortgage is but a sale with a power of defeasance.[14]

5. Judicial Sale of Corporate Franchises — a. Corporate Franchises Not Vendible Under Execution. The franchises of a corporation, whether primary or secondary, cannot be levied upon and sold upon execution, unless there is a provision in the charter or governing statute which enables it to be done.[15]

b. What Franchises of Railway Company Pass by Judicial Sale. In defining what are the franchises of a railway company acquired by a purchaser at a marshal's sale, the supreme court of the United States have said: "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked."[16] This description has been held to include the right of appropriating strips of land necessary to the construction of depots, cattle-pens, coal-bins, sheds, and the like, without which the railway could not be successfully operated.[17]

c. What Special Immunities Do Not Pass to Purchasing Company Organized Under Existing Laws. An immunity from legislative interference with reference to fixing its tolls does not so pass.[18]

6. Whether Portion of Franchise of Railway Corporation Can Be Alienated. As to whether a railway franchise can be split up so as to enable the corporation to alien a portion of its privileges see the authorities collected in the note.[19]

7. Whether Corporate Franchise Can Be Transferred to Individual. Plainly a franchise possessed by a corporation cannot be transferred to an individual, unless it is such a franchise as an individual might hold and exercise. A franchise which is in its nature personal to the grantee already possessed of it, such as an exemption from taxation, cannot be sold to an individual;[20] nor can a franchise to operate a railroad, since this would have the effect of turning a franchise granted for a public benefit into a mere means of private emolument;[21] nor can a navigation company grant to an individual the privilege of taking water from its dams for private purposes.[22] But of course the legislature may authorize the sale of the franchise of a corporation to a natural person, and such a statute will not be unconstitutional.[23]

8. Power of Corporation to Purchase Exclusive Franchise From Individual. It has been held that where the legislature has by a valid grant conferred upon

14. Willamette Woolen Mfg. Co. *v.* British Columbia Bank, 119 U. S. 191, 7 S. Ct. 187, 30 L. ed. 384. See also *infra*, XVIII, B, 1, c.

15. *Louisiana.*— New Orleans, etc., R. Co. *v.* Delamore, 34 La. Ann. 1225; State *v.* Morgan, 28 La. Ann. 482.

Mississippi.— Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Missouri.— Stewart *v.* Jones, 40 Mo. 140.

Tennessee.—Baxter *v.* Nashville, etc., Turnpike Co., 10 Lea 488.

Texas.— Palestine *v.* Barnes, 50 Tex. 538.

Compare State *v.* Rives, 27 N. C. 297.

Of course the legislature can change this rule as was done in Pennsylvania by the Pennsylvania act of April 7, 1870. Philadelphia, etc., R. Co.'s Appeal, 70 Pa. St. 355.

16. Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.

17. Lawrence *v.* Morgan's Louisiana, etc., R., etc., Steamship Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265.

18. Norfolk, etc., R. Co. *v.* Pendleton, 86 Va. 1004, 11 S. E. 1062.

19. That it cannot be split up so as to carry an exemption from taxation see State *v.* Morgan, 28 La. Ann. 482 [*affirmed* in 93 U. S. 217, 23 L. ed. 860]. That the splitting up of a street railway franchise is a matter which concerns the public alone see Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181.

20. State *v.* Morgan, 28 La. Ann. 482 [*affirmed* on other grounds in 93 U. S. 217, 23 L. ed. 860].

21. Stewart's Appeal, 56 Pa. St. 413.

22. Jessup *v.* Loucks, 55 Pa. St. 350.

23. Clow *v.* Van Loan, 4 Hun (N. Y.) 184, 6 Thomps. & C. (N. Y.) 458.

private persons an exclusive franchise, a corporation may purchase from such persons such franchise, the state making no objection.[24]

9. Sale of Vendible Franchises of Corporation Does Not Work Dissolution. While as already seen [25] a corporation cannot sell its primary franchise, that is, its franchise of being a corporation, yet, as it can exist as a corporation without owning any property, a sale of all its property and franchises will operate to pass those franchises which are vendible, and will not have the effect of working a dissolution of the corporation.[26]

10. Transfer of Franchises of Corporation by Its Members Transferring All Their Shares. Even the primary franchise of a corporation, the right to exist as a corporation, may be transferred to a new set of adventurers by the very simple act of its shareholders transferring all their shares to the new sharetakers or to a trustee for them. This transaction is not regarded as a transfer of its franchises by the corporation, but it remains, in the theory or fiction of law, the same person as before, although its membership has totally changed.[27]

11. After Unlawful Assignment, Franchises Annulled Only by State. It seems that franchises illegally assigned by one corporation to another can be annulled only in an action by the state against the corporation to which they have been assigned.[28]

12. Property Necessary to Possession and Enjoyment of Inalienable Franchises Is Not Alienable. No corporation can, without the distinct permission of the state, alien any property necessary to the possession and enjoyment of its inalienable franchises, that is to say, such property as is necessary, either (1) to the exercise of its franchise to be a corporation,[29] or (2) to the discharge of the public duties in consideration of which its franchises have been granted.[30]

13. All Other Corporate Property Alienable. But the power to sell and dispose of all of its property not necessary to the exercise of its inalienable franchises necessarily exists as an incident of the mere right of ownership, since the possession of property is not necessary to the existence of a corporation.[31]

24. California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398.

25. See *supra*, XVI, C, 1.

26. Bruffett *v.* Great Western R. Co., 25 Ill. 353 (sale of the rolling-stock and personal property of a railway company); Troy R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581 (sale by a railway company of its entire road). For a statute which was held not to revoke the charter of a railway corporation or vest in a company purchasing its property under a mortgage the title to a judgment not covered by the mortgage see Wilmington, etc., R. Co. *v.* Downward, (Del. 1888) 14 Atl. 720.

27. State *v.* Butler, 86 Tenn. 614, 8 S. W. 586.

28. People *v.* Albany, etc., R. Co., 15 Hun (N. Y.) 126.

29. Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

30. Such as the right or power of eminent domain. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518. *Compare* Reg. *v.* South Wales R. Co., 14 Q. B. 902, 14 Jur. 828, 19 L. J. Q. B. 272, 6 R. & Can. Cas. 489, 68 E. C. L. 902.

31. Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 30; State *v.* Western Irrigating Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166; Willamette Woolen Mfg. Co. *v.* British Columbia Bank, 119 U. S. 191, 7 S. Ct. 187, 30 L. ed. 384. Neither can the mere insolvency of a corporation extinguish its corporate existence, for the reason above stated, that the possession of property is not necessary to the existence of a corporation. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292. As to the effect of selling all the assets of a corporation see notes 99 Am. Dec. 333, and 75 Am. Dec. 548. Upon the proposition that a railway company may, under the general power of disposing of its property for the purposes of its incorporation, conferred by its charter or by other statute, alienate its personal property, such as its locomotives and cars, there seems to be no substantial difference of opinion. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518. The power of a railroad corporation to alienate its property by its voluntary conveyance, and the right of creditors to subject it to their debts, rest upon the same analogies; therefore the rolling-stock of a railroad is subject to attachment and execution. Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

Rights of way, works, etc., of irrigating company alienable.— Martin *v.* Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; State *v.* Western Irrigating Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166.

XVII. CORPORATE POWERS AND DOCTRINE OF ULTRA VIRES.

A. Corporate Powers in General — 1. No Powers Except Those Expressly Granted or Necessarily Implied — a. In General. Judicial decisions abound in general statements of doctrine to the effect that corporations possess only such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted.[32]

b. Or Incidental to Its Existence — (I) *In General.* "A corporation," said a great jurist in a great case, "being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."[33]

(II) *What Is Meant by Incidental Power.* An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it.[34] An incidental

32. *Alabama.*— Chewacla Lime Works *v.* Dismuke, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100; Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76; State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564; State *v.* Stebbins, 1 Stew. 299.

California.— Vandall *v.* South San Francisco Dock Co., 40 Cal. 83; Smith *v.* Eureka Flour Mills Co., 6 Cal. 1; Smith *v.* Morse, 2 Cal. 524.

Connecticut.— Fuller *v.* Plainfield Academic School, 6 Conn. 532.

Georgia.— First M. E. Church *v.* Atlanta, 76 Ga. 181; Winter *v.* Muscogee R. Co., 11 Ga. 438.

Illinois.— Petersburg *v.* Metzker, 21 Ill. 205; Jacksonville *v.* McConnel, 12 Ill. 138; Kinzie *v.* Chicago, 3 Ill. 187, 33 Am. Dec. 443; Betts *v.* Menard, 1 Ill. 395.

Louisiana.— State *v.* Newman, 51 La. Ann. 833, 25 So. 408, 72 Am. St. Rep. 476; New Orleans, etc., Steamship Co. *v.* Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90; Louisiana State Bank *v.* New Orleans Nav. Co., 3 La. Ann. 294.

Maryland.— Lazear *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355; Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

Michigan.— Atty.-Gen. *v.* Oakland County Bank, Walk. 90.

Missouri.— State *v.* Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593; Matthews *v.* Skinker, 62 Mo. 329, 21 Am. Rep. 425.

Nebraska.— State *v.* Atchison, etc., R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

Nevada.— Whitman Gold, etc., Min. Co. *v.* Baker, 3 Nev. 386.

New Hampshire.— Downing *v.* Mt. Washington Road Co., 40 N. H. 230.

New Jersey.— Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; National Trust Co. *v.* Miller, 33 N. J. Eq. 155.

New York.— People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243; Beatty *v.* Marine Ins. Co., 2 Johns. 109, 3 Am. Dec. 401.

Ohio.— White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59.

Oregon.— Beers *v.* Dalles City, 16 Oreg. 334, 18 Pac. 835.

Pennsylvania.—Stormfeltz *v.* Manor Turnpike Co., 13 Pa. St. 555; McMasters *v.* Reed, 1 Grant 36.

Tennessee.— Greeneville, etc., R. Co. *v.* Johnson, 8 Baxt. 332.

Wisconsin.— Janesville Bridge Co. *v.* Stoughton, 1 Pinn. 667.

United States.— Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837; Huntington *v.* District of Columbia Nat. Sav. Bank, 96 U. S. 388, 24 L. ed. 777; Minturn *v.* Larue, 23 How. 435, 16 L. ed. 574; Perrine *v.* Chesapeake, etc., Canal Co., 9 How. 172, 13 L. ed. 92; Mills *v.* St. Clair County, 8 How. 569, 12 L. ed. 1201; Tombigbee R. Co. *v.* Kneeland, 4 How. 16, 11 L. ed. 855; Runyan *v.* Coster, 14 Pet. 122, 10 L. ed. 382; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. ed. 773, 938; Beaty *v.* Knowler, 4 Pet. 152, 7 L. ed. 813 [*affirming* 14 Fed. Cas. No. 7,896, 1 McLean 41]; Goszler *v.* Georgetown, 6 Wheat. 593, 5 L. ed. 339; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629; Head *v.* Providence Ins. Co., 2 Cranch 127, 2 L. ed. 229; Columbus City Bank *v.* Beach, 5 Fed. Cas. No. 2,736, 1 Blatchf. 425; Farnum *v.* Blackstone Canal Corp., 8 Fed. Cas. No. 4,675, 1 Sumn. 46; Russell *v.* Topping, 21 Fed. Cas. No. 12,163, 5 McLean 194.

See 12 Cent. Dig. tit. "Corporations," § 1517.

There is a collection of American decisions on the doctrine that the powers of corporations are restrained to those conferred by statute, in 5 L. R. A. 100 note.

33. Marshall, C. J., in Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636, 4 L. ed. 629. See also Gould *v.* Fuller, 79 Minn. 414, 82 N. W. 673, same rule under articles of incorporation, which are analogous to a charter.

34. Hood *v.* New York, etc., R. Co., 22 Conn. 1; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep.

power exists only for the purpose of enabling a corporation to carry out the powers expressly granted to it, that is to say the powers necessary to accomplish the purpose of its existence, and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises, not directly, but only remotely connected with its specific corporate purposes.[35]

(III) *What Is Meant by Implied Power.* The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those expressly granted, but comprise all that are necessary, in the sense of being appropriate, convenient, and suitable for such purposes, including the right of a reasonable choice of means to be employed.[36] They must result from the charter by necessary implication, regard being had to the object and purpose of the corporation; and if there is any uncertainty or doubt as to the terms of the charter it must be resolved in favor of the public.[37]

(IV) *In Executing Express Powers May Use Any Means Reasonably Adapted to Ends.* If the means employed are reasonably adapted to the ends for which the corporation was created, they come within its implied or incidental powers, although they may not be specifically designated by the act of incorporation.[38] The meaning is that, except where expressly restricted by charter or statute,[39] corporations take, by implication, the right to use all reasonable modes of executing their express powers which a natural person might adopt in the exercise of similar powers.[40] "They must have a choice of means adapted to ends, and are not to be confined to any one mode of operation."[41]

(V) *Mode of Exercising Express Powers May Be Varied by Custom*— (A) *In General.* Directory provisions of charters, or those provisions which prescribe the formalities of exercising the powers of the corporation, may be varied by custom, and a customary, although not a statutory, exercise of their powers will be deemed good for the purpose of upholding the rights of third parties who have dealt with them in good faith.[42] For instance, although as a general rule the directors of a corporation can exercise their powers only when sitting as a board,[43] yet if they adopt the practice of giving separate assent to the execution of contracts in their name by their agents it will be of the same force as if done by vote at a regular meeting of the board.[44]

(B) *But Custom or Usage Cannot Vary Express Contracts.* But the custom or practice of a corporation cannot be set up in its favor to vary the terms of an express contract into which it has entered,[45] although a custom of a corporation may be set up to show a waiver by it of a condition in a contract.[46]

e. What Powers Possessed by Necessary Implication. Every corporation has by necessary implication the power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited

319, 8 L. R. A. 497; State *v.* Newman, 51 La. Ann. 833, 25 So. 408, 72 Am. St. Rep. 476.

35. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664.

36. Central Ohio Natural Gas, etc., Co. *v.* Capital Dairy Co., 60 Ohio St. 96, 53 N. E. 711.

37. State *v.* Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593.

38. Halsey *v.* Rapid Transit R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 5 Wis. 173.

39. See *supra*, XII, B, 1, a.

40. New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536. See also *supra*, XII, D, 1, b, (I) *et seq.*; XII, F, 1.

41. Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475, 502, per Church, J.

42. Thus corporations authorized by their charters to contract in a prescribed mode may nevertheless by practice render themselves liable on instruments executed in a different mode. Witte *v.* Derby Fishing Co., 2 Conn. 260; Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271.

43. See *supra*, IX, E, 1, a *et seq.*

44. Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159.

45. New Hampshire Mut. F. Ins. Co. *v.* Rand, 24 N. H. 428; Partridge *v.* Life Ins. Co., 18 Fed. Cas. No. 10,786, 1 Dill. 139 [*affirmed* in 15 Wall. (U. S.) 573, 21 L. ed. 229].

46. Tennant *v.* Travellers' Ins. Co., 31 Fed. 322.

by law or by its charter.[47] The meaning is that whatever may fairly be regarded as incidental to, and consequential upon, those things which are authorized by the charter of a corporation will not be held by judicial construction to be *ultra vires*, unless expressly prohibited.[48] The doctrine is not that an express power conferred upon a corporation to accomplish certain objects carries with it by implication all the power which might possibly under given circumstances be called into exercise to effectuate those objects. The meaning rather is that it carries with it by implication a grant of the right to use all such powers as a natural person might properly and lawfully use to accomplish the same results under similar circumstances. Such a grant does not for instance carry with it an implied power to do an act impairing the vested rights of others.[49]

d. Possess Implied Powers to Do Whatever Is Necessary to Effectuate Express Powers — (I) *In General.* Where an express power is granted to do a particular act, this carries with it by implication the right to do any act which may be found reasonably necessary to give effect to the power expressly granted.[50]

(II) *Examples of These Powers.* On this principle every corporation, private or municipal, without regard to the ends for which it is created, possesses, in the absence of language expressly restrictive, certain powers which have been found necessary to its very existence and self-preservation, among which are the power to make by-laws or other rules for its internal management;[51] the power to make and use a common seal by which to express its assent to its contracts;[52] and the power to sue and be sued[53] in the ordinary courts of justice, for the vindication of its rights and for the vindication of the rights of others against it. These three powers are often referred to as incident to every corporation,[54] and they are often described as the common-law powers of corporations. Upon this subject it has been observed that "the common law gives to all corporations the powers belonging to corporations of their class, unless there is something in the nature of the corporation, or in the terms of its charter or act of incorporation, inconsistent with the exercise of such powers, or there is some general statute restricting their powers. The power to make contracts, to contract obligations as natural persons may do, is laid down in all the elementary books, as one of the ordinary incidents of all corporations not specially restricted."[55]

47. Le Couteulx *v.* Buffalo, 33 N. Y. 333; Leavitt *v.* Blatchford, 5 Barb. (N. Y.) 9; Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574; McMasters *v.* Reed, 1 Grant (Pa.) 36; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223.

48. Ellerman *v.* Chicago Junction R., etc., Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

49. Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

50. *Colorado.*— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Connecticut.— New Haven *v.* Sargent, 38 Conn. 50, 9 Am. Rep. 360; Hope Mut. L. Ins. Co. *v.* Weed, 28 Conn. 51; Bridgeport *v.* Housatonuc, etc., R. Co., 15 Conn. 475; Stratford *v.* Sanford, 9 Conn. 275.

Illinois.— St. Clair County Turnpike Co. *v.* People, 82 Ill. 174; Chandler *v.* Northern Cross R. Co., 18 Ill. 190; Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589; Illinois Cent. R. Co. *v.* Rucker, 14 Ill. 353; Newhall *v.* Galena, etc., R. Co., 14 Ill. 273.

Indiana.— New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536; Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467, 68 Am. Dec. 650.

Kentucky.— Bardstown, etc., Co. *v.* Metcalfe, 4 Metc. 199, 81 Am. Dec. 541.

Louisiana.— Knight *v.* Carrollton R. Co., 9 La. Ann. 284; New Orleans, etc., R. Co. *v.* New Orleans Second Municipality, 1 La. Ann. 128.

Maine.— Plummer *v.* Penobscot Lumbering Assoc., 67 Me. 363.

Maryland.— Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476; Tide Water Canal Co. *v.* Archer, 9 Gill & J. 479.

Missouri.— Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514; St. Louis *v.* Russell, 9 Mo. 507.

New Jersey.— Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Atty.-Gen. *v.* Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526.

United States.— Blanchard's Gun-Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258, 1 Fish Pat. Rep. 184.

51. See *supra*, V, B, 1.

52. See *supra*, XII, D, 1, a.

53. That the power to sue and be sued is necessarily implied see Grant County *v.* Lake County, 17 Oreg. 453, 21 Pac. 447. See also *infra*, XXII, A, 1, a *et seq.*

54. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

55. Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 94, 59 Am. Dec. 364.

e. Subject to Same Inferences and Intendments as Natural Persons. A corporation, when acting within the general scope and purview of its granted powers, is subject to the same intendments and implications in respect of the mode of their exercise as would arise from similar acts or conduct of natural persons.[56]

f. Subject to Same Restraints as Natural Persons. Corporations stand under the same restraints as individuals, except where otherwise provided in their charters, in the use of their property, in the exercise of their powers, and in the transaction of their business, to the end of avoiding injury to others; and to this end they are subject to the same control under the police powers of the state, whether exercised directly through its legislature, or by delegation through the legislature of a municipal corporation.[57]

2. Can Do No Acts Not Authorized by Charter or Governing Statute. "A corporation can make no contracts, and do no acts either within or without the State which created it, except such as are authorized by its charter";[58] and in strictness those acts must moreover be done through the instrumentality of officers or agents in such a manner as the charter or governing statute authorizes.[59] Assuming, then, that the charter or governing statute of a particular corporation is, under the constitution of the United States and that of the particular state, within the powers of the legislature, it constitutes the index to the objects for which the corporation was created and to the powers with which it has been endowed.[60]

3. Held to Reasonable Exercise of Their Powers. The power of the judicial courts to nullify the operation of the by-laws, rules, and regulations of corporations, including the ordinances of municipal corporations, when unreasonable,[61] is founded upon the principle "that corporations have none of the elements of sovereignty, that they cannot go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner"; and upon the further principle that "the court must judge in each case whether the exercise of the power be reasonable."[62]

4. Limits of Power to Make and Take Contracts. In respect of the power of corporations to make and take contracts, two propositions may be stated: (1) That they have, by mere implication of law and without any affirmative

Instances of powers implied under this rule. — New Orleans, etc., R. Co. *v.* New Orleans Second Municipality, 1 La. Ann. 128 [*reaffirmed* in Knight *v.* Carrollton R. Co., 9 La. Ann. 284, power to lay a railroad on a street includes power to make a turnout]; Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514 (implied power to employ agents to effect general purpose); Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 94, 59 Am. Dec. 364 (power to become common carrier of goods includes power to become responsible as bailee after end of transit); Atty.-Gen. *v.* Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526 (power to build railroad includes power to bridge navigable stream). And see the following cases:

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Connecticut.— New Haven *v.* Sargent, 38 Conn. 50, 9 Am. Rep. 360; Hope Mut. L. Ins. Co. *v.* Weed, 28 Conn. 51.

Illinois.— Chandler *v.* Northern Cross R. Co., 18 Ill. 190; Newhall *v.* Galena, etc., R. Co., 14 Ill. 273.

Indiana.— Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467, 68 Am. Dec. 650.

Kentucky.—Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. 199, 81 Am. Dec. 541.

56. Tennessee River Transp. Co. *v.* Kavanaugh, 93 Ala. 324, 9 So. 395; Bates *v.* State Bank, 2 Ala. 451.

57. Richmond, etc., R. Co., *v.* Richmond, 26 Gratt. (Va.) 83. See also Farmers', etc., Bank *v.* Harrison, 57 Mo. 503. Thus the right to lay a railway through a city does not by implication prohibit a municipal corporation from restraining the use of engines thereon propelled by steam. Richmond, etc., R. Co. *v.* Richmond, 26 Gratt. (Va.) 83.

58. Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337; Tombigbee R. Co. *v.* Kneeland, 4 How. (U. S.) 16, 11 L. ed. 855; Runyan *v.* Coster, 14 Pet. (U. S.) 122, 10 L. ed. 382; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 587, 10 L. ed. 274.

59. Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337. See also *supra*, XII, B, 1, a *et seq.*

60. Aurora *v.* West, 9 Ind. 74.

For a leading exception to the doctrine of the text with respect to *ultra vires* acts which are fraudulent or tortious see *infra*, XIX, A, 6, a *et seq.*

61. See *supra*, V, C, 11, a *et seq.*

62. St. Louis *v.* Weber, 44 Mo. 547, 550.

expression to that effect in their charters or governing statutes, and of course in the absence of express prohibitions, the same power to make and take contracts, within the scope of the purposes of their creation, which natural persons have;[63] and (2) that this power on the other hand is restricted to the purposes for which the corporation has been created and cannot be lawfully exercised by it for other purposes.[64]

5. Powers of De Facto Corporations. If a corporation exists *de facto*, within the meaning of principles already considered,[65] then the law will ascribe to it all the powers which it would have possessed if it had been regularly organized; and this will include all these powers which are ascribed by implication of law to corporations generally; such as the power to make and take contracts, to acquire and transmit property, to sue and be sued, etc. It can make any contracts, including mortgages of after-acquired property, which the law authorizes corporations to make.[66] For instance a conveyance by or to a corporation defectively organized but existing and exercising its franchises without interference by the state will pass a good title, as least as against everyone save the state.[67] So it is not necessary to do more than to prove that a plaintiff suing as a corporation is such *de facto* to enable it to maintain an action against any one other than the state who has contracted with the corporation or who has done it a wrong.[68]

B. Financial Powers — 1. Implied Financial Powers — a. General Principles Stated. In deciding whether a corporation can make a particular contract, it is said that we are to consider in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and, if the charter and statutory law are silent on the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfil the purpose of its existence, or whether the contract is entirely foreign to that purpose.[69]

63. *California.*— Smith *v.* Eureka Flour Mills Co., 6 Cal. 1.

Michigan.— Cicotte *v.* St. Anne Catholic, etc., Church, 60 Mich. 552, 27 N. W. 682.

Missouri.— Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212; Baile *v.* St. Joseph F., etc., Ins. Co., 73 Mo. 371.

New York.— Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280.

Ohio.— Reynolds *v.* Stark County, 5 Ohio 204.

Oregon.— Portland Lumbering, etc., Co. *v.* East Portland, 18 Oreg. 21, 22 Pac. 536, 6 L. R. A. 290.

Pennsylvania.—Hand *v.* Clearfield Coal Co., 143 Pa. St. 408, 22 Atl. 709, 29 Wkly. Notes Cas. 9.

64. *Alabama.*— Morris *v.* Hall, 41 Ala. 510; Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76; Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558.

California.— Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620.

Connecticut.— Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166; Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468; Hood *v.* New York, etc., R. Co., 22 Conn. 1, 23 Conn. 609; Fuller *v.* Naugatuck R. Co., 21 Conn. 557; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100.

Missouri.— Detweiler *v.* Breckenkamp, 83 Mo. 45.

New York.— People *v.* Boston, etc., R. Co., 70 N. Y. 569; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280.

United States.— Shields *v.* Ohio, 95 U. S. 319, 24 L. ed. 357; U. S. *v.* Louisville, etc., Canal Co., 26 Fed. Cas. No. 15,633, 1 Flipp. 260, 4 Dill. 601. See also Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

65. See *supra*, I, O, 1, a *et seq.*

66. McTighe *v.* Macon Constr. Co., 94 Ga. 306, 21 S. E. 701, 47 Am. St. Rep. 143, 32 L. R. A. 208.

67. Finch *v.* Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383; Doyle *v.* San Diego Land, etc., Co., 46 Fed. 709.

68. Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. ed. 784. See to the contrary under the law of Louisiana Hincks *v.* Converse, 37 La. Ann. 484; Workingmen's Accommodation Bank *v.* Converse, 29 La. Ann. 369. *Compare* Vredenburg *v.* Behan, 33 La. Ann. 627; African M. E. Church *v.* New Orleans, 15 La. Ann. 441.

For further illustrations of the principle see Larned *v.* Beal, 65 N. H. 184, 23 Atl. 149; Lippincott *v.* Shaw Carriage Co., 25 Fed. 577.

Status of unconstitutional corporations under early Michigan "Wild Cat" decisions, which are deemed untenable. Hurlbut *v.* Britain, 2 Dougl. (Mich.) 191; Smith *v.* Barstow, 2 Dougl. (Mich.) 155. See also *supra*, I, O, 2, d.

69. Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91, 92, per Scott, J.

b. Implied Power to Borrow Money — (I) *In General.* Every corporation, except those organized for public or governmental purposes, which may require the use of money for carrying out the purposes of its organization has an implied or incidental power to borrow money for such purposes, as much as an individual has, although no such power is expressly granted in its charter;[70] and to give the customary evidences of debt therefor,[71] and to add to this the customary security.[72]

70. *Colorado.*— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Illinois.— Ward *v.* Johnson, 95 Ill. 215.

Indiana.— Wright *v.* Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412.

New York.— Partridge *v.* Badger, 25 Barb. 146; Mead *v.* Keeler, 24 Barb. 20; Beers *v.* Phœnix Glass Co., 14 Barb. 358; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280.

Tennessee.— Moss *v.* Harpeth Academy, 7 Heisk. 283.

71. See *infra*, XVII, C, 1, a; XVIII, A, 1, a, (I) *et seq.*

72. See *infra*, XVIII, B, 1, a.

Distinction between English and American doctrine on this subject.— The reader is cautioned that there is a vital distinction between the English and the American doctrine on the subject of the power of a corporation to borrow money. The English decisions approach the subject with the presumption that unless the power is conferred by the legislature it does not exist. Wenlock *v.* River Dee Co., 36 Ch. D. 674, 56 L. J. Ch. 899, 57 L. T. Rep. N. S. 401. Whereas as just seen the American cases approach it with the presumption that it does exist. In England it depends largely upon the powers which the coadventurers have taken to themselves in their articles of association, and the powers which the shareholders have conferred upon the directors, this being a matter with respect to which a majority of the shareholders can bind the minority. Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & J. 123, 60 Eng. Ch. 96. The strictness with which corporations are confined in that country to the exercise of the powers expressly granted is illustrated by an English case where a company was formed to improve a river and the lands adjoining, and for this purpose was empowered to borrow twenty-five thousand pounds on a mortgage. The directors borrowed eighty-five thousand pounds, sixty thousand pounds of which they applied in paying off a previous mortgage. In an action to recover the eighty-five thousand pounds and interest it was held that plaintiff was entitled to recover only twenty-five thousand pounds, and so much more as had been applied in payment of debts and liabilities of the company properly incurred. Wenlock *v.* River Dee Co., 10 App. Cas. 354, 49 J. P. 773, 54 L. J. Q. B. 577, 53 L. T. Rep. N. S. 62 [*affirming* 36 Ch. D. 675 note (*affirmed* in 19 Q. B. D. 155, 56 L. J. Q. B. 589, 57 L. T. Rep. N. S. 320, 35 Wkly. Rep. 822)]. See further Landowners' West of England Land Drainage, etc., Co. *v.* Ashford, 16 Ch. D. 411, 50 L. J. Ch. 276, 44 L. T. Rep. N. S. 20, borrowing powers under the forty-second section of the English Companies Clauses Act considered by Frye, J. Whether building associations in England possess the power to borrow see Lindley Comp. L. (5th ed.) 189, 190 [*quoted* with citations of cases in 4 Thompson Corp. § 5699]. As to the distinction in English law between the power of the corporation and that of the directors to borrow see Lindley Comp. L. (5th ed.) 190 [*citing In re* International L. Assur. Soc. L. R. 10 Eq. 312, 39 L. J. Ch. 667, 23 L. T. Rep. N. S. 350, 18 Wkly. Rep. 970; Wenlock *v.* River Dee Co., 36 Ch. D. 674, 56 L. J. Ch. 899, 57 L. T. Rep. N. S. 401; *In re* Hamilton's Windsor Ironworks, 12 Ch. D. 707, 40 L. T. Rep. N. S. 569, 27 Wkly. Rep. 445; Maclae *v.* Sutherland, 2 C. L. R. 1320, 3 E. & B. 1, 18 Jur. 942, 23 L. J. Q. B. 229, 2 Wkly. Rep. 161, 77 E. C. L. 1; Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & J. 123, 60 Eng. Ch. 96; Royal British Bank *v.* Turquand, 5 E. & B. 248, 1 Jur. N. S. 1086, 24 L. J. Q. B. 327, 85 E. C. L. 248 [*affirmed* in 6 E. & B. 327, 2 Jur. N. S. 663, 25 L. J. Q. B. 317, 88 E. C. L. 327]; *In re* Joint-Stock Co.'s Winding-up Acts, 18 Jur. 885; Australasia Bank *v.* Australia Bank, 12 Jur. 189, 6 Moore P. C. 152, 13 Eng. Reprint 642; Australian Auxiliary Steam Clipper Co. *v.* Mounsey, 4 Jur. N. S. 1224, 4 Kay & J. 733, 27 L. J. Ch. 729, 6 Wkly. Rep. 734]. This distinction is not pursued here, because it is deemed inapplicable under American law, where borrowing powers are regarded as pertaining to mere details of business, when not restrained or prohibited by constitution, statute, or charter, and where the directors consequently wield all those powers. The same may be said of borrowing powers conferred by special delegation from the shareholders, as to which see Lindley Comp. L. (5th ed.) 190, 191. The English decisions on this subject are not examined here, because under American conceptions borrowing powers are implied and do not proceed from power specially delegated by the sharehholders. The same may be said of the consequences under English law of a corporation borrowing without power. Those consequences are very severe. The lender cannot in general recover the money so borrowed (*In re* Companies Acts, 21 Q. B. D. 301; Chapleo *v.* Brunswick Permanent Bldg. Soc., 6 Q. B. D. 696, 50 L. J. Q. B. 372, 44 L. T. Rep. N. S. 449, 29 Wkly. Rep. 529; Blackburn, etc., Ben. Bldg. Soc. *v.* Cunliffe, 29 Ch. D. 902, 54 L. J. Ch. 1091, 53 L. T. Rep. N. S. 741; English Channel Steamship Co. *v.* Rolt, 17 Ch. D. 715, 44 L. T. Rep. N. S. 135 [doctrine conceded]; *Re* Pooley Hall Colliery Co., 21 L. T. Rep. N. S. 690, 18 Wkly. Rep. 201) unless he can show that it has been applied to the legitimate purposes of the company (*In re* National Permanent Ben. Bldg. Soc., L. R. 5 Ch. 309, 34 J. P.

(II) *Scope and Extent of Power.* The rule broadly is, that where authority is given to a corporation to engage in a particular business, or to carry out a particular purpose, pecuniary or ideal, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories; and that it may consequently borrow money to attain its legitimate objects, precisely as an individual may, and may bind itself for the payment of the same by any form of obligation not forbidden.[73]

(III) *Possess This Power as an Incidental, and Not as a Principal, Power, Unless Expressly Granted.* But corporations possess this power as an incidental and not as a principal power. They may not, unless expressly authorized to do so by their charters, emit bonds, notes, or bills of credit intended to circulate as money, and take in exchange therefor notes, mortgages, or other securities. The issuing of paper credits as a principal business is *ultra vires*, unless the power has been expressly granted, and courts will not aid them in

341, 22 L. T. Rep. N. S. 284, 18 Wkly. Rep. 388; *In re* Cork, etc., R. Co., L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. Rep. N. S. 735, 18 Wkly. Rep. 26; Matter of Joint-Stock Co.'s Winding-up Act, 4 De G. M. & G. 19, 18 Jur. 710, 53 Eng. Ch. 16; *Re* Magdalena Steam Nav. Co., Johns. 690, 6 Jur. N. S. 975, 29 L. J. Ch. 667, 8 Wkly. Rep. 329). Partial applications of this principle were made in Wenlock *v.* River Dee Co., 10 App. Cas. 354, 49 J. P. 773, 54 L. J. Q. B. 577, 53 L. T. Rep. N. S. 62 [*affirmed* in 19 Q. B. D. 155, 57 L. T. Rep. N. S. 320, 35 Wkly. Rep. 822 (*affirming* 36 Ch. D. 674, 56 L. J. Ch. 899, 57 L. T. Rep. N. S. 401, 38 Ch. D. 534, 57 L. J. Ch. 946, 59 L. T. Rep. N. S. 485)]; Cunliffe *v.* Blackburn, etc., Ben. Bldg. Soc., 9 App. Cas. 857, 54 L. J. Ch. 376, 52 L. T. Rep. N. S. 225, 33 Wkly. Rep. 309 [*affirming* 22 Ch. D. 61, 52 L. J. Ch. 92, 48 L. T. Rep. N. S. 33, 31 Wkly. Rep. 98, 29 Ch. D. 902, 54 L. J. Ch. 1091, 53 L. T. Rep. N. S. 741]; and in *In re* London, etc., Assur. Co., 9 Wkly. Rep. 366, 10 Wkly. Rep. 662. Sir Nathaniel Lindley concludes a review of these cases with the following statement of doctrine, which clearly does not express the American law: "The mere fact that the company has had the use of the money is not enough to create an obligation to repay it: so to hold would render nugatory all prohibition against borrowing. Accordingly where the managers of a building society borrowed money for the society, but in excess of their powers, and the money so borrowed was advanced to members on the security of their shares, it was held that the lenders had no claim against the society, either as creditors at law or by reason of the application of the money." Lindley Comp. L. (5th ed.) 238 [*citing* to the illustration *In re* National Permanent Ben. Bldg. Soc., L. R. 5 Ch. 309, 34 J. P. 341, 22 L. T. Rep. N. S. 284, 18 Wkly. Rep. 388]. See further as to the consequences under English law of a corporation borrowing without power 4 Thompson Corp. § 5702, citing still other cases. Under that law, if the directors of a corporation borrow money of a stranger, not having the power so to do, and apply it to the purposes of the company, and afterward repay it to the stranger, they, the directors, may have indemnity against the company and against its shareholders. Hoare's Case, 30 Beav. 225, 2 Johns. & H. 229; Troup's Case, 29 Beav. 353; *In re* Norwich Yarn Co., 22 Beav. 143, 2 Jur. N. S. 940, 25 L. J. Ch. 601, 4 Wkly. Rep. 619; *In re* National Patent Steam Fuel Co., 1 Dr. & Sm. 55; British Provident Soc. *v.* Norton, 9 Jur. N. S. 1308, 9 L. T. Rep. N. S. 598, 2 New Rep. 147, 12 Wkly. Rep. 142; Lowndes *v.* Garnett, etc., Gold Min. Co. of America, 3 New Rep. 601. Sir Nathaniel Lindley comments unfavorably on these decisions. Lindley Comp. L. (5th ed.) 383. They led up to a meritorious class of holdings, made in some cases and denied in others, to the effect that, where the creditor advanced the money directly to the company, yet he might prove up a claim for reimbursement, to the extent to which the money advanced by him had been employed in the legitimate business of the company. Under English law, although the borrower cannot recover from the company, as a debt, money loaned by him to it in excess of its powers, yet he may be subrogated to any securities which the company may have obtained by means of the money loaned, as where it has used it to take up a mortgage. Wenlock *v.* River Dee Co., 19 Q. B. D. 155, 56 L. J. Q. B. 589, 57 L. T. Rep. N. S. 320, 35 Wkly. Rep. 822 [*affirming* 10 App. Cas. 354, 49 J. P. 773, 54 L. J. Q. B. 577, 53 L. T. Rep. N. S. 62 (*affirming* 36 Ch. D. 675 note, 38 Ch. D. 534, 57 L. J. Ch. 946, 59 L. T. Rep. N. S. 485)]. See also Cunliffe *v.* Blackburn, etc., Ben. Bldg. Soc., 9 App. Cas. 857, 54 L. J. Ch. 376, 52 L. T. Rep. N. S. 225, 33 Wkly. Rep. 309 [*affirming* 22 Ch. D. 61, 52 L. J. Ch. 92, 48 L. T. Rep. N. S. 33, 31 Wkly. Rep. 98, 29 Ch. D. 902, 54 L. J. Ch. 1091, 53 L. T. Rep. N. S. 741].

73. Wright *v.* Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; Smith *v.* Law, 21 N. Y. 296; Curtis *v.* Leavitt, 15 N. Y. 9; *In re* Hercules Mut. L. Assur. Soc., 12 Fed. Cas. No. 6,402, 6 Ben. 35. That a corporation must act according to this, even in borrowing money, was laid down in the unique opinion of Bleckley, J., in Harriman *v.* First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117, where the power to raise money by a steamboat excursion was denied to a relig-

executing contracts originating in this way, although they will not deny to the public a remedy on such obligations.[74]

(IV) *To What Corporations This Power Ascribed.* This power has been ascribed to manufacturing,[75] railway,[76] banking,[77] insurance,[78] and even to eleemosynary corporations.[79] For instance it has been held that a corporation, organized for the manufacture of copper and brass goods, may borrow money to buy at low prices, raw material, in excess of its immediate needs;[80] that a railroad company may borrow money for carrying out the purposes of its creation, although its charter provides that its funds shall be raised by share subscriptions;[81] and that a fire-insurance company, whether organized on the stock[82] or mutual[83] plan, may borrow money to pay its losses. So it is held that a corporation possessing general banking powers, but whose charter says nothing about borrowing money, nevertheless possesses this power, without more specific authority therefor.[84]

(V) *Construction of Charters Conferring and Excluding This Power.* Under a body of statutes authorizing any mining company "to enter into any obligations or contracts, essential to the transaction of its ordinary affairs, or for the purposes for which it was created," and clothing its directors with authority to exercise its corporate powers in the conduct and control of its business and property, it has been held that they may borrow money for its purposes and authorize certain of its officers to negotiate loans, to execute notes, and to sign checks drawn against its bank-account, and that such authority may be otherwise shown than by the official record of its proceedings.[85] On the other hand, where the charter of a turnpike company empowered it to lay a tax upon property-owners along its road to aid in its completion, it was held that it was not thereby authorized to borrow money to hasten the work and to charge the taxpayers with interest thereon.[86]

(VI) *Construction of Constitutional and Statutory Provisions Limiting Power of Corporations With Respect to Creation of Debts.* Constitutional and statutory provisions placing a limitation upon the amount of indebtedness which corporations may incur have been enacted in many states.[87] Such a constitutional provision does not prohibit a corporation from borrowing

ious corporation, one of the excursionists having been "threatened with a most profane form of immersion."

74. Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558.

75. Oxford Iron Co. *v.* Spradley, 46 Ala. 98; National Shoe, etc., Bank's Appeal, 55 Conn. 469, 12 Atl. 646; Burr *v.* McDonald, 3 Gratt. (Va.) 215.

76. Union Bank *v.* Jacobs, 6 Humphr. (Tenn.) 515.

77. Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Ringling *v.* Kohn, 6 Mo. App. 333; Curtis *v.* Leavitt, 15 N. Y. 9 [*affirming* on this point 17 Barb. (N. Y.) 309]; Maclae *v.* Sutherland, 2 C. L. R. 1320, 3 E. & B. 1, 18 Jur. 942, 23 L. J. Q. B. 229, 2 Wkly. Rep. 161, 77 E. C. L. 1; Royal British Bank *v.* Turquand, 5 E. & B. 248, 1 Jur. N. S. 1086, 24 L. J. Q. B. 327, 85 E. C. L. 248 [*affirmed* in 6 E. & B. 327, 2 Jur. N. S. 663, 25 L. J. Q. B. 317, 88 E. C. L. 327]; *In re* Joint Stock Co.'s Winding-up Acts, 18 Jur. 885; Australasia Bank *v.* Australia Bank, 12 Jur. 189, 6 Moore P. C. 152, 13 Eng. Reprint 642.

78. Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387, 6 Atl. 696.

79. Moss *v.* Harpeth Academy, 7 Heisk. (Tenn.) 283.

80. National Shoe, etc., Bank's Appeal, 55 Conn. 469, 12 Atl. 646.

81. Union Bank *v.* Jacobs, 6 Humphr. (Tenn.) 515.

82. Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53.

83. Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387, 6 Atl. 696.

84. Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Ringling *v.* Kohn, 6 Mo. App. 333; Curtis *v.* Leavitt, 15 N. Y. 9 [*affirming* on this point 17 Barb. (N. Y.) 309].

85. Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707.

86. Lewis, etc., Turnpike Road Co. *v.* Thomas, (Ky. 1887) 3 S. W. 907. For a restricted view of this subject, which can scarcely commend itself to American courts, resulting in the conclusion that the assent of every individual member of the corporation will not make valid a loan beyond the sum which the company is empowered by its governing statute to borrow, there being no positive prohibition, see Wenlock *v.* River Dee Co., 36 Ch. D. 674, 56 L. J. Ch. 899, 57 L. T. Rep. N. S. 401.

87. These have been considered when dealing with the liabilities of shareholders to creditors of corporation (see *supra*, VIII), and will be further considered when dealing

money from one party to pay an existing and overdue indebtedness to another party, because this does not increase its indebtedness.[88] But an indebtedness created for the purpose of purchasing real estate, of erecting buildings for the prosecution of the business of the corporation, and not intended to discharge existing obligations, or to secure their payment, and not arising in the ordinary operations of the corporation, by the employment of labor and purchase of materials, is an increase of indebtedness within the meaning of such a prohibition.[89] Under a statute authorizing corporations to borrow money not exceeding their authorized capital stock, a loan to a corporation in excess of its authorized stock is not invalid up to that amount.[90]

(VII) *Rights of Creditors Where Debts Are Created in Excess of Statutory Limit.* By the American law, where there is a statute imposing a limit upon corporations in respect of the amount of debts which they can incur, a creditor who does not know that the limit has been exceeded, and who has no reasonable ground to believe that such is the fact, may enforce the obligation of the contract against the corporation.[91] The American courts have adopted this rule under the stress of justice, seeking to found it sometimes on the view that the statute is directory merely,[92] or that the corporation is estopped from setting up such a defense after having enjoyed the benefit of the contract, especially where the money thus borrowed has been used in conducting the legitimate business of the corporation, with the knowledge and consent of all the shareholders.[93]

(VIII) *Power of Officers to Borrow For Company.* With respect to the directors, the power is presumed, since it is a mere business power, and they

with corporate bonds (see *infra*, XVIII, A, 1, c).

88. Powell *v.* Blair, 7 Pa. Co. Ct. 492 [*affirmed* in 133 Pa. St. 550, 19 Atl. 559], the prohibition was against the increase of indebtedness without the consent of a majority of the shareholders.

89. Nicholas *v.* Putnam Mach. Co., 7 Northam. Co. Rep. (Pa.) 137.

90. Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., 13 Tex. Civ. App. 103, 35 S. W. 337 [*writ of error denied* in 89 Tex. 511, 35 S. W. 1047]. That the directors of a corporation are not prohibited from creating an original bonded indebtedness by a statute prohibiting them from increasing a bonded indebtedness and requiring a meeting of the shareholders to accomplish that purpose was held in Smith *v.* Ferries, etc., R. Co., (Cal. 1897) 51 Pac. 710. Further as to the construction of such statutes and charters see Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; Com. *v.* Lehigh Ave. R. Co., 6 Pa. Co. Ct. 557. That non-negotiable notes secured by mortgages, given for advances of money and materials for the improvement of corporate property, are not a fictitious indebtedness or a bonded indebtedness, within the meaning of a constitutional provision, and a statute prohibiting the directors of corporations from creating debts larger than the prescribed capital stock, etc., see Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049. It seems that a constitutional restriction, followed and enforced by a statute, as to the manner of incurring corporate debts, by requiring the consent of a majority in value of the shares, does not apply to corporations operating under existing charters. Lewis *v.* Jeffries, 86 Pa. St. 340.

91. *Iowa.*— Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa 607.

Kansas.— Sherman Center Town Co. *v.* Morris, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134.

Minnesota.— Kraniger *v.* People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

New Hampshire.— Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295.

United States.— Allis *v.* Jones, 45 Fed. 148; Wood *v.* Corry Water Works Co., 44 Fed. 146, 12 L. R. A. 168. *Contra*, Weber *v.* Spokane Nat. Bank, 50 Fed. 735.

Doctrine of ultra vires not applied.—Where a creditor of a corporation had no knowledge that the corporation had exceeded the limit beyond which it was forbidden by statute to contract debts, and could not by inquiry have ascertained that fact, it was held that the doctrine of *ultra vires* would not be applied to him. Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295.

92. Sherman Center Town Co. *v.* Morris, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134.

93. Allis *v.* Jones, 45 Fed. 148.

Rule as to strictly public corporations.— This rule does not apply with respect to strictly public corporations (Daviess County *v.* Dickinson, 117 U. S. 657, 6 S. Ct. 897, 29 L. ed. 1026; Litchfield *v.* Ballou, 114 U. S. 190, 5 S. Ct. 820, 29 L. ed. 132; Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. ed. 1070), but even here the money thus advanced may be recovered back in an action for money had and received (Louisiana City *v.* Wood, 102 U. S. 294, 26 L. ed. 153).

That shares issued and turned over to other corporations in consideration of transfers by them of property of various kinds is "sub-

wield all the powers of the corporation for the purpose of conducting its business.[94] But in the case of other ministerial officers, the power ought to be proved; although in such cases it is not necessary that it should be proved by the production of an official record, but it may be proved by circumstances.[95] As already seen this power has been judicially ascribed to the president,[96] and to other managing agents of corporations; and it has been ascribed to the cashier of a bank.[97]

(IX) *When Not Necessary to Show That Corporation Received Benefit of Money Loaned to It.* Manifestly where the company has the power to borrow, and where, as in ordinary cases under American law, the directors wield the borrowing powers of the company, if in the absence of collusion or fraud affecting the lender they borrow money for the purposes of the corporation, it is not necessary for him, in order to maintain his legal or equitable remedies against the corporation, its shareholders, or sureties, to show that the money so borrowed was actually appropriated to its use,[98] and this on a principle already stated that one who in good faith advances money to a trustee is not concerned with his subsequent disposition of it as a part of the trust fund.[99]

2. Power of Corporations to Lend Out Their Funds — a. In General. Except in the case of those corporations which possess banking powers, it may be assumed that the power of corporations to lend their funds, except their surplus and unemployed funds, will not be implied; but if it is possessed at all, it must be found in their charters or governing statutes. The power to lend out its surplus funds has been ascribed to a railroad company,[1] to an insurance company,[2] to a mutual benefit society,[3] and to a manufacturing company.[4]

b. Power to Lend Financial Aid to Customer. It also seems a reasonable conclusion that a trading, mining, or manufacturing corporation may extend financial aid to a customer whenever the exigencies of its own business make such a course expedient, a rule, the necessity of which business men will readily understand.[5]

c. Charters Under Which Power to Lend Out Their Funds Is Denied. In the state of New York at an early period, when it was the policy of the state to make a monopoly of the business of banking, the power of other than banking corporations to lend out their money by discounting or purchasing commercial paper was denied, and such transactions were held void in the sense that they could not form

scribed capital stock" within the meaning of a statute see Smith *v.* Ferries, etc., R. Co., (Cal. 1897) 51 Pac. 710.

94. See *supra*, IX, C, 1 *et seq.*

95. Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707.

96. See *supra*, X, A, 1, b, (II), (B).

97. Ringling *v.* Kohn, 6 Mo. App. 333. The court referred to New Haven City Bank *v.* Perkins, 4 Bosw. (N. Y.) 420, where the same point was ruled on analogous facts, and also to Barnes *v.* Ontario Bank, 19 N. Y. 152, where such power in the cashier of a bank was conceded.

98. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

99. 4 Thompson Corp. § 4930.

Loan to president treated as loan to company.— For circumstances under which advances to the president of a corporation were treated as advances to the corporation see Poole *v.* West Point Butter, etc., Assoc., 30 Fed. 513.

1. North Carolina R. Co. *v.* Moore, 70 N. C. 6.

2. Such was the intimation of Brown, C. J., in McFarlan *v.* Triton Ins. Co., 4 Den. (N. Y.) 392.

3. Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37.

4. Dock *v.* Schlichter Jute Cordage Co., 167 Pa. St. 370, 31 Atl. 656. So also under an act incorporating a company for the purpose of granting annuities, insuring lives, and loaning money on bond and mortgage, which latter power was to cease, by a provision of the act, at the expiration of fifteen years, it was held that the company had power to lend money on bond and mortgage after fifteen years had expired, inasmuch as the continuing of the two first powers made it necessary for them to invest their funds in order to carry on their business. Farmers' Loan, etc., Co. *v.* Clowes, 4 Edw. (N. Y.) 575. A corporation organized for the purpose of establishing and operating a theater has power to borrow money and loan it to a lessee of the theater, for the purpose of keeping the theater running. Thoma *v.* East End Opera House Co., 30 Pittsb. Leg. J. N. S. 230.

5. Holmes *v.* Willard, 125 N. Y. 75, 25 N. E. 1083, 34 N. Y. St. 455, 11 L. R. A. 170 [*af-*

the basis of an action.[6] These cases proceed upon the principle that a contract made with a corporation for the loan of money as well as the security taken on the loan is void if the power to lend money be not expressly given or necessarily incident to the power given to the corporation by its charter.[7] At a later period in Alabama the same conclusion was reached with respect to a grand lodge of Masons,[8] and also with respect to a corporation chartered by the name of the "State Grange of the Patrons of Husbandry of Alabama";[9] and no doubt other decisions could be found of the same nature.

d. Power to Lend on Particular Securities. A charter empowering a bank to "deal in bullion, gold and silver coin, promissory notes, mortgages, bills of exchange, public stock, or any collateral security" did not prohibit it from acquiring a promissory note otherwise than as collateral security.[10] According to old doctrine an insurance company which is clothed with power to lend money on bottomry, *respondentia*, mortgages, real estate, or chattels generally, but is prohibited from exercising banking powers, or from engaging in trade, or other business, except that of insuring property, has no power to lend its money by discounting notes. A note so discounted by it is void, and it cannot recover upon it.[11]

e. Doctrine That Corporation Cannot Recover on Security Taken For Illegal Loan. It was a strictly logical consequence of the doctrine that a corporation cannot lend out its funds unless thereto authorized by charter or statute to hold that there could be no recovery upon the security thus illegally taken for the loan. And it was equally logical to hold that there could be no recovery, in an action on such a security, on a common count for money had and received; since this would equally be to give effect to the illegal contract.[12]

f. But Can Recover Money Back in Action For Money Had and Received. But the stress of justice drove the courts into the subtlety that, while the security taken for the illegal loan was void and could not afford a foundation for an action, yet the corporation might nevertheless recover back the money so illegally advanced to the borrower, in an action for money had and received; and that this might be done under the common count in an action on the security.[13] Even in case of loans which are prohibited by statute, the modern doctrine is that the corporation may recover the money back unless the governing statute says that it

firming 5 N. Y. Suppl. 610]. See also Platt *v.* Birmingham Axle Co., 41 Conn. 255, not *ultra vires* under particular circumstances to make a single temporary loan to its secretary.

6. New York Firemen Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100; Life & F. Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 31; North River Ins. Co. *v.* Lawrence, 3 Wend. (N. Y.) 482; New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678.

7. Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573.

8. Grand Lodge *v.* Waddill, 36 Ala. 313.

9. Chambers *v.* Falkner, 65 Ala. 448.

10. State Bank *v.* Criswell, 15 Ark. 230.

11. New York Firemen Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100. Power of a joint-stock insurance corporation in Pennsylvania to invest its capital in such funds as it may deem most judicious, and consequently, under the authority of a statute, in the bonds of a solvent street railway company. *In re* Accident Ins. Co.'s Investments, 4 Pa. Dist. 227, 16 Pa. Co. Ct. 312. Power of a Pennsylvania corporation to ratify a contract whereby the corporation transfers bonds and stock to an officer in consideration of his agreement to purchase property for it. Danville, etc., R. Co. *v.* Kase, (Pa. 1898) 39 Atl. 301, 41 Wkly. Notes Cas. (Pa.) 411.

12. Grand Lodge *v.* Waddill, 36 Ala. 313. To the same effect see Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573. That a corporation cannot maintain an action on the security see Columbia Bridge Co. *v.* Kline, Brightly (Pa.) 320.

13. The doctrine seems to have had its foundation in Robinson *v.* Bland, 2 Burr. 1077. See also U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119; Utica Ins. Co. *v.* Kip, 8 Cow. (N. Y.) 20. *Compare* Albert *v.* Baltimore, 2 Md. 159. For a decision to the effect that a loan for which a note is taken, payable on demand, is not a loan on personal security within the meaning of a statutory prohibition, the note not being a security, but a mere evidence of indebtedness, see U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119.

shall not.[14] In reaching this result the courts have quoted a pertinent *dictum* of Lord Mansfield: "It is very material that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side."[15] Other courts reach the same result on a principle hereafter discussed that where an *ultra vires* contract has been fully executed on one side the other contracting party is estopped from setting up the want of power to make it.[16]

g. Power to Assign Securities Given For Loans. A corporation which has the power to lend its money and take securities therefor has therefore by necessary implication the power to assign and transfer those securities. For instance if a corporation has power to enter into contracts for the loan of its money and to take real-estate security therefor, it follows that it has power to sell and assign such securities.[17] On this principle it has been held that where a bank is authorized by its charter to have, possess, etc., lands, goods, etc., of what kind so ever, it cannot be restrained by a subsequently enacted statute from transferring its notes, bills receivable, etc., by indorsement or otherwise, but that such a statute impairs the obligation of the contract embodied in its charter, within the meaning of the constitution of the United States.[18]

h. Statutory Power to Raise Money by Means of Lottery, When Exhausted. A statutory power to manage a lottery for the purpose of raising any sum not exceeding one hundred thousand dollars, for a specified public purpose, is completely exhausted when the one hundred thousand dollars have been raised; and this is so whether the grant is in the hands of the original grantees or of purchasers from them.[19]

3. Power to Lay Taxes. In the history of corporations it will be found that corporations other than municipal have been created with the power to lay taxes. A corporation possessing such an extraordinary power will on the clearest grounds be limited in the exercise of it to the specific objects intended by the legislature to be accomplished in granting it.[20]

4. Power to Hold Shares in Other Corporations — a. In General. One corporation cannot, unless authorized thereto by its governing statute, make a valid subscription to the stock of another corporation, or otherwise become a shareholder,[21] unless for the purpose of receiving payment of or security for a debt

14. Lester *v.* Howard Bank, 33 Md. 558, 3 Am. Rep. 211 [*distinguishing* Albert *v.* Baltimore, 2 Md. 159]; Bowditch *v.* New England Mut. L. Ins. Co., 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474; Davis Sewing-Mach. Co. *v.* Best, 30 Hun (N. Y.) 638; Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549 (circumstances under which an insurance company may maintain an action on the security given for a loan made in excess of its charter powers).

15. Browning *v.* Morris, Cowp. 790, 793. See also Harris *v.* Runnels, 12 How. (U. S.) 79, 13 L. ed. 901; Williams *v.* Hedley, 8 East 378; Jaques *v.* Golightly, 2 W. Bl. 1073 (in which cases distinctions are taken between prohibited contracts which are wholly void and those which for certain reasons are enforceable). That an improper condition imposed by one of the projectors of a corporation, prior to its organization, upon a loan to be made to it after its organization, will not invalidate the transaction, unless the company in its corporate capacity has adopted and ratified it, see Central Park F. Ins. Co. *v.* Callaghan, 41 Barb. (N. Y.) 448.

16. See *infra*, XVII, F, 2, c, (I), (A) *et seq.*

17. Detweiler *v.* Breckenkamp, 83 Mo. 45.

18. Planters' Bank *v.* Sharp, 6 How. (U. S.) 301, 12 L. ed. 447.

19. Com. *v.* Frankfort, 13 Bush (Ky.) 185.

20. Beaty *v.* Knowler, 4 Pet. (U. S.) 152, 7 L. ed. 813 [*affirming* 14 Fed. Cas. No. 7,896, 1 McLean 41].

21. See *supra*, VI, G, 2, a *et seq.* See also the following cases:

Alabama.— Woods *v.* Memphis, etc., R. Co., 5 R. & Corp. L. J. 372.

New Jersey.— New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

New York.— Berry *v.* Yates, 24 Barb. 199.

Ohio.— Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412.

Tennessee.— McMillen Marble Co. *v.* Harvey, 92 Tenn. 115, 20 S. W. 427, 36 Am. St. Rep. 71, 18 L. R. A. 252.

United States.— Sumner *v.* Marcy, 23 Fed. Cas. No. 13,609, 3 Woodb. & M. 105.

Illustrations.— Thus an insurance company has no authority to subscribe to the stock of a mutual insurance company and agree to give its notes in advance for premiums on insurances subsequently to be effected. Berry *v.* Yates, 24 Barb. (N. Y.) 199. Manufacturing corporation in New York not authorized by statute to acquire the stock of a rival concern which has ceased to do business, for the

owing to it;[22] and even then it seems that while it may receive dividends it will not be allowed to exercise the power of controlling the corporation whose shares it has acquired, by voting them as a shareholder, but that its attempt so to vote may be enjoined by the other shareholders.[23] Moreover if a corporation purchases the shares of stock of another corporation on a credit, and gives its promissory note therefor, it will not be allowed to defend an action upon the note on the ground that it had no power so to acquire the shares,[24] on principles elsewhere considered.[25] And the holder of such a judgment, when recovered, has the same remedy against the shareholders of the corporation thus unlawfully purchasing the shares of another corporation, which he would have on any other valid judgment.[26] The reasons which operate to exclude an implied power in one corporation to become the owner of shares in another are stronger in the case of an unlimited company, or in the case where the shares are not fully paid up; since in either case, if the company whose shares are thus purchased becomes insolvent, the company which becomes a shareholder therein will be liable to be put on the list of its contributories, as it is called in England, that is to say, in the case of an unlimited company where the shares are not paid up, to contribute its ratable share; or in the case of a limited company, where the shares are not paid up, to contribute its ratable share to the extent of their par value toward liquidating the debts of the company. This it has been clearly and strongly pointed out[27] has the effect of making one company a partner in another company. It is too plain for any argument that unless an express power to that end has been conferred, the directors of one corporation or company cannot involve their shareholders or the trust funds in their hands in the liability created by entering into a partnership with another corporation or company.[28]

b. Such Purchases Void When Resorted to For Purpose of Enabling One Corporation to Control Another — (i) *In General.* Such purchases are the subject of special disfavor where one corporation purchases the shares of another corporation engaged in a similar business, for the express purpose of absorbing and controlling it, with a view of defeating competition; and the more so where the purchasing corporation is a foreign, and the absorbed corporation a domestic, one.[29]

(ii) *Void Under Federal Anti-Trust Law.* A scheme by which a third corporation is formed to acquire and hold the shares of two competing railway corporations is void under the act of congress known as the Sherman Anti-Trust Law.[30]

c. Legislature May Authorize Such Purchases. The legislature may authorize one corporation to subscribe to the capital stock of another, and such a statute is not unconstitutional.[31]

purpose of preventing reorganization and obtaining its patronage. De la Vergne Refrigerating Mach. Co. *v.* German Sav. Inst., 175 U. S. 40, 20 S. Ct. 20, 44 L. ed. 65. Want of power in a corporation organized for "the purpose of manufacturing," etc., to become a negotiator or broker of bonds on commission. Peck-Williams Heating, etc., Co. *v.* Board of Education, 6 Okla. 279, 50 Pac. 236.

22. A statute prohibiting a corporation organized under it from using any of its funds in the purchase of any stock in any other corporation does not limit its power to take such stock in payment of a debt. Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448, 38 N. Y. St. 155. It has been held that a statute forbidding one corporation to subscribe for or purchase stock or securities of another corporation, except in payment of a *bona fide* debt, does not apply to a case where one corporation, which has made advances to another on the security of its mortgage bonds, which it is unable to redeem, makes further advances secured by its bonds and stocks. Taylor County Ct. *v.* Baltimore, etc., R. Co., 35 Fed. 161.

24. Milbank *v.* New York, etc., R. Co., 64 How. Pr. (N. Y.) 20. See also *supra*, IV, F, 10, b.

24. Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 53 Hun (N. Y.) 52, 5 N. Y. Suppl. 937, 25 N. Y. St. 538.

25. See *infra*, XVII, C, 2.

26. Sumner *v.* Marcy, 23 Fed. Cas. No. 13,609, 3 Woodb. & M. 105.

27. *In re* European Soc. Arbitration Acts, 8 Ch. D. 679, 39 L. T. Rep. N. S. 136, 27 Wkly. Rep. 88.

28. See *supra*, VI, G, 2, a.

29. McMillen Marble Co. *v.* Harvey, 92 Tenn. 115, 20 S. W. 427, 36 Am. St. Rep. 71, 18 L. R. A. 252.

30. Minnesota *v.* Northern Securities Co., 123 Fed. 692.

31. White *v.* Syracuse, etc., R. Co., 14 Barb. (N. Y.) 559.

5. Power of Corporation to Own Its Own Shares. In the absence of a statute denying the right, a corporation may purchase and dispose of its own stock, provided the transaction is made in good faith and without causing injury to its creditors.[32]

6. Usury by Corporations. A charter authorizing a particular corporation to issue mortgage bonds bearing interest at a rate not to exceed ten per cent per annum contravenes a constitutional provision requiring the legislature to fix the rate of interest, which shall be uniform throughout the state.[33] It is not usury for an insurance company in making a loan to require the borrower to insure the mortgaged premises with the company, and to pay a premium for the insurance in addition to the legal rate of interest.[34] A legislative charter which grants to an incorporated company the power to contract, without limit, for commissions, in addition to lawful interest, does not enable the corporation to take usury under the name of commissions.[35]

7. Power to Become Surety For, or Lend Credit To, Another Person or Corporation — a. In General. With the exception of those corporations, such as trust and guaranty companies, which are organized for the express purpose of becoming sureties for other persons or corporations, and with other exceptions elsewhere stated,[36] it may be laid down as a general rule that no corporation has the power, by any form of contract or indorsement, to become a guarantor or surety or otherwise to lend its credit to another person or corporation.[37]

b. To What Corporations This Power Denied. This power has been denied to banking,[38] to insurance,[39] to railroad,[40] to plank-road,[41] and to other transportation companies,[42] to manufacturing companies,[43] and to building and loan associations.[44]

32. Shoemaker *v.* Washburn Lumber Co., 97 Wis. 585, 73 N. W. 333.

33. McKinney *v.* Memphis Overton Hotel Co., 12 Heisk. (Tenn.) 104.

34. New York F. Ins. Co. *v.* Donaldson, 3 Edw. (N. Y.) 199 [*following* Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296].

35. Johnson *v.* Griffin Banking, etc., Co., 55 Ga. 691.

36. See *infra*, XVII, B, 7, c.

37. *Alabama.*— Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558.

Illinois.— Rogers *v.* Jewell Belting Co., 184 Ill. 574, 56 N. E. 1017 [*reversing* 84 Ill. App. 249, holding that where a corporation is without power to become a surety on the notes of another corporation the fact that such contract of suretyship is based upon an independent consideration does not render the corporation liable thereon].

Indiana.— Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

Iowa.— Lucas *v.* White Line Transfer Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449.

Massachusetts.— Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

New York.— Berry *v.* Yates, 24 Barb. 199; Filon *v.* Miller Brewing Co., 15 N. Y. Suppl. 57, 38 N. Y. St. 602.

Pennsylvania.—Culver *v.* Reno Real Estate Co., 91 Pa. St. 367.

Tennessee.— Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

Wisconsin.— Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 7 Wis. 59, holding that the guarantor corporation cannot enforce a mortgage on the faith of which the guaranty was given.

England.— Crewer, etc., United Min. Co. *v.* Willyams, 14 Wkly. Rep. 1003 [*recognized* in Haddon *v.* Ayers, 5 Jur. N. S. 408].

Canada.— Johansen *v.* Chaplin, 6 Montreal Q. B. 111.

See also *infra*, XVII, C, 4, a, (I) *et seq.*

38. Johansen *v.* Chaplin, 6 Montreal Q. B. 111.

39. Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558; Berry *v.* Yates, 24 Barb. (N. Y.) 199.

40. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Memphis Grain, etc., Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

41. Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 7 Wis. 59.

42. Lucas *v.* White Line Transfer Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449.

43. Best Brewing Co. *v.* Klassen, 185 Ill. 37, 57 N. E. 20, 76 Am. St. Rep. 26, 50 L. R. A. 765 [*reversing* 85 Ill. App. 464] (brewing company cannot go on the appeal-bond of a customer in order to enable him to continue in business and make further purchases from the company); Filon *v.* Miller Brewing Co., 15 N. Y. Suppl. 57, 38 N. Y. St. 602; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. 356, 10 C. C. A. 415 (corporation organized for manufacturing iron work for mining plants has no power to guarantee the performance of a contract by a customer for the erection of the mining plant, in order to get his business).

44. Kentucky Citizens' Bldg., etc., Assoc. *v.* Lawrence, 49 S. W. 1059, 20 Ky. L. Rep. 1700, holding that such a corporation cannot without statutory authority assume the debts or obligations of another corporation, ex-

So too the power to become surety for another has been denied in the case of merchandizing companies.[45]

c. **Exceptions to Rule Which Denies This Power.** Exceptions have been admitted on various grounds to the rule which denies this power. In California a corporation may for a valuable consideration guarantee or assume the debt of another corporation and bind itself to pay the bonds of such other corporation, although such bonds were not regularly or legally issued.[46] A guaranty by a corporation of the bonds of another corporation which could be lawfully made only upon the petition of a majority of the shareholders of the guarantor corporation, which consent was not obtained, has been held to be enforceable by *bona fide* holders of the bonds, but invalid as to other holders.[47] A statute requiring the articles of association of a corporation to state the purposes for which it is formed, and providing that it shall not be lawful for it to divert its operations or to appropriate its funds to any other purpose, was held to have been enacted for the protection of the public, and the conclusion was that it did not appear upon the contracts of the corporation so as to prevent it from foreclosing a mortgage given to indemnify it for guaranteeing the payment of notes of another corporation after paying such notes.[48] A manufacturing corporation in New York can, with the consent of its shareholders, execute accommodation paper, where the rights of its creditors do not intervene, and in such a case the paper may be enforced against the corporation.[49] A corporation engaged in brewing may support a customer who purchases its beer by guaranteeing the keeping of the covenants of a lease of the premises occupied by the customer, especially where the fixtures are mortgaged to the brewing company.[50] A manufacturing corporation may, as a proper incident of its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods.[51] Whenever a corporation has the power to take and dispose of the securities of another corporation, of whatsoever kind, it may, for the purpose of giving them a marketable quality, guarantee their payment.[52] Corporations created for the purpose of becoming sureties on the bonds of executors, administrators, guardians, trustees, etc., may become sole sureties in such a bond, for example, in a bond given by a trustee in a deed of trust for the benefit of creditors, provided their charter contains the requisite

cept to the extent of the assets received from the latter corporation.

45. Kelley *v.* O'Brien Varnish Co., 90 Ill. App. 287, denying power to become surety on an appeal-bond for its debtor, although by so doing it delays other creditors and collects its own claim.

46. Smith *v.* Ferries, etc., R. Co., (Cal. 1897) 51 Pac. 710.

47. Louisville Trust Co. *v.* Louisville, etc., R. Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*affirming* in part and *reversing* in part 75 Fed. 433, 22 C. C. A. 378 (*reversing* 69 Fed. 431)].

48. Butterworth *v.* Kritzer Milling Co., 115 Mich. 1, 72 N. W. 990.

49. Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303, 33 N. Y. St. 318 [*affirming* 44 Hun (N. Y.) 130].

50. Aaronson *v.* David Mayer Brewing Co., 26 Misc. (N. Y.) 655, 56 N. Y. Suppl. 387; Fuld *v.* Burr Brewing Co., 18 N. Y. Suppl. 456, 45 N. Y. St. 649 [*distinguishing* Schurr *v.* New York, etc., Invest. Co., 18 N. Y. Suppl. 454, 45 N. Y. St. 645]. See to the contrary Best Brewing Co. *v.* Klassen, 185 Ill. 37, 57 N. E. 20, 76 Am. St. Rep. 26, 50 L. R. A. 765 [*reversing* 85 Ill. App. 464]; Filon *v.* Miller Brewing Co., 15 N. Y. Suppl. 57, 38 N. Y. St. 602.

51. Holmes *v.* Willard, 125 N. Y. 75, 25 N. E. 1083, 34 N. Y. St. 455, 11 L. R. A. 170. *Contra*, Best Brewing Co. *v.* Klassen, 185 Ill. 37, 57 N. E. 20, 76 Am. St. Rep. 26, 50 L. R. A. 765 [*reversing* 85 Ill. App. 464]; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. 356, 10 C. C. A. 415.

52. *California.*— Low *v.* California Pac. Co., 52 Cal. 53, 28 Am. Rep. 629.

Indiana.— Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457.

Massachusetts.— Broadway Nat. Bank *v.* Small, 176 Mass. 294, 57 N. E. 603, guarantees of payment of bonds taken by a loan and trust company in the ordinary course of its business made in connection with their sale not *ultra vires*.

New Jersey.— Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 23 Atl. 287.

New York.— Arnot *v.* Erie R. Co., 5 Hun 608.

United States.— Chicago, etc., R. Co. *v.* Howard, 7 Wall. 392, 19 L. ed. 117; Marbury *v.* Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393; Rogers Locomotive, etc., Works

authority; and for the purpose of determining this the court will take judicial notice of such a charter.[53] But such a company cannot escape the general rule of law that a corporation cannot guarantee the liability of others, except in so far as it becomes a guarantor in the ordinary course of its business, or unless it receives the proceeds of the paper which it guarantees.[54] A railroad company which has power to acquire, by grant or license, land on which to construct its road, may guarantee the payment of a note executed by one who has purchased the land for the company.[55]

d. Power to Assume Debts of Precedent Partnership or Individual. Where a a partnership is incorporated, and the corporation takes over the assets and the business of the partnership, the corporation has power to assume the debts of the partnership;[56] and the rule is the same where a corporation takes over the business of an individual.[57]

C. Powers Relating to Commercial Paper Other Than Bonds — 1. Implied Power to Issue Negotiable Paper — a. In General. Contrary to the English doctrine[58] it is the settled doctrine of the American courts, to which very few exceptions are admitted,[59] that every private corporation has, unless restrained by its charter or by positive law, the implied power of issuing negotiable paper in payment or settlement of any debts which it may incur in the course of its legitimate business, or in respect of any matter or thing which it is authorized by its charter or governing statute to do, and which is not foreign to the purposes of its creation.[60] The reason is that the power to make and take contracts carries with

v. Southern R. Assoc., 34 Fed. 278; Opdyke *v.* Pacific R. Co., 18 Fed. Cas. No. 10,546, 3 Dill. 55.

53. Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176.

54. Ward *v.* Joslin, 105 Fed. 224, 44 C. C. A. 456. When such a company, having gone on the bond of an administratrix, may take an assignment from her of a claim against one to whom money has been overpaid under an erroneous decree. Matter of Lawyers' Surety Co. *v.* Reinach, 25 Misc. (N. Y.) 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. (N. Y.) 242, 51 N. Y. Suppl. 162].

55. Lake St. El. R. Co. *v.* Carmichael, 184 Ill. 348, 56 N. E. 372 [*affirming* 82 Ill. App. 344]. That a joint-stock bank in England, with powers stated, may guarantee the payment of interest on debentures of a corporation, see *In re* West of England Bank, 14 Ch. D. 317, 49 L. J. Ch. 400, 42 L. T. Rep. N. S. 619, 28 Wkly. Rep. 809. See also the observations of Lord Campbell, C. J., in Kirk *v.* Bell, 16 Q. B. 290, 71 E. C. L. 290. Charter provision under which a land company has power to guarantee the bonds of a railroad company, nearly all of whose stock is owned by the land company. Marbury *v.* Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393.

56. Waterman's Appeal, 26 Conn. 96.

57. Dominion Type Founding Co. *v.* Gazette Pub. Co., 32 N. Brunsw. 692. See also the following cases:

California.— Hall *v.* Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75.

Iowa.— Lucas *v.* White Line Transfer Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449.

Massachusetts.— Davis *v.* Smith American Organ Co., 131 Mass. 238.

Pennsylvania.— Culver *v.* Reno Real Estate Co., 91 Pa. St. 367.

Wisconsin.— Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road, 7 Wis. 59.

58. See *infra*, XVII, C, 1, d.

59. These exceptions will be noted hereafter. See *infra*, XVII, C, 4, a, (I) *et seq.*; XVII, C, 6, a *et seq.*

60. *Alabama.*— Talladega Ins. Co. *v.* Peacock, 67 Ala. 253; Oxford Iron Co. *v.* Spradley, 46 Ala. 98.

California.— Smith *v.* Eureka Flour Mills, 6 Cal. 1; Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 258.

Georgia.— Butts *v.* Cuthbertson, 6 Ga. 166.

Illinois.— Millard *v.* St. Francis Xavier Female Academy, 8 Ill. App. 341.

Indiana.— Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245; Hardy *v.* Merriweather, 14 Ind. 203; Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359.

Kentucky.— Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171.

Louisiana.— Donnelly *v.* St. John's Protestant Episcopal Church, 26 La. Ann. 738; Brode *v.* Fireman's Ins. Co., 8 Rob. 244.

Maine.— Came *v.* Brigham, 39 Me. 35.

Massachusetts.— Fay *v.* Noble, 12 Cush. 1.

Minnesota.— Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285; Sullivan *v.* Murphy, 23 Minn. 6.

Missouri.— Buckley *v.* Briggs, 30 Mo. 452.

New Hampshire.— Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127; Harvey *v.* Chase, 38 N. H. 272.

New Jersey.— Montague *v.* Millstone Tp. Church School Dist. No. 3, 34 N. J. L. 218; Lucas *v.* Pitney, 27 N. J. L. 221; Savage *v.* Ball, 17 N. J. Eq. 142.

New York.— Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 35 N. Y. 505; Curtis *v.* Leavitt, 15 N. Y. 9; Ketchum *v.* Buffalo, 14 N. Y. 356; Moss *v.* Averell,

it the power to contract debts, and that the power to contract debts carries with it the power to give the usual evidences of, or security for, such debts.[61] This power is implied from the power to borrow money,[62] even though the power to borrow is not expressly granted, but is itself implied;[63] it is implied from the power to purchase property[64] and from the power of making contracts generally.[65]

b. What This Power Includes. This includes the power to make negotiable promissory notes, payable at a future day or on demand;[66] to draw bills of

10 N. Y. 449; Hascall *v.* Life Assoc. of America, 5 Hun 151; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. 9; Olcott *v.* Tioga R. Co., 40 Barb. 179 [*affirmed* in 27 N. Y. 546, 84 Am. Dec. 298]; Partridge *v.* Badger, 25 Barb. 146; Mead *v.* Keeler, 24 Barb. 20; Conro *v.* Port Henry Iron Co., 12 Barb. 27; McCullough *v.* Moss, 5 Den. 567; Moss *v.* Rossie Lead Min. Co., 5 Hill 137; Safford *v.* Wyckoff, 4 Hill 442; Kelley *v.* Brooklyn, 4 Hill 263; Moss *v.* Oakley, 2 Hill 265; Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. 256; Barker *v.* Mechanics' F. Ins. Co., 3 Wend. 94, 12 Am. Dec. 664; Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; Munn *v.* Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Atty.-Gen. *v.* Life, etc., Ins. Co., 9 Paige 470; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280.

Pennsylvania.—McMasters *v.* Reed, 1 Grant 36; Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256, 14 Am. Dec. 681.

Rhode Island.— Clarke *v.* School Dist. No. 7, 3 R. I. 199.

Tennessee.— Union Bank *v.* Jacobs, 6 Humphr. 515.

Virginia.— Richmond, etc., R. Co. *v.* Snead, 19 Gratt. 354, 100 Am. Dec. 670.

Wisconsin.—Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

United States.— Tensas Parish Police Jury *v.* Britton, 15 Wall. 566, 21 L. ed. 251.

61. Howard Oil, etc., Co. *v.* Hughes, 12 Pa. Super. Ct. 311. "The very power to contract necessarily involves the cognate power to create debt; and a corporation, without such power would be a body without life, utterly effete and worthless." Gordon, J., in Watts' Appeal, 78 Pa. St. 370, 391. "The power to execute and issue bonds, contracts, or other certificates of indebtedness belongs to all corporations, public as well as private, and is inseparable from their existence." Strong, J., in Com. *v.* Pittsburgh, 41 Pa. St. 278, 284. See also Watts' Appeal, 78 Pa. St. 370.

62. Hamilton *v.* New Castle, etc., R. Co., 9 Ind. 359; Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 137; Partridge *v.* Badger, 25 Barb. (N. Y.) 146; Mead *v.* Keeler, 24 Barb. (N. Y.) 20; Miller *v.* New York, etc., R. Co., 8 Abb. Pr. (N. Y.) 431, 18 How. Pr. (N. Y.) 374.

63. Mead *v.* Keeler, 24 Barb. (N. Y.) 20.

64. Ketchum *v.* Buffalo, 14 N. Y. 356; Moss *v.* Averell, 10 N. Y. 449.

65. Rockwell *v.* Elkhorn Bank, 13 Wis. 653. See also Watts' Appeal, 78 Pa. St. 370; Com. *v.* Pittsburgh, 41 Pa. St. 278.

66. *Alabama.*— Talladega Ins. Co. *v.* Peacock, 67 Ala. 253.

California.— Smith *v.* Eureka Flour Mills, 6 Cal. 1; Magee *v.* Molekumne Hill Canal, etc., Co., 5 Cal. 258.

Georgia.— Butts *v.* Cuthbertson, 6 Ga. 166.

Illinois.— Millard *v.* St. Francis Xavier Female Academy, 8 Ill. App. 341.

Louisiana.— Brode *v.* Firemen's Ins. Co., 8 Rob. 244.

Maine.— Came *v.* Brigham, 39 Me. 35.

Michigan.— Odd Fellows *v.* Sturgis First Nat. Bank, 42 Mich. 461, 4 N. W. 158.

Missouri.— Buckley *v.* Briggs, 30 Mo. 452.

New Hampshire.— Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

New Jersey.— Lucas *v.* Pitney, 27 N. J. L. 221.

New York.— Moss *v.* Averell, 10 N. Y. 449; Partridge *v.* Badger, 25 Barb. 146; McCullough *v.* Moss, 5 Den. 567; Kelley *v.* Brooklyn, 4 Hill 263; Moss *v.* Oakley, 2 Hill 265; Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; Atty.-Gen. *v.* Life, etc., Ins. Co., 9 Paige 470.

Rhode Island.— Clarke *v.* School Dist. No. 7, 3 R. I. 199.

Municipal corporations — School-districts.— This power has even been ascribed to municipal corporations (Halstead *v.* New York, 5 Barb. (N. Y.) 218; Kelley *v.* Brooklyn, 4 Hill (N. Y.) 263), and in one case to a school-district (Clarke *v.* School Dist. No. 7, 3 R. I. 199) as a power incidental to corporations.

That the fact that a corporation is insolvent does not render a note given or a judgment confessed by it for a *bona fide* debt fraudulent and void see Savage *v.* Ball, 17 N. J. Eq. 142.

"A corporation, created to construct a railroad has power to borrow money, as one of the implied means necessary and proper to carry into effect its specific powers; and to give its promissory notes for the repayment of it." Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127, 135; Harvey *v.* Chase, 38 N. H. 272; Union Bank *v.* Jacobs, 6 Humphr. (Tenn.) 515. "This power is not restricted by the provision of the charter, limiting the capital stock of the corporation to 20,000 shares; and prescribing that no assessment shall be laid on any share of a greater amount than $100 on each share; and that if a greater amount of money shall be necessary, it shall be raised by creating new shares." Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127, 135.

A corporation, authorized to employ its stock solely in advancing money upon goods and selling upon commission, may lawfully accept bills drawn on account of future consignments or deposits of goods, and is bound by its agent's acceptance of such bills. Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219.

exchange;[67] to accept drafts or bills;[68] to draw checks upon funds kept with a banker;[69] or in case of a railroad company to issue negotiable bonds.[70]

c. To What Corporations This Power Has Been Ascribed. This power has been ascribed to manufacturing corporations,[71] to milling companies,[72] to mining companies,[73] to railway companies,[74] and to insurance companies.[75]

d. No Such Implied Power Under English Law. The law of England undoubtedly is that corporations have not the implied power to issue negotiable paper, but that where such power is claimed to exist, it must be produced in the statute or other governing instrument of the corporation. As the law of England is on this question essentially different from that of America, the English decisions will not be examined here, but the reader is referred to a collection of them in a recent work.[76]

2. Distinction Between Want of Power to Issue Negotiable Instruments and Irregularities in Exercise of Power. There is a fundamental distinction between defenses arising from the total want of power in a corporation to issue negotiable instruments and those arising from irregularities in the exercise of the power. In respect of the former defense the rule is that persons dealing with a corporation must be presumed to know the extent of its corporate powers, and to take notice of any restrictions in its charter; and that where the duties and powers of the officers of a corporation are prescribed by statute or by charter, all persons dealing with such officers must take notice of any limitation imposed upon their authority by such statute or charter.[77] It follows that a defense by a corporation, in an action wherein it is sought to charge it with liability on a negotiable instrument which it has undertaken to issue, will be good against all persons, including *bona fide* holders for value, if there is an entire want of power on the part of the corporation to issue the security in question, unless the corporation is precluded from

67. Lucas *v.* Pitney, 27 N. J. L. 221.

68. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151. Thus under a charter power to contract with connecting roads for their use, etc., a railroad company is authorized to accept bills drawn by a connecting road as a consideration for a change of gauge of that road. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104. So where a corporation, authorized to make loans on certain securities, has received and approved the same, although for its own convenience the payment of the money is postponed until a future day, it may bind itself by accepting a draft for the amount of the loan drawn by the borrower payable on such future day. Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151.

69. The ordinary mode in which business partnerships and corporations of all descriptions pay debts of a considerable amount is by transferring credits at their bank by means of checks drawn by them on such bank in favor of their own creditor. So far as the writer is aware the power to draw checks has never been denied to any corporation. Dr. Brice states that "this power has never been contested in any of the questions as to the liabilities of corporations upon negotiable instruments, or even upon checks [*citing* Serrell *v.* Derbyshire, etc., R. Co., 10 C. B. 910, 70 E. C. L. 910, 9 C. B. 811, 19 L. J. C. P. 371, 67 E. C. L. 811], while it is admitted in every case as to the banking accounts of corporations" [*citing* Waterlow *v.* Sharp, L. R. 8 Eq. 501, 20 L. T. Rep. N. S. 902].

70. Miller *v.* New York, etc., R. Co., 8 Abb. Pr. (N. Y.) 431, 18 How. Pr. (N. Y.) 374.

71. Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Partridge *v.* Badger, 25 Barb. (N. Y.) 146; Mead *v.* Keeler, 24 Barb. (N. Y.) 20.

72. Smith *v.* Eureka Flour Mills, 6 Cal. 1; Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285.

73. Moss *v.* Averell, 10 N. Y. 449.

74. Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Lucas *v.* Pitney, 27 N. J. L. 221; Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298 [*affirming* 40 Barb. (N. Y.) 179]; Union Bank *v.* Jacobs, 6 Humphr. (Tenn.) 515. Appended to the report of this last case is an opinion given as counsel, in the year 1842, by the venerable ex-Chancellor Kent, in opposition to the existence of the power, and contrary to the decision of the court, which was rendered in 1845.

75. Barker *v.* Mechanics' F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664. *Contra*, Bacon *v.* Mississippi Ins. Co., 31 Miss. 116.

76. 4 Thompson Corp. § 5735.

77. Brady *v.* New York, 2 Bosw. (N. Y.) 173 [*affirmed* in 20 N. Y. 312]; Merritt *v.* Lambert, Hoffm. (N. Y.) 166; Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. (N. Y.) 339; Hayes *v.* State Bank, Mart. & Y. (Tenn.) 179; Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Green's Brice's

setting up the defense by the principle of estoppel elsewhere treated of.[78] Where on the other hand the paper is issued by the corporation in violation of an express restraining law, and yet the instrument is in such a form that it may or may not be within the prohibition of the law according to the purposes for which it was issued, then it seems that unless the taker of it has notice that the paper was issued against the prohibition of the statute it will be good in his hands against the corporation or of its receiver after its insolvency.[79]

3. Extent to Which Ultra Vires Commercial Paper Is Good in Hands of Innocent Purchasers For Value — a. In General. While judicial holdings on this question are not entirely uniform, yet it is believed that sound principle and the weight of judicial authority justify the statement of the propositions contained in the two following paragraphs.

b. Where There Is Entire Want of Power, Instrument Is Not Made Good by Being Transferred to Bona Fide Purchaser. Where there is an entire want of power in a corporation to issue negotiable paper of the kind under consideration, under any circumstances, such paper will be void in the hands of a *bona fide* purchaser for value; since what is absolutely void *ab initio* cannot acquire validity by being transferred to a third person, any more than a forged instrument can acquire validity in that way.[80] In such a case the note would be exactly like the note of an infant or of any other person incapable of contracting.

c. Where There Is General Power Erroneously Exercised in Particular Instance. But where the corporation, although possessing general power to issue negotiable paper of the kind under consideration, had no power to issue it in the particular instance, by reason of some fact or circumstance not apparent on the face of the instrument itself, but which must be proved (if at all) by parol, then for the sake of protecting the negotiable quality of commercial paper the courts will uphold its validity in the hands of a *bona fide* purchaser for value, by treating the want of power to issue it as a matter affecting the consideration merely, such as might, in the case of such an instrument issued by an individual, be inquired into in an action between the original parties to it, but not in an action by an innocent purchaser for value.[81]

Ultra Vires (2d ed.) 272, note *a*. See also Root *v.* Godard, 20 Fed. Cas. No. 12,037, 3 McLean 102: Root *v.* Wallace, 20 Fed. Cas. No. 12,039, 4 McLean 8.

78. See *infra*, XVII, F, 2, b, (I) *et seq.*

79. Atty.-Gen. *v.* Life, etc., Ins. Co., 9 Paige (N. Y.) 470.

80. Elliott Nat. Bank *v.* Western, etc., R. Co., 2 Lea (Tenn.) 676, 677. In this case a statute of Georgia (Ga. Code, § 971) authorized the superintendent of a railroad, which was the property of that state, to make all "contracts necessary for the general working and business of said road, not exceeding three thousand dollars — and over that amount subject to the approval of the Governor in writing." It was held that notes executed by him in excess of three thousand dollars were void even in the hands of one who had purchased them innocently for value and in the usual course of trade, and that the fact that other notes had been executed and paid by him in excess of three thousand dollars did not make any difference. See also Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104 [*denied* in Madison, etc., R. Co. *v.* Norwich Sav. Fund Soc., 24 Ind. 457]; Elliott Nat. Bank *v.* Western, etc., R. Co., 2 Lea (Tenn.) 676.

81. Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285. See further McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 35 N. Y. 505; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 129, 69 Am. Dec. 678; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309 (per Denio, J.); Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Holbrook *v.* Bassett, 5 Bosw. (N. Y.) 147; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442; Stoney *v.* American L. Ins. Co., 11 Paige (N. Y.) 635. So it has been well held that a private corporation, empowered to issue negotiable paper, is bound by its notes in the hands of an innocent holder for value, although in executing it the corporation exceeded the amount of indebtedness which it was authorized to incur. Auerbach *v.* Le Sueur, 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285. So although a corporation has no power to issue negotiable paper in payment of the private debts of its officers, yet where a bank had frequently discounted commercial paper drawn by the agents of a corporation, who were authorized to draw for the business of the company, and in the usual course of business discounted

4. Power With Respect to Accommodation Paper — a. No Power to Make, Indorse, or Accept For Accommodation — (I) *In General.* Judicial authority is nearly unanimous to the effect that a corporation has no power to make, to indorse, to accept, or otherwise to become liable upon commercial paper for the mere accommodation of another person or corporation.[82]

(II) *Even For Consideration Paid Therefor.* A business corporation cannot, in the absence of express power in its charter or governing statute so to do, bind itself by indorsing negotiable paper for the accommodation of third persons or corporations, even for a consideration paid therefor.[83]

(III) *Officers of Corporations Have No Such Power.* The officers of a corporation have no power to execute or to authorize the execution of a note for the accommodation of a third party, for a matter which has no relation to the business of the corporation and in which the corporation has no interest.[84]

b. May Indorse to Assist Customers. But according to one disputed and unsettled view this rule does not restrain a manufacturing corporation from exercising this power in order to assist one who is a large customer in the purchase of its goods.[85]

c. Such Paper Good in Hands of Innocent Purchaser For Value Before Maturity. But such paper is good in the hands of an innocent purchaser for value before maturity;[86] and this, although there is a statute making it unlawful for a

a similar draft in good faith and without knowledge that it had been fraudulently issued by the agents for private purposes, it was held that the bank could recover from the company. Exchange Bank *v.* Monteath, 26 N. Y. 505. Another case more or less illustrative of the text is Sheridan Electric Light Co. *v.* Chatham Nat. Bank, 52 Hun (N. Y.) 575, 5 N. Y. Suppl. 529, 24 N. Y. St. 622. What sufficient to put intended purchaser on inquiry. Wilson *v.* Metropolitan El. R. Co., 14 Daly (N. Y.) 171, 6 N. Y. St. 234. What not sufficient to justify him in concluding in favor of the existence of the power. Elliott Nat. Bank *v.* Western, etc., R. Co., 2 Lea (Tenn.) 676. How, under statute of New York, where the notes of the corporation amount in the aggregate to more than one thousand dollars. Ogden *v.* Raymond, 3 Abb. Dec. (N. Y.) 396, 1 Keyes (N. Y.) 42, 26 How. Pr. (N. Y.) 599; Houghton *v.* McAuliff, 2 Abb. Dec. (N. Y.) 409, 26 How. Pr. (N. Y.) 270; Smith *v.* Hall, 5 Bosw. (N. Y.) 319.

82. Blake *v.* Domestic Mfg. Co., (N. J. Ch. 1897) 38 Atl. 241 (no recovery in favor of one who knew of the nature of the paper, or who took it with such a suspicion with regard to its character as to make his conduct fraudulent); National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 7 Atl. 488; National Park Bank *v.* German-American Mut. Warehouse, etc., Co., 116 N. Y. 281, 22 N. E. 567, 26 N. Y. St. 675, 5 L. R. A. 673; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. (N. Y.) 421, 19 How. Pr. (N. Y.) 51; Central Park *v.* Empire Stone Dressing Co., 26 Barb. (N. Y.) 23; Morford *v.* Farmers' Bank, 26 Barb. (N. Y.) 568; Farmers', etc., Bank *v.* Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275, 10 Abb. Pr. (N. Y.) 47; Cuyahoga Steam Furnace Co. *v.* Lewis, 4 Ohio Dec. (Reprint) 17, 1 Clev. L. Rec. 16; South Texas Nat. Bank *v.* Lagrange Oil-Mill Co., (Tex. Civ. App. 1897) 40 S. W. 328 (no recovery where the taker had notice of the nature of the paper); Park Hotel Co. *v.* St. Louis Fourth Nat. Bank, 86 Fed. 742, 30 C. C. A. 409 (bank discounting such a note with notice that it is an accommodation note cannot recover against the corporation). That a by-law authorizing officers of a corporation "to accept bills of exchange in the prosecution of its business" does not empower them to make an accommodation acceptance see Farmers', etc., Bank *v.* Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275, 10 Abb. Pr. (N. Y.) 47. That authority given to a corporation by its charter, "in the prosecution of its business, to accept and indorse bills and notes," does not empower it to accept accommodation paper see Farmers', etc., Bank *v.* Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275, 10 Abb. Pr. (N. Y.) 47.

83. National Park Bank *v.* German-American Mut. Warehouse, etc., Co., 116 N. Y. 281, 22 N. E. 367, 26 N. Y. St. 675, 5 L. R. A. 673. That an accommodation indorsement cannot be made the basis of a proceeding to charge the trustees of a corporation with a liability on the ground of failing to file an annual report, this not creating a debt of the corporation, see National Park Bank *v.* Remsen, 43 Fed. 226.

84. Hall *v.* Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75.

85. See *supra*, XVII, B, 7, c.

86. *Indiana.*—Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457 [*modifying* Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104].

Massachusetts.— Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

Missouri.— Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299.

corporation to appropriate its funds to any purpose not stated in its articles of incorporation, unless the statute in terms makes such paper void.[87]

5. Presumption of Validity of Commercial Paper Issued or Received by Corporations. In the United States the courts indulge in a general presumption in favor of the validity of commercial paper issued,[88] assigned,[89] or received [90] by corporations,[91] unless issued, assigned, or received in violation of positive law, or for purposes wholly foreign to those for which the corporation was created.[92] This presumption applies both with respect to the power of the corporation to issue, assign, or receive the paper, and to the power of the officers of the corporation through whom it acted in the given case.[93]

6. Distinction Between Ultra Vires and Prohibited Commercial Paper — a. In General. With respect to the doctrine of *ultra vires* a well-grounded distinction exists between acts which are beyond the power conferred by statute upon the corporation in express terms, and acts which are prohibited by the express language of a statute.[94] With respect to the former class of cases, the question presented to the intending customer of the corporation is often a nice question of interpretation, and the officers of the corporation presumptively have a better opportunity of understanding the limits of the power of the corporation than the customer has. The law will not therefore allow the corporation to take the benefits of the contract and escape its burdens. But with respect to contracts which are prohibited by the terms of positive statutes the rule is different. Applying the rule to commercial paper issued by corporations in contravention of statutory prohibitions, the rule is that such paper is absolutely void in the hands of any person who may receive it; and this rule applies to the holders of such paper who reside outside of the state in which the corporation has its origin and domicile, and whose laws prohibit the issuing of the particular paper.[95] Neither can the indorsee of such a note recover upon it in an action against his indorser. The note being void, it will not be admitted in evidence in such an action, although the holder of it might sue an indorser and recover of him the consideration paid for it.[96] So if a bank draws a draft in violation of express law, and a holder of it transfers it to his creditor in payment of a debt, and the bank becomes insolvent, such transferee cannot maintain an action upon it against the transferrer.[97] Under a statute of Massachusetts, prohibiting banking corporations within that state from receiving or negotiating the bills or notes of foreign incorporated banks, except the bills of the bank of the United States, it was held that a promissory note, payable in the prohibited bills to a banking corporation in

New Jersey.— National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York.— Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 35 N. Y. 505; Genessee Bank *v.* Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. 421, 19 How. Pr. 51; Morford *v.* Farmers' Bank, 26 Barb. 568; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23.

United States.— *Ex p.* Estabrook, 8 Fed. Cas. No. 4,534, 2 Lowell 547.

87. Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191, 17 L. R. A. 595. That one who discounts an accommodation bill of exchange before acceptance by the proper officer of the corporation is not a *bona fide* holder within the protection of this principle see Farmers', etc., Bank *v.* Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275.

88. Mitchell *v.* Rome R. Co., 17 Ga. 574.

89. McIntire *v.* Preston, 10 Ill. 48, 48 Am. Am. Dec. 321; Blake *v.* Holley, 14 Ind. 383.

90. Roussin *v.* St. Louis Perpetual Ins. Co., 15 Mo. 244.

91. Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91.

92. Lucas *v.* Pitney, 27 N. J. L. 221.

93. Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Blake *v.* Holley, 14 Ind. 383; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Sparks *v.* State Bank, 7 Blackf. (Ind.) 469.

Cases denying this presumption.—The English cases as already seen (see *supra*, XVII, C, 1, d) and here and there a sporadic American case, such as Bacon *v.* Mississippi Ins. Co., 31 Miss. 116; McCullough *v.* Moss. 5 Den. (N. Y.) 567.

94. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504.

95. Root *v.* Godard, 20 Fed. Cas. No. 12,037, 3 McLean 102.

96. Root *v.* Wallace, 20 Fed. Cas. No. 12,039, 4 McLean 8.

97. Davis *v.* River Raisin Bank, 7 Fed. Cas. No. 3,626, 4 McLean 387.

Massachusetts, was void, and that no action could be maintained upon it even after the statute had been repealed.[98]

b. Rule Where Statute Provides Other Penalties and Sanctions. But if the prohibitory statute has provided other penalties and sanctions, then the courts will not necessarily hold the security void, especially when to do so will defeat the very purpose of the statute. If for instance the statute prohibits a director from becoming indebted to the corporation beyond a certain amount, and he nevertheless does become indebted to it beyond that amount, and gives his promissory note to the corporation in settlement of the debt, it would defeat the very purpose of the statute to hold that the transaction being prohibited there can be no recovery on the note.[99]

c. Such Statutes Do Not Prevent Recovery Upon Quantum Meruit. Nor will such a statute be so construed as to prohibit a recovery upon a *quantum meruit* for services rendered by innocent third persons to the corporation, in furtherance of its attempt to issue securities prohibited by the statute,[1] the refined distinction being that while the debt is valid the security is void.[2]

7. Distinction Between Power to Contract Debts and Power to Give Instrument by Which It Is Evidenced. The preceding paragraphs suggest a distinction between the power to contract a debt and the power to emit the particular instrument by which the debt is evidenced. Thus where a company's deed of settlement prohibited the directors from accepting bills on behalf of the company, but they nevertheless accepted bills in settlement of certain work for which they were authorized to contract and to incur indebtedness on the part of the company, and gave a mortgage of the company's property to secure the debt evidenced by such bills, it was held that the company could not, in a suit to foreclose the mortgage, set up the want of power in the directors to accept the bills. The mortgage was treated as having been given to secure a debt which was valid, and not to secure the bills of exchange, which were invalid.[3]

8. Issuing Notes or Scrip Intended to Circulate as Money. Judicial wisdom and acumen have settled on the conclusion that if an individual issues notes or scrip intended to circulate as money, in violation of the statute law, he may be compelled to redeem it,[4] but that it is otherwise if such scrip is issued by a corporation.[5] In the latter case, if the corporation issuing the unlawful scrip becomes insolvent, it cannot be proved as a claim against its estate.[6] But a general statute prohibiting corporations from issuing notes intended to circulate as money does not prohibit them from issuing ordinary commercial paper, for the purpose of carrying on their legitimate business and effectuating the objects of their creation.[7]

98. Springfield Bank *v.* Merrick, 14 Mass. 322.

99. Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

1. Underwood *v.* Newport Lyceum, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260; Weed *v.* Snow, 29 Fed. Cas. No. 17,347, 3 McLean 265.

Other untenable or obsolete decisions construing early statutory restraints upon banks in dealing in commercial paper.—U. S. *v.* Fay, 9 Port. (Ala.) 465; Levert *v.* Planters', etc., Bank, 8 Port. (Ala.) 104; Bates *v.* Planters', etc., Bank, 8 Port. (Ala.) 99.

2. Vanatta *v.* State Bank, 9 Ohio St. 27. See also Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91. That the liability of a party to a promissory note, made to a corporation, is not affected by any alterations in the charter of such corporation made after such party has ceased to be a shareholder see Mitchell *v.* Rome R. Co., 17 Ga. 574.

3. Scott *v.* Colburn, 26 Beav. 276, 5 Jur. 183, 28 L. J. Ch. 635, 7 Wkly. Rep. 114.

4. James *v.* Rogers, 23 Ind. 451; Lester *v.* Howard Bank, 33 Md. 558, 3 Am. Rep. 211; Browning *v.* Morris, Cowp. 790; Smith *v.* Bromley, Dougl. (3d ed.) 696 note; Williams *v.* Hedley, 8 East 378; Stokes *v.* Twitchen, 2 Moore C. P. 538, 8 Taunt. 492, 20 Rev. Rep. 527, 4 E. C. L. 245; Jaques *v.* Golightly, 2 W. Bl. 1073.

5. Brown *v.* Killian, 11 Ind. 449.

6. Atty.-Gen. *v.* Life, etc., Ins. Co., 9 Paige (N. Y.) 470. See further as to such scrip Wray *v.* Tuskegee Ins. Co., 34 Ala. 58; Harris *v.* Runnels, 12 How. (U. S.) 79, 13 L. ed. 901.

7. Smith *v.* Eureka Flour Mills, 6 Cal. 1. Upon the question what charter powers do not extend to authorizing the issue of circulating notes see People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64.

9. Authority of Officers of Corporations to Execute Commercial Paper — a. In General. The directors sitting as a board have of course such power, provided the issuing of the paper is within the power of the corporation itself, under its charter or governing statute.[8] *Prima facie* a majority of the shareholders have power to authorize the directors to make a promissory note for the corporation, and their action in ordering an assessment to raise funds for its payment is evidence of, and equivalent to, a precedent authorization.[9] There are holdings which seem to carry with them the general conclusion that neither the treasurer,[10] the secretary,[11] nor the manager[12] has *prima facie* such power; and whether the president has will generally depend upon which of the two opposing theories[13] is taken as to the implied or *ex officio* powers of this officer.[14]

b. How Such Authority Proved. In conformity with what has preceded[15] it must be concluded that in order to prove such authority it is not necessary to produce the record of a corporate vote or resolution, or of any other formal action, or an express authorization in the by-laws,[16] but that the possession of the power may be proved by circumstances, such as evidence of habitual action showing a custom[17] or evidence of a subsequent ratification.[18]

10. Power of Corporation to Take Negotiable Securities — a. In General. The power of a corporation to receive ordinary evidences of debt which are received by individuals according to the course of business, including negotiable paper, may be regarded as one of the implied or inherent powers of all corporations.[19]

8. Schimpf *v.* Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373.

9. Forbes *v.* San Rafael Turnpike Co., 50 Cal. 340. *Compare supra*, XV, B, 7, a, (1) *et seq.*

10. Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171. That in an action against a manufacturing corporation on a note alleged to have been indorsed by it, when the company denies the indorsement, it can show that although made by its treasurer it was never authorized by its directors see Wahlig *v.* Standard Pump Mfg. Co., 5 N. Y. Suppl. 420, 25 N. Y. St. 864.

11. Neale *v.* Turton, 4 Bing. 149, 13 E. C. L. 442.

12. Middlesex County Bank *v.* Hirsch Bros. Veneer Mfg. Co., 4 N. Y. Suppl. 385, 24 N. Y. St. 297.

13. As to which see *supra*, X, A, 1, b, (1) *et seq.*

14. Presumption that the president of a corporation giving a note and issuing a mortgage to secure it had authority to execute the assignments. Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543. Circumstances under which the president of an insurance company could not take a transfer of notes belonging to the company and recover upon them against the company. Marsh *v.* Brett, 16 How. Pr. (N. Y.) 95. It has been held that a vote of the directors, authorizing its agent to raise money for its own use, on the credit of the corporation, and to give therefor "the company note," authorizes him to draw a bill of exchange in the name of the company, the dishonor of which will not subject them to damages. Tripp *v.* Swanzey Paper Co., 13 Pick. (Mass.) 291. That a misrecital in the note that it was given in pursuance of a vote of the society instead of a vote of the trustees was immaterial see Hayward *v.* Pilgrim Soc., 21 Pick. (Mass.) 270.

15. See *supra*, X, D, 1, f, (1) *et seq.*

16. Hannibal First Nat. Bank *v.* North Missouri Coal, etc., Co., 86 Mo. 125. But there is an old decision to the effect that a manufacturing corporation is not bound by the note given by its agent for a debt contracted by its members before they were incorporated, unless he has express authority by vote. White *v.* Westport Cotton Mfg. Co., 1 Pick. (Mass.) 215, 11 Am. Dec. 168.

17. Hannibal First Nat. Bank *v.* North Missouri Coal, etc., Co., 86 Mo. 125; Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298 (evidence that on various occasions the same officer had executed such paper for the corporation).

18. See *supra*, X, D, 1, f, (1) *et seq.*

19. *Georgia.*— Mitchell *v.* Rome R. Co., 17 Ga. 574.

Illinois.— Goodrich *v.* Reynolds, 31 Ill. 390, 83 Am. Dec. 240.

Indiana.— Hardy *v.* Merriweather, 14 Ind. 203.

Missouri.— State Bank *v.* Price, 1 Mo. 54.

Ohio.— Straus *v.* Eagle Ins. Co., 50 Ohio St. 59; White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601.

Wisconsin.— Wayland University *v.* Boorman, 56 Wis. 657, 14 N. W. 819; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

United States.— Alexander *v.* Horner, 1 Fed. Cas. No. 169, 1 McCrary 634.

A state being a corporation may become the payee of a promissory note and may sue to recover thereon in the courts of another state. Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

b. May Take Notes in Settlement of Share Subscriptions. Thus corporations may take promissory notes in settlement of subscriptions to their shares,[20] although according to one view not in payment of the deposit which the statute requires to be made in cash.[21]

c. Other Illustrations of This Power. So an insurance company which has power under its charter to invest its funds in personal securities may purchase a bill of exchange, for that is a personal security.[22] So also a prohibition in a charter against dealing in commercial paper will not exclude the power of receiving and transferring notes given to the corporation for the sale of its lands.[23]

d. Doctrine That Corporation May Recover Funds so Expended on Common Count. But it is a more or less doubtful conclusion that where a corporation employs its funds without authority in its charter or governing statute in purchasing bills of exchange it may recover back the money so expended upon the common counts as so much money had and received by the defendants to its use.[24]

e. Power to Purchase and Discount Bills in Other States and Places. If a corporation is endowed with the general power to deal in bills of exchange without regard to place, it may purchase or discount such bills in another state, unless restrained from so doing by the laws of such other state.[25]

11. Distinction Between Power to Purchase and Power to Discount Commercial Paper. This refined and childish distinction has reference to the consideration that a banking corporation may have, under its charter or governing statute, the power to discount commercial paper, but not the power to purchase it, the two transactions being in substance and sense the same thing.[26]

12. Power of Corporations to Assign and Transfer Commercial Paper — a. In General. The *jus disponendi* being an ordinary incident of the beneficial ownership of property, it follows, and is well settled, that where a corporation has the power to take negotiable paper in the course of its business it has the corresponding power to negotiate and transfer it by indorsement in the customary way.[27]

20. See *supra*, VI, M, 1, j, (I) *et seq.*; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240. See also Mitchell *v.* Rome R. Co., 17 Ga. 574; Frye *v.* Tucker, 24 Ill. 180; Alexander *v.* Rollins, 14 Mo. App. 109 [*affirmed* in 84 Mo. 657, holding that a *bona fide* transferee of such a note before maturity will take it free from equities]; Pine River Bank *v.* Hodsdon, 46 N. H. 114 (holding that the subscriber cannot set up his own wrong in defense of an action on the note).

21. See *supra*, VI, H, 13, b, (II), (A).

22. Gee *v.* Alabama L. Ins., etc., Co., 13 Ala. 579. And see White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601.

23. Buckley *v.* Briggs, 30 Mo. 452. That a mutual insurance company prohibited from exercising banking privileges may take notes in the regular course of its business, which are presumed to be valid until the contrary is shown, see Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91. That the liability of a party to a promissory note, made to a corporation, is not affected by any alterations in the charter of such corporation made after such party has ceased to be a shareholder see Mitchell *v.* Rome R. Co., 17 Ga. 574.

24. Waddill *v.* Alabama, etc., R. Co., 35 Ala. 323. The difficulty is that the contract is executed. See *infra*, XVII, F, 2, c, (I), (A). As to the power of insurance companies to invest their funds in commercial paper see White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59. Invalidity of a promissory note given to an educational corporation, in pursuance of a promise to make a donation thereto at a future date. Simpson Centenary College *v.* Bryan, 50 Iowa 293.

25. Montgomery Branch State Bank *v.* Knox, 1 Ala. 148 (holding that a bank receiving a bill of exchange for collection drawn on another place, which omits to present it for payment, is liable to make good the loss); Tombigbee R. Co. *v.* Kneeland, 4 How. (U. S.) 16, 11 L. ed. 855; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Columbus City Bank *v.* Beach, 5 Fed. Cas. No. 2,736, 1 Blatchf. 425.

26. For a considerable discussion of this distinction see 4 Thompson Corp. § 5751; Rochester First Nat. Bank *v.* Pierson, 24 Minn. 140, 31 Am. Rep. 341; Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 23 Am. Rep. 683; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631. *Contra*, as to such a note payable on demand, and negotiated to an innocent purchaser thirteen months after its date, the lapse of time letting in proof of equities. Atlantic De Laine Co. *v.* Tredick, 5 R. I. 171.

27. *Alabama.*— Savage *v.* Walshe, 26 Ala. 619.

Illinois.— Morris *v.* Cheney, 51 Ill. 451; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Frye *v.* Tucker, 24 Ill. 180; McIntyre

b. Authority of Corporate Officers to Indorse and Transfer. Assuming now that the general officer or attorney of a corporation is clothed with power "to do all acts and things, for and in behalf of the company that he may deem proper to further and protect its interests" an authority to indorse and transfer its negotiable securities will be implied.[28] A uniform practice on the part of the president of an insurance company extending over a period of several months prior to the transfer of a note has been held evidence to go to a jury on the question of his authority to indorse and transfer the note.[29] The agent of a corporation having authority to raise money and create a liability on behalf of the corporation therefor, may, in indorsing its promissory note, waive demand and notice, and this too after the note has been negotiated; and it has been held that he may waive demand and notice for the purpose of procuring delay of payment of the note, and that in this way he may bind the corporation, although in procuring the delay he may also be acting as agent of the maker.[30]

c. Assignments and Indorsements, How Made so as to Bind Corporation. The custom of the business of banking permits assignments and indorsements of commercial paper by a bank to be made by the cashier by the use of his own name,

v. Preston, 10 Ill. 48, 48 Am. Dec. 321 (charter provision from which this power implied; innocent transferee protected, although corporation may not have had power to take the note in the particular instance, where it had a general power).

Indiana.— Blake *v.* Holley, 14 Ind. 383; Hardy *v.* Merriweather, 14 Ind. 203.

Maine.— Came *v.* Brigham, 39 Me. 35.

Missouri.— Buckley *v.* Briggs, 30 Mo. 452 (although prohibited by its charter from dealing in commercial paper); Alexander *v.* Rollins, 14 Mo. App. 109 [*affirmed* in 84 Mo. 657, such a transfer creates no presumption of fraud].

New Jersey.— Lucas *v.* Pitney, 27 N. J. L. 221.

New York.— Farmers' Bank *v.* Maxwell, 32 N. Y. 579; Genesee Bank *v.* Patchin Bank, 19 N. Y. 312, 13 N. Y. 309; Marvine *v.* Hymers, 12 N. Y. 223 (power of a bank to transfer a note, although it is past due); Ogden *v.* Raymond, 3 Abb. Dec. 396, 1 Keyes 42, 26 How. Pr. 599 [*affirming* 5 Bosw. 16]; Clark *v.* Titcomb, 42 Barb. 122; Partridge *v.* Badger, 25 Barb. 146; Merchants' Bank *v.* McColl, 6 Bosw. 473; Scott *v.* Johnson, 5 Bosw. 213; Holbrook *v.* Basset, 5 Bosw. 147; Ogden *v.* Andre, 4 Bosw. 583 [*affirmed* in 3 Abb. Dec. 396, 1 Keyes 42].

United States.— Mississippi Planters' Bank *v.* Sharp, 6 How. 301, 12 L. ed. 447.

This rule is not affected by a statute which only authorizes the assignment of such notes as are payable to some "person" or "persons," since these words embrace corporations. McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.

Charter provision under which a mutual insurance company was held to have power to transfer notes as collateral security for its debts. Brookman *v.* Metcalf, 32 N. Y. 591 [*affirming* 5 Bosw. (N. Y.) 213]; Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147. See also Nelson *v.* Wellington, 5 Bosw. (N. Y.) 178; Brooklyn Cent. Bank *v.* Lang, 1 Bosw. (N. Y.) 202. Charter provision under which a railroad corporation is held to have the power to sell a note and mortgage which have been executed to it or to pledge the same as security for its bonds. Uncas Nat. Bank *v.* Rith, 23 Wis. 339.

Corporation having power to borrow, may borrow a bill or note and indorse and transfer it. Lucas *v.* Pitney, 27 N. J. L. 221; Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147; Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53.

Insurance companies.— Power of a mutual insurance company to negotiate a note given to it by one of its members. Farmers' Bank *v.* Maxwell, 32 N. Y. 579. A promissory note given to an insurance company for advance premiums under a special provision in its charter has been held to be a valid security in the hands of a third party purchasing it for value, and not subject to any equities subsisting between the makers and the insurance company. Great Western Ins. Co. *v.* Thayer, 4 Lans. (N. Y.) 459, 60 Barb. (N. Y.) 633. And where notes are delivered to special trustees of an insurance company, under an agreement by which they are to be used for the benefit of the company, a transfer of the notes, made by the trustees to third persons in exchange for their notes, which are discounted and the proceeds used by the company, is within the power of the corporation and conveys a good title to the notes. Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147. That such a note is not subject to equities in the hands of a purchaser for value before maturity see Great Western Ins. Co. *v.* Thayer, 4 Lans. (N. Y.) 459, 60 Barb. (N. Y.) 633. *Compare* Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147.

Statutory authority to a bank upon the surrender of its charter "to sell and convey" its property empowers it to transfer its negotiable paper by indorsement. Cooper *v.* Curtis, 30 Me. 488.

28. Lawrence *v.* Gebhard, 41 Barb. (N. Y.) 575.

29. New York City Mar. Bank *v.* Clements, 31 N. Y. 33.

30. Whitney *v.* South Paris Mfg. Co., 39 Me. 316.

with the addition of the name of his office, or of an abbreviation of that name, as "Cash."[31] Custom and usage have in some cases rendered a similar mode of indorsing by other officers admissible, as for example "A B, President."[32] But on principles already considered[33] the only safe way, except in the case of indorsements by banks, is to sign the name of the corporation by the officer executing the power, or to sign the name of the officer executing the power "for the corporation." The following indorsements are consequently *prima facie* good and binding on the corporation: "Pay to the order of A. J. A. Marine Bank, by J. S. H., Pres't."[34] "Sterling and Rock Island Railroad, per M. S. Henry, President."[35]

d. Consequences of Assignments of Commercial Paper by Corporations. The cases do not disclose anything under this head which makes such consequences different from what they would be in the case of a natural person. An indorsement by a corporation formally made by its proper officer, accompanied by delivery, transfers the legal title of the paper to the transferee and enables him to maintain an action thereon in his own name.[36] He takes it discharged of equities, and any subsequent arrangements between the transferrer and the maker respecting its payment will not affect his rights in any way.[37] The law presumes that the paper was transferred in the usual course of business, and this presumption becomes conclusive where the assignee stands in the position of a *bona fide* purchaser for value and before maturity; so that defendant cannot thereafter impeach the paper on the ground that it was not taken by the corporation and assigned in the ordinary course of its business, until it is first shown that plaintiff is not such a *bona fide* purchaser.[38]

e. Liabilities Incurred by Corporation as Indorser. These are not different from those incurred by a natural person who indorses commercial paper;[39] but, with the exception that where the paper is indorsed for accommodation, and the taker of it knows that such is the fact, the corporation will incur no liability. On a principle already considered,[40] indorsements by corporations, like those by individuals, are, however, presumed to be for value, and not for accommodation, until the contrary appears. Nor is it enough that there be facts sufficient to raise suspicion, to excite surmise, or to impute negligence to the taker of such paper, but nothing else than fraud can defeat his title.[41] Nor does the fact that the name of a corporation which has no power to indorse for accommodation appears as indorser upon a negotiable instrument of which it is not the payee tend to show that such an indorsement was made for the accommodation of others; nor is it even a circumstance putting an intending purchaser of the paper upon inquiry; but in a suit upon the instrument the burden of showing that it was taken with notice that the corporation had no authority to indorse it lies on the defendants.[42] A corporation which has indorsed, through its agent, a promissory note, is bound to pay the amount legally due thereon, although its agent, in negotiating it, may

31. See *supra*, XII, H, 7, d.
32. Elwell *v.* Dodge, 33 Barb. (N. Y.) 336; Scott *v.* Johnson, 5 Bosw. (N. Y.) 213. See also Clark *v.* Titcomb, 42 Barb. (N. Y.) 122. So of an indorsement, "Indorsed, A. B. President." Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473.
33. See *supra*, XII, H, 7, a *et seq.*
34. Aiken *v.* Marine Bank, 16 Wis. 679.
35. Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.
36. Savage *v.* Walshe, 26 Ala. 619.
37. Farmers' Bank *v.* Maxwell, 32 N. Y. 579.
38. McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.
39. Whitney *v.* South Paris Mfg. Co., 39 Me. 316; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. (N. Y.) 23.
40. See *supra*, XVII, C, 4, a, (I) *et seq.*
41. Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934. See to the principle generally Hamilton *v.* Marks, 63 Mo. 167; Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299; Franklin's Sav. Inst. *v.* Heinsman, 1 Mo. App. 336.
42. Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299. Upon the question whether a note was indorsed by a railroad company for accommodation or for value see Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298.

have agreed to pay an illegal rate of interest to procure delay in its payment.[43] Although a note may have been indorsed by a corporation for a purpose apparently beyond the scope of its business, yet if the indorsement was really made in the course of its business and for its benefit the corporation will be bound thereby.[44]

f. Liabilities of Indorsers of Ultra Vires Corporate Paper. It has been held that where a corporation emits negotiable paper without having power to do so, one who indorses the same is not liable thereon as an indorser of negotiable paper, as where a corporation created for the purpose of lending money on pledges undertook to issue promissory notes and to receive money in exchange therefor.[45] But while an indorser of negotiable paper made by a corporation may be allowed to set up by way of defense when sued upon his contract of indorsement that the corporation was prohibited by law from issuing the paper, yet he cannot set up that the instrument was not made in the form prescribed by the statute. The reason is that by indorsing the instrument he becomes a warrantor that it has been executed in proper form, the indorser always warranting the existence and legality of the contract which he undertakes to assign.[46]

13. Draft Drawn by One Officer of Corporation Upon Another. A draft drawn by one officer of a corporation upon another, we will say by its secretary upon its treasurer, in the settlement of a debt, is in the nature of a promissory note and need not be presented for acceptance, nor need any notice of its non-acceptance be given as a condition precedent to a right of action thereon,[47] although the holder may at his election treat it as a bill of exchange and go through the customary circumlocution.[48]

D. Powers Relating to Ownership and Transfer of Property — 1. Power to Take and Hold Land and Transmit Title Thereto — a. In General — (1) *This Power at Common Law.* At common law corporations have the power, without any special license thereto in their charters or governing statutes, to take and hold as much land as may be reasonably necessary or convenient for the purposes of their creation.[49]

43. Whitney *v.* South Paris Mfg. Co., 39 Me. 316.

44. Central Bank *v.* Empire Stone Dressing Co., 26 Barb. (N. Y.) 23.

45. Southern Loan Co. *v.* Morris, 2 Pa. St. 175, 44 Am. Dec. 188.

46. Kilgore *v.* Bulkley, 14 Conn. 362. That an indorser will not be allowed to exonerate himself by proving that he was led to indorse by misrepresentations made by the president and cashier of the bank in which the note was to be discounted, etc., see U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316 [*followed* in Metropolis Bank *v.* Jones, 8 Pet. (U. S.) 12, 8 L. ed. 850].

47. Dennis *v.* Table Mountain Water R. Co., 10 Cal. 369; Indiana, etc., R. Co. *v.* Davis, 20 Ind. 6, 83 Am. Dec. 303. See also *supra*, XII, E, 3, a *et seq.*

48. Indiana, etc., R. Co. *v.* Davis, 20 Ind. 6, 83 Am. Dec. 303.

49. *California.*— Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544.

Illinois.— Brown *v.* Hogg, 14 Ill. 219.

Indiana.— Hayward *v.* Davidson, 41 Ind. 212.

Kentucky.— Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481.

Massachusetts.— Sutton First Parish *v.* Cole, 3 Pick. 232.

Michigan.— Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Missouri.—Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305; St. Louis Stoneware Co. *v.* Partridge, 8 Mo. App. 580.

New York.— Sherwood *v.* American Bible Soc., 4 Abb. Dec. 227, 1 Keyes 561; Robie *v.* Sedgwick, 35 Barb. 319; Champlain, etc., R. Co. *v.* Valentine, 19 Barb. 484; McCartee *v.* Orphan Asylum Soc., 9 Cow. 437, 18 Am. Dec. 516; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280.

North Carolina.— It has been said in North Carolina "that the common law right to take an estate in fee, incident to a corporation at common law, is unlimited, except by its charter and by statute." Ashe, J., in Mallett *v.* Simpson, 94 N. C. 37, 41, 55 Am. Rep. 594.

Ohio.— Reynolds *v.* Stark County Com'rs, 5 Ohio 204.

Pennsylvania.—Leazure *v.* Hillegas, 7 Serg. & R. 313.

Vermont.— Page *v.* Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

Virginia.— Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. 19, 46 Am. Dec. 183; Banks *v.* Poitiaux, 3 Rand. 136, 15 Am. Dec. 706.

United States.—Blanchard's Gun-Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258.

And see 1 Bl. Comm. 478; 2 Kent Comm. 227, 281; 1 Washburn Real Prop. (4th ed.) 75.

(II) *Effect of Statutes of Mortmain.* In England by a series of statutes called the statutes of mortmain, beginning with Magna Charta, 9 Henry III, and ending with 9 George II, corporations, both ecclesiastical and lay, were rendered incapable of taking and holding lands without a license from the crown.[50] These statutes have never been reënacted in this country, and do not seem to be regarded as in force in any state of the American Union[51] with the exception of Pennsylvania. In Pennsylvania the operation of the statutes of mortmain is said to be not to restrain a corporation from acquiring lands in pursuance of its common-law power, but to prevent it from retaining lands which it has acquired without a license, and to vest the right thereto in the state.[52]

(III) *Cannot Take and Hold Land For Purposes Foreign to Their Creation.* Irrespective of the operation of statutory restrictions it is a settled principle of American jurisprudence that a corporation cannot take and hold land except in so far as reasonably necessary to carry out the objects of its creation.[53]

(IV) *Constitutional and Statutory Restrictions Upon Power to Take and Hold Land.* There are, in American constitutions and statutes, express restrictions upon the power to take and hold land, some of them being merely affirmations of the common law, like the following: "No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business."[54]

See 12 Cent. Dig. tit. "Corporations," § 1765.

50. 2 Kent Comm. 282; 1 Washburn Real Prop. (4th ed.) 76.

51. Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Mallett *v.* Simpson, 94 N. C. 37, 55 Am. Rep. 595; Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183.

52. Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313.

53. *Connecticut.*— Occum Co. *v.* A. & W. Sprague Mfg. Co., 34 Conn. 529.

Illinois.— Chicago First M. E. Church *v.* Dixon, 178 Ill. 260, 52 N. E. 887 [*reversing* 77 Ill. App. 166], holding that it is the public policy of the state of Illinois that corporations shall not hold land for purposes not directly appropriate to their specific chartered purposes.

Kentucky.— To the same effect see Cynthiana, etc., Turnpike Co. *v.* Hutchinson, 60 S. W. 378, 22 Ky. L. Rep. 1233.

Massachusetts.— Sutton First Parish *v.* Cole, 3 Pick. 232.

New Jersey.— State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

Ohio.— Overmyer *v.* Williams, 15 Ohio 26.

Virginia.— Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. 19, 46 Am. Dec. 183.

Illustration.— Therefore a corporation cannot take, either by condemnation or by grant, land for the use of a freight-belt railroad which it has no power to construct or operate. South, etc., R. Co. *v.* Highland Ave., etc., R. Co., 119 Ala. 105, 24 So. 114.

That a corporation cannot take a lease of land for the purpose of making a malicious use of it see Occum Co. *v.* A. & W. Sprague Mfg. Co., 34 Conn. 529.

54. S. D. Const. art. 17, § 7. See also Gilbert *v.* Hole, 2 S. D. 164, 49 N. W. 1.

For a statutory restriction which did not prevent a corporation from taking and holding a banking-house and the lot on which it was situated and also from mortgaging the same see Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728. Nearly to the same effect is Banks *v.* Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

For a clause in a charter which operated to prohibit a corporation from buying, selling, or becoming a speculator in lands see State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575.

Instances of constitutional and statutory restrictions upon religious corporations with respect to taking and holding lands may be discovered in the following cases, their doctrine not being set out, because religious societies are not within the scope of this article. Hamsher *v.* Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; Baltimore Catholic Cathedral Church *v.* Manning, 72 Md. 116, 19 Atl. 599; Catholic Church *v.* Tobbein, 82 Mo. 418; U. S. *v.* Church of Jesus Christ, 150 U. S. 145, 14 S. Ct. 44, 37 L. ed. 1033; Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 481; Gilmer *v.* Stone, 120 U. S. 586, 7 S. Ct. 689, 30 L. ed. 734. See, generally, Religious Societies.

Construction of various statutes with respect to this power.— That a statute enacting that every corporation as such shall have power to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, confers upon the directors while acting as trustees for the purpose of winding-up the power to sell at private sale see Freeman *v.* Sea View Hotel Co., 57 N. J. Eq. 68, 40 Atl. 218. That a charter conferring upon a hotel company the power to lease, purchase, and hold real estate, and to maintain a hotel thereon, and to transact all such business as may be incident

(v) *Construction of Enabling Statutes.* It is a sound rule that a corporation having the power to construct a certain road[55] or certain works for the purposes of its business[56] may purchase a road already built or works already constructed. Statutes authorizing corporations to acquire property have sometimes been held in subordination to the provisions of general laws; and hence a statute authorizing a corporation to take by purchase was construed as not abrogating in its favor the general statute of wills prohibiting such corporations to take by devise.[57] But if the word "purchase" had been large enough to include "devise" the rule would have been different, upon the principle of statutory interpretation that *generalia specialibus non derogant.*[58] Where the charter of a lumber company authorized it to purchase timber lands or any other lands that might be necessary and convenient for the purpose of transacting its business, it was held that the fact that a part of a tract of land purchased by it was cleared and used for farming purposes did not show that its purchase was *ultra vires.*[59] A corporation authorized to hold a given amount of real and personal property "in fee simple or otherwise," to employ its annual income, among other purposes, "to promote inventions and improvements in the mechanic arts, by granting premiums for said inventions and improvements," may purchase land and erect a permanent building thereon in which to hold its meetings and to give public exhibitions.[60] A statute vesting in a corporation "all such property as hath heretofore, or may hereafter accrue to the State," in a certain district, which, by another act regulating escheats, "hath escheated to the State," has been held to entitle it to property escheated to the state after the passage of the act.[61]

to the mortgaging of the premises, or otherwise controlling or disposing of the same, authorizes the directors to convey land owned by the company at any time that in their judgment it may be best for the company so to do see Freeman *v.* Sea View Hotel Co., 57 N. J. Eq. 68, 40 Atl. 218. That a memorandum of association of an English company, which among other things recites as the objects of the association the selling of any part of its assets, and its amalgamation with any companies or firms carrying on a business of like nature, authorizes a contract for the sale of all the assets of the corporation to another corporation carrying on a similar business except the stock held by the former see Wall *v.* London, etc., Corp. [1898] 2 Ch. 469, 67 L. J. Ch. 596, 79 L. T. Rep. N. S. 249. That the title to land acquired from a corporation by a voluntary adjustment of boundary lines is not invalid because not authorized by a vote of three fifths of the capital stock of such corporation as required by a statute in the case of an "alienation" of land see Pittsburgh, etc., Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395. That, under a statute giving to all private corporations the power to acquire real estate in payment of debts, the fact that a lumber and grain company is not expressly authorized so to do does not render its acts in that respect *ultra vires* and void, so as to make its agent, whose representative capacity is disclosed, acting in good faith and without fraud, liable individually to one injured by his taking title to certain property in its behalf see Ray *v.* Foster, (Tex. Civ. App. 1899) 53 S. W. 54. That a statute providing that a certain society shall be capable of taking by gift real and personal property, holding and conveying the same for all its purposes, provided the annual income of its realty in the state shall not exceed a specified sum is a mere enabling act and does not reincorporate such society as a domestic corporation see *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 49 N. Y. St. 658, 18 L. R. A. 713 [*affirming* 64 Hun (N. Y.) 50, 18 N. Y. Suppl. 603, 45 N. Y. St. 832].

55. State *v.* Hannibal, etc., Gravel Road Co., 37 Mo. App. 496.

56. Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 9 L. R. A. 527 [*reversing* 52 Hun (N. Y.) 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409].

57. McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

58. That it does include "devise" when used according to the terminology of the common law see *infra*, XVII, D, 1, c. (v), (E).

59. Kentucky Lumber Co. *v.* Green, 87 Ky. 257, 8 S. W. 439, 10 Ky. L. Rep. 139.

60. Richardson *v.* Massachusetts Charitable Mechanic Assoc., 131 Mass. 174.

61. Brown *v.* Chesterville Academy Soc., 3 Rich. Eq. (S. C.) 362. As to power of a corporation created for educational purposes and also for church purposes to acquire land for collegiate purposes and to transmit the same independently of any rights of the church see Liggett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133. That a manufacturing corporation, under Massachusetts law, created to manufacture gun-stocks, has power to purchase a patent "for turning irregular forms appropriate to be used in making gunstocks" see Blanchard's Gun-Stock Turning Factory *v.* Warner, 3 Fed. Cas. No. 1,521, 1 Blatchf. 258.

(vi) *Whether Exclusion of Power to Hold Excludes Power to Take.* It is reasoned in some cases that a limitation of the power to hold property is necessarily a limitation of its power to take such property.[62] But this is not necessarily so. The operation of the English statutes of mortmain was such that the corporation held until the next lord of the fee entered, or in default of mesne lords the king. By analogy to the rule under these statutes the rule in America would be that the corporation holds until the state intervenes.[63]

(vii) *Power to Hold Property in Trust.* A corporation may be created with legal capacity to hold land upon a trust in the same manner and to the same extent as a private individual may.[64]

b. Power of Various Corporations to Take and Hold Land — (i) *Banking Corporations.* Presumptions are indulged in favor of the title of a bank to lands fairly acquired, where it has power to acquire land in "satisfaction of its debts."[65] The principle, hereafter considered,[66] which precludes a corporation, incapable of taking title to land by direct conveyance or devise to it, from taking and holding such title by means of a trustee, does not extend so far as to prevent a banking corporation from having a mortgage made to its officers in their own names, upon their promise to enforce the security for the benefit of the bank;[67] and it has been held that a purchase of lands by a bank cashier, for the benefit of his bank is not necessarily invalid because the bank by its charter is disabled from purchasing lands.[68] And in general the right of such a corporation so to acquire and hold land is one against which the sovereign alone can object.[69]

(ii) *Real Estate Corporations.* A corporation which has been created with power to do a general real estate business has power to enter into a contract, under the terms of which it agrees to take possession of certain real estate, to offer it for sale, to collect rents with respect to it, and at the expiration of a stated period to purchase the interest of a lien-holder.[70] Where a real estate corporation has acquired land subject to the lien of an attachment, in exchange for its capital stock, it may procure the release of the attachment by giving its note secured by a mortgage upon the land.[71]

(iii) *Various Other Corporations Not Treated In Extenso in This Article.* With respect to the power of various other corporations not specially treated in this article to take and hold land some of the cases are merely cited in the marginal note.[72]

62. *In re* McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirming* 45 Hun (N. Y.) 354]; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

63. Shewalter *v.* Pirner, 55 Mo. 218; Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466; Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

64. White *v.* Rice, 112 Mich. 403, 70 N. W. 1024.

65. Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347.

66. See *infra*, XVII, D, 1, d, (II).

67. Apperson *v.* Exchange Bank, 10 S. W. 801, 10 Ky. L. Rep. 943.

68. White *v.* Lester, 4 Abb. Dec. (N. Y.) 585, 1 Keyes 316, 34 How. Pr. 136.

69. Banks *v.* Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188. *Compare* Colorado Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648.

70. Neosho Valley Invest. Co. *v.* Huston, (Kan. 1900) 59 Pac. 643 [*affirming* 10 Kan. App. 499, 63 Pac. 92].

71. Leonard, etc., Real Estate, etc., Co. *v.* Bank of America, 86 Fed. 502, 30 C. C. A. 221.

72. **Educational corporations.**— *Massachusetts.*— Phillips Academy *v.* King, 12 Mass. 546, may hold land in the absence of statutory restraints.

Michigan.— State University *v.* Detroit Young Men's Soc., 12 Mich. 138, regents of University of Michigan may hold land.

Minnesota.— State University *v.* Hart, 7 Minn. 61, regents of University of Minnesota.

New York.— *In re* McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*followed* in Cornell University *v.* Fiske, 136 U. S. 152, 10 S. Ct. 775, 34 L. ed. 427], devise to Cornell University in excess of its capacity to take.

Oregon.— Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81, power of Corvallis College to take and convey to the regents of the State Agricultural College.

Tennessee.— State *v.* Nashville University, 4 Humphr. 157, Nashville University.

Religious corporations.—May take and hold land as trustee for pious uses unless restrained by charter or statute. Phillips

c. Modes by Which Corporations May Acquire Land — (i) *Whether Corporation Can Acquire Land Except by Deed.* By the ancient common law, a corporation could not take title to land except by deed.[73] But the modern law is that a corporation can acquire title to land in any manner in which a natural person can, and in some modes in which a natural person cannot, as by a parol dedication for public purposes;[74] by adverse possession under the statute of limitations, although it did not authorize a disseizin and occupation by deed,[75] and this, although the existence of the corporation itself is proved merely by prescription; by prescription in the case of an easement, as for instance a right of way;[76] by the exercise of the power of eminent domain, of which we see instances every day in the case of the condemnation of land for railroads and other public utilities; by devise;[77] and by a legislative enactment sanctioned by the holders of land, by which their title is transferred to a corporation composed of themselves created by an act of the legislature.[78]

(ii) *Power to Take Land For Purpose of Saving Debt.* It seems clear that a corporation may take land for the purpose of saving a debt, and hold it until it can dispose of it at a reasonable price and on reasonable terms.[79] This power is, however, guarded and limited by statutes or by charter provisions in many instances. These in general relate to the terms and conditions on which land may be so acquired, the amount which may be so acquired, the length of time during which it may be held, and the terms under which it must be sold.[80] Under such a provision in the charter of a bank the bank had the power to purchase a judgment which was a prior lien upon lands which had been mortgaged to it to secure the payment of an existing debt, if the object was to protect itself and to secure the payment of its own claim; and in such a case it might purchase the lands of the debtor on an execution founded on such judgment.[81] Numerous other statutes of the same kind have received judicial interpretation.[82]

(iii) *Power to Acquire Land by Purchase at Judicial Sale.* A corporation has the same right to buy any property at execution sale, under judgments in which it is plaintiff, which any other plaintiff has; and even where statutory limitations have been placed upon the time during which the corporation may hold land so purchased, yet the lapse of this length of time does not disable it from selling such lands and passing a good title to such purchaser where the state has not intervened.[83] And where a corporation has a general power to purchase real estate, but is restrained by a proviso to purchases for corporate

Academy *v.* King, 12 Mass. 546. But cannot take or hold land for purposes foreign to their creation. Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422.

Turnpike companies.— Cannot acquire title to swamp land not necessary for its right of way. Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517. Has a mere easement, the fee remaining in the former owner. People *v.* Lawrence, 54 Barb. (N. Y.) 589. *Contra,* that it can convey a fee-simple title to another. People *v.* Mauran, 5 Den. (N. Y.) 389. Does not take upon any condition of reverter. Heath *v.* Barmore, 50 N. Y. 302.

Canal corporations.— May purchase from a proprietor, under circumstances justifying it, an excess of land over what is necessary "for the mere thread of its canal." Spear *v.* Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

Titles of British eleemosynary corporations not affected by the revolution.— Society for Propagation, etc. *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

73. Predyman *v.* Wodry, Cro. Jac. 109.

74. Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407.

75. Rehoboth Second Precinct *v.* Rehoboth Catholic Cong. Church, etc., 23 Pick. (Mass.) 139 note. For an earlier and obsolete conception of this subject see Weston *v.* Hunt, 2 Mass. 500.

76. Slackman *v.* West, Cro. Jac. 673. See also 2 Beach Pub. Corp. § 1458, and cases cited.

77. *In re* McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387.

78. Ladies' Benev. Soc. No. 2 *v.* Edgefield Benev. Soc. No. 2, 2 Tenn. Ch. 77.

79. 5 Thompson Corp. § 5779.

80. See Brown *v.* Hogg, 14 Ill. 219, where such a provision is quoted and construed.

81. Brown *v.* Hogg, 14 Ill. 219.

82. Home Ins. Co. *v.* Head, 30 Hun (N. Y.) 405; Merritt *v.* Lambert, 1 Hoffm. (N. Y.) 166.

83. Home Ins. Co. *v.* Head, 30 Hun (N. Y.) 405. *Compare* Merritt *v.* Lambert, 1 Hoffm. (N. Y.) 166.

uses only, and it purchases land at a sheriff's sale, the presumption is that the purchase is within the power conferred, and the party that denies it must show the contrary.[84]

(IV) *Power to Take Land by Mortgage.* Speaking generally every corporation which has the power to become a creditor has the power to take a mortgage on land to secure its debt, except so far as the power may be excluded by the express language of charter or statute.[85]

(V) *Power to Take Land by Devise*—(A) *In General.* The power of corporations to take land by devise, to the extent and for the purposes prescribed by charter or governing statute, is unquestioned.[86]

(B) *Operation of Statutes of Wills Upon This Power.* The English statutes of wills,[87] authorizing devises of land to any person or persons, expressly excepted bodies politic and corporate. The same exception was incorporated into the New York statute of wills, without variation, from the English statutes just cited. Under the operation of that statute devises of land to corporations have been uniformly held void in that state, unless the charter expressly empowered the corporation to take by devise, which provision of course brought the corporation within an exception to the prohibition in the statute of wills.[88] It is believed that this provision has not been generally reënacted in the statutes of wills of the different American states.[89]

(C) *Devises to Foreign Corporations*—(1) Validity Depends Upon Lex Rei Sitæ. The validity of a devise of land to a foreign corporation depends upon the condition of the law of the state or country within which the land is situated.[90] Hence, although the law of the *situs* of the corporation may authorize it to take land, yet it will not have the power to take land in a foreign state if the law of that state does not confer the power.[91]

(2) Rule Where Statute Law of State Creating Corporation Disables It From Taking Land by Devise. It has been held that if the statute of wills of the state creating the corporation disables it from taking land by devise, this disability will follow it into other states; so that by reason of the disability imposed by the general statute law of the state of its domicile it will not be able so to acquire land in another state.[92] Where the disability is created by the general statute law of the state of the domicile of the corporation then the sound view is that it is a question of the policy of that state, as declared by its legislature, relating to the devolution of title to land within its own limits, and that it has no extraterritorial operation. It is only where the disability is created by the charter

84. *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540.

85. Thus we have seen (see *supra*, VI, M, 2, i, (I) *et seq.*) a class of holdings to the effect that railroad corporations have without any express power thereto in their charters the power to take mortgages of land from subscribers to their shares to secure the payment of their subscriptions. Andrews *v.* Hart, 17 Wis. 297; Cornell *v.* Hichens, 11 Wis. 353; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709; Clark *v.* Farrington, 11 Wis. 306.

86. *In re* McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387.

87. 32 Hen. VIII, c. 1; 34 Hen. VIII, c. 5.

88. Holmes *v.* Mead, 52 N. Y. 332; White *v.* Howard, 46 N. Y. 144; Bascom *v.* Albertson, 34 N. Y. 584; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Atty.-Gen. *v.* New York City Reformed Protestant Dutch Church, 33 Barb. (N. Y.) 303; McCaughal *v.* Ryan, 27 Barb. (N. Y.) 376; King *v.* Rundle, 15 Barb. (N. Y.) 139; McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Van Kleeck *v.* Reformed Dutch Church, 6 Paige (N. Y.) 600; Kuypers *v.* Reformed Dutch Church, 6 Paige (N. Y.) 570; Auburn Theological Seminary *v.* Childs, 4 Paige (N. Y.) 419.

89. There was no such provision in the Virginia statute of wills in force in 1846 (Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183), or in the Kentucky statute, which seems to have been like that of Virginia (Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417).

90. Draper *v.* Harvard College, 57 How. Pr. (N. Y.) 269 (holding that a devise of land, situated in New York, to the city of St. Louis, in Missouri, was void. But the supreme court of Missouri held that the city had the capacity to take the devise, so that it passed title to land situated in Missouri. Chambers *v.* St. Louis, 29 Mo. 543.

91. White *v.* Howard, 46 N. Y. 144.

92. Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133.

of the corporation itself, or by the general statute under which the corporation is organized, so that there is an entire want of power in the artificial person so to acquire title to land, that the disability will follow it into another state. In such case the disability attends it everywhere, on the principle that a corporation cannot exercise in a foreign state, except by an express provision of the legislation of that state, larger powers than have been granted to it by the sovereign which has created it.[93]

(3) Statutes Limiting Amount of Land Which Person Can Devise to Corporation Have No Extraterritorial Operation. In like manner a statute limiting the amount of land which a person can devise to a corporation has no extraterritorial operation. Therefore a statute of New York providing that "no person having a husband, wife, child, or parent, shall by his will bequeath to any charitable corporation more than one half of his estate after the payment of his debts, such bequest, to be valid to the extent of one half, and no more," did not prevent a bequest from being made by a testator domiciled in Connecticut to a charitable corporation domiciled in New York.[94]

(4) This Power in Foreign Corporations, When Presumed. In the absence of any express statutory expression on the subject, it will not be presumed that it is against the public policy of a state that one of its citizens, owning real estate there situated, should convey it to a foreign corporation for benevolent purposes, where the state permits her own corporations, organized for like purposes, to take real estate by purchase, gift, devise, or in any other manner.[95]

(D) *Devises to United States.* The United States is a political corporation,[96] possessing defined and limited corporate powers, with capacity to contract and be contracted with, and to sue in its corporate name;[97] but it cannot take by a devise land situated in a state whose statute of wills as in New York prohibits devises of lands to corporations;[98] but otherwise where as in Massachusetts there is no such prohibitory statute.[99]

(E) *Whether Power to Take by Purchase Includes Power to Take by Devise.* The word "purchase," when used in connection with real property, has long been construed as embracing all modes of acquiring such property except by descent. It therefore includes the acquisition of land by devise.[1] Hence, although the statute of wills may except corporations generally from the power to take lands

93. American Bible Soc. *v.* Marshall, 15 Ohio St. 537; American, etc., Christian Union *v.* Yount, 101 U. S. 352, 25 L. ed. 888.

94. Crum *v.* Bliss, 47 Conn. 592.

95. American, etc., Christian Union *v.* Yount, 101 U. S. 352, 25 L. ed. 888 [*distinguishing* Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Carroll *v.* East St. Louis, 67 Ill. 568, 16 Am. Rep. 632].

96. Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169; U. S. *v.* Maurice, 26 Fed. Cas. No. 15,747, 2 Brock. 96 (per Marshall, C. J.).

97. Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257. See preface to Beach Pub. Corp., from which I have adopted this statement. See also Dickson *v.* U. S., 125 Mass. 311, 28 Am. Rep. 230; U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937; Neilson *v.* Lagow, 12 How. (U. S.) 98, 13 L. ed. 909; U. S. *v.* Linn, 15 Pet. (U. S.) 290, 10 L. ed. 742; U. S. *v.* Bradley, 10 Pet. (U. S.) 343, 9 L. ed. 448; U. S. *v.* Tingey, 5 Pet. (U. S.) 115, 8 L. ed. 66.

98. *In re* Fox, 52 N. Y. 530, 11 Am. Rep. 751 [*affirmed* in 94 U. S. 315, 24 L. ed. 192].

99. Dickson *v.* U. S., 125 Mass. 311, 28 Am. Rep. 230. In this case the devise to the United States was: "Wishing to contribute my mite towards suppressing the rebellion and restoring the Union, I give and devise the rest and residue of my estate to the United States of America." The devise being absolute, it was held to be good, notwithstanding that the rebellion had been suppressed and the Union restored before the death of the testator. The opinion in this case, by Mr. Justice Gray, also recalls the fact that the Smithsonian Institution at Washington was created by the bequest of an Englishman named Smithson, established by a decree of Lord Langdale as master of the rolls, and accepted by act of congress. U. S. *v.* Drummond [*cited* in Whicker *v.* Hume, 7 H. L. Cas. 124, 155, 4 Jur. N. S. 933, 28 L. J. Ch. 396].

1. McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Radcliffe *v.* Roper, 10 Mod. 89 [*reversed* in 10 Mod. 230]; Ratcliffe's Case, 1 Str. 267. See also Atty.-Gen. *v.* Bowyer, 3 Ves. Jr. 714, 4 Rev. Rep. 132, where it is intimated that a corporation authorized by license to hold real estate may take lands by devise.

by devise, yet if the charter of a particular corporation empowers it to purchase, hold, and convey any estate, real or personal, this will enable it to take land by devise;[2] and so it may where its charter empowers it "to hold, purchase, and convey real estate."[3]

(F) *Devises to Corporations Where Their Statutory Limit Has Been Reached.* According to one view, if the amount of land which a corporation may hold is prescribed by its governing statute, and if it has already acquired lands to such an extent that a further devise to it will exceed that limit, then in so far as the devise is in excess of that limit it is void and the title vests in the heirs. In such a case the principle that the state alone can question the right of the corporation to hold the lands does not in the opinion of some of the courts apply, but the heirs of the testator can raise the question. Nor in such a case is the construction put upon the language of the statutes of mortmain applicable, making a distinction between the power to take and the power to hold; but such a statute, in the absence of some plain expression showing the contrary intent, is construed as prohibiting a taking where the prescribed limit has been reached.[4] But other courts have taken the view that here as in other cases[5] the question of the capacity of the corporation to take is one which can be raised by the state alone.[6]

(G) *Devise Good up to Statutory Limit.* Under the former view the devise is void only as to the excess; it is good up to the statuory limit, although there may be difficulty in determining that limit.[7]

(H) *Operation of Statutes Curing Incapacity of Corporations to Take by Devise or Bequest.* Although the supposed corporation which is to be the recipient of the devise or bequest may not have the capacity to take at the time when the devise or bequest is created, yet this will be immaterial, provided it becomes legally qualified to take before the happening of the event upon which the devise or bequest is to become vested.[8] Thus, although a bequest to an unincorporated religious body may be void, by reason of its incapacity to take under a will,[9] yet if it becomes incorporated at the time when the devise is to vest and take effect, that will be sufficient.[10] And whichever way the question is viewed, a devise is contingent upon the existence of a devisee capable of taking at the time when the devise is to vest. Thus a devise to a church society, which is to take effect at the death of the testator's wife, of land to be used as a parsonage, which is to revert to the heirs at law when it shall cease to be so used, is contingent upon the existence of a devisee capable of taking at the termination of the life-estate of the wife; but if the society is then incorporated it will take, although not incorporated at the death of the testator.[11]

(I) *Change of Rule by Legislature Does Not Operate Upon Previous Devises* But an act of the legislature passed subsequently to the death of the testator

2. McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

3. American Bible Soc. *v.* Marshall, 15 Ohio St. 537.

4. Cromie *v.* Louisville Orphans' Home Soc., 3 Bush (Ky.) 365; McGraw's Estate, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirming* 45 Hun (N. Y.) 354]; Chamberlain *v.* Chamberlain, 43 N. Y. 424; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; Cornell University *v.* Fiske, 136 U. S. 152, 10 S. Ct. 775, 34 L. ed. 427. *Compare* American, etc., Christian Union *v.* Yount, 101 U. S. 352, 25 L. ed. 888. Note that the Rhode Island case was changed by a statute which, however, could not operate retroactively. R. I. Pub. Laws (1889), c. 76, p. 65.

5. See *infra*, XVII, D, 1, g, (I), (A) *et seq.*

6. De Camp *v.* Dobbins, 29 N. J. Eq. 36.

7. McGraw's Estate, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirming* 45 Hun (N. Y.) 354]; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

8. Plymouth Soc. *v.* Hepburn, 57 Hun (N. Y.) 161, 10 N. Y. Suppl. 817, 32 N. Y. St. 943.

9. Wilmoth *v.* Wilmoth, 34 W. Va. 426, 12 S. E. 731.

10. Lougheed *v.* Dykeman's Baptist Church, etc., 58 Hun (N. Y.) 364, 12 N. Y. Suppl. 207, 35 N. Y. St. 270.

11. Lougheed *v.* Dykeman's Baptist Church, etc., 58 Hun (N. Y.) 364, 12 N. Y. Suppl. 207, 35 N. Y. St. 270.

enlarging the power of the corporation to take will not affect the rights of the heirs, because the title vests in them instantly on the death of the testator, and it is not competent for the legislature to divest it.[12]

(J) *Devise to Corporation Where There Are Two Corporations of Same Name.* Where there are different corporations of the same or of a similar name, and a devise is made to one of them, naming it in such a way as not to distinguish it from the others, then the will presents a case of latent ambiguity, where parol evidence is admissible to explain the real meaning of the testator.[13]

(K) *Power to Take "Subscriptions" or "Contributions" Does Not Include Power to Take by Devise.* It has been held in Maryland that the power conferred upon a corporation by an act of the legislature to take and hold "subscriptions or contributions, in money or otherwise," when construed, as it must be, with reference to the restriction imposed upon religious corporations by section 38 of the bill of rights does not include the power to take by devise.[14]

(L) *Doctrine of Equitable Conversion Where Corporation Is Not Capable of Taking Land by Devise.* If then the corporation is not capable of taking land, but nevertheless a devise of land is made directly to it, the devise will be void and the land will revert to the heirs of the grantor, under the theory of his having died intestate as to it; or will pass under other theories to other devisees under other provisions of the will. But this is not so where the will directs the executors to convert the land into money, and to hand the money over to the corporation. Here, if the corporation is capable of taking personalty, the devise will be good; for when carried out according to its terms it does not operate to vest land in the corporation, but merely operates as a bequest of money to it.[15] This in accordance with the doctrine of equitable conversion, by which, in construing and applying a will, a court of equity will treat land as money or money as land, when it is plain from all the terms of the will that the testator intended land to be converted into money or money into land for the purposes of the will, the general rule being that an equitable conversion is not to be presumed beyond the purposes of the will as plainly expressed therein, or further than is necessary to gratify the several legacies and bequests; and that when these fail or lapse there is a resulting trust in favor of the heir, unless there is a clear and manifest expression in the will to the contrary.[16] In every case involving this doctrine the paramount question is what the testator really meant, whether he meant to give to the produce of the real estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will.[17]

d. Statutory Limits Upon Amount of Land Which May Be Taken Other Than by Devise — (I) *In General.* But in respect of land acquired by a corporation other than by devise, the rule seems to be that the right of the corporation to hold

12. McGraw's Estate, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387.

13. *Connecticut.*— Brewster *v.* McCall, 15 Conn. 274.

Kentucky.— Breckenridge *v.* Duncan, 2 A. K. Marsh. 50, 12 Am. Dec. 359.

Massachusetts.— Hinckley *v.* Thatcher, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719.

New Hampshire.—Tilton *v.* American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321.

New Jersey.— That the misnomer of the legatee will not defeat the gift see De Camp *v.* Dobbins, 29 N. J. Eq. 36.

Wisconsin.— Morgan *v.* Burrows, 45 Wis. 211, 30 Am. Rep. 717.

United States.— Gilmer *v.* Stone, 120 U. S. 586, 7 S. Ct. 689, 30 L. ed. 734. See to this principle in the law of wills Patch *v.* White, 117 U. S. 210, 6 S. Ct. 617, 29 L. ed. 860; Wilkins *v.* Allen, 18 How. 385, 15 L. ed. 396.

14. Brown *v.* Tompkins, 49 Md. 423. *Compare* Baltimore Catholic Cathedral Church *v.* Manning, 72 Md. 116, 19 Atl. 599.

15. Sherwood *v.* American Bible Soc., 4 Abb. Dec. (N. Y.) 227.

16. Orrick *v.* Boehm, 49 Md. 72.

17. Cox's note to Cruse *v.* Barley, 3 P. Wms. 19, 22, 24 Eng. Reprint 952 [*quoted* in Orrick *v.* Boehm, 49 Md. 72, 105]. The rule has been said to be that "the heir-at-law must be effectually displaced, not by inference or implication, but there must be a clear, substantive and undeniable intent on the part of the testator to exclude him." Amphlett *v.* Parke, 2 Russ. & M. 221, 11 Eng. Ch. 221 [*cited* in Orrick *v.* Boehm, 49 Md. 72, 105]. See as to this doctrine of equitable conversion Given *v.* Hilton, 95 U. S. 591, 24 L. ed. 458; Singleton *v.* Tomlinson, 3 App.

lands in excess of the statutory limit can be questioned only by the state.[18] Hence a trespasser will not be allowed to trespass upon any portion of such land.[19]

(II) *Evasion of Such Statutes by Taking Land in Name of Another as Trustee.* The evasion of the statutes of wills by the device of conveying lands to feoffees to the use of the feoffors in the will, and other refinements which disgraced the jurisprudence of our ancestors, resulting in distinctions between interests in lands and interests collateral to land, which involved direct violation of the policy and purpose of the statute law,[20] are not tolerated in modern jurisprudence. But if the legislature has limited the amount of land which a corporation may hold, or the purposes for which it may hold it, the courts will not allow the statute to be evaded by the corporation resorting to the device of thrusting a trustee between itself and the law.[21]

e. What Estate in Lands Corporation May Take — (I) *Fee Simple or Determinable Fee.* In some cases a distinction is taken between the estate which a corporation may take for the purposes of alienation, and the estate which it may take for the purposes of enjoyment, holding that it may take a fee-simple estate for the purposes of alienation, but can take only a determinable fee for the purposes of enjoyment.[22] There seems never to have been any doubt upon the former of these propositions, that is, upon the proposition that a corporation may take a grant of land and convey it in fee, so that the title of its grantee will not be affected by its subsequent dissolution.[23] But the second proposition, namely, that a corporation can take only a determinable fee for the purposes of enjoyment is founded upon the premise that upon its dissolution its land reverts to the original grantor or his heirs.[24] But it is elsewhere pointed out that this is no longer the law, at least in respect of private joint-stock corporations, but that the law is that, upon the dissolution of such a corporation, all of its estate, whether consisting of lands or goods, passes into administration, for the benefit of its creditors first, and its shareholders afterward.[25] It is therefore conceived that this doctrine of a corporation being incapable of taking an estate in fee simple for the purposes of enjoyment is an exploded refinement of the common law.

(II) *Statutes and Charters Under Which Corporation Takes Fee Simple.* Where there is a statute relating to conveyances providing that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant,[26] a conveyance to a corporation and its successors will pass an estate in fee, although the corporation may be created for a limited period,[27] and it would have the same effect if no words of succession were used.[28] When

Cas. 404, 38 L. T. Rep. N. S. 653, 26 Wkly. Rep. 722.

18. Hamsher *v.* Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556.

19. Whitman Gold, etc., Min. Co. *v.* Baker, 3 Nev. 386.

20. See Clere's Case, 6 Coke 18; Coke Litt. 272; 1 Saunders Uses 72. See also the opinion of Chancellor Jones in McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, as condensed in 18 Am. Dec. 516.

21. Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517; Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 481; Case *v.* Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513; Cox *v.* Gould, 6 Fed. Cas. No. 3,301, 4 Blatchf. 341.

22. Nicoll *v.* New York, etc., R. Co., 12 Barb. (N. Y.) 460 [*affirmed* in 12 N. Y. 121]; Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107.

23. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255; People *v.* Mauran, 5 Den. (N. Y.) 389.

24. Blackstone's definition of the title which a corporation takes by grant is "an estate for life which may endure forever, or which reverts to the donor only when the life of the donee is terminated." 1 Bl. Comm. 484.

25. Heath *v.* Barmore, 50 N. Y. 302. See also *infra*, XXI, G, 6, a.

26. For example 1 N. Y. Rev. Stat. p. 748, § 1.

27. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255; Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121 [*affirming* 12 Barb. (N. Y.) 460]. *Compare* Webb *v.* Moler, 8 Ohio 548.

28. Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121 [*affirming* 12 Barb. (N. Y.) 460, per Parker, J.].

therefore a corporation is empowered by its charter to acquire land it may acquire an estate in fee, although its own existence is limited to a term of years.[29] So a railroad corporation which has the power under its charter to acquire by purchase such real estate as may be necessary for the construction of its road may acquire title in fee to the same by a deed purporting to convey the fee, and when the land is no longer needed for this purpose it may sell it and convey the fee.[30] So a plank-road company authorized to acquire land for the building and operation of its road may acquire title to the same in fee simple absolute, and no condition of reverter, in case of its ceasing to use the land for the purposes intended, will be implied.[31]

(III) *Power to Take Land as Joint Tenant or Tenant in Common.* A corporation cannot take an estate in joint tenancy, either jointly with another corporation, or with a natural person;[32] but it can take and hold as a tenant in common with another corporation or with a natural person.[33]

(IV) *Power to Take Land by Statutory Investiture* — (A) *In General.* A devolution of land upon a corporation may take place by a mere legislative enactment, sanctioned of course by the owners of the land and by the corporation.[34] The books present cases where corporations have been created by the legislature and property vested in them by the statute, without any formal conveyance. This was held to have taken place where the provincial legislature of Georgia passed an act declaring that the rector of a certain church was thereby created a body politic and corporate, and that he should be in the actual possession of the church, with its cemetery and appurtenances, to hold and to enjoy the same to him and his successors, etc. This was held to be a statutory investiture in the corporation thus created, of title, not only to the church, but also to the cemetery; and a subsequent statute perpetuated the same title, in substantially the same corporation, under a different name.[35] In some of these cases the question will depend upon a consideration of the body which is incorporated, whether the trustees or the beneficiaries or proprietors.[36]

(B) *Legislative Intent so to Devolve Title Must Be Clear.* But if the legislature, in an act of incorporation, intends that the property of the coadventurers who are incorporated shall be vested in the corporation without a deed of conveyance, it will of course say so in direct language. Thus an act incorporating tenants

29. Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121; Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231.

30. Yates *v.* Van de Bogert, 56 N. Y. 526.

31. Heath *v.* Barmore, 50 N. Y. 302.

Applications of above doctrine in case of railroads.— See Old Colony R. Corp. *v.* Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394 (specific performance of a contract by which a railroad company purchased land for the excavation of gravel to be hauled over its road to a distant place and sold); Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107 (holding that a railroad corporation may take by purchase and hold in fee simple, such land as may be necessary for its purposes). *Compare* Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Waldo *v.* Chicago St., etc., R. Co., 14 Wis. 575 (railroad corporation has no power to hold land situated at a distance from its road for the purpose of speculation). To a similar effect see Land *v.* Coffman, 50 Mo. 243.

32. Telfair *v.* Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637; Coke Litt. 296.

33. De Witt *v.* San Francisco, 2 Cal. 289; Estell *v.* South University, 12 Lea (Tenn.) 476; Windham's Case, 5 Coke 7; Willion *v.* Berkley, Plowd. 223; Bennet *v.* Holbech, 2 Saund. 316; 1 Washburn Real Prop. (4th ed.) 643. *Compare* New York, etc., Canal Co. *v.* Fulton Bank, 7 Wend. (N. Y.) 412.

34. Ladies' Benev. Soc. No. 2 *v.* Edgefield Benev. Soc. No. 2, 2 Tenn. Ch. 77.

35. Christ Church *v.* Savannah, 82 Ga. 656, 9 S. E. 537.

36. See *supra*, I, A, 6.

Illustration.— Where the proprietors of certain lands were incorporated, and the trustees were endowed with a power of superintendence and management, it was held that the act of incorporation did not give the trustees title or possession, power to make contracts of agistment binding the corporation, or power to sell grass or herbage; and consequently that one who had agreed with the trustees for the pasturage of his horse, which died through their negligence, had no action against the corporation. Appley *v.* Montauk, 38 Barb. (N. Y.) 275. But while the trustees were not the corporation, the conclusion of the court is obviously a *non sequitur*; for they were its managing agents, and it was responsible for their contracts and neglects.

in common to enable them to carry on more conveniently a common purpose does not of itself vest in the corporation a title to the land previously owned by the individuals, and used by them for the same purpose.[37] A statute incorporating the tenants in common of a wharf, their heirs and assigns, upon their own petition, for the purpose of enabling them the better to manage and improve the wharf, did not therefore transfer the title in the wharf to the corporation.[38] So the organization of a voluntary loan association, under a statute,[39] does not transfer the property of the associates to the corporation without a formal conveyance, because the statute does not say so.[40] And in general a clause in a charter declaring that the corporators are constituted a body corporate for a specified purpose does not give them any rights of property with respect to such purpose. It only confers corporate existence, and limits the purpose for which such existence is given. If lands are necessary for carrying the purpose into effect, they must be acquired under some other authority, grant, or conveyance.[41]

f. Limitation of Power of Corporations to Take and Hold Land as Determined by Purposes of Their Existence. Where the question is raised in the proper proceeding, it will be held that a corporation can take and hold only so much land as is necessary for the purposes recited in its charter or in its articles of incorporation. Thus a manufacturing corporation cannot hold vacant and unoccupied land, unless it is or will be necessary for its use in the conduct of its business,[42] or will be necessary for its use in its business in the near future.[43] A narrow view of this subject has resulted in the holding that a manufacturing corporation cannot acquire and hold land for the purpose of building a town composed of houses constructed to be occupied as dwellings by its employees, and that vacant lots kept for the purpose of constructing thereon future dwellings for this purpose cannot be held by it in the exercise of its implied powers.[44] But the ownership of an office building near the business center of a city by a manufacturing corporation does not exceed its implied powers merely because the building is larger than is needed for its present use, and because a part of it is therefore rented out, if it is made to appear that it is probable that the whole building will be needed for the business of the corporation in the near future.[45]

g. Power of Corporation to Hold Land Not Questioned Collaterally, but Only by State — (i) *Rule Stated* — (a) *In General.* The limitations imposed by the principles of the common and the statute law upon the power of corporations to hold land, as elsewhere explained in this article, are greatly modified by a principle of extensive application now to be considered, which is that although a corporation may be disabled or forbidden from holding land at all, or from holding land except for particular purposes, or from holding land beyond a prescribed

37. Leffingwell *v.* Elliott, 8 Pick. (Mass.) 455, 19 Am. Dec. 343.

38. Holland *v.* Cruft, 3 Gray (Mass.) 162.

39. Mass Stat. (1854), c. 454.

40. Manahan *v.* Varnum, 11 Gray (Mass.) 405.

41. Keyport, etc., Steamboat Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 13.

42. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664. But it was held in this case that a palace-car company which has built shops for the manufacture of cars requiring five thousand employees, at a place remote from any city or village, may buy adjoining lands and build dwellings for the employees, provide such buildings with water, light, heat, and drainage; build schoolhouses and churches, halls, a library and theater, and hold and set apart lands for parks and pleasure-grounds for the use of its employees and their families, if it does so in good faith, with an honest belief, based on reasonable grounds, that it is required for the successful prosecution of its business.

43. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664.

44. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664.

45. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664.

Evidence held not sufficient to show that certain lots purchased by a railroad corporation were not necessary for the construction of its road. Lake St. El. R. Co. *v.* Carmichael, 184 Ill. 348, 56 N. E. 372 [*affirming* 82 Ill. App. 344].

Where a private corporation, for the purpose of paying its debts and closing its affairs, accepts land in part payment of its stock of merchandise, such transaction will not condemn or defeat the sale. Morisette *v.* Howard, 62 Kan. 463, 63 Pac. 756.

limit, yet if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the state alone, and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the state for that purpose.[46]

(B) *As Where Statute Law Prohibits Foreign Corporations From Acquiring Land Beyond Prescribed Amount.* Thus under a statute of Georgia[47] providing that the state of Georgia will not consent to foreign corporations owning five thousand or more acres of land in that state, unless they shall become incorporated under the laws thereof, it is held that the state alone can question the right of foreign corporations to hold land in contravention of the statute.[48]

(II) *Rule Prevents Title of Corporation From Being Assailed by Its Grantor.* If a corporation is authorized to purchase land for certain purposes, and for no other, a deed of land executed to it, by one having capacity to convey, will vest title in it, which title can be assailed, on the ground that the purchase is *ultra vires*, only by the state or by a shareholder, but not by the grantor.[49]

46. *Arizona.*— Tidwell *v.* Chricahua Cattle Co., (1898) 53 Pac. 192.

California. — Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544.

Colorado.— Water Supply, etc., Co. *v.* Tenney, 24 Colo. 344, 51 Pac. 505, right of a corporation, under its articles, to hold real property cannot be attacked by another corporation in an action between the two.

Illinois.— Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088 (question cannot be raised by one having adverse possession, but only by the state); Cooney *v.* A. Booth Packing Co., 169 Ill. 370, 48 N. E. 406; Alexander *v.* Tolleston Club, 110 Ill. 65; Hough *v.* Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230; Henderson *v.* Virden Coal Co., 78 Ill. App. 437 (holding that a lessor, his heirs, or devisees cannot assail a lease to a corporation upon the ground that it already held more real estate than it was authorized by its charter to hold, as that is an objection which can be raised only by the state); Lauder *v.* Peoria Agricultural Soc., 71 Ill. App. 475.

Indiana.— Hayward *v.* Davidson, 41 Ind. 212.

Kentucky. — Miller *v.* Flemingsburg, etc., Turnpike Co., 109 Ky. 475, 59 S. W. 512, 22 Ky. L. Rep. 1039.

Maine.— Farrington *v.* Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 399.

Maryland. — Hagerstown Mfg. Min., etc., Co. *v.* Keedy, 91 Md. 430, 46 Atl. 965 (trustee in a deed of trust executed by a beneficial association, in the absence of fraud, cannot raise the question that the purchase was *ultra vires*, since that is a matter between the corporation and the state, and can be tried only in a direct proceeding by the state to annul the charter); *In re* Stickney, 85 Md. 79, 36 Atl. 654, 60 Am. St. Rep. 308, 35 L. R. A. 693.

Missouri.— Ragan *v.* McElroy, 98 Mo. 349, 11 S. W. 735; Shewalter *v.* Pirner, 55 Mo. 218; Land *v.* Coffman, 50 Mo. 243; Chambers *v.* St. Louis, 29 Mo. 543; McIndoe *v.* St. Louis, 10 Mo. 575.

Nebraska.— Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104 (right of a corporation to hold real estate, or to purchase or hold a lien thereon, can be questioned only by the state); Missouri Valley Land Co. *v.* Bushnell, 11 Nebr. 192, 8 N. W. 389.

Nevada.— Whitman Gold, etc., Min. Co. *v.* Baker, 3 Nev. 386.

New Jersey.— De Camp *v.* Dobbins, 29 N. J. Eq. 36.

New York.— Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466; People *v.* Mauran, 5 Den. 389; Silver Lake Bank *v.* North, 4 Johns. Ch. 370; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633.

North Carolina.— Mallett *v.* Simpson, 94 N. C. 37, 55 Am. Rep. 595.

Pennsylvania.— Goundie *v.* Northampton Water Co., 7 Pa. St. 233; Baird *v.* Washington Bank, 11 Serg. & R. 411; Leazure *v.* Hillegas, 7 Serg. & R. 313.

Tennessee.— Barrow *v.* Nashville, etc., Turnpike Co., 9 Humphr. 304.

Texas.— Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686; Ray *v.* Foster, (Civ. App. 1899) 53 S. W. 54.

Virginia.— Banks *v.* Poitiaux, 3 Rand. 136, 15 Am. Dec. 706.

Wisconsin.— Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

United States.— Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317; Genesee Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; St. Louis Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188; Runyan *v.* Coster, 14 Pet. 122, 10 L. ed. 382; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 22 Fed. Cas. No. 13,188*a*, 6 Sawy. 157.

The report of a legislative committee that the property of a corporation is properly taxed does not amount to a concession on the part of the state that the corporation had a right to acquire the title to the property. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664.

47. Ga. Act Feb. 28, 1877.

48. American Mortg. Co. *v.* Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529.

For an exception to the rule in the case of devises to corporations see *supra*, XVII, D, 1, c, (V), (B).

49. Hough *v.* Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230.

(III) *Rule Enables Corporations to Recover Against Trespassers.* The foregoing rule enables a corporation, which has received a grant of land, to maintain an action against a trespasser to recover possession of it; and the trespasser will not be heard to question the title of the corporation on the ground that it has no authority to take the lands.[50]

(IV) *Rule Enables Corporation to Pass Good Title to Its Grantee.* The rule also operates in such a way that although the state might in a direct proceeding for that purpose have overthrown the title of the corporation and escheated the property to its own use, yet, not having done so, the corporation may in the mean time convey an indefeasible title to another, of whatever estate in the lands had been conveyed to or acquired by it.[51]

(V) *Rule Prevents Private Persons From Questioning Validity of Conveyance by or to Corporation.* The rule also operates to prevent third persons having no interest in land conveyed by one corporation to another from disputing the validity of the conveyance.[52] Thus a stranger to the original title to land deeded to a corporation cannot take advantage of the fact that the deed was not executed with the consent of the holders of two thirds of the capital stock of the corporation, as required by statute, if the shareholders have made no objection.[53]

(VI) *Rule Applies Where Corporation May, Under Certain Circumstances, Acquire and Hold Land.* Under the operation of this principle, where property which a corporation, under certain circumstances, is authorized by its charter to acquire, is purchased in a mode or for a purpose not authorized, the title of the corporation to the property cannot be defeated by a party who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer.[54] The doctrine on this subject may therefore be summed up in the proposition that the power of a corporation to acquire and hold title to land cannot be questioned by any party except the state, where it has the power to hold land under any circumstances or for any purpose;[55] and we have seen that it has at common law the implied power to hold land for the purposes of its creation.[56]

(VII) *Rule Does Not Apply Where Corporation Is Seeking to Acquire Land Which It Has No Power to Acquire and Hold.* This principle has no application where the corporation is seeking the aid of a court of justice to enable it to acquire lands which it has no power to acquire and hold. Here the principle is that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law.[57]

h. Presumption in Favor of Power of Corporation to Take and Hold Land. There is a general presumption in favor of the power of a corporation to take and hold land, until the contrary is made to appear;[58] so that if a corporation is authorized under some circumstances to hold and convey real estate, it will be presumed, in the absence of evidence to the contrary, that the real estate which

50. Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 22 Fed. Cas. No. 13,188*a*, 6 Sawy. 157.

51. Shewalter *v.* Pirner, 55 Mo. 218; Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

52. Beels *v.* North Nebraska Fair, etc., Assoc., 54 Nebr. 226, 74 N. W. 581; Benton *v.* Elizabeth, 61 N. J. L. 411, 39 Atl. 683, 906 [*affirmed* in 61 N. J. L. 693, 40 Atl. 1132].

53. Boston, etc., Copper, etc., Min. Co. *v.* Montana Ore-Purchasing Co., 89 Fed. 529 [*disapproving* Pekin Min., etc., Co. *v.* Kennedy, 81 Cal. 356, 22 Pac. 679; McShane *v.* Carter, 80 Cal. 310, 22 Pac. 178].

54. Ehrman *v.* Union Cent. L. Ins. Co., 35 Ohio St. 324.

55. Hamsher *v.* Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; Alexander *v.* Tolleston Club, 110 Ill. 65; Hayward *v.* Davidson, 41 Ind. 212; Gilbert *v.* Hole, 2 S. D. 164, 49 N. W. 1.

56. As to which see *supra*, XVII, D, 1, a, (I).

57. Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369 (specific performance of an agreement to convey land to a railroad company refused because the company had no power under its charter to take and hold land); Case *v.* Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513.

58. Diamond Coal Co. *v.* Cook, (Cal. 1900) 61 Pac. 578.

it undertook to convey was held and conveyed under those circumstances and in pursuance of its powers.[59]

i. In Case of Grants of Land to Corporations Before Being Organized, Acceptance Presumed — (i) *In General.* A deed of conveyance of land to an intended corporation, before its organization, will take effect upon the event of its organization; for its acceptance of the deed, when it becomes capable of accepting, will be presumed;[60] whereas, onerous contracts made by promoters will not bind the future corporation, in the absence of an affirmative ratification.[61] Thus a deed of land to a corporation, dated after its charter, but before its organization, and recorded after its organization, although before the institution of the suit, is admissible as evidence of title in the corporation, in an action by it for a trespass upon the land.[62] So after letters-patent, another expression for a charter, have been issued by the governor, as required by the law of Pennsylvania, to a corporation, a deed of conveyance to the company will vest the estate in it, although the corporation has not been organized by the election of its officers. The assent of the corporation to the grant will be presumed.[63]

(ii) *Circumstances Under Which Vendor Becomes Trustee of Title For Purchaser.* So where a purchase is made by several persons representing a voluntary association of Christians, for the common benefit of all the persons composing the association, and the purchase-money is paid, and possession of the land given, equity raises a promise by the vendor to make a title, either to the persons making the payment, or to the corporation, if one be created. In such case the vendor, as to the title, becomes a trustee for the purchasers; and, they being the mere agents of the voluntary association, the moment the association is incorporated it has a right to a conveyance from the vendor.[64]

j. Conveyances to Non-Existent and De Facto Corporations — (i) *In General.* As already seen[65] there must be two parties to every contract, and to every deed of conveyance, a grantor and a grantee. A deed to a person having no existence is generally inoperative and passes no present title from the grantor.[66] If a man grant his estate to an imaginary person, who exists only in his own mind, no title passes. But the mere fact that a corporation has been irregularly organized will not render invalid the title to land which has been derived from it in good faith.[67] In applying this principle it will often be difficult to distinguish between a non-existent or imaginary and a *de facto* corporation;[68] but the distinction is said to be that if there is a law authorizing the organization of the supposed corporation, then whether it has been properly organized is a question of fact, and a party contracting with it is estopped from disputing the fact that it has been properly organized. But where there is no law authorizing it to be organized, or if the statute authorizing it is unconstitutional and void, then a contract with it will not estop the party making it from disputing its existence.[69] If therefore the owner of land conveys the same to a *de facto* railroad corporation in settlement of his subscription to its capital stock, and it conveys the land for value to an innocent purchaser, the original grantor cannot maintain ejectment for it against

59. Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466. See also State University *v.* Detroit Young Men's Soc., 12 Mich. 138, opinion by Christiancy, J.

60. Rotch's Wharf Co. *v.* Judd, 108 Mass. 224.

Facts from which the acceptance of a charter will be presumed see U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552; and *supra*, I, J, 7, b.

61. See *supra*, I, Q, 2.

62. Rotch's Wharf Co. *v.* Judd, 108 Mass. 224.

63. Rathbone *v.* Tioga Nav. Co., 2 Watts & S. (Pa.) 74.

64. African M. E. Church *v.* Conover, 27 N. J. Eq. 157.

65. See *supra*, XII, D, 5, c.

66. Harriman *v.* Southam, 16 Ind. 190; African M. E. Church *v.* Conover, 27 N. J. Eq. 157; Russell *v.* Topping, 21 Fed. Cas. No. 12,163, 5 McLean 194.

67. Snyder *v.* Studebaker, 19 Ind. 462, 81 Am. Dec. 415; Brown *v.* Phillipps, 16 Iowa 210.

68. See *supra*, I, O, 1, a *et seq.*

69. Snyder *v.* Studebaker, 19 Ind. 462, 81 Am. Dec. 415 [*overruling* Harriman *v.* Southam, 16 Ind. 190; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395].

such innocent purchaser, by setting up that the corporation was in fact non-existent.[70] Nor can he maintain a bill in equity to set aside such conveyance and have the title revested in him.[71]

(II) *Rescission and Cancellation of Conveyances of Land to Corporation Not Empowered to Take and Hold* — (A) *In General.* An attempt to rescind a conveyance or an agreement to convey land to a corporation, on the ground that it has no capacity to take and hold land, or on the ground that it is non-existent as a corporation, will generally be met by the principle of estoppel, whichever party seeks the rescission. Thus if the corporation is the vendor, the vendee cannot set up its want of capacity to take and hold land as a defense to an action to recover the purchase-price; because, on a principle already seen,[72] the question of the capacity of the corporation is merely a question between it and the state.[73] But there are cases proceeding in seeming violation of this principle.

(B) *Cases Where Such Rescissions and Cancellations Have Been Permitted.* Thus where a man has given a bond to convey certain salt marsh lands to a turnpike company, not needed by it in constructing or operating its road, his subsequent grantee of the same lands was allowed to maintain a suit to cancel the bond as a cloud upon his title, although his deed mentioned the bond, and the conveyance was made to him subject to it.[74] So where a corporation advanced money on a purchase of real estate at a sale on execution and then, perceiving that by its charter it could not hold land, relinquished the purchase to a third person, who agreed to take the bid and repay the money, it was held that the corporation could recover from such person the amount advanced.[75]

(C) *No Rescission on Ground That Land Is Being Used For Unauthorized Purpose.* It is no ground for the rescission of a contract for the sale of land to a corporation, upon a bill in equity by the vendor, that the corporation has used the land for different purposes from those for which it was authorized to use real estate by its charter,[76] this misuser being likewise a question with which the state alone is concerned. So where a corporation brings a suit in equity for the purpose of restraining one who has conveyed land to it from violating the contract he will not be heard to set up the defense that the purchase was *ultra vires*, as where the land had been conveyed to a railroad company for the purpose of being used as an excursion ground.[77] When therefore land was conveyed to a corporation with the declared purpose of establishing a gate and toll-house thereon, and the vendor sold it for that purpose alone, and the corporation afterward abandoned that purpose and rented the land to a blacksmith, in the absence of any condition in the deed restricting the purpose for which the grantee might use the land, it was held that a court of chancery would not rescind the conveyance.[78]

(D) *No Rescission on Ground That Grantee Corporation Is Non-Existent.* So one who has conveyed land to a corporation will not, especially after the corporation has conveyed it to a second purchaser for value, be allowed to recover possession of the land on the ground that the corporation was non-existent, provided it was a corporation *de facto*, that is such a corporation as might have been properly organized under some existing law.[79] Nor in such a case can the vendor

70. Snyder *v.* Studebaker, 19 Ind. 462, 81 Am. Dec. 415.

71. Brown *v.* Phillipps, 16 Iowa 210.

72. See *supra*, XVII, D, 1, g, (I), (A).

73. Missouri Valley Land Co. *v.* Bushnell, 11 Nebr. 192, 8 N. W. 389. But see Russell *v.* Topping, 21 Fed. Cas. No. 12,163, 5 McLean 194.

74. Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517.

75. Crutcher *v.* Nashville Bridge Co., 8 Humphr. (Tenn.) 403.

76. Hamilton *v.* Annapolis, etc., R. Co., 1 Md. Ch. 107; Barrow *v.* Nashville, etc., Turnpike Co., 9 Humphr. (Tenn.) 304 (opinion by Green, J.).

77. Shelby *v.* Chicago, etc., R. Co., 143 Ill. 385, 32 N. E. 438 [*affirming* 42 Ill. App. 339]. But *compare supra*, XVII, D, 1, j, (II), (C).

78. Barrow *v.* Nashville, etc., Turnpike Co., 9 Humphr. (Tenn.) 304.

79. Snyder *v.* Studebaker, 19 Ind. 462, 81 Am. Dec. 415.

maintain a suit in equity to cancel the conveyance and revest the title in himself, there being no equity in such a bill.[80]

(E) *This Estoppel Works Also Against Corporation.* The estoppel works against the corporation, as well as for it. It will not for example be permitted to repudiate a purchase, as not falling within the scope of its charter, where the mass of the property so purchased does fall within the general scope of the charter, and the only objection is that some articles, apparently unnecessary, are included.[81]

k. Power of Alienation or Disposition — (I) *In General.* As the *jus disponendi* is an incident of ownership, whenever a corporation has the power to own land it has the power to dispose of it in like manner as a natural person might do.[82] The law goes further. Although as against the state the corporation may not have the power to hold land to which it has acquired a fee-simple title, and although it may hold it subject to the constant risk of intervention by the state, yet, until the state intervenes to escheat it, the corporation may transfer it to another and pass a good title to him. It may grant to another corporation the right to use such land for any purpose within the powers of the grantee, although such purpose was not within the powers of the grantor.[83] Although a corporation may not have the power to hold particular land for the reason that it is not required for the purposes of the corporation, yet it may sell such land and pass a good title to the purchaser.[84]

(II) *Power to Sell and Dispose of All Its Property.* A strictly private corporation, owing no peculiar duties to the public, has the same dominion over and power to dispose of its property that an individual has; and when the exigencies of its business render it necessary it may, if done in good faith and with the assent of its shareholders, discontinue business and dispose of its entire assets and property, with a view to paying its debts and closing up the affairs of the corporation.[85] A private manufacturing corporation has the right temporarily to lease or rent its plant, when the purpose of such action is not an abandonment of its franchise, for the purpose of raising a fund so as to enable it afterward to conduct its business profitably and to continue the business for which it was created, although the leasing of its property is not within the powers enumerated

80. Brown *v.* Phillipps, 16 Iowa 210.

81. Moss *v.* Averell, 10 N. Y. 449.

82. That there is no difference between a corporate and individual debtor with respect to the power of disposition of property, except so far as the corporation is restrained by its charter or by the general rules of law, see Childs *v.* N. B. Carlstein Co., 76 Fed. 86.

83. Benton *v.* Elizabeth, 61 N. J. L. 411, 39 Atl. 683, 906 [*affirming* 41 N. J. L. 693, 40 Atl. 1132].

84. Freeman *v.* Sea View Hotel Co., 57 N. J. Eq. 68, 40 Atl. 218, hotel company may sell land originally purchased for its hotel site and purchase other property, where a change of condition makes such a course advisable.

Charter provision construed to authorize the general manager of a corporation to sell land purchased at trustee's sale for the corporation, the title to which is taken in the name of an individual. Reddell *v.* J. B. Watkins Land Mortg. Co., (Tex. Civ. App. 1896) 37 S. W. 608.

Construction of a statute prohibiting the sale of mine works, real estate, or the franchises of mining corporations without the consent of the holders of three fifths of the capital stock, with the conclusion that it does not prohibit the sale of lands or standing not used for mining purposes. Baggaley *v.* Pittsburg, etc., Iron Co., 90 Fed. 636, 33 C. C. A. 202.

85. Morisette *v.* Howard, 62 Kan. 463, 63 Pac. 756. To the same effect see the following cases:

California.— Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

Iowa.— Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263.

Louisiana.—Leathers *v.* Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661.

Massachusetts. — Treadwell *v.* Salisbury Mfg. Co., 7 Gray 393, 66 Am. Dec. 490; Sargent *v.* Webster, 13 Metc. 497, 46 Am. Dec. 743.

New Jersey.— Sewell *v.* East Cape May Beach Co., 50 N. J. Eq. 717, 25 Atl. 929.

Pennsylvania.— Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

Rhode Island.—Phillips *v.* Providence Steam Engine Co., 21 R. I. 302, 43 Atl. 598, 45 L. R. A. 560.

England.— Wilson *v.* Miers, 10 C. B. N. S. 348, 3 L. T. Rep. N. S. 780, 100 E. C. L. 348.

in its charter.[86] A statute empowering corporations to purchase, hold, sell, mortgage, and convey real and personal property renders valid a voluntary transfer by an insolvent corporation of all its property in payment of outstanding valid mortgage liens, when such transfer is made in good faith.[87] But it has been held that neither the directors nor a majority of the shareholders of a corporation have power at common law to sell or otherwise transfer all its property while the corporation is a going, prosperous concern, able to achieve the objects of its creation as against the dissent of any shareholder.[88] Moreover a transfer by a corporation of its entire assets and property of every description, to another company, in consideration of shares of stock in the latter, not made with the intention of winding up its affairs and dividing the stock among its own shareholders, or as a temporary arrangement, but as a permanent investment, is *ultra vires* and may be set aside in an action by a dissenting shareholder.[89] A power conferred by statute upon the trustees of mining corporations to "sell, lease, mortgage, or otherwise dispose of" certain mining property does not extend so far as to render valid an exchange of all the property of a mining company for the capital stock of a foreign corporation.[90]

l. Power of Foreign Corporations to Take and Hold Land. This is governed entirely by the law of the state or country within which the land is situated. A statute of Illinois prohibiting foreign corporations from purchasing or holding land except as therein provided, and prohibiting any corporation from accepting any trust except upon the deposit of a certain sum with the auditor of public accounts, has been construed as not prohibiting a foreign corporation from taking a mortgage of land to secure a debt.[91] Where there is a statute requiring foreign corporations, as a condition precedent to doing business in the domestic state, to file their certificates of incorporation, charter, etc., such a corporation may take under a trust deed executed before, but not delivered until after, compliance with such a statute.[92]

m. Estoppels With Respect to Corporate Acquisition and Ownership of Land. The rule obtains here as elsewhere[93] that a corporation acquiring land cannot keep the benefit and plead *ultra vires* when it is sought to charge it with the burden. A corporation which has obtained the full benefit of an unauthorized purchase of land by its president cannot, while retaining the land, defeat the vendor's right of recovery, on the ground that the particular mode under which the contract was made was *ultra vires*.[94] So a corporation which acquired property from one in whose hands it was charged with a lien for the payment of a claim for services rendered while the property was in the possession of a receiver cannot question the legality of the claim, where its grantor was a party to the action in which the lien was adjudicated.[95]

2. Power to Take, Hold, and Transfer Personal Property — a. In General. A corporation may acquire and hold any species of personal property the use of

86. Plant *v.* Macon Oil, etc., Co., 103 Ga. 666, 30 S. E. 567.

87. Klosterman *v.* Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136.

88. Forrester *v.* Butte, etc., Copper, etc., Min. Co., 21 Mont. 544, 55 Pac. 229 [*rehearing denied* in 21 Mont. 565, 55 Pac. 353 (*citing* People *v.* Ballard, 134 N. Y. 269, 32 N. E. 54, 48 N. Y. St. 166, 17 L. R. A. 737; Abbot *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578, and *distinguishing* Tredwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490)].

89. Byrne *v.* Schuyler Electric Mfg. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304.

90. Forrester *v.* Butte, etc., Copper, etc., Min. Co., 21 Mont. 544, 55 Pac. 229 [*rehearing denied* in 21 Mont. 565, 55 Pac. 353]. Circumstances under which an action may be maintained in the name of a corporation to cancel a deed of all its property on the ground that it was procured through fraud. Texas Consol. Compress, etc., Assoc. *v.* Dublin Compress, etc., Co., (Tex. Civ. App. 1896) 38 S. W. 404.

91. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 68 Fed. 412.

92. Miller *v.* Williams, 27 Colo. 34, 59 Pac. 740.

93. See *supra*, XV, C, 2, e.

94. Lake St. El. R. Co. *v.* Carmichael, 82 Ill. App. 344 [*affirmed* in 184 Ill. 348, 56 N. E. 372].

95. Shelburn Coal Min. Co. *v.* Delashmutt, 21 Ind. App. 257, 53 N. E. 102.

which is appropriate to its functions and a reasonable means of carrying out the purposes of its existence. It may acquire a claim for damages to property of a partnership where the whole property of the partnership is transferred to the corporation, which is organized to receive and operate it.[96] A manufacturing corporation may become the owner of a bond, although the power to do so is not specifically granted in its charter or act of incorporation, or necessarily resulting from its proper business; and a defensive pleading which challenges this power has been held bad on demurrer.[97] A corporation authorized by its charter "to receive deposits on trust" may receive money on deposit and give certificates therefor; and this power is not affected by a proviso prohibiting the corporation from issuing bills, bonds, notes, or other securities to circulate in the community as money.[98] A statute of wills,[99] prohibiting devises of land to corporations, leaves them free to acquire personal property in any manner consistent with their charters or with law.[1]

b. May Make Isolated Purchases of Goods, Although Prohibited to Do so as an Employment. A statute providing that "no corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock jobbing, exchange or banking business of any kind" is not construed as invalidating an isolated contract for the purchase of goods. It refers only to the buying and selling of articles of merchandise as an employment, and implies operations conducted with a view of realizing the profits which come from skilful purchase, barter, speculation, and sale.[2]

E. Power to Do Various Acts — 1. To Appoint Agents. As a corporation can act only through the agency of others, its power to appoint agents is necessarily implied from the fact of its existence,[3] and hence where a person sues for his salary as the agent of the corporation he need not allege and prove the power of the corporation to appoint agents.[4]

2. To Act as Agent For Another — a. In General. A corporation may of course act as agent for another to the extent permitted by its charter, governing statute, or articles of incorporation.[5]

b. Acting For Undisclosed Principal in Cotton Speculations. If a saving-bank corporation, without being thereto authorized, assumes to act for an undisclosed principal, in buying and selling futures in cotton, and suffers a loss, and is sued to make good its contracts, it may set up the defense of *ultra vires*, there being no rule of law or of public policy which will prevent it from pleading that it had no power to embark its funds in such an immoral transaction.[6]

3. To Be Attorney in Fact. A corporation may execute a deed as an attorney in fact for another.[7]

4. To Act as Trustee. The power of a corporation to act as trustee for any purpose within the scope of its charter or governing statute,[8] or where it has itself

96. Central Ohio Natural Gas, etc., Co. *v.* Capital City Dairy Co., 60 Ohio St. 96, 53 N. E. 711.

97. Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 467.

98. Talladega Ins. Co. *v.* Landers, 43 Ala. 115.

99. See *supra*, XVII, D, 1, c, (v), (B).

1. Sherwood *v.* American Bible Soc., 4 Abb. Dec. (N. Y.) 227.

2. Graham *v.* Hendricks, 22 La. Ann. 523.

An analogous rule of interpretation exists in respect of statutes prohibiting foreign corporations from doing or carrying on business within the domestic state, without complying with certain prescribed conditions. See, generally, Foreign Corporations.

3. Cincinnati, etc., R. Co. *v.* Clarkson, 7 Ind. 595.

4. Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514.

Evidence supporting a finding of an employment, by the vice-president of a railroad company, of agents to take care of its lands. Chicago, etc., R. Co. *v.* James, 24 Wis. 388.

5. Frostburg Mut. Bldg. Assoc. *v.* Lowdermilk, 50 Md. 175.

6. Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 33 N. Y. St. 335, 19 Am. Rep. 482, 9 L. R. A. 708.

7. Killingsworth *v.* Portland Trust Co., 18 Oreg. 351, 23 Pac. 66, 17 Am. St. Rep. 737, 7 L. R. A. 638.

8. Sheldon *v.* Chappell, 47 Hun (N. Y.) 59, 13 N. Y. St. 35.

an interest in the trust fund or property,[9] is entirely free from doubt; although of course it cannot act as a trustee where it has no interest, and where the purposes of the trust are entirely foreign to its institution.[10] Upon this subject it has been said in a learned opinion by Sharkey, P. J.: "Before the statute of uses,[11] there was a limitation or restriction as to those who could stand seized to uses; but since the passage of that statute, trusts have been adopted to supply the place of uses, and the former inability to stand seized to a use, no longer prevails. The general rule now is, that all persons capable of confidence, and of holding real or personal property, may hold as trustees. Corporations may now hold as trustees, although they could not be seized to a use before the statute."[12] The principle that a corporation cannot be a trustee for a purpose wholly foreign to the objects of its own institution is illustrated by a case where a devise had been made to a corporation which was chartered "to establish an institution in the town of Newmarket for the instruction of youth," and the will directed the corporation to hold the principal of the funds, and pay over the income for the support of missionaries.[13] Although a corporation as a general rule cannot be a trustee in a matter in which it has no interest, yet, where property is devised to a corporation partly for its own use and partly in trust for others, the power to take the property for its own use carries with it the power to execute the trust in favor of others.[14] The power of a corporation to take as trustee under a devise or bequest in a will does not according to one view depend upon the fact of its being incorporated so as to be capable of taking at the time of the death of the testator; but where the bequest is made to an unincorporated society by name it will be sufficient that it becomes incorporated after the death of the testator;[15] although some courts hold that a bequest to an unincorporated society is valid.[16]

5. To Be Beneficiary in a Trust. A corporation may be and often is the beneficiary in a trust, of which an instance is found in the case where a corporation lends money and takes as security a note or bond secured by a deed of trust in the nature of a mortgage, which consists in the conveyance of real or personal property to a trust, with a power of sale, upon a prescribed notice, in the case of default in the payment of principal or interest. An instrument creating a trust made to "A B, treasurer" of a corporation named, inures to the benefit of the corporation, although it has been held with senseless technicality for the life of the treasurer only.[17]

6. To Act as Executor or Administrator — a. In General — (1) *Ancient Rule* — (A) *Rule Stated.* The idea of the old law was that a corporation could not act as executor or administrator, because it could not take the oath of office,[18] because it could not be a feoffee in trust for others, and because it was a body created for a special purpose, which did not include such a purpose.[19] The diffi-

9. Sheldon *v.* Chappell, 47 Hun (N. Y.) 59, 13 N. Y. St. 35; *In re* Howe, 1 Paige (N. Y.) 214.

10. South Newmarket Methodist Seminary *v.* Peaslee, 15 N. H. 317; *In re* Howe, 1 Paige (N. Y.) 214.

11. 27 Hen. VIII, c. 10.

12. Sinking Fund Com'rs *v.* Walker, 6 How. (Miss.) 143, 185, 38 Am. Dec. 433. A great array of cases might be cited, where bequests to corporations, which have been made for charitable purposes, have been sustained. Burbank *v.* Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; Wade *v.* American Colonization Soc., 7 Sm. & M. (Miss.) 663, 45 Am. Dec. 324.

13. South Newmarket Methodist Seminary *v.* Peaslee, 15 N. H. 317.

14. *In re* Howe, 1 Paige (N. Y.) 214. See also Sheldon *v.* Chappell, 47 Hun (N. Y.) 59, 13 N. Y. St. 35.

15. Wade *v.* American Colonization Soc., 7 Sm. & M. (Miss.) 663, 45 Am. Dec. 324.

16. Bartlett *v.* Nye, 4 Metc. (Mass.) 378; Burbank *v.* Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422.

17. Andover First Baptist Soc. *v.* Hazen, 100 Mass. 322.

18. Bacon Abr. tit. Executors and Administrators 2; 1 Bl. Comm. 477; Comyns Dig. Adm. b. 2; Wentworth Ex. c. 1, p. 39; Williams Ex. 268.

19. Georgetown College *v.* Browne, 34 Md. 450; Bacon Abr. tit. Executors and Administrators 2. See also *In re* Thompson, 33 Barb. (N. Y.) 334. The English doctrine that a corporation can act as executor or adminis-

culty with respect of taking the oath of office was avoided by allowing the corporation to appoint one of its members as a syndic to take the oath; but it has been said that this practice is inadmissible in this country.[20] The question was, however, left undecided.

(B) *Corporation Sole May so Act.* A corporation sole was competent to act as executor or administrator, if otherwise empowered thereto, since it could take the oath of office.[21]

(II) *Modern Corporations May so Act if Thereto Empowered.* "There is," says Wales, J., "no inherent disability or disqualification belonging to a corporation as such which excludes it from acting as an administrator; and it may accept the office if not prohibited by its charter, or forbidden by statute, whenever from the objects of its incorporation and the nature of its business it may become necessary and proper, and it is able to comply with the conditions prescribed by law as to giving bond, etc."[22] In fact trust companies are incorporated in several states with the faculty of acting as executor or administrator of the estates of decedents.[23]

b. Whether Foreign Corporation May so Act. A foreign corporation, authorized by the law of its creation to act as executor of the estate of a deceased person, may perform the functions of a foreign executor in like manner as it could do if it were a natural person, unless there is something in the statute law of the domestic state or country which renders the exercise of such functions inadmissible. In Delaware it has been found that there is nothing either in the statute law of the state or in its public policy which deprives a corporation created in another state for the purpose of acting as executor or administrator from exercising such functions in that state.[24]

7. To Act as Committee of Lunatic. A corporation which, under a provision of its governing statute, has the power "to execute trusts of every description," is presumed to have capacity to act as the committee of a lunatic, in the absence of any specific restriction in its charter.[25]

8. To Act as Assignee For Creditors. A corporation may act as assignee for the creditors of an insolvent debtor, in like manner as it may execute any other trust, if thereto authorized by its charter and governing statute.[26]

9. Cannot Enter Into Partnership — a. General Rule. Provisions are made by statutes, it may be assumed, in all the states, for the consolidation or amalgamation of corporations, providing schemes by which two or more corporations may unite or consolidate their funds into a single incorporated enterprise.[27] Outside

trator has been frequently recognized in this country. *In re* Kirkpatrick, 22 N. J. Eq. 463.

20. Porter *v.* Trall, 30 N. J. Eq. 106.

21. Toller Ex. 30; Will. Ex. 269; and authorities.

22. Fidelity Ins., etc., Deposit Co. *v.* Niven, 5 Houst. (Del.) 416, 430, 1 Am. St. Rep. 150.

23. 14 Del. Laws 714. So stated in Porter *v.* Trall, 30 N. J. Eq. 106, as to a corporation in Philadelphia and in Camden Safe Deposit, etc., Co. *v.* Ingham, 40 N. J. Eq. 3, as to one in New Jersey. See Schouler Ex. § 32; 1 Woerner Adm. 509. It has also been held that a partnership firm may be nominated as executors, and that letters testamentary will be granted to the individual members of the firm. *Re* Fernie, 6 Notes Cas. 657 [*cited* in 1 Woerner Adm. 510]. That a person (and *a fortiori* a corporation) will not be allowed to act as executor, although nominated to be such in the will, unless capable of taking the office, is shown by Berry *v.* Hamilton, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515. And see a learned note to this case, 54 Am. Dec. 518 *et seq.*, on the question who may act as executor or administrator. A decision of the court of appeals of Kentucky, not officially reported, is to the effect that a provision in the charter of a corporation, authorizing it to act as executor, administrator, etc., that the capital stock shall be taken and considered as security required by law for the faithful performance of its duties, and that other security shall not be required upon its appointment as administrator, except when required by the court of parties in interest, is not unconstitutional. Coleman *v.* Parrott, 13 S. W. 525, 11 Ky. L. Rep. 947.

24. Fidelity Ins., etc., Deposit Co. *v.* Nivens, 5 Houst. (Del.) 416, 1 Am. St. Rep. 150.

25. Equitable Trust Co. *v.* Garis, 190 Pa. St. 544, 42 Atl. 1022, 44 Wkly. Notes Cas. (Pa.) 41, 70 Am. St. Rep. 644.

26. Roane Iron Co. *v.* Wisconsin Trust Co., 99 Wis. 273, 74 N. W. 818, 67 Am. St. Rep. 856.

27. See *supra*, III, A, 1 *et seq.*

of such provisions the general rule is that although corporations may make joint contracts, by which they will be jointly or severally liable with other parties,[28] yet they cannot consolidate their funds with each other so as to form a partnership,[29] amalgamate into a new corporation without the consent of the legislature,[30] or enter into a partnership with a private individual unless the legislature has enabled them so to do.[31]

b. View That Corporation Can Enter Into Partnership With Individuals to Effectuate Object of Its Creation — (I) *View Stated.* On the other hand we find decisions to the effect that corporations may enter into a copartnership with natural persons for the purpose of carrying on the business for which the corporation was created.[32]

(II) *Recovery on Instruments Made to Them in Their Partnership Name.* Where two corporations, or a corporation and a natural person, have assumed to enter into a partnership, and have done business jointly, they may recover upon obligations made to them in their partnership name, irrespective of their rights and duties as between themselves, or of the power of the corporation to enter into a partnership.[33]

10. Cannot Take an Oath. A corporation aggregate cannot take an oath,[34] although a corporation sole can.[35]

11. May Incur Expenses on Account of Injured Employees. An implied power will be ascribed to any corporation employing labor, to incur expense on account of injuries received by its employees in the line of their employment, in the absence of any express statutory grant of such power.[36] A more difficult question arises as to the power of particular officers or agents of corporations to charge them with such expenses; and this has been already considered.[37]

12. May Establish Fund For Benefit of Sick and Wounded Employees. Railroad companies have the implied power, as incidental to their power to employ labor and to render compensation therefor, to establish by levying assessments upon the wages of their employees in pursuance of contracts made with them, a fund for the relief of such employees when sick or wounded, and to assume the management of the funds so raised; to erect and maintain therewith hospitals wherein to treat such sick and wounded employees; and to make additional contributions thereto out of their corporation funds.[38]

28. Chicago Mar. Bank *v.* Ogden, 29 Ill. 248.

29. Chicago Mar. Bank *v.* Ogden, 29 Ill. 248; New York, etc., Canal Co. *v.* Fulton Bank, 7 Wend. (N. Y.) 412; Mallory *v.* Hanaur Oil Works, 86 Tenn. 598, 8 S. W. 396.

30. Charlton *v.* Newcastle, etc., R. Co., 5 Jur. N. S. 1096, 7 Wkly. Rep. 731. See also *supra*, III, A, 1.

31. *Alabama.*— Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353.

Georgia.— Gunn *v.* Central R. Co., 74 Ga. 509.

Illinois.— Bishop *v.* American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317.

Massachusetts.—Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Whittenton Mills *v.* Upton, 10 Gray 582, 71 Am. Dec. 681.

Ohio.— Merchants' Nat. Bank *v.* Standard Wagon Co., 9 Ohio S. & C. Pl. Dec. 380, 6 Ohio N. P. 264.

Texas.— Sabine Tram Co. *v.* Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837.

United States.— California Nat. Bank *v.* Kennedy, 167 U. S. 362, 17 S. Ct. 831, 42 L. ed. 198; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748; Central Transp. Co. *v.* Pullman Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Pittsburg, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441, 16 L. ed. 184.

England.— East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 16 Jur. 249, 21 L. J. C. P. 23, 73 E. C. L. 775.

32. Catskill Bank *v.* Gray, 14 Barb. (N. Y.) 471; Allen *v.* Woonsocket Co., 11 R. I. 288.

33. French *v.* Donohue, 29 Minn. 111, 12 N. W. 354.

34. Alabama, etc., R. Co. *v.* Oaks, 37 Ala. 694.

35. See *supra*, XVII, E, 6, a (I), (B).

36. Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188, 95 Am. Dec. 484.

37. See *supra*, X, C, 6, a *et seq.*

38. *Illinois.*— Eckman *v.* Chicago, etc., R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750.

Indiana.— Pittsburg, etc., R. Co. *v.* Moore,

13. No Power to Contract For Payment of Pension. It has been held that the trustees of a mutual life-insurance company have no power to contract to pay a retiring president of the company a salary for life in consideration of past services rendered by him.[39]

14. Cannot Pay Bonus to Its President For His Influence in Securing Consolidation. An agreement by one insurance company that another, which it had absorbed by purchasing a controlling interest in its stock, shall pay to its president, on his retirement, a certain sum for his influence in securing the consolidation, is invalid, and he cannot recover the amount from the purchaser on refusal of payment.[40]

15. May Compromise Disputed Claims. A corporation undoubtedly has, by mere implication of law, and without any statutory expression to that effect, the same power of compromising claims preferred against it which an individual has;[41] and we have already seen that *bona fide* compromises between a corporation and its shareholders, in respect of the amounts due upon their shares, will be upheld even as against creditors.[42]

16. No Power to Create Forfeitures — a. In General. A corporation cannot exercise the power of creating forfeitures unless that power has been expressly granted, and then the power can be exercised only by due process of law.[43]

b. No Power to Forfeit Shares For Non-Payment of Additional Assessments. In the absence of an enabling statute no corporation has the power to make an additional assessment upon the shares of its capital stock, after they have been paid for in full, and to forfeit the shares for the non-payment of the same.[44]

17. Power to Establish Transportation Lines. A charter conferring upon a corporation the power to make and keep in repair a road to the top of Mount Washington, to take tolls of passengers and for carriages, to build and own toll-houses, and to take land for the road, did not authorize the corporation to establish stage and transportation lines, or to buy carriages and horses for such a purpose. Nor did an additional act empowering it to erect and maintain, lease, and dispose of any buildings found convenient for the accommodation of its business, and of the horses, carriages, and travelers passing over its road, authorize the purchase of carriages and horses for the purpose of transportation.[45]

18. Power to Make Extraterritorial Contracts. A corporation chartered in one state for the purpose of manufacturing certain articles of commerce, "and

152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Lease *v.* Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423. *Contra*, Pittsburg, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301.

Iowa.— Donald *v.* Chicago, etc., R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492.

Maryland.— Fuller *v.* Baltimore, etc., Employés' Relief Assoc., 67 Md. 433, 10 Atl. 237.

Nebraska.— Chicago, etc., R. Co. *v.* Bell, 44 Nebr. 44, 62 N. W. 314.

New Jersey.— Beck *v.* Pennsylvania R. Co., 63 N. J. L. 232, 43 Atl. 908, 76 Am. St. Rep. 211.

Ohio.— Pittsburg, etc., R. Co. *v.* Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507.

Pennsylvania.— Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. Rep. 628; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854.

United States.— Vickers *v.* Chicago, etc., R. Co., 71 Fed. 139; Otis *v.* Pennsylvania Co., 71 Fed. 136; Maryland *v.* Baltimore, etc., R. Co., 36 Fed. 655; Owens *v.* Baltimore, etc., R. Co., 35 Fed. 715, 1 L. R. A. 75. *Contra*, Miller *v.* Chicago, etc., R. Co., 65 Fed. 305.

39. Beers *v.* New York L. Ins. Co., 66 Hun (N. Y.) 75, 20 N. Y. Suppl. 788, 49 N. Y. St. 182.

40. Wood *v.* Manchester F. Assur. Co., 54 N. Y. App. Div. 522, 63 N. Y. Suppl. 427, 67 N. Y. Suppl. 1150.

41. Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 23 Atl. 287; *In re* Norwich Provident Ins. Soc., 8 Ch. D. 334, 47 L. J. Ch. 601, 38 L. T. Rep. N. S. 267, 26 Wkly. Rep. 441.

42. See *supra*, VI, L, 20. See also *in re* Accidental Death Ins. Co., 7 Ch. D. 568, 47 L. J. Ch. 396, 26 Wkly. Rep. 473.

43. Cotter *v.* Doty, 5 Ohio 393.

As to by-laws creating forfeitures see *supra*, V, D, 1, b, (I) *et seq.*

44. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

As to the forfeiture of shares for non-payment of assessments see *supra*, VI, O, 1, a, (I) *et seq.*

45. Downing *v.* Mt. Washington Road Co., 40 N. H. 230.

disposing of and dealing in the same," may lawfully make contracts for the sale of them, in any other state whose local laws do not prohibit such contracts.[46]

19. Power to Drive or Handle Logs in a Stream. A corporation created to improve the navigation of a river has no incidental power to drive or handle logs therein.[47]

20. Power to Procure Custom-House Certificates. A corporation created for the purpose of manufacturing boxes and other appliances for handling and packing fruit has power to procure custom-house certificates on shipping an order of boxes to a foreign country, in order that they may be reshipped without the payment of custom duties.[48]

21. Power to Maintain School of Instruction. A corporation organized to make and sell instruments designed for practice and instruction in piano-playing has the power to maintain a school for such instruction for the purpose of advertising an invention for teaching the piano owned by the corporation.[49]

22. Cannot Purchase Shares in Other Corporations. As a general rule a corporation cannot, without express statutory authority, subscribe for the shares of another corporation, either directly or indirectly through third persons,[50] especially where this is done in order to enable the subscribing corporation to control the other.[51]

23. Power to Buy Competing Business. It is not against the public policy of New Jersey for a corporation, empowered to engage in and to carry on a manufacturing business of a given kind, to buy the business of its competitors, although such purchase may tend to and may actually produce a temporary monopoly of such manufacture.[52]

24. Power to Furnish Wines and Liquors to Persons Traveling on Its Vehicles. A so-called palace-car company, having power under its charter to "manufacture and use railway cars, with all convenient supplies for persons traveling therein," may lawfully supply wines and liquors to persons so traveling.[53]

25. Cannot Condemn Lands in Order to Resell Them. A corporation authorized to make certain "street works" within the limits of a deviation shown on its deposited plans, and to take for such purpose the land shown on such plans in connection therewith, and which it "may require for the purposes thereof," is not authorized to take land shown on the plans, but not actually needed for street works, in order to sell it at a profit.[54]

26. Power to Offer Rewards For Apprehension of Criminals. A manufacturing and trade corporation has the power to offer and pay a reward for procuring the conviction of persons who have committed a crime affecting the rights of such corporation.[55]

46. Hall *v.* Tanner, etc., Engine Co., 91 Ala. 363, 8 So. 348.

47. Northwestern Imp., etc., Co. *v.* O'Brien, 75 Minn. 335, 77 N. W. 898. See also Bangor Boom Corp. *v.* Whiting, 29 Me. 123.

48. Pierpont Mfg. Co. *v.* Goodman Produce Co., (Tex. Civ. App. 1900) 60 S. W. 347.

49. Virgil *v.* Virgil Practice Clavier Co., 33 Misc. (N. Y.) 200, 68 N. Y. Suppl. 335.

50. Martin *v.* Ohio Stove Co., 78 Ill. App. 105.

51. Martin *v.* Ohio Stove Co., 78 Ill. App. 105; De la Vergne Refrigerating Mach. Co. *v.* German Sav. Inst., 175 U. S. 40, 20 S. Ct. 20, 44 L. ed. 65.

52. Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255 [*affirming* in part and *reversing* in part 56 N. J. Eq. 680, 39 Atl. 923]. As to the right of a corporation to buy the business of its competitors see People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497; State *v.* Nebraska Distilling Co., 29 Nebr. 700, 46 N. W. 155; Wall *v.* London, etc., Corp. [1898] 2 Ch. 469, 67 L. J. Ch. 596, 79 L. T. Rep. N. S. 249. Validity of a department store contract by which the owner of the store agrees not to sell, or allow to be sold, in the store articles of the manufacture of the department store from which it rents the apartment. Standard Fashion Co. *v.* Siegel-Cooper Co., 44 N. Y. App. Div. 121, 60 N. Y. Suppl. 739.

53. People *v.* Pullman's Palace Car Co., 27 Chic. Leg. N. 349 [*affirmed* in 175 Ill. 125, 51 N. E. 664].

54. Donaldson *v.* South Shields Corp., 68 L. J. Ch. 162, 79 L. T. Rep. N. S. 685 [*affirming* 68 L. J. Ch. 102].

55. Norwood, etc., Co. *v.* Anderson, 71 Miss. 641, 16 So. 262.

27. **Power to Take Assignment of Judgment.** Although the business for which a corporation is created is specified to be the manufacture of lumber and the erection of buildings it may take an assignment of a judgment and sue thereon.[56]

28. **Power to Enter Into Monopolistic Combination.** A charter or governing statute which authorizes a corporation to engage in a general distillery business in the state and elsewhere, and to own the property necessary for that purpose, gives it no power to enter upon a scheme of getting into its hands all the distillery business of the country and establishing a virtual monopoly of the business.[57]

29. **Banking Corporation Cannot Engage in Manufacturing.** A corporation organized exclusively for the purpose of banking cannot engage in manufacturing.[58]

F. The Doctrine of Ultra Vires — 1. Nature and Extent of This Doctrine — a. General Statement of Doctrine. Perhaps the most general statement which can be made of the doctrine of *ultra vires* is to say that a contract of a corporation which is unauthorized by, or in violation of, its charter or other governing statute, or entirely outside of the scope of the purposes of its creation,[59] is void, in the sense of being no contract at all, because of a total want of power to enter into it;[60] that such a contract will not be enforced by any species of action in a court of justice;[61] that being void *ab initio* it cannot be made good by ratification,[62] or by any succession of renewals;[63] and that no performance on either side can give validity to the unlawful contract or form the foundation of any right of action upon it.[64]

b. Statement of Early and Rigid Doctrine. Ignoring considerations of natural justice and the principle of estoppel the early courts rigidly applied the principle that where the corporation is moving affirmatively to enforce its unlawful or prohibited contracts courts of justice will withhold their aid, as where a banking corporation sues to enforce a contract reserving a prohibited rate of interest,[65] or

56. Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454.

57. Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200.

58. Bletz *v.* Commonwealth Bank, 55 S. W. 697, 21 Ky. L. Rep. 1554.

Whether incur debts with authorization of all shareholders giving their assent separately. — The shareholders of a corporation acting individually gave their authorization in writing to one who was a large shareholder and chairman of the executive committee of the directors, to improve the grounds of the corporation at his own expense upon the condition of his being reimbursed of his outlays by the corporation. It was held that the corporation was not liable to reimburse him for outlays thus incurred by him in the absence of proof of an acquiescence or ratification. Nicholstone City Co. *v.* Smalley, 21 Tex. Civ. App. 210, 51 S. W. 527.

Liability of corporations for acts of their dummy corporations. — It has been held that a railroad company, having power to conduct a telegraph business, and having a system of telegraph, will be charged in equity with the payment of a judgment for breach of contract, obtained against a telegraph company which it has caused to be incorporated with a small capital, of which it is the sole shareholder, and which it has held out as authorized to contract with regard to its whole telegraph system, where it sells the whole system to a rival telegraph company and leaves the company so organized without assets. Interstate Tel. Co. *v.* Baltimore, etc., Tel. Co., 51 Fed. 49.

59. National Home Bldg., etc., Co. *v.* Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245 [*reversing* 79 Ill. App. 303]; Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

60. Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669; Central Transp. Co. *v.* Pullman's Palace Car. Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

61. Memphis Grain, etc., Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

62. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

63. Orr *v.* Lacey, 2 Dougl. (Mich.) 230.

64. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950. See also as to the doctrine and its reasons *In re* National Permanent Ben. Bldg. Soc., L. R. 5 Ch. 309, 34 J. P. 341, 22 L. T. Rep. N. S. 284, 18 Wkly. Rep. 388; *In re* Cork, etc., R. Co., L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. Rep. N. S. 735, 18 Wkly. Rep. 26.

65. Chillicothe Bank *v.* Swayne, 8 Ohio 257, 32 Am. Dec. 707. See also Hitchcock *v.* U. S. Bank, 7 Ala. 386; Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395; Union Bank *v.* Bell, 14 Ohio St. 200; Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631; Preble County Branch State Bank *v.*

where a corporation which is expressly prohibited from exercising banking powers sues to recover upon a promissory note which it has discounted.[66] On the other hand they applied it with equal rigor in the destruction of the rights of persons contracting with corporations, holding them conclusively bound to know — what the judges themselves did not in many cases know — the limitations of the power of the corporation, by holding that where the corporation had made an obligation in favor of an individual in excess of its granted powers, he could not maintain an action against the corporation and recover thereon, as where a corporation had executed its promissory note for a purpose not warranted by its charter.[67]

c. Statements of Reasons on Which Doctrine of Ultra Vires Rests. Among the many attempted statements of the reasons upon which the doctrine of *ultra vires* rests we find the following in an opinion of the supreme court of the United States, by Mr. Justice Gray: "The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the Legislature, and varying from the objects of its creation as declared in the law of its organization, are: 1st. The interest of the public, that the corporation shall not transcend the powers granted. 2d. The interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock. 3d. The obligation of everyone, entering into a contract with a corporation, to take notice of the legal limits of its powers."[68] Somewhat differently Mr. Chief Justice Cooley stated two reasons for the doctrine as follows: (1) The state has not by law consented that its corporations, of the kind or class to which the one in question belongs, shall be at liberty to make contracts such as the one in question, but for reasons of sound public policy has withheld from them the power to do so. (2) Nor have the corporators of the corporation consented that their interests may be put in jeopardy by such contracts.[69]

d. Ultra Vires Contracts Deemed Unlawful. It is said that the word "unlawful" as applied to corporations is not used exclusively in the sense of *malum in se* or *malum prohibitum*, but that it is also used to designate powers which corporations are not authorized to exercise, contracts which they are not authorized to make, or acts which they are not authorized to do, or in other words such acts, powers, and contracts as are *ultra vires*.[70]

Russell, 1 Ohio St. 313; Wooster Bank *v.* Stevens, 1 Ohio St. 233, 59 Am. Dec. 619.

Other courts have refused to go to the length of holding that the reserving of usurious interest by a bank renders the contract wholly void.

Mississippi.— Commercial Bank *v.* Nolan, 7 How. 508.

Missouri.— Farmers', etc., Bank *v.* Harrison, 57 Mo. 503.

Ohio.— Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751.

Wisconsin.— Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

United States.—McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,888, 3 McLean 587.

66. New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100; New York State L. & T. Co. *v.* Helmer, 77 N. Y. 64; U. S. Bank *v.* Waggener, 9 Pet. (U. S.) 378, 9 L. ed. 163; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

67. McCullough *v.* Moss, 5 Den. (N. Y.) 567 [*reversing* 5 Hill (N. Y.) 137]. See also Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

The unjust results to which this rigid application of the doctrine has sometimes led may be discovered in Chewacla Lime Works *v.* Dismukes, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100.

68. Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157 [*citing* Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441, 16 L. ed. 184]. Another statement, less comprehensive, by the same eminent judge of the same doctrine will be found in Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

69. Day *v.* Spiral Spring Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352. See also the statement by Rothrock, J., in Lucas *v.* White Line Transfer Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449, where many of the qualifying elements found in modern decisions are introduced. The subject-matter may be pursued by examining the following, among many other cases: Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Whittenton Mills *v.* Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441, 16 L. ed. 184.

70. People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319,

e. Persons Dealing With Corporations Bound to Take Notice of Their Powers —(I) *In General.* The so-called doctrine of *ultra vires* is based upon the proposition that every person dealing with a corporation is bound at his peril to take notice of the limits of its powers, as imposed by its charter or governing statute, whether those limitations are expressed in public acts of the legislature or in private statutes, having many amendments scattered through many volumes.[71]

(II) *And of Their Agents' Powers.* A correlative proposition, but one which rests upon a totally different principle, is that persons dealing with corporations through their agents, as they must if they deal with them at all, are bound at their peril to take notice that the agent is duly empowered in the premises and are chargeable with knowledge of his authority or want of authority to bind the corporation.[72] It follows that a person seeking to charge a corporation upon a contract sustains the burden of showing that the officer or agent of the corporation through whom the contract was made was authorized to make it.[73]

f. Distinction Between Contracts Wholly Outside of Power of Corporation, and Contracts Outside of Power in Given Particular or Through Some Undisclosed Circumstance. Many of the decisions take a distinction between cases where a contract entered into by a corporation is entirely and obviously outside of its granted powers, and cases where the contract, while within the general scope of its granted powers, is *ultra vires* because of some particular circumstance which may not be known to the other contracting party.[74] In the former case the contract is void in the sense that no recovery can be had upon it;[75] in the latter case the contract is enforceable if otherwise the ends of justice require it.[76] Under the

8 L. R. A. 497; State *v.* Nebraska Distilling Co., 29 Nebr. 700, 46 N. W. 155.

71. *Illinois.*— National Home Bldg., etc., Assoc. *v.* Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245 [*reversing* 79 Ill. App. 303]; Columbus Bldg., etc., Assoc. *v.* Kriete, 87 Ill. App. 51 (holding that whereas building and loan associations have no power to receive deposits as bankers, persons depositing their money with them cannot recover it back); Durkee *v.* People, 53 Ill. App. 396 [*affirmed* in 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340].

Maine.— Franklin Co. *v.* Lewiston Inst., 68 Me. 43, 28 Am. Rep. 9; Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256.

Massachusetts.— Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

New York.— Wilson *v.* Kings County El. R. Co., 114 N. Y. 487, 21 N. E. 1015, 24 N. Y. St. 81; Merritt *v.* Lambert, Hoffm. 166.

Tennessee.— Memphis Grain, etc., Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

Virginia.— Whitehurst *v.* Whitehurst, 83 Va. 153, 1 S. E. 101; Bocock *v.* Alleghany Coal, etc., Co., 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128; Haden *v.* Farmers', etc., F. Assoc., 80 Va. 683; Bockover *v.* Life Assoc. of America, 77 Va. 85.

United States.— Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337; Pearce *v.* Madison, etc., R. Co., 21 How. 441, 16 L. ed. 184.

72. Middletown First Nat. Bank *v.* Council Bluffs City Water-works Co., 56 Hun (N. Y.) 412, 9 N. Y. Suppl. 859, 32 N. Y. St. 85; De Bost *v.* Albert Palmer Co., 35 Hun (N. Y.) 386; Bohm *v.* Loewer's Gambrinus Brewery Co., 16 Daly (N. Y.) 80, 9 N. Y. Suppl. 514, 30 N. Y. St. 424.

73. Wilson *v.* Kings County El. R. Co., 114 N. Y. 487, 21 N. E. 1015; Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39, 14 N. E. 832; Alexander *v.* Cauldwell, 83 N. Y. 480; Adriance *v.* Roome, 52 Barb. (N. Y.) 399.

74. For a very clear discussion of this distinction by Sawyer, C. J., see Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 578, 587, 588, 99 Am. Dec. 300.

75. Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655, 19 Am. Rep. 781; Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 7 Wis. 59.

76. *Iowa.*— Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa 607, where the articles prohibited a corporation from becoming indebted beyond a certain amount, but the person dealing with it did not know that its limit of lawful indebtedness had been exceeded — recovery. *Contra*, Weber *v.* Spokane Nat. Bank, 50 Fed. 735.

Mississippi.— Littlewort *v.* Davis, 50 Miss. 403 (corporation had power to loan out its moneys on a prescribed security, but loaned them on a different and better security); Haynes *v.* Covington, 13 Sm. & M. 408; Commercial Bank *v.* Nolan, 7 How. 508 (bank loaned its money out at rates in excess of that allowed by its charter, but not in excess of the general usury law of the state — contract not void for illegality, although all interest forfeited).

Missouri.— Farmers', etc., Bank *v.* Harrison, 57 Mo. 503 (money loaned on usurious interest, principal sum recoverable); Hart *v.*

operation of this principle a corporation making a contract which is within its charter powers for one purpose cannot avoid liability thereon on the ground that it was made for another and unauthorized purpose, unless it shows that the other party to the contract had knowledge of such fact.[77]

g. Distinction Between Acts Ultra Vires the Corporation and Acts Ultra Vires the Agents of the Corporation. Another sound distinction exists between acts which are wholly outside the power of the corporation and acts which, while within the power of the corporation, are not within the scope of the powers or duties of the particular agent of the corporation who attempts to perform them. The latter class of acts are not *ultra vires* in the sense in which the term is commonly used, since it applies only to acts which are outside the powers of the corporation in the sense that they cannot be ratified.[78] Thus if a deed is executed in the name of a corporation by its proper officers under its corporate seal, this carries with it a presumption that the officers were thereto duly authorized by a resolution of the board of directors where such authority is required by its governing instrument, and strangers will be protected in taking such a deed if they act in good faith.[79]

h. Distinction Between Want of Power and Want of Necessary Formality in Executing Power. There is an obvious distinction between an act done wholly without power to do it, and an act done with power to do it, but without the formality prescribed for the execution of the power. In the former case the act if *ultra vires* the directors will be void without ratification; if *ultra vires* the company itself it will generally be wholly void. But in the latter case, persons dealing with the company are not bound to do more than to ascertain that the power to do the proposed act exists. Having ascertained this they have a right to presume that the persons who offer to do the act are proceeding to do it with the requisite formality, unless they are apprised to the contrary.[80]

i. Right of Subrogation With Respect to Ultra Vires Debts. Upon a principle which has been applied in the case of infants[81] and married women[82] it has been

Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91.

New York.—Alward *v.* Holmes, 10 Abb. N. Cas. 96, rule applied to protect the title acquired by a foreign bank for value at a foreclosure sale.

Wisconsin.—Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549 (governing statute allowed insurance company to loan its surplus money for one year upon a bond and mortgage, and it made a loan for two years upon a note and mortgage — action to foreclose the mortgage maintainable); Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669 (money loaned on usurious interest, principal sum recoverable).

United States.— Fleckner *v.* U. S. Bank, 8 Wheat. 338, 5 L. ed. 631, where a bank having a general power to discount, discounted notes at usury, notes actionable.

Much to the same effect see Little *v.* Obrien, 9 Mass. 423; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Banks *v.* Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

77. Colorado Springs Co. *v.* American Pub. Co., 97 Fed. 843, 38 C. C. A. 433.

78. Kelley *v.* O'Brien Varnish Co., 90 Ill. App. 287.

79. Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300, able opinion of Sawyer, C. J.

80. Royal British Bank *v.* Turquand, 6 E. & B. 327, 2 Jur. N. S. 663, 25 L. J. Q. B. 317, 88 E. C. L. 327 [*affirming* 5 E. & B. 248, 1 Jur. N. S. 1086, 24 L. J. Q. B. 327, 85 E. C. L. 248]. See also Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300 (where this doctrine is ably enforced by Sawyer, C. J.); City Fire Ins. Co. *v.* Carrugi, 41 Ga. 660, 671 (per McKay, J.); Ogden *v.* Raymond, 3 Abb. Dec. (N. Y.) 396, 1 Keyes (N. Y.) 42, 26 How. Pr. (N. Y.) 599 [*affirming* 5 Bosw. (N. Y.) 16]; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Brookman *v.* Metcalf, 5 Bosw. (N. Y.) 429; Scott *v.* Johnson, 5 Bosw. (N. Y.) 213; Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147; Ogden *v.* Andre, 4 Bosw. (N. Y.) 583 [*affirmed* in 3 Abb. Dec. (N. Y.) 396, 1 Keyes (N. Y.) 42].

To illustrate this, if the deed of settlement of an English company confers upon the directors power to borrow money when so authorized by a joint resolution of the company, a banker advancing money upon an instrument executed by two of the directors of the company, under the company's seal, need look no further than to see that there was a power to borrow; he is not bound to inquire whether a joint resolution to borrow in the particular case was or was not passed. Royal British Bank *v.* Turquand, 6 E. & B. 327, 2 Jur. N. S. 663, 25 L. J. Q. B. 317, 88 E. C. L. 327 [*affirming* 5 E. & B. 248, 1 Jur. N. S. 1086, 24 L. J. Q. B. 327, 85 E. C. L. 248].

81. Marlow *v.* Pitfield, 1 P. Wms. 558, 24 Eng. Reprint 516.

82. Harris *v.* Lee, 1 P. Wms. 482, 24 Eng. Reprint 482.

held that, although directors or the acting managers of a corporation have no power to borrow money, even for necessaries, so as to bind the shareholders for the repayment of the same,[83] yet if they do borrow money for the necessary carrying on of the company, and repay the same, and the company is afterward wound up, they will be entitled to be reimbursed, just as other trustees are entitled to indemnity from their *cestuis que trustent* for expenses *bona fide* incurred. On like grounds if shareholders under the same circumstances advance money to the directors for the carrying on of the company, and it is afterward wound up, they will be entitled to offset such advances against their liability for calls.[84] So if a railway company borrows money in contravention of a statute imposing a penalty for so doing, and uses the money in the payment of existing valid debts, the person advancing the money is not to lose it, but is entitled to stand in the place of the creditor to whom it was paid; and it is further held that in so far as the company has had the benefit of the money so borrowed for its legitimate purposes, the person making the advances is entitled to be repaid.[85]

j. Ultra Vires Contracts Between Two Corporations. A contract between two corporations, in order to bind either of them, must be within the corporate powers of both.[86]

k. Ultra Vires Contracts Void in Part and Valid in Part. A contract made by a corporation may be valid in so far as it is within the power of the corporation, and void in so far as it transcends that power, or is prohibited in positive terms by its charter.[87] On this principle it is frequently held that where a banking or other corporation has by its charter power to lend money at a lawful rate of interest, a note in which usurious interest is reserved will not be void *in toto*, but will be void only as to the usury, that is to say, only in so far as it is unlawful.[88]

l. Exercise of Power Which Has Been Exhausted. If the power conferred by a charter has been exhausted, then in respect of any further exercise of it the case stands as though it had never been granted. For instance a power is conferred upon a railroad corporation, by an act of the legislature to issue bonds, secured by a mortgage, to raise money to complete its road and put it in operation. When it has done this, and through the exercise of the power has completed its road and put it in operation, it cannot under this power issue any further mortgage bonds; and if there is a general law authorizing railroad companies to issue such bonds, any further issue of them will be ascribed to the general law and not to the special statute.[89]

m. Money Paid on Ultra Vires Contract May Be Recovered Back — (i) *In General.* A party who is not *in pari delicto* may recover from a corporation money which he has paid to it on a contract which is beyond the power of the corporation, or which is prohibited by its governing statute, in a common-law action for money had and received, or in an action of that nature under the code, provided he himself has not received from the corporation the consideration for the payment.[90] Such a contract does not become lawful by being carried into

83. Ricketts *v.* Bennett, 4 C. B. 686, 11 Jur. 1062, 17 L. J. C. P. 17, 56 E. C. L. 686; Burmester *v.* Norris, 6 Exch. 796, 21 L. J. Exch. 43; Hawtayne *v.* Bourne, 5 Jur. 118, 10 L. J. Exch. 244, 7 M. & W. 595.

84. Matter of Joint-Stock Co.'s Winding-up Act, 4 De G. M. & G. 19, 18 Jur. 710, 53 Eng. Ch. 16.

85. *In re* Cork, etc., R. Co., L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. Rep. N. S. 735, 18 Wkly. Rep. 26. See also *In re* National Permanent Ben. Bldg. Soc., L. R. 5 Ch. 309, 34 J. P. 341, 22 L. T. Rep. N. S. 284, 18 Wkly. Rep. 388. *Compare* Chambers *v.* Manchester, etc., R. Co., 5 B. & S. 588, 10 Jur. N. S. 700, 33 L. J. Q. B. 268, 117 E. C. L. 588.

86. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

87. Grand Gulf Bank *v.* Archer, 8 Sm. & M. (Miss.) 151; Farmers', etc., Bank *v.* Harrison, 57 Mo. 503.

88. Farmers', etc., Bank *v.* Harrison, 57 Mo. 503; Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

89. East Tennessee, etc., R. Co. *v.* Frazier, 139 U. S. 288, 11 S. Ct. 517, 35 L. ed. 196.

90. Morville *v.* American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40; Dill *v.* Wareham,

execution; but while it will not be disturbed so far as it has been executed it may be disaffirmed by either party, each restoring what he has received under it which has not been earned under it; and if he fails to make such restoration the other party may recover it in an action on a *quantum meruit*.[91]

(II) *Although Illegality Is Known to Both Parties.* On the other hand there is judicial authority to the effect that where an *ultra vires* contract, involving no element of criminality, is entered into with a corporation, known to be such by both parties, and the corporation has received benefits under it, it is liable to pay for the benefits received, not exceeding the agreed price in the contract, although the other party and not the corporation has refused complete execution of the contract.[92]

n. Contracts Prohibited by By-Laws of Corporation — (I) *Strangers Not Bound to Take Notice of Provisions of By-Laws.* The general rule is that the by-laws of a corporation are in the nature of private regulations for the government of its officers and agents in the transaction of its business, and that parties dealing with the corporation who are not members of it are not affected with notice of the terms of the by-laws, unless knowledge of the same is brought home to them.[93] Thus if it is within the apparent scope of the powers of an agent of a corporation to do certain acts or to make certain contracts an innocent third party dealing with him will not be affected by one of its by-laws, of which he has no knowledge or notice, restraining his powers in respect of such act or contract.[94] For instance where an insurance company has an agent who takes surveys of property for the purpose of applications for insurance thereon, such agent remains what he is in point of fact, the agent of the company, although the company has a by-law declaring him the agent of the assured.[95] But where there is no question of agency founded upon a holding out by the corporation, and no estoppel growing out of its permitting the agent to exercise certain powers in its behalf, but where on the contrary the question arises what powers have actually been conferred upon it, then the by-laws may be material evidence of such powers, just as any other private instrument creating an agency or instructing an agent might be; and in such a case it may well be held that the corporation is not bound, in the absence of a holding-out or other proof of agency, where its by-laws show that the agent was without authority in the premises.[96]

(II) *Contrary Doctrine That Strangers Are Bound to Notice Constitution, By-Laws, and Ways of Doing Business.* There are decisions which carry the obligation of third persons to take notice of the by-laws of private corporations to an extent which seems clearly untenable, imposing the obligation upon every person dealing with a corporation to take notice of its constitution, by-laws, and ways of doing business.[97]

o. Ultra Vires Torts — (I) *In General.* The doctrine of *ultra vires* has no application to torts committed by corporations; otherwise a corporation could never be held liable for a tort, since no corporation is clothed by the legislature

7 Metc. (Mass.) 438; White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Utica Ins. Co. *v.* Bloodgood, 4 Wend. (N. Y.) 652; Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296; Utica Ins. Co. *v.* Scott, 19 Johns. (N. Y.) 1; Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Louisiana City *v.* Wood, 102 U. S. 294, 26 L. ed. 153.

91. Anthony *v.* Household Sewing Mach. Co., 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575 (corporation borrowed money on its promise to issue preferred shares, but it had no power to issue them; money recoverable back, although before the trial the corporation received from the legislature such authority); Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 389, 9 S. Ct. 770, 33 L. ed. 157 (per Gray, J.).

92. Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352.

93. See *supra*, V, A, 5.

94. Walker *v.* Wilmington, etc., R. Co., 26 S. C. 80, 1 S. E. 366. See also Sherman *v.* Commercial Printing Co., 29 Mo. App. 31.

95. Masters *v.* Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624.

96. Bocock *v.* Alleghany Coal, etc., Co., 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128.

97. Bocock *v.* Alleghany Coal, etc., Co., 82 Va. 813, 1 S. E. 325, 3 Am. St. Rep. 128; Haden *v.* Farmers', etc., F. Assoc., 80 Va. 683;

with the power to commit wrongs. Moreover the distinction between *ultra vires* contracts and *ultra vires* torts is vital. In the case of an *ultra vires* contract, the person contracting with the corporation has, in the absence of fraud or duress, entered into the contract voluntarily, and is therefore to some extent the author of the injury which he brings upon himself; but in every case of an *ultra vires* tort the injured person is the involuntary victim of the wrong.[98] The universal doctrine therefore is that a corporation cannot evade liability for a tortious act committed in violation of its charter or governing statute, for its pecuniary gain, by setting up the defense of *ultra vires*.[99] The doctrine rests upon the further principle that the duty to abstain from injuring others is one which rests upon all persons natural or artificial.[1]

(II) *Torts Committed in Execution of Ultra Vires Business.* It has been held that the defense of *ultra vires* cannot be successfully interposed by the corporation, where the action brought against it is an action *ex delicto*, to recover damages for a tort committed by it in the performance of an act not authorized by its charter, as where a railway and banking company, having no authority to run a steamboat, nevertheless engages in such business, and while so engaged an injury happens to a passenger on the boat;[2] or where two railway companies have illegally united their lines, and thus running together have entered into a contract for the carriage of a passenger, and he has been hurt while being so carried.[3] This principle has been applied in a case where the plaintiff was injured by the negligent management of a street horse-car in the use of a steam railway company, so as to avoid the defense that the corporation had no franchise to operate a street railway;[4] and also in a case where a company, chartered to operate a railway between two points, ran a sleigh to carry passengers beyond one of its terminal points.[5]

p. Contracts by Which Corporations Abnegate Their Public Duties — (I) *In General.* Contracts by which a corporation created for the performance of public duties, for example the building and operating of a railway, abnegate those duties by devolving them upon others, whether in the form of leases, mortgages, sales, or any other form of devolution, are *ultra vires* and void, unless made with the consent of the legislature.[6]

Bockover *v.* Life Assoc. of America, 77 Va. 85; Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337. *Compare* Martin *v.* Nashville Bldg. Assoc., 2 Coldw. (Tenn.) 418.

98. Reasoning of Miller, J., in Salt Lake City *v.* Hollister, 118 U. S. 256, 263, 6 S. Ct. 1055, 30 L. ed. 176.

99. Zinc Carbonate Co. *v.* Shullsburg First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845. And see *infra*, XIX, A, 6, a *et seq.*

A building and loan association which enters into an *ultra vires* agreement knowing that it cannot perform its part, and thereby induces the other party to part with his money in the purchase of stock, is guilty of a tort for which it is liable. Williamson *v.* Eastern Bldg., etc., Assoc., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822.

1. Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Bissell *v.* Michigan Southern, etc., R. Co., 22 N. Y. 258.

2. Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353.

3. Bissell *v.* Michigan Southern, etc., R. Co., 22 N. Y. 258.

4. New York, etc., R. Co. *v.* Haring, 47 N. J. L. 137, 54 Am. Rep. 123.

5. Buffett *v.* Troy, etc., R. Co., 40 N. Y. 168.

Out of line with these holdings and with sound principle is a decision to the effect that an agricultural society which employs hackmen to convey persons to and from its fair grounds is not liable to a passenger injured through the negligence of a hackman so employed, because it is beyond its power to enter upon such business. Bathe *v.* Decatur County Agricultural Soc., 73 Iowa 11, 34 N. W. 484, 5 Am. St. Rep. 651.

6. Chicago Gaslight, etc., Co. *v.* People's Gaslight, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748; Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 S. Ct. 635, 29 L. ed. 785; Thomas *v.* West Jersey R. Co., 101 U. S. 715, 25 L. ed. 950; New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21

(II) *Continuing Duty to Disaffirm Such Contracts.* In such a case a continuing duty rests upon both parties to the contract to disaffirm it at the earliest moment, upon doing justice to the other party, which duty is not diminished by the lapse of years;[7] and while the courts will not aid either party to undo it, so far as it has been executed between them,[8] yet they will do nothing to aid in its enforcement; and neither party will be allowed to sustain an action against the other upon it, so far as it remains unexecuted. Thus if it consists of an unlawful lease, it may be disaffirmed by the lessee after the lapse of sixteen years, and the lessor cannot maintain an action of covenant against the lessee to recover instalments of rent accruing after the disaffirmance.[9]

(III) *Equity Will Not Aid in Enforcement of Such Contracts.* Equity will not aid either party in the enforcement of such a contract.[10]

(IV) *Equity Will Not Aid Either Party in Canceling Such Contracts.* Nor will a court of equity aid either party by setting aside and canceling the unlawful contract; but in pursuance of the maxim, *In pari delicto potior est conditio defendantis*, will leave them where they have placed themselves subject to the right of either party to defend, in a court of law, any action brought to compel him further to execute the contract on his part, on the ground of its illegality.[11]

(V) *Corporations May Release to Others Mere Privileges Conferred For Their Own Benefit.* But in so far as the charter confers upon the corporation a mere privilege to be exercised for its own benefit this it may of course release to another; and whether the charter is to be regarded as conferring a privilege or imposing a public duty is of course a question of interpretation.[12]

q. Right to Disaffirm Ultra Vires Contracts After Part Performance — (I) *In General.* There are decisions which uphold the right of the corporation to disaffirm an *ultra vires* contract after it has been partly executed,[13] but other courts find an estoppel in a part performance by the other party to the contract.[14] The decisions under this head cannot be reconciled; but an examination of them will lead to the conclusion that those which support a continuing duty of rescission were cases where corporations had attempted to cast off their public duties by devolving them upon other corporations, in which case the continued execution of the agreement is regarded as a continuing violation of law carrying with it a continuing duty of rescission, which duty is not diminished by lapse of time.[15]

(II) *Contracts Abnegating Performance of Public Duties.* The principle then is applicable with special force in the case of contracts whereby a corporation seeks to devolve upon another corporation, without the consent of

L. ed. 627; York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30, 15 L. ed. 27.

7. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

8. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83.

9. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

10. Chicago Gaslight, etc., Co. *v.* People's Gaslight, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124.

11. St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748.

12. Chicago Gaslight, etc., Co. *v.* People's Gaslight, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124.

13. Bowman Dairy Co. *v.* Mooney, 41 Mo. App. 665; Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 8 S. W. 396; Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

14. Macon, etc., R. Co. *v.* Georgia R. Co., 63 Ga. 103.

15. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950. And see Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55, where the subject is exhaustively considered by Gray, J.

the legislature, its public duties, in which case the courts will not allow the contract to gain strength and acquire validity by lapse of time.[16]

(III) *Contracts or Arrangements Which Are Otherwise Opposed to Public Policy.* The rule applies with equal force to any contract or arrangement between corporations which are for other reasons opposed to a sound public policy. Thus where several such corporations unite their funds and properties under an arrangement called a "trust," the object of which is to prevent competition, and to monopolize and engross an article of commerce, then the scheme is denounced by a sound public policy, and a court of justice will uphold any member of such a partnership in withdrawing from it at any time.[17]

(IV) *Contracts Which Otherwise Involve Continuing Violation of Law.* From these decisions we may safely collect the principle that there is always a right of rescission where a continuing performance involves a continuing violation of law. This principle has indeed been extended by some courts to cases where no question of public policy can be supposed to have been involved, but where the question was merely the right of a private corporation to withdraw, upon restoring the consideration to the other party, from a contract entered into in excess of its powers.[18]

r. **Right of Disaffirmance Predicated Upon Doing Justice to Other Party** — (I) *In General.* It cannot be stated with absolute assurance that the right of disaffirmance of an *ultra vires* contract is always predicated upon doing exact justice to the other party, by restoring to him what he has lost or would lose through a disaffirmance. This must be true where public rights are involved, and where a disaffirmance is upheld and even required for that reason.

(II) *Railroad Company Disaffirming License Granted to Telegraph Company and Seizing Its Line by Force.* It has been held that if a railroad company, having a franchise to operate a line of telegraph, has assumed to sell such franchise to a telegraph company, and has received a large consideration therefor, if it attempts to disaffirm the contract and to seize the telegraph line by mere force, equity will restrain it by an injunction until an accounting and settlement can be had between it and the telegraph company.[19] So where a court of the United States, sitting in equity, set aside as *ultra vires* a railway construction contract, it did so on the principle of compelling the corporation to account for what it had received in partial performance, not on the basis of a bare reimbursement, but of a fair compensation, such as any other railroad contractor would receive under a similar contract, if it were within the power of the corporation, to which it was held that interest should be added.[20]

16. Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. ed. 157; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837 [*reversing* 22 Fed. 245, 10 Sawy. 464, 23 Fed. 232, 10 Sawy. 472].

17. Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 8 S. W. 396. To the contrary see St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. ed. 748.

18. Harriman *v.* First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117 (upholding the right of a steamboat company to withdraw from a contract agreeing to furnish a steamboat for a church excursion); Bowman Dairy Co. *v.* Mooney, 41 Mo. App. 665 (denying relief to a dairy company against its servant hired to run its oyster wagon, who had quit its service and gone into the oyster business on his own account, the dairy company having no power to sell oysters). In support of the text see also Case *v.* Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513.

19. Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745, 1 McCrary 188, 541.

20. New Castle Northern R. Co. *v.* Simpson, 23 Fed. 214. That the proper remedy of either party to an *ultra vires* contract is to disaffirm and to sue to recover as a *quantum meruit* what he has lost by the partial performance of it see the *dictum* of Gray, J., in Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 389, 9 S. Ct. 770, 33 L. ed. 157. For an analogy in the case of void municipal bonds, holding that a party who has parted with his money by investing the bonds may after their repudiation maintain an action against the corporation to compel restitution see Brown *v.* Atchison, 39 Kan. 37, 17 Pac. 465, 7 Am. St. Rep. 515; Louisiana City *v.* Wood, 102 U. S. 294, 26 L. ed. 153; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040. That equity would reach the same result by treating the corporation as trustee of the person who has thus parted with his money to it see Chapman

(III) *Right of Other Party to Recover What He Has Lost After Disaffirmance.* If the contract of a corporation is *ultra vires*, but not immoral or otherwise *malum in se*, and either party disaffirms it on the ground that it is *ultra vires*, and refuses further execution of it, then, while the other party cannot sue to recover damages or compensation in respect of the unexecuted portion of the contract,[21] yet the law will afford him remedies for procuring from the other party a restoration of what he has lost under it. The governing principle is that where money has been paid or property transferred to a corporation under a contract which is not *malum in se*, but which is merely *malum prohibitum*, the party receiving may be made to refund, to the party from whom it has received, the value of that which it has actually received;[22] and to this end he may maintain against the corporation the equitable common-law action for money had and received,[23] or a suit in equity to compel an accounting and restitution of what the corporation has received through the transaction;[24] and he may be protected by an injunction until there has been such an accounting and restitution.[25]

(IV) *Ultra Vires Contract Not Allowed to Stand as Security For Damages For Refusal of Further Performance.* But while the *ultra vires* contract will, in so far as it has been fully executed, thus stand as the security for or foundation of rights acquired by the transaction, yet it will not be allowed to stand as the foundation for damages accruing from the refusal of further performance by the party who elects to rescind. Thus where a lease of a railroad has been made for the term of twenty years, without authority of the legislature, and the lessor has elected to rescind and resume possession at the end of five years, and the accounts for that period were adjusted and paid, a covenant in the lease to pay the value of the unexpired term is void, and an action of covenant cannot be maintained thereon by the lessee against the lessor.[26]

s. **Presumption That Corporations Act Within Their Powers** — (I) *In General.* A general presumption of right-acting attends corporations, the effect of which is to place the burden of proving that a contract made or an act done by a corporation was *ultra vires* upon him who alleges that fact as the foundation of his action or defense.[27]

(II) *How This Presumption Operates.* Aside from casting the burden of proof upon the party setting up the want of power this presumption operates in several ways. If the powers possessed by the particular corporation do not appear at all, and are not judicially noticed by the court, then it operates within certain limits to carry with it the general presumption that the act or contract which is challenged was within its powers.[28] If it has the power to do a given act, or

v. Douglas County, 107 U. S. 348, 2 S. Ct. 62, 27 L. ed. 378; Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238.

21. Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950. See also *infra*, XVII, F, 1, r, (IV).

22. Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Morville *v.* American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40; White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238.

23. Paul *v.* Kenosha, 22 Wis. 266, 94 Am. Dec. 598; Louisiana City *v.* Wood, 102 U. S. 294, 26 L. ed. 153; Manville *v.* Belden Min. Co., 17 Fed. 425, 5 McCrary 391. See also *supra*, XVII, F, 1, m, (I) *et seq.*

24. Moore *v.* Swanton Tanning Co., 60 Vt. 459, 15 Atl. 114; New Castle Northern R. Co. *v.* Simpson, 23 Fed. 214.

25. See *supra*, XVII, F, 1, r, (I).

26. Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

27. Dana *v.* St. Paul Bank, 4 Minn. 385; Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542; Rider Life Raft Co. *v.* Roach, 97 N. Y. 378; De Groff *v.* American Linen Thread Co., 21 N. Y. 124; Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347; Farmers' Loan, etc., Co. *v.* Curtis, 7 N. Y. 466; Kappel *v.* Chaari Zedek Congregation, 19 Hun (N. Y.) 364. If for instance a contract made in the name of a corporation by its president is one which the corporation has the power to make, or to ratify after it has been made, and an action is brought under a statute to charge the trustees of the corporation on the ground that the indebtedness was in excess of the capital stock of the corporation, and the defendants place their defense upon the ground that the creation of the debt was not authorized or ratified by the corporation, the burden is upon them to show that fact. Patterson *v.* Robinson, 116 N. Y. 193, 22 N. E. 372.

28. Dana *v.* St. Paul Bank, 4 Minn. 385.

to make a contract of a given nature under prescribed conditions, then the principle operates to create the presumption that those conditions existed in the particular instance.[29] It also operates as a principle of favorable interpretation in respect of corporate contracts; so that where the words employed in such a contract admit of a double construction, they are to be construed consistently with the provisions of its charter.[30] If the corporation itself seeks to avoid its contract on the ground that it was *ultra vires*, this presumption puts upon it the burden of showing that its articles of incorporation did not authorize the contract.[31]

(III) *Defense of Ultra Vires Not Available Under General Denial.* The defense of *ultra vires* is special and is not available under a general denial, but must be specially pleaded and proved.[32]

2. Theories Under Which Application of This Doctrine Is Denied — a. Plea of Ultra Vires Not Allowed When It Will Not Advance Justice but Will Accomplish Legal Wrong. Except in cases where the rights of the public are involved[33] the plea of *ultra vires*, whether interposed for or against a corporation, will not be allowed to prevail when it will not advance justice, but will accomplish a legal wrong.[34]

b. Either Party Estopped to Set up Defense of Ultra Vires After Having Received and Retained Fruits of Contract — (I) *In General.* The courts reach a just result, in cases where the question is not one of public policy, and where there has been no violation of law, and in many cases where there has been, by holding that the corporation itself on the one hand, and the party contracting with it on the other hand, are estopped by their own contract or conduct from setting up, as a defense to an action to enforce the contract, that it was beyond the power of the corporation to make it; and it is a general principle of law that no party will be permitted to set up this defense while retaining the fruits or the benefits of the contract.[35]

(II) *Corporation So Estopped.* The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in

29. Thus if a corporation has power to hold and convey real estate for some purposes the court will presume, until the contrary is shown, that real estate conveyed by it was taken, held, and conveyed by virtue of the powers granted to it. Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466. So where a banking corporation, having by its charter power to acquire real estate "in satisfaction of debts," took from the holder of a sheriff's certificate of sale, after it had become absolute, an assignment of all his right, and then received the sheriff's deed, and the assignment was expressed to be "for value received," it was held, in the absence of proof of any other consideration, that it would be presumed that the corporation had taken the assignment "in satisfaction of debts," and that it could hold the real estate by virtue of the sheriff's deed. Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347.

30. Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542.

31. West *v.* Averill Grocery Co., 109 Iowa 488, 80 N. W. 555.

32. Citizens' State Bank *v.* Pence, 59 Nebr. 579, 81 N. W. 623.

33. 5 Thompson Corp. § 6015.

34. *Idaho.*—Burke Land, etc., Co. *v.* Wells, (1900) 60 Pac. 87.

Illinois.— McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Bradley *v.* Ballard, 55 Ill. 413, 8 Am. Rep. 656.

Michigan.— Carson City Sav. Bank *v.* Carson City Elevator Co., 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454; Eureka Iron, etc., Works *v.* Bresnahan, 60 Mich. 332, 27 N. W. 524; Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352.

New York.— Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Steam Nav. Co. *v.* Weed, 17 Barb. 378.

Wisconsin.— Lewis *v.* American Sav., etc., Assoc., 99 Wis. 203, 73 N. W. 793, 39 L. R. A. 559.

United States.— Colorado Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648.

35. Lurton *v.* Jacksonville Loan, etc., Assoc., 87 Ill. App. 395 [*affirmed* in 187 Ill. 141, 58 N. E. 218, the other party to the contract estopped by reason of having received the benefit]; Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689; Clarke *v.* Olson, 9 N. D. 364, 83 N. W. 519 (everybody estopped to plead that the act of depositing securities with a foreign state to acquire a license to do business therein was *ultra vires*); Union Bank, etc., Co. *v.* Wright, (Tenn. Ch. App. 1900) 58 S. W. 755 (rule

excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it.[36]

prevents the maker of a note to a corporation acting as administrator of a decedent's estate from denying the capacity of the corporation so to act). See also *supra*, XV, C, 2, e.

36. *California.*— Smith *v.* Ferries, etc., R. Co., (1897) 51 Pac. 710 (corporation cannot, while retaining a valuable consideration from another corporation, upon which is based an assumption by the former of a debt by the latter, deny the validity of the debt); Main *v.* Casserly, 67 Cal. 127, 7 Pac. 426.

Colorado.— Colorado Loan, etc., Co. *v.* Grand Valley Canal Co., 3 Colo. App. 63, 32 Pac. 178.

Connecticut.— Union Hardware Co. *v.* Plume, etc., Mfg. Co., 58 Conn. 219, 20 Atl. 455.

Illinois.— People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650 (*ultra vires* undertakings of quasi-public corporations enforced against them while they retain and enjoy the benefits of the concessions granted on the condition that such undertakings should be performed); Darst *v.* Gale, 83 Ill. 136; West *v.* Madison County Agricultural Bd., 82 Ill. 205; Bradley *v.* Ballard, 55 Ill. 413, 8 Am. Rep. 656; Brewer, etc., Brewing Co. *v.* Boddie, 80 Ill. App. 353 (corporation estopped from pleading *ultra vires* so as to avoid its agreement to pay rent under a lease, where it has occupied the premises, the contract not being prohibited by law); People's Gaslight, etc., Co. *v.* Chicago Gaslight, etc., Co., 20 Ill. App. 473; Millard *v.* St. Francis Xavier Female Academy, 8 Ill. App. 341.

Indiana.— Wright *v.* Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674; Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239; State Bd. of Agriculture *v.* Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702; Flint, etc., Mfg. Co. *v.* Kerr-Murray Mfg. Co., 24 Ind. App. 350, 56 N. E. 858 (holds a corporation to liability on a guaranty of the payment of a debt of its customer who was indebted to the corporation); G. F. Wittmer Lumber Co. *v.* Rice, 23 Ind. App. 586, 55 N. E. 868 (lumber company becoming surety on a contractor's bond in order to get the contract of supplying the building materials estopped from pleading that its act was *ultra vires*); Bedford Belt R. Co. *v.* McDonald, 17 Ind. App. 492, 46 N. E. 1022, 60 Am. St. Rep. 172.

Indian Territory.— Ranney-Alton Mercantile Co. *v.* Mineral Belt Constr. Co., (1899) 48 S. W. 1028.

Iowa.— Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688 [*modified* in 107 Iowa 591, 78 N. W. 197, railroad corporation receiving the benefit of a loan cannot escape liability because the loan was in excess of its statutory limit]; Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa 607.

Kansas.— Blue Rapids Opera House Co. *v.* Mercantile Bldg., etc., Assoc., 59 Kan. 778, 53 Pac. 761, corporation having received the benefits of a loan contract performed by the other party, estopped to plead *ultra vires* to defeat an action upon it.

Michigan.— Butterworth *v.* Kritzer Milling Co., 115 Mich. 1, 72 N. W. 990 (corporation which gives a real-estate mortgage to indemnify another corporation for guaranteeing the payment of notes of the former corporation cannot set up as a defense in an action to foreclose the mortgage that the contract of guaranty was *ultra vires*); Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063; Carson City Sav. Bank *v.* Carson City Elevator Co., 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454.

Mississippi.— Natchez *v.* Mallery, 54 Miss. 499.

New Hampshire.— International Trust Co. *v.* Davis, etc., Mfg. Co., 70 N. H. 118, 46 Atl. 1054 (both corporation and its creditors estopped from setting up the defense of *ultra vires* against an issue of bonds after the company has received and while it retains the proceeds thereof); Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689; Connecticut River Sav. Bank *v.* Fiske, 60 N. H. 363.

New Jersey.— Chapman *v.* Iron Clad Rheostat Co., 62 N. J. L. 497, 41 Atl. 690 (plea of *ultra vires* is inadmissible where one has fully performed on his part a contract made with a corporation, and cannot be restored to his former status or honestly dealt with otherwise than by a specific performance on the part of the corporation); Camden, etc., R. Co. *v.* May's Landing, etc., R. Co., 48 N. J. L. 530, 7 Atl. 523.

New York.— Seymour *v.* Spring Forest Cemetery Assoc., 144 N. Y. 333, 39 N. E. 365, 63 N. Y. St. 672, 26 L. R. A. 859; Great Western Turnpike Co. *v.* Shafer, 57 N. Y. App. Div. 331, 68 N. Y. Suppl. 5 (corporation bound by agreement of its agent to release a farmer from the payment of toll, in consideration of his closing a certain road, after having observed the contract for years); Peck *v.* Doran, etc., Co., 57 Hun 343, 10 N. Y. Suppl. 401, 32 N. Y. St. 405; Verona *v.* Peckham, 66 Barb. 103; Madison Ave. Baptist Church *v.* Baptist Church, 3 Rob. 570, 1 Abb. Pr. N. S. 214, 30 How. Pr. 455; Quantmeyer *v.* J. H. Mohlman Co., 29 Misc. 746, 60 N. Y. Suppl. 220 [*affirming* 59 N. Y. Suppl. 1113, receiving benefits under an agreement estops the corporation from denying the authority of its agent to make it]; Homestead Bank *v.* Wood, 1 Misc. 145, 20 N. Y. Suppl. 640, 48 N. Y. St. 775 (corporation estopped to the extent to which the

(III) *Either Party so Estopped Where Other Party Has Acted to His Disadvantage.* The rule has been carried further, and has been rested upon the principle which supports the consideration of contracts, and operates to estop either party where the other, on the faith of entering into the engagement, has acted to his or its disadvantage. The principle is that the rule requiring the observance of good faith and fair dealing is just as applicable to corporations as to individuals, and that neither can involve others in onerous engagements, and with the consideration of the contract in their possession disavow their acts to the damage and discomfiture of others, unless it clearly appears that there was an absolute want of capacity to make the contract.[37]

(IV) *Illustrations of Estoppel Against Corporations on Ground of Having Received Benefit of Ultra Vires Contracts.* The simplest illustration of this doctrine will be found in cases where the corporation has acquired money[38] or property[39] by means of a contract in excess of its powers, and then, when the other party to the contract seeks to enforce against the corporation the obligation which it has assumed therein, pleads that it had no power to enter into the contract, and at the same time keeps the money or the property. Thus if a corporation has executed a promissory note for a consideration which it has received and retained it is bound to pay the note, although it may have been executed in furtherance of a contract which was *ultra vires.*[40] So a corporation cannot avoid its obligation to pay money which has been loaned to it and used by it, under the plea that in borrowing the money it exceeded its statutory power to contract debts, or that its officers by whom the loan was negotiated were not properly authorized in the premises.[41] Neither can it avoid its obligation on the ground that it was given for property which the corporation was not empowered by its charter to take.[42] It cannot, where it has purchased property contrary to

other party has performed the agreement on his part); Schurr *v.* New York, etc., Invest. Co., 18 N. Y. Suppl. 454, 45 N. Y. St. 645; Indiana *v.* Woram, 6 Hill 33, 40 Am. Dec. 378.

Oregon.— Tyler *v.* Tualatin Academy, 14 Oreg. 485, 13 Pac. 329.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Shaw, (1888) 14 Atl. 323; Wright *v.* Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701; Oil Creek, etc., R. Co. *v.* Pennsylvania Transp. Co., 83 Pa. St. 160; Bucks County R. Co. *v.* Guarantors' Finance Co., 23 Pa. Co. Ct. 101 (estoppel after part performance by the other party).

South Carolina.— Williamson *v.* Eastern Bldg., etc., Assoc., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822, private corporation cannot plead *ultra vires* where the contract has been performed by the other party, or while retaining the benefit of the contract.

Texas.— Steger *v.* Davis, 8 Tex. Civ. App. 23, 27 S. W. 1068, hotel corporation and its shareholders estopped to repudiate the purchase of property as *ultra vires,* although hotel subsequently built elsewhere.

Washington.— Spokane *v.* Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141, question of *ultra vires* of a corporation in selling its property will not be considered where it has received the consideration for its property, and its vendee mortgaged it, and the mortgage has been foreclosed.

Wisconsin.— Bullen *v.* Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115, a clear statement of the rule.

United States.— Bowman *v.* Foster, etc., Hardware Co., 94 Fed. 592 (prevents corporation from repudiating its subscription to a building and loan association); Marbury *v.* Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393 (sufficient to satisfy the rule that the shareholders deemed the contract beneficial to the corporation); Wood *v.* Corry Water Works Co., 44 Fed. 146, 12 L. R. A. 168; Memphis, etc., R. Co. *v.* Dow, 19 Fed. 388.

37. Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674 (opinion by Mitchell, C. J.); State Bd. of Agriculture *v.* Citizens St. R. Co., 47 Ind. 407, 17 Am. Rep. 702.

38. Millard *v.* St. Francis Xavier Female Academy, 8 Ill. App. 341.

39. Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063; Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378; Memphis, etc., R. Co. *v.* Dow, 19 Fed. 388 [*affirmed* in 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595].

40. Main *v.* Casserly, 67 Cal. 127, 7 Pac. 426; Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063.

41. Connecticut River Sav. Bank *v.* Fiske, 60 N. H. 363.

42. Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378. In this remarkable case the state of Indiana exchanged its credit with a whaling company (not a teachers' institute) to the extent of sixty thousand dollars, backed up by the undertakings of certain individuals. The whaling company got the bonds of the state and of course failed, and the individuals,

a prohibition or without an authorization in its charter, retain both the property and its price; it cannot retain the property and refuse to pay the price, or set up the defense of *ultra vires* when sued for the same.[43] So where it has purchased land and received a deed therefor, which reserves a vendor's lien for the purchase-money, and has taken possession thereunder, it will not be heard to defend a proceeding to enforce the lien, on the ground that it had not corporate power to contract for payment in money, but only in corporate warrants, unless it offers to surrender the land.[44]

(v) *Borrower Cannot Keep Money and Plead Ultra Vires.* The principle to which the stress of justice drove the earlier courts was, that where the corporation is prohibited from lending money on a particular security, it may, notwithstanding the prohibition, recover the money loaned, although the security may be void.[45] That is to say, if an action is brought upon the instrument alone there can be no recovery. If the declaration counts on the instrument, and contains also the common counts for money had and received, the count upon the instrument will be bad on demurrer, but a recovery will be had on the common counts.[46] If, ignoring the void security, an action is brought for the money loaned, which we suppose at common law would be an action of assumpsit for money had and received, the plaintiff will recover. But this doctrine was predicated of acts where the corporation, although prohibited from taking the particular security, yet had a general power to lend money, and consequently power to make such a loan as the loan in question without taking the security. If the corporation had no power whatever to lend money, not only the security

when sued by the state upon the undertakings made by the whaling company and themselves, defended on the ground that the whaling company had no power to acquire the property of the state, having been chartered only for the purpose of catching whales and making spermaceti candles. This defense was overruled and the state of Indiana had judgment.

43. Wright *v.* Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701.

44. Natchez *v.* Mallery, 54 Miss. 499.

Further illustrations of this estoppel.— This estoppel prevents the corporation from setting up the defense that the contract is void by reason of not having been entered into with the requisite formality. Thus if an educational corporation is sued for services rendered by plaintiff as a military instructor therein, it cannot defend the action on the ground that it had never passed an ordinance authorizing the employment of such an instructor. Tyler *v.* Tualatin Academy, 14 Oreg. 485, 13 Pac. 329. See also Schurr *v.* New York, etc., Invest. Co., 18 N. Y. Suppl. 454, 45 N. Y. St. 645. So a railroad company which under a contract has used the road-bed, rolling-stock, and equipments of another cannot set up, as a defense to a bill in equity by the latter for an accounting and a return of the property, that the contract was *ultra vires.* Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689. So although it may be *ultra vires* for a railroad company to maintain and operate a telegraph line, yet this will be no defense to an action by its contractor for compensation under a contract for building the line. Pittsburgh, etc., R. Co. *v.* Shaw, (Pa. 1888) 14 Atl. 323. So although a corporation cannot enlarge its powers beyond those granted in the applicatory enabling statute by merely taking to itself larger powers in its articles of association, yet if it does this, and in the exercise of such powers incurs obligations, it will be no defense against an action that the business in which it was engaged was not authorized by its governing statute. Carson City Sav. Bank *v.* Carson City Elevator Co., 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454. Nor can a corporation escape the obligation of a contract which is within the scope of its amended articles of incorporation by setting up its own failure to record those articles. Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa 607. And generally a corporation will be estopped from defending against an action to recover on a contract which it has entered into on the ground that in making the contract it has not conformed to the statutory limitations and requirements, where it has received the fruits or benefits of the contract. Colorado Loan, etc., Co. *v.* Grand Valley Canal Co., 3 Colo. App. 63, 32 Pac. 178; Wood *v.* Corry Water Works Co., 44 Fed. 146, 12 L. R. A. 168. For a curious turn of the doctrine of *ultra vires* in an elaborately considered but doubtful case see *In re* McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387.

45. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Utica Ins. Co. *v.* Kip, 8 Cow. (N. Y.) 20; Utica Ins. Co. *v.* Scott, 19 Johns. (N. Y.) 1.

46. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Utica Ins. Co. *v.* Kip, 8 Cow. (N. Y.) 20.

but the contract itself was void, and no recovery could be had upon either.[47] If therefore according to this doctrine an insurance company usurps the business of banking and discounts notes, as did the Utica Insurance Company,[48] it will not be able to maintain an action upon the notes; but if as an insurance company it has a general power to lend money, it may maintain an action for the money loaned.[49] With reference to this subject, a distinction has been taken between cases where the making of the loan and the taking of the illegal security form one entire transaction, and cases where a valid loan is made within the powers of the corporation, and afterward an illegal security is taken for it. Here, although no recovery can be had on the security, yet a recovery can be had on common counts for the money lent.[50] Such were the distinctions in the American courts fifty years ago; but ignoring these subtleties and taking the direct road to justice the doctrine now is that the corporation thus making the loan in good faith may recover upon or enforce the security, and that the borrower will be estopped by his act of receiving the loan and keeping the money from setting up that the corporation had no power to make it.[51]

(VI) *This Estoppel Extends to Privies of Either Party.* This like other estoppels extends to the privies of the corporation; so that where the corporation has received the benefit of an *ultra vires* contract and has thereby precluded itself from avoiding it, it cannot be avoided by one succeeding to its rights with notice. For instance the purchaser of the real estate of a private corporation at a judicial sale, who is neither a shareholder nor a creditor, cannot question the power of the corporation to make a prior deed of trust upon the property and have the deed of trust set aside in his favor, when he purchases with notice of it, and when the owner of the indebtedness thereby secured has been guilty of no fraud.[52] So the principle already referred to[53] which prevents either party to a contract which is beyond the power of the corporate party from disaffirming it without restoring what he has received under it operates not only against the corporation, but against its shareholders; so that when they sue in its right to set aside and cancel an *ultra vires* mortgage of its property made for money lent to it, they must, in order to succeed, offer to return the money.[54] So where the president of a corporation together with other officers bought for the corporation shares of stock of another corporation, and his own corporation brought an action against him for the unlawful conversion of it, it was held that he could not be heard to set up in defense of his unlawful action that his own corporation had no power to acquire the shares of another corporation.[55]

(VII) *Other Party Estopped When He Has Received Benefit.* Modern decisions make the estoppel reciprocal, and hold that where the corporation is plaintiff in the action and is seeking to enforce a contract into which it had no power to enter, if the defendant has received the benefit of the contract, he will not be allowed to defend on the ground that it was *ultra vires*; at least until he restore the benefits which he received thereunder.[56] The simplest illustration of this is to suppose that a corporation has exceeded its powers in lending its money upon a promissory note, but nevertheless seeks to get its money back by bringing an action upon the note. Here the maker of the note will not be heard to defend

47. Life, etc., Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573.

48. People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

49. Utica Ins. Co. *v.* Kip, 8 Cow. (N. Y.) 20; Utica Ins. Co. *v.* Scott, 19 Johns. (N. Y.) 1; Parker *v.* Rochester, 4 Johns. Ch. (N. Y.) 329.

50. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249.

51. See *supra*, XVII, F, 2, b, (VII).

52. Darst *v.* Gale, 83 Ill. 136.

53. See *supra*, XVII, F, 1, r, (I).

54. Wright *v.* Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412.

55. St. Louis Stoneware Co. *v.* Partridge, 8 Mo. App. 217.

56. *California.*—Argenti *v.* San Francisco, 16 Cal. 255.

Indiana.— Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239; Pancoast *v.* Travelers' Ins. Co., 79 Ind. 172; Pollock *v.* Lafayette Bldg. Assoc., 71 Ind. 357.

on the ground that the corporation had no power to lend him the money.[57] In like manner, where the charter of a corporation restricts its power to invest its surplus funds to a certain class of securities, one who has obtained a loan from it upon another security will not be heard to set up the defense, when the corporation proceeds to enforce the loan, that it had no power to make it.[58]

(VIII) *RULE WHERE CORPORATION HAS ACTED TO ITS DISADVANTAGE.* As in the case where the corporation has made the promise and the other party has acted to his disadvantage on the faith of it,[59] so where the promise is made by another to a corporation, and it has acted to its disadvantage on the faith of it, an estoppel *in pais* will arise against the promisor, which will prevent him from setting up the defense of *ultra vires* when the corporation sues to enforce his promise. Thus where certain residents of a county bound themselves to raise enough money to purchase a right of way for a railway company, and the company constructed its road on the faith of the promise, it was held that the promisors when sued thereon could not plead that the corporation had no power to enter into such a contract.[60]

(IX) *WHETHER BRINGING OF ACTION BY CORPORATION IS RATIFICATION CURING WANT OF FORMAL VOTE.* Where the invalidity of a contract of loan consists in an informality, as the want of a vote at a trustees' meeting, the mere bringing of the action by the corporation to recover the money lent is a ratification of the act of its officers in making the loan, and the borrower will not be heard to object that the loan was made to him without a formal vote.[61]

(X) *CONTRARY DOCTRINE THAT CORPORATION IS NOT ESTOPPED BY RECEIVING BENEFITS OF CONTRACT.* There is a class of cases, happily limited in number, which holds that where a corporation has made a contract in excess of its granted powers, and has received or enjoyed the consideration or the benefits or fruits of it, this fact does not estop it from defending on the ground of *ultra vires* an action to enforce the obligation which it assumed by the contract on its part.[62] Some courts attempt to draw a line by holding that while a corporation cannot be estopped from setting up the defense of *ultra vires* against a corporate act which is absolutely void,[63] yet this rule does not apply to contracts which are voidable merely.[64] The theory of these decisions is that the rule estopping the corporation from raising the question of *ultra vires* where it has received the benefit of the contract does not apply where the contract is *ultra vires* in

New York.— Steam Nav. Co. *v.* Weed, 17 Barb. 378; Whitney Arms Co. *v.* Barlow, 38 N. Y. Super. Ct. 554 [*affirmed* in 63 N. Y. 62, 20 Am. Rep. 504].

Wisconsin.— Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549.

United States.— New York Mut. L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,980, 8 Biss. 203. See as strongly illustrating the principle Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188.

57. Poock *v.* Lafayette Bldg. Assoc., 71 Ind. 357. The early and discarded doctrine was that there could be no recovery upon the security. See *supra*, XVII, B, 2, c.

58. New York Mut. L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,980, 8 Biss. 203. Similarly see Pancoast *v.* Travelers' Ins. Co., 79 Ind. 172.

59. State Bd. of Agriculture *v.* Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702. See also *supra*, XVII, F, 2, b, (III).

60. Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239.

61. Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549.

62. Chewacla Lime Works *v.* Dismukes, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100; Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695; Best Brewing Co. *v.* Klassen, 185 Ill. 37, 57 N. E. 20, 76 Am. St. Rep. 26, 50 L. R. A. 765 [*reversing* 85 Ill. App. 464] (holding that the signing of an appeal-bond by a trading corporation as surety, and the enjoyment of the benefits arising therefrom, will not estop the corporation from making the defense of *ultra vires*, if such act is not within the scope of its charter); Chicago Pneumatic Tool Co. *v.* Jones Mfg. Co., 91 Ill. App. 547 (when a contract is beyond the chartered power conferred on a corporation by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or acting on it, to show that it was prohibited by such laws); Kelley *v.* O'Brien Varnish Co., 90 Ill. App. 287; Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407.

63. National Home Bldg., etc., Co. *v.* Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245 [*reversing* 79 Ill. App. 303].

64. Sioux City Terminal R., etc., Co. *v.* Trust Co. of North America, 173 U. S. 99, 19 S. Ct. 341, 43 L. ed. 628 [*affirming* 82 Fed. 124, 27 C. C. A. 73 (*affirming* 69 Fed. 441)].

the sense that it is void; for example without the scope of the powers of the corporation.

c. Rule Where Contract Has Been Executed on One or Both Sides in Whole or in Part — (I) *Where Contract Has Been Fully Executed on Both Sides* — (A) *In General.* In conformity with a settled principle of law, where a contract with a corporation, the making of which is beyond its granted powers, has been fully executed by both parties, neither of them can assert its invalidity as a ground of relief against it.[65]

(B) *Doctrine That Individual Is Not Estopped in Such Cases.* Under the old and rigid doctrine which excluded the operation of the principle of estoppel, the right to cheat was mutual; so that where a person had made a contract with a corporation which was *ultra vires*, and had received the benefit of it, neither he nor those claiming under him were estopped from setting up the invalidity of the contract as a defense to an action to enforce it.[66]

(C) *No Estoppel Where Other Contracting Party Knows That Contract Is Ultra Vires.* It being a fundamental ground of estoppel *in pais* that the person seeking to assert the estoppel must have been misled to his injury,[67] it follows that there is no estoppel of the kind under consideration where the other contracting party knows that the contract is *ultra vires*, but that in such a case the parties are equally in the wrong and the rule *in pari delicto* obtains.[68]

(II) *Where Contract Has Been Fully Executed On Either Side* — (A) *In General.* There is authority for the proposition that where the contract has been fully executed on either side, and the party so executing it on his part is suing to recover the agreed consideration for executing it, the other party will be estopped from setting up the defense that the corporation had no power to enter into it; and for the purposes of this rule it is immaterial whether the plaintiff or the defendant is the corporation. On this subject it has been said that parties may "be estopped, in some cases, from disputing the validity of a corporate contract when it has been fully performed on one side, and when nothing short of enforcement will do justice."[69] In view of what has preceded this proposition cannot be stated with entire confidence, and great care is required in its application.

(B) *Provided Plaintiff Does Not Require Aid of Illegal Contract to Make Out His Case.* In such a case it has been said that if the contract has been so executed that plaintiff does not require the aid of the illegal contract to make out his case, he is entitled to recover, and the defendant cannot set up the illegality of the original transaction, and hence his own turpitude, in order to defeat the plaintiff's right.[70]

65. Long *v.* Georgia Pac. R. Co., 91 Ala. 519, 8 So. 706, 24 Am. St. Rep. 931. "The executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require." Comstock, C. J., in Parish *v.* Wheeler, 22 N. Y. 494, 508 [*quoted* with approval by Cooley, C. J., in Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352]. In like manner it was said by Gibson, C. J.: "True it is, that an illegal contract will not be executed; but when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties, for a promise, express or implied; and the court will not unravel the transaction to discover its origin." Lestapies *v.* Ingraham, 5 Pa. St. 71, 81. See also Hipple *v.* Rice, 28 Pa. St. 406.

Other illustrations of the doctrine. Mitchell *v.* Beckman, 64 Cal. 117, 24 Pac. 110; Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 27 N. E. 831, 38 N. Y. St. 155, 24 Am. St. Rep. 448.

66. Chambers *v.* Falkner, 65 Ala. 448.

67. Observe that a very able and scholarly lawyer and thinker, John S. Ewart, Esq., K. C., of Winnipeg, has discarded the word estoppel and employed the phrase "assisted misrepresentation." See his recent work on this subject.

68. Lucas *v.* White Line Transfer Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449.

69. Cooley, C. J., in Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 151, 23 N. W. 628, 58 Am. Rep. 352.

70. In Swan *v.* Scott, 11 Serg. & R. (Pa.) 155, 164, it was said by Duncan, J.: "The test, whether a demand connected with an illegal transaction, is capable of being enforced

(c) *Rule Where Contract Has Been Fully Executed by Party Contracting With Corporation.* Where a party has made a contract with a corporation and has fully performed what he agreed to do on his part, and is suing the corporation for the compensation which it agreed to pay or to render as the consideration of the contract, then the corporation will be estopped from setting up the defense that it had no power to enter into the contract, or that it was prohibited by statute from so doing. Here the fact that plaintiff has performed the obligation of the contract on his part necessarily implies that the corporation has received the benefits or fruits of it; and the case is therefore one governed by the principle already stated,[71] that the corporation will not be allowed to receive the fruits of a contract, and then, when sued for performance on its part, while keeping the fruits, set up the defense that it had no power to make the contract.[72] The most frequent application of this doctrine is that where a corporation has entered into a contract which has been fully executed by the other contracting party, so that nothing remains for the corporation to do but to pay the consideration money, it will not be allowed to set up that the contract was *ultra vires*.[73]

(d) *Rule Where Contract Has Been Fully Executed by Corporation.* Where the *ultra vires* contract has been fully executed by the corporation, and the other party has been placed in possession of the fruits of it, such other party will not be heard to set up, as a defense to an action by the corporation for the agreed consideration of the contract, that the contract was *ultra vires*.[74] Thus one who purchases from a corporation cannot, in an action for the purchase-price, where the contract has been performed by the corporation, object that the corporation was prohibited by law from trading in the specific article sold.[75]

d. Estoppel in Favor of Bona Fide Holders of Commercial Paper. One of the rules with respect to this subject is that if the corporation has power to make a note for any purpose, it cannot, as against a *bona fide* holder, set up that it had

at law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case."

71. See *supra*, XVII, F, 2, b, (II).

72. *California.*— Argenti *v.* San Francisco, 16 Cal. 255.

Colorado.— Denver F. Ins. Co. *v.* McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134.

Indiana.— Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674; Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239; State Bd. of Agriculture *v.* Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702.

Kansas.— Sherman Center Town Co. *v.* Morris, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134.

Michigan.— Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063.

New Jersey.— Camden, etc., R. Co. *v.* May's Landing, etc., R. Co., 48 N. J. L. 530, 7 Atl. 523.

New York.— Cunningham *v.* Massena Springs, etc., R. Co., 63 Hun 439, 18 N. Y. Suppl. 606, 44 N. Y. St. 723; Schurr *v.* New York, etc., Invest. Co., 16 N. Y. Suppl. 210, 41 N. Y. St. 90; Palmer *v.* Cypress Hill Cemetery, 14 N. Y. St. 591.

Pennsylvania.— Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110, 18 Atl. 428; Reed's Appeal, 122 Pa. St. 565, 16 Atl. 100.

United States.— Wood *v.* Corry Water-Works Co., 44 Fed. 146, 12 L. R. A. 168.

73. Wright *v.* Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701; Oil Creek, etc., R. Co. *v.* Pennsylvania Transp. Co., 83 Pa. St. 160.

Illustrations of the foregoing.— An insurance company is authorized by its charter to insure against losses by fire only, but it nevertheless issues to the plaintiff a policy in which it insures against a loss by hail, and the plaintiff pays the premium thereon, and a loss takes place by hail. Here the company will be liable to pay the indemnity, although the premium was settled partly in cash and partly in a promissory note. Denver F. Ins. Co. *v.* McClelland, 9 Colo. 11, 11 Pac. 771, 59 Am. Rep. 134. So where a corporation is prohibited by its charter from purchasing the stock of another corporation, but nevertheless does make such a purchase and gives its note for the stock and the stock is delivered to it, it cannot, when sued on the note by a *bona fide* purchaser (and it is supposed by a party to the original transaction), defend on the ground that it did not have power to purchase its own stock. Wright *v.* Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701, reasoning that plaintiffs did not need the aid of any illegal transaction to make out their case.

74. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Matter of Joint-Stock Co.'s Winding-up Act, 4 De G. M. & G. 19, 18 Jur. 710, 53 Eng. Ch. 16; London Fishmongers *v.* Robertson, 5 M. & G. 131, 6 Scott N. R. 56, 44 E. C. L. 78.

75. Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Illustrations of this principle.—Accordingly if a corporation has been organized for the purpose of manufacturing arms, but nevertheless enters into a contract with another cor-

no power to make the particular note in question.[76] So a person who in good faith lends money to a corporation and takes a transfer of its subscription notes as collateral security, without notice of any fraud affecting the origin of such notes, or that they were transferred without any previous resolution of the board of directors of such company, is entitled to recover upon them, although they may have been acquired from the maker by fraud, and although there may have been no such resolution authorizing the transfer.[77]

e. Doctrine That Violations of Charter or Want of Power Cannot Be Set up Collaterally, But Only by State — (I) *Statement of Doctrine.* A most important doctrine connected with this subject, and one which rises above the mere principle of estoppel, is that whether a corporation has acted without authority conferred on it by the legislature or has acted in contravention to an act of the legislature, cannot be set up collaterally by individuals who deal with it, or by third persons, but can be set up only by the state in a direct proceeding to forfeit its charter, to oust it of some particular franchise, or to subject it to punishment; or where the question is otherwise litigated between the state and the corporation.[78]

(II) *When State Will Interfere on Ground That Corporation Is Acting Ultra Vires.* Where no public question, public right, or public interest is involved, the state will not interfere on the ground that a corporation is acting in excess of its granted powers. But it is said that to justify a forfeiture of the franchises in a proceeding instituted by the state the *ultra vires* acts must be so substantial and continued as to derange or destroy the business of the

poration to manufacture and deliver to it a quantity of railroad locks, to be paid for within a stated period after delivery, and does so manufacture and deliver the locks, it can enforce the contract against the purchasing corporation; and if the purchasing corporation is insolvent, and the circumstances are such that the selling corporation could charge the directors if the contract were *intra vires*, it can charge them as it is; for they cannot set up a defense to escape their personal liability which it would be inequitable to allow their corporation to set up. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 20 Am. Rep. 504. So, although a corporation cannot, according to most holdings, enter into a partnership with a natural person or with another corporation (see *supra*, XVII, E, 9), yet where it has done so, it may maintain an action for an accounting from the other partner, and he will be estopped to set up that the partnership arrangement was *ultra vires*. Standard Oil Co. *v.* Scofield, 16 Abb. N. Cas. (N. Y.) 372.

76. Lehigh Valley Coal Co. *v.* West Depere Agricultural Works, 63 Wis. 45, 22 N. W. 831.

77. Ogden *v.* Andre, 4 Bosw. (N. Y.) 583 [*affirmed* in 3 Abb. Dec. (N. Y.) 396, 1 Keyes (N. Y.) 42, 26 How. Pr. (N. Y.) 599].

78. *Florida.*— Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Illinois.— Bushnell *v.* Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596.

Massachusetts.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 164 Mass. 223, 41 N. E. 268, 49 Am. St. Rep. 454; Prescott Nat. Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909; Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

Minnesota.— State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 8 L. R. A. 510; Baker *v.* Northwestern Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464.

Missouri.— St. Louis Drug Co. *v.* Robinson, 81 Mo. 18 [*affirming* 10 Mo. App. 588]; Hovelman *v.* Kansas City Horse R. Co., 79 Mo. 623; Wherry *v.* Hale, 77 Mo. 20; Franklin Ave. German Sav. Inst. *v.* Board of Education, 75 Mo. 408; Thornton *v.* National Exch. Bank, 71 Mo. 221; State Bank *v.* Merchants' Bank, 10 Mo. 123; St. Louis Stoneware Co. *v.* Partridge, 8 Mo. App. 217 (the court nevertheless denied the doctrine that the question whether a corporation has exceeded its powers can be litigated only between the state and the corporation).

Pennsylvania.— Wright *v.* Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701; Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208; Bly *v.* Titusville Second Nat. Bank, 79 Pa. St. 453 (where plaintiff needs no aid from the unlawful transaction to make out his case).

South Carolina.— State Bank *v.* Hammond, 1 Rich. 281.

Wisconsin.— Zinc Carbonate Co. *v.* Shullsburg First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

United States.— Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188 [*reversing* Matthews *v.* Skinker, 62 Mo. 329, 21 Am. Rep. 425]; Ohio, etc., R. Co. *v.* McCarthy, 96 U. S. 258, 24 L. ed. 693; Bensiek *v.* Thomas, 66 Fed. 104, 13 C. C. A. 457; Wood *v.* Corry Water-Works Co., 44 Fed. 146, 12 L. R. A. 168.

The doctrine that the state alone can challenge *ultra vires* acts of corporations is enunciated with more or less distinctness in the

corporation to such an extent that it no longer fulfils the ends for which it was created. In short if the unauthorized acts affect merely the shareholders and creditors, and they have adequate legal or equitable remedies, the state will not interfere.[79]

(III) *Expressions and Applications of Principle That Question of Ultra Vires Can Be Invoked Only by State.* Upon this subject no consistent doctrine can be reached or stated with confidence. It is perceived that the doctrine flatly contradicts the so-called doctrine of *ultra vires* in all its original conceptions. It was said in the leading case announcing the doctrine that "a private person cannot, directly or indirectly, usurp the functions of the government."[80] What was held was that one who had borrowed money from a national bank upon the security of a mortgage could not, when the bank proceeded to enforce the security, set up the want of power in the bank to lend upon such security.[81] The supreme court of Missouri, after an attentive consideration of the question, endeavored to generalize the doctrine of the leading case and to state it in broad terms by saying that "the question of *ultra vires* can only be raised in a direct proceeding, by the state against the corporation, and not in a collateral proceeding by another, except when the charter of the corporation, not only specifies, and, therefore, limits it to the business in which it may engage, or by express terms, or by a fair implication from its term, invalidates transactions outside of its legitimate corporate business."[82]

(IV) *Doctrine Uproots Distinction Between Discounting and Purchasing Commercial Paper.* It is to be observed that the doctrine of the case of National Bank v. Matthews uproots a line of untenable decisions which take a distinction between discounting and purchasing commercial paper by a bank,[83] by preventing an obligor upon such paper from questioning the manner in which the bank acquired it, when it brings an action upon it.[84]

(V) *Application of This Principle With Respect to Power of Foreign Corporations to Hold Land.* A leading application of this principle is that, although a foreign corporation may not have power to hold land in the domestic state, yet the question cannot be raised in a collateral proceeding, as for example in an action for coal sold by a foreign corporation to a defendant, which coal had been dug by the corporation under a mining lease.[85] So where a foreign corporation had purchased land and taken a conveyance of it in direct violation of the

following cases: Land *v.* Coffman, 50 Mo. 243; Chambers *v.* St. Louis, 29 Mo. 543; McIndoe *v.* St. Louis, 10 Mo. 575; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Goundie *v.* Northampton Water Co., 7 Pa. St. 233; Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313; Runyan *v.* Coster, 14 Pet. (U. S.) 122, 10 L. ed. 382.

79. State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

80. Prescott Nat. Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909; Merchants' Nat. Bank *v.* Hanson, 33 Minn. 40, 21 N. W. 845, 53 Am. Rep. 5; Genesee Nat. Exch. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188 [*reversing* 62 Mo. 329, 21 Am. Rep. 425, and *followed* in Thornton *v.* National Exch. Bank, 71 Mo. 221].

81. Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188.

82. St. Louis Drug Co. *v.* Robinson, 81 Mo. 18, 26 [*affirming* 10 Mo. App. 588]. The following cases were referred to by the court as supporting the doctrine, and they do support it more or less directly: Union Nat. Bank *v.* Hunt, 76 Mo. 439; St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Thornton *v.* National Exch. Bank, 71 Mo. 221; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; Land *v.* Coffman, 50 Mo. 243; Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369; Chambers *v.* St. Louis, 29 Mo. 543; McIndoe *v.* St. Louis, 10 Mo. 575.

83. Such as Lazear *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355; Rochester First Nat. Bank *v.* Pierson, 24 Minn. 140, 31 Am. Rep. 341; Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 23 Am. Rep. 683; Niagara County Bank *v.* Baker, 15 Ohio St. 68. Other courts, it is to be observed, have had the sense to repudiate this distinction. Pape *v.* Topeka Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183; Atlas Nat. Bank *v.* Savery, 127 Mass. 75; National Pemberton Bank *v.* Porter, 125 Mass. 333, 28 Am. Rep. 235; Smith *v.* Pittsburg Exch. Bank, 26 Ohio St. 141. For a transaction held to be a discounting see Prescott Nat. Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909.

84. Prescott Nat. Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909.

85. Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208.

laws of the state in which the land was situated, it was held that it took title as against its grantor and his subsequent grantee, and that the validity of the conveyance to it could be questioned by the state alone.[86]

(VI) *Further Applications and Misapplications of This Principle.* Applying this principle, it has been held that, in a suit in equity to set aside a conveyance of real estate made in trust for the receiver of a national bank, on the ground that it was made without consideration and with intent to hinder, delay, and defraud creditors, plaintiff cannot challenge the conveyance, on the ground of its being unauthorized or inhibited by the National Banking Act.[87]

(VII) *When Third Persons May and May Not Appeal to Principle of Ultra Vires.* Where the *ultra vires* act of a corporation is injurious to a third person, even to a shareholder, provided there be no estoppel against him, he may appeal to the courts for an appropriate mode of redress just as any other person injured by the unlawful act of another may. If he is a creditor of the corporation, he may have the appropriate relief against a contract made by it in excess of its powers, whereby its funds are dissipated and diverted from the payment of his debt.[88] On the other hand in general it may be said that one whose rights are not injuriously affected by reason of the fact that a corporation is acting in excess of its powers, or beyond the warrant of law, has no standing in court to complain of the same.[89]

(VIII) *When Shareholders May and May Not.* Unless estopped by their own conduct,[90] shareholders may, when they have exhausted their means of redress within the corporation, under a principle already stated,[91] appeal to the courts for appropriate redress against *ultra vires* acts of the corporation.[92]

86. Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317. Still further applications of the principle may be culled from the following cases: Southern L., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448; Bushnell *v.* Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596 (prevented the success of a bill in equity to have a corporation irregularly organized declared a partnership); Baker *v.* Northwestern Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464; State Bank *v.* Hammond, 1 Rich. (S. C.) 281.

87. Wherry *v.* Hale, 77 Mo. 20.

Other applications and misapplications of the principle may be collected from the following, among many other cases: Hovelman *v.* Kansas City Horse R. Co., 79 Mo. 632 (no injunction against a street railroad at the suit of a private party from constructing a railway upon city streets — a violation of the principle that a private person may have an injunction against an *ultra vires* act of a corporation involving special injuries to him); Franklin Ave. German Sav. Inst. *v.* Board of Education, 75 Mo. 408 (prevents defendant in a private action by a corporation from showing that the corporation had not legal capacity to sue); St. Louis Drug Co. *v.* Robinson, 10 Mo. App. 588 [*affirmed* in 81 Mo. 18, party for whose benefit an indorsement has been made, cannot invoke the doctrine of *ultra vires* against the enforcement of a chattel mortgage given to secure the corporation against liability on the note].

88. Washington Mill Co. *v.* Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067. See also Webster *v.* Home Mach. Co., 54 Conn. 394, 8 Atl. 482. When a mortgage made by a mining company which has joined with a railroad company to raise money to enlarge the facilities of transporting the product of the mining company will not be treated as void in favor of subsequent creditors of the mortgagor who becomes such with notice of the mortgage. Central Trust Co. *v.* Columbus, etc., R. Co., 87 Fed. 815.

89. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; Starin *v.* Edson, 112 N. Y. 206, 19 N. E. 670, 20 N. Y. St. 898 [*reversing* 42 Hun (N. Y.) 549]; New Orleans, etc., R. Co. *v.* Ellerman, 105 U. S. 166, 26 L. ed. 1015; Georgetown *v.* Alexandria Canal Co., 12 Pet. (U. S.) 91, 9 L. ed. 1012; Pudsey Coal Gas Co. *v.* Bradford, L. R. 15 Eq. 167, 28 L. T. Rep. N. S. 11, 21 Wkly. Rep. 286; Liverpool *v.* Chorley Water Works Co., 2 De G. M. & G. 852, 51 Eng. Ch. 666; Stockport Dist. Waterworks Co. *v.* Manchester, 9 Jur. N. S. 266, 7 L. T. Rep. N. S. 545, 11 Wkly. Rep. 156. See also State *v.* Passaic, 42 N. J. L. 524; State *v.* Fuller, 34 N. J. L. 227; Erie *v.* Crooke, 10 N. Y. 60; Belden *v.* Meeker, 2 Lans. (N. Y.) 470; State *v.* Senft, 2 Hill (S. C.) 367.

90. Thompson *v.* Lambert, 44 Iowa 239.

91. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; New Orleans, etc., R. Co. *v.* Ellerman, 105 U. S. 166, 26 L. ed. 1015, in both of which cases this right is conceded to a shareholder while denied to a stranger.

92. That a shareholder cannot, in a suit in equity which he is permitted to prosecute in behalf of the corporation, question its right to exercise all the powers which it has

f. Persons Advancing Money to Corporation Not Bound to See to Its Proper Application. On a principle already considered,[93] if a contract made by a corporation is within the general scope of its powers, but if the real purpose of its officers in making the contract is unlawful, as where it has a general power to borrow money, but borrows it in the particular case for unlawful purposes, then if the party contracting with the corporation has no knowledge of the unlawful purpose he will not be affected thereby, and the defense of *ultra vires* will not be available to the corporation, or to those claiming through it, when he brings an action to enforce the contract.[94] Thus one who purchases property of a corporation is not bound to follow the price into its treasury, and to see to its proper distribution among its shareholders, there being no fraudulent connivance on his part with its officers to wrong its shareholders.[95] It has even been held that if a corporation has power to borrow money and to execute mortgages to secure the loan, the fact that its purpose in borrowing the money is to use it in a transaction which is *ultra vires* will be no defense to the enforcement of the mortgage, although the lender knew that such was its purpose, provided he had no further complicity in the unlawful transaction than that arising from such mere knowledge.[96]

g. Other Cases in Which Courts Have Refused to Admit Defense of Ultra Vires. A mining corporation, being unsuccessful and under expense, transferred its properties for stock in a new corporation, and in so doing incurred expenses, to pay which it borrowed money from one of its shareholders. It afterward levied an assessment upon its shares to raise money to repay the money thus borrowed. It was held that a delinquent shareholder, whose shares had been sold under the assessment, could not, in an action to set aside the assessment, set up that the assessment was rendered necessary by the purchase of shares in the other corporation, which was *ultra vires*.[97]

XVIII. CORPORATE BONDS AND MORTGAGES.

A. Corporate Bonds — 1. In General — a. Power to Issue Bonds — (I) *In General.* As already seen[98] the power to borrow money for the purpose of carrying into effect the objects of its creation is ascribed to every corporation where not expressly prohibited; and this carries with it by necessary implication the power to issue the usual evidences of indebtedness in order to procure such loan, among which evidences of indebtedness are negotiable interest-bearing bonds.

(II) *From What Express Power Power to Issue Bonds Has Been Implied.* The power to issue bonds has been implied from the power to mortgage its property;[99] in a railway company, from the power to borrow money;[1] and in

taken to itself in its certificate of incorporation, but that such a question can be raised by the state only, see Willoughby *v.* Chicago Junction R., etc., Co., 50 N. J. Eq. 656, 25 Atl. 277. That a contract by a corporation to buy off the competition of a rival company cannot be assailed by a shareholder as *ultra vires*, but is within the discretionary power of the directors, see Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363, 18 N. Y. St. 522, 1 L. R. A. 456.

93. See *supra*, XVII, F, 1, f.

94. See Thompson *v.* Lambert, 44 Iowa 239; and the reasoning of Comstock, C. J., in Bissell *v.* Michigan Southern, etc., R. Co., 22 N. Y. 258, 273 [*quoted* in Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 579, 99 Am. Dec. 300].

95. Leathers *v.* Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661.

96. Wright *v.* Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412. For another illustration of the doctrine see Lippincott *v.* Shaw Carriage Co., 25 Fed. 577.

97. Taylor *v.* North Star Gold Min. Co., 79 Cal. 285, 21 Pac. 753.

98. See *supra*, XVII, B, 1, b.

That a corporation may, in order to carry out the legitimate objects of its creation, deal precisely as an individual may, except in so far as it is restrained by its charter or governing statute, see Braud *v.* Donaldsonville, 28 La. Ann. 558; Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Craven *v.* Atlantic, etc., R. Co., 77 N. C. 289; Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574; McMasters *v.* Reed, 1 Grant (Pa.) 36; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223.

99. Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211.

1. Miller *v.* New York, etc., R. Co., 8 Abb. Pr. (N. Y.) 431, 18 How. Pr. (N. Y.) 374.

a cemetery association, from the power "to hold, purchase, and convey such real estate as the offices of the corporation may require," this carrying with it the power to issue bonds and deliver them in payment for lands used as a cemetery and for the improvements thereon.[2]

(III) *No Power to Issue Bonds Never Maturing.* A corporation cannot increase its capital stock and change the relative rights of its existing shareholders, by issuing this species of share in the professed exercise of its power to borrow, and such an issue will be enjoined.[3]

(IV) *Power to Issue Debentures Creating Floating Charge Upon Undertaking.* This power is much used in England under provisions of general statutes which extend to all railway companies having power to raise money by mortgage or bond, although their special acts may contain no express provision on the subject of the issue of debenture shares.[4]

(V) *Power of Reorganized Corporations to Issue Bonds.* A corporation which has become the purchaser at foreclosure sale of the property of a previously existing corporation may issue its bonds for the purpose of paying for the franchises and property which it has purchased, under a statute providing that the purchasers of such property who procure it clear of encumbrance, or "any company organized by their consent," may issue stock or bonds in the proportion which they may deem advisable.[5]

(VI) *Power to Lend Its Credit by Issuing Bonds.* It may be concluded, by analogy to the power to issue accommodation paper,[6] that a corporation has no power to lend its credit to third persons by issuing its bonds; and it has been held that a corporation has no power to issue its own bond in exchange for the mortgage bond of a natural person, and that having done so it cannot maintain a bill in equity to foreclose the mortgage securing such bond.[7]

(VII) *Power to Issue Bonds With Respect to Question of Interest and Usury.* Authority in the charter of a railroad company to borrow money at interest, and to give bonds or notes therefor, payable at such times and places as may be agreed upon, includes authority to contract for the payment of interest semiannually.[8] An authority in such a charter to borrow money upon such terms as may be agreed upon between the parties includes an authority to pay interest beyond the rate fixed by the statutes of the state.[9] So where the charter of a corporation authorizes it to borrow money on such terms as its directors may determine and to issue bonds a loan to it is not usurious because the bonds are sold for less than their face value.[10] The effect of a clause on the face of a negotiable bond which a corporation has the power to issue, providing for the payment by the corporation of interest in excess of the rate allowed by law, is, in the absence of special applicatory statutes, to be determined by the law with respect to usurious contracts in the particular jurisdiction. If by the law of the state the

2. Seymour *v.* Spring Forest Cemetery Assoc., 19 N. Y. Suppl. 94, 45 N. Y. St. 520. For a similar conclusion with respect to a merchants' exchange company see Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

3. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. 386.

4. *In re* Mersey R. Co., [1895] 2 Ch. 287, 64 L. J. Ch. 625, 72 L. T. Rep. N. S. 735, 12 Reports 345. See also Government Stock Invest., etc., Co. *v.* Manila R. Co., [1895] 2 Ch. 551, 64 L. J. Ch. 740; *In re* Colonial Trusts Corp., 15 Ch. D. 465. An English company is not debarred from issuing the remaining debentures of a series by the fact that the earlier debenture-holders have called in the principal and issued a writ to enforce their security, if they have not, at the date of the further issue, obtained the appointment of a receiver. *In re* Hubbard, 68 L. J. Ch. 54, 79 L. T. Rep. N. S. 665, 5 Manson 360. *Compare* Anderson *v.* Bullock County Bank, 122 Ala. 275, 25 So. 523; Wakefield Water Co. *v.* New England Trust Co., 175 Mass. 478, 56 N. E. 703.

5. Thayer *v.* Wathem, 17 Tex. Civ. App. 382, 44 S. W. 906.

6. See *supra*, XVII, C, 4.

7. Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558.

8. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

9. Morrison *v.* Eaton, etc., R. Co., 14 Ind. 110.

10. Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363, opinion by Smith, C. J.

holder of an obligation tainted with usury is entitled to recover the principal sum and lawful interest, rejecting the usurious excess,[11] the same rule of recovery will be applied in an action upon a negotiable corporate bond.[12]

b. Questions Relating to Payment For Bonds — (I) *No Power to Give Away Its Bonds.* It is a sound conclusion, although somewhat shaken by one or two unfortunate decisions,[13] that a corporation can neither give away its bonds as a bonus to its shareholders, nor give away its stock as a bonus to its bondholders, but that such donations are diversions of its assets, in breach of the trust under which its directors and officers hold those assets, both as against creditors and shareholders.[14] But it has been held that a bonus in shares given to purchasers of the bonds of a corporation, simply as an inducement to them to purchase the bonds, will not entitle dissenting shareholders to have a deduction of the par value of the bonus shares made from the bonds, provided the giving of the bonus shares was in good faith.[15]

(II) *Power to Issue Its Bonds at Discount.* In the absence of restraining constitutional provisions or statutes, private corporations have the same power to sell their bonds at less than their par value which natural persons would have.[16]

(III) *Power to Issue Its Bonds For Property in Kind.* A corporation which has power to issue bonds to raise money for the construction of its works may issue them in payment for works already constructed, which are suitable for its purposes, and which it has power to purchase and hold.[17]

(IV) *Constitutional and Statutory Provisions Against Issuing Stock or Bonds Except For Money, Labor, Property, Etc.* — (A) *In General.* Constitutional prohibitions exist in many of the states against the issuing by corporations of stock or bonds, except for money, labor, or property actually received and applied to the purposes for which the corporation was created, and providing that all fictitious indebtedness of corporations shall be void.[18] Such constitutional provisions are not construed as being intended to interfere with the usual and customary methods of raising funds by corporations, by the issue of stocks or bonds for accomplishing legitimate corporate purposes.[19] They do not for example require that the money, property, or labor received in exchange for the bonds shall be of the equal market value of the bonds, provided the transaction is a real one based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and to accomplish what it forbids.[20] In short such provisions merely operate to require that there

11. As in Pennsylvania. Turner *v.* Calvert, 12 Serg. & R. (Pa.) 46; Wycoff *v.* Longhead, 2 Dall. 92, 1 L. ed. 303.

12. Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

13. See *supra*, VI, M, 1, b, (VII), (B); VI, M, 1, i.

14. Central Trust Co. *v.* New York City, etc., R. Co., 18 Abb. N. Cas. (N. Y.) 381.

15. Dickerman *v.* Northern Trust Co., 176 U. S. 181, 20 S. Ct. 311, 44 L. ed. 423.

16. Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 9 L. R. A. 527 [*reversing* 52 Hun (N. Y.) 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]; Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

17. Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 33 N. Y. St. 88, 9 L. R. A. 527 [*reversing* 52 Hun (N. Y.) 166, 5 N. Y. Suppl. 124, 23 N. Y. St. 409]; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

18. See *supra*, XVIII, A, 1, a, (I).

19. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187 [*approved* in Memphis, etc., R. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595].

20. Memphis, etc., R. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595. Similarly see Elyton Land Co. *v.* Birmingham Warehouse, etc., Co., 92 Ala. 407, 9 So. 129, 25 Am. St. Rep. 65, 12 L. R. A. 307; Brown *v.* Duluth, etc., R. Co., 53 Fed. 889. See also Ala. Code, §§ 1560–1663.

For example the mere fact that property bought for seventeen thousand dollars at sheriff's sale, on execution against a corporation, was resold to the reorganized corporation for thirty-eight thousand dollars is not proof of fraudulent overvaluation, so as to affect the validity, as against the receiver of the latter corporation, of its bonds given on account of the transaction. Pomeroy *v.* New York Smelting, etc., Co., (N. J. Ch. 1901) 48 Atl. 395.

For an agreement construed as not being in violation of a statute prohibiting the sale of railroad bonds to directors of the corporation, either directly or indirectly, for less than

shall be a real debt founded upon real transactions having reference to the legitimate purposes of the corporation and not to fictitious debts, tricks, or devices intended to impose obligations on the corporation which it ought not to assume.[21]

(B) *Statutes Limiting Deviation to Stated Per Centum* — (1) IN GENERAL. The danger of abuse in applying the foregoing principles of construction have led the legislature of one state to limit the deviation which is permitted between real and actual value to twenty-five per centum of the par value.[22] This statute restrains a corporation from hypothecating its bonds as a security for loans, in other words from issuing them as collateral security, without stipulating that they shall be accounted for at not less than seventy-five cents on the dollar of their par value, and all bonds otherwise issued are void.[23]

(2) POWER TO PLEDGE BONDS FOR CORPORATE DEBTS WITHOUT REFERENCE TO VALUE. In the absence of such a statutory limit as that existing in Wisconsin just referred to[24] the conclusion was that a corporation might pledge its own mortgage bonds as collateral security for a debt without any such restriction as to the value at which they should be accounted for to the company in case of a sale to foreclose the pledge, and that such a pledge, if made without fraud, but with the *bona fide* purpose of securing the payment of corporate debts, could not properly be regarded as a fictitious increase of the indebtedness of the corporation, or as an issuing of its bonds except for money, labor done, or money or property actually received, within the meaning of the constitutional inhibition, although the amount of the bonds thus pledged might exceed the amount of the indebtedness to be secured.[25] In short it seems to be established that a corporation which has the power to issue bonds secured by a mortgage may execute such bonds and a mortgage to secure them, and then transfer the bonds and the mortgage, as collateral security for an indebtedness of a less value than the sum for which the bonds are issued, and which is secured by the mortgage.[26]

(C) *What Indebtedness Is Not "Fictitious" Within Meaning of Such Prohibitions.* It has been held that an indebtedness of a corporation is not "fictitious," within the meaning of such a provision, where it consists of notes and mortgages issued by the corporation in consideration of money advanced to and paid for the corporation, and of property sold and delivered to it by the mortgagee, although but a part of the consideration for each note executed by the corporation had been received by it at the date of the execution of the note, if the full consideration was afterward received by it and there was no fraud on the part of the mortgagee.[27]

(D) *Prohibition Against Fictitious Bonded Indebtednees — Non-Negotiable Promissory Notes.* A constitutional prohibition against the issue of "fictitious"

their par value, see Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155 [*rehearing denied* in 96 Fed. 784, 37 C. C. A. 587, *modifying* 82 Fed. 642, 86 Fed. 929]. Circumstances under which the court refused to condemn a transaction as being a violation of a statute forbidding the issuing of bonds except for money or property actually received for the use and lawful purposes of the corporation, at the suit of a subsequent creditor, where the bonds had been issued in exchange for notes given by the corporation and indorsed by the firm to the business of which the corporation had succeeded, and the accounts were complicated, and the objecting creditor failed to designate the bonds the issuing of which should be condemned as being within the prohibition of the statute, see *Re* Snyder, 29 Misc. (N. Y.) 1, 59 N. Y. Suppl. 993.

21. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375.

22. Wis. Rev. Stat. § 1753.

23. Pfister *v.* Milwaukee Electric R. Co., 83 Wis. 86, 53 N. W. 27.

24. See *supra*, XVIII, A, 1, b, (IV), (B), (1).

25. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375. Thus the giving by a corporation of its mortgage bonds amounting to the face value of one hundred and five thousand dollars, as collateral security for a debt of eighty-five thousand dollars due from the corporation, was not a fictitious issue or disposition of the bonds, within the meaning of such a constitutional provision. Dexter *v.* McClellan, 116 Ala. 37, 22 So. 461.

26. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375; Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190.

27. Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049, opinion by Vanclief, Commissioner.

bonded indebtedness has been held not to prohibit the issue of non-negotiable promissory notes secured by a mortgage of the corporate property,[28] although this plainly opens the door to evasions of the constitutional provision by the mere device of putting the obligation in the form of a non-negotiable note.

(E) *Conclusion Where Constitution or Statute Declares Prohibited Issue of Bonds to Be Void.* Some of these statutes declare that all bonds otherwise issued shall be void. Where the statute contains such a declaration the courts have nothing to do, in the absence of circumstances of estoppel, except to enforce the mandate of the statute and to hold that bonds issued in contravention of its terms are void.[29]

c. **Prohibitions Against Creating Bonded Indebtedness Beyond Prescribed Limits.** Many constitutional and statutory prohibitions against the creating by corporations of bonded indebtedness beyond prescribed limits have been established.[30] With respect to such provisions the following holdings have been made: That such a statute does not apply to a mortgage given by a corporation upon its own property;[31] that such a prohibition will not render a mortgage void with respect to a subsequent creditor who becomes such with notice that the mortgage is made to secure a loan excessive in amount;[32] and that after the assets of a corporation had greatly depreciated and the bookkeeper had made an entry on the books charging the loss to the capital stock, but there had been no amendment of the articles reducing the capital, and no calling in or surrender of shares, a debt, contracted by the company, which amounted to more than one half of the available assets, but not to more than one half of the amount of the shares paid up and actually issued to the shareholders, was not within the statutory prohibition, but was a valid debt of the corporation.[33]

d. **Prohibition Against Borrowing Money at More Than Prescribed Rate of Interest.** Where the governing statute of a corporation contains an express limitation of the rate of interest at which it may borrow money and forbids it to borrow at a greater rate, a bond and mortgage executed by it to a building and loan association are *ultra vires*, void, and unenforceable where the agreed interest, together with premiums and exactions, exceeds the rate prescribed by the statute.[34]

e. **Prohibition Against Increasing Bonded Indebtedness Without Consent of Shareholders.** Constitutional and statutory provisions exist, varying in their terms, prohibiting the increase of the bonded indebtedness of corporations without the consent of their shareholders. These provisions, having been established for the protection of the shareholders, may be waived by them.[35] Such a prohibition is not infringed by the execution of a mortgage to secure the payment of money, in a transaction which does not increase the corporate indebtedness, but merely changes the form of an existing corporate indebtedness.[36]

f. **Bond May Be Valid Although Mortgage Void.** A bond issued by a corporation may be valid, although the mortgage by which it is attempted to secure it is void; and notwithstanding the invalidity of the mortgage an action may be maintained upon the bond.[37]

28. Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 28 Pac. 1049.

29. Pfister *v.* Milwaukee Electric R. Co., 83 Wis. 86, 53 N. W. 27; National Foundry, etc., Works *v.* Oconto Water Co., 52 Fed. 29.

30. These provisions have already been referred to when dealing with the subject with special reference to the issuing of shares. See *supra*, VI.

31. Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197.

32. Central Trust Co. *v.* Columbus, etc., R. Co., 87 Fed. 815.

33. Cunningham *v.* German Ins. Bank, 101 Fed. 977, 41 C. C. A. 609.

34. Southern Bldg., etc., Assoc. *v.* Casa Grande Livery Stable Co., 119 Ala. 175, 24 So. 886.

35. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375; Riesterer *v.* Horton Land, etc., Co., 160 Mo. 141, 61 S. W. 238 (holding that the shareholders may waive a provision prescribing the number of days' notice of a meeting called to increase its bonded indebtedness, by express agreement, or by attending a meeting held without such notice).

36. Powell *v.* Blair, 133 Pa. St. 550, 19 Atl. 559; Ahl *v.* Rhoads, 84 Pa. St. 319.

37. Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

g. Bonds Which Are Mortgages by Force of Statute. A statute of Florida authorizing a railroad company to issue "first-mortgage bonds" has been held to authorize it to issue a bond which should operate as a first mortgage upon its properties, without the additional formality of executing a mortgage.[38]

h. Negotiability of Corporate Bonds — (i) *In General* — (a) *Corporate Bonds Negotiable Although Under Seal.* These instruments are a modern financial invention. They are as is well known issued by the United States government,[39] by the governments of the several states,[40] by the governments of the territories,[41] as well as by municipal corporations, and railway, canal, steamboat, mining, manufacturing, and other incorporated companies. Such bonds, whether the coupons are attached or detached, are, when they employ negotiable words, as when they are made payable to the bearer, the holder, or to order, almost universally held to be negotiable instruments, possessing the ordinary incidents of such instruments, although they may be issued under seal.[42] This is true of cor-

38. State *v.* Florida Cent. R. Co., 15 Fla. 690.

39. The United States 5-20 bonds were negotiable, and title thereto passed by delivery. One who took them in good faith for value acquired a good title to them. If one deposited them for safe-keeping with a banking institution, and the cashier of the institution pledged them in violation of his duty, the pledgee, acting in good faith, acquired a good title to them; and a recovery of them from him, effected through the fraud and bad faith of the cashier, did not divest the title out of the pledgee and revest it in the depositor. Ringling *v.* Kohn, 4 Mo. App. 59.

40. Walker *v.* State, 12 S. C. 200; 1 Daniel Neg. Instr. §§ 440, 446.

41. Brunswick First Nat. Bank *v.* Yankton County, 101 U. S. 130, 25 L. ed. 1046, per Waite, C. J.

42. *Alabama.*— Reid *v.* Mobile Bank, 70 Ala. 199; State *v.* Cobb, 64 Ala. 127; Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57.

Connecticut.— Savings Soc. *v.* New London, 29 Conn. 174.

Illinois.— Johnson *v.* Stark County, 24 Ill. 75.

Indiana.— Junction R. Co. *v.* Cleneay, 13 Ind. 161.

Iowa.— Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

Louisiana.— Planters' Consol. Assoc. *v.* Avegno, 28 La. Ann. 552.

Maryland.— Virginia *v.* Chesapeake, etc., Canal Co., 32 Md. 501.

Massachusetts.— Haven *v.* Grand Junction R., etc., Co., 109 Mass. 88; Spooner *v.* Holmes, 102 Mass. 503, 3 Am. Rep. 491; Chapin *v.* Vermont, etc., R. Co., 8 Gray 575.

Mississippi.— Craig *v.* Vicksburg, 31 Miss. 216.

Missouri.— Barrett *v.* Schuyler County Ct., 44 Mo. 197; Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 4 Mo. App. 276; Ringling *v.* Kohn, 4 Mo. App. 59, 63.

New Jersey.— Winfield *v.* Hudson, 28 N. J. L. 255; Elizabeth *v.* Force, 29 N. J. Eq. 587; Vreeland *v.* Van Horn, 17 N. J. Eq. 137; Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

New York.— McClelland *v.* Norfolk St. R. Co., 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299; Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Seybel *v.* National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; Brainerd *v.* New York, etc., R. Co., 25 N. Y. 496; Hodges *v.* Shuler, 22 N. Y. 114; Rome Bank *v.* Rome, 19 N. Y. 20, 75 Am. Dec. 272; Evertson *v.* Newport Nat. Bank, 4 Hun 695 [*affirmed* in 66 N. Y. 14, 23 Am. Rep. 9]; Wickes *v.* Adirondack Co., 2 Hun 112; Blake *v.* Livingston Co., 61 Barb. 149; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. 9; Hubbard *v.* New York, etc., R. Co., 36 Barb. 286.

North Carolina.— Weith *v.* Wilmington, 68 N. C. 24.

Pennsylvania.— Beaver County *v.* Armstrong, 44 Pa. St. 63; Carr *v.* Le Fevre, 27 Pa. St. 413; Connor *v.* Fifth Nat. Bank, 14 Pittsb. L. J. N. S. 370. But see Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429.

Rhode Island.— National Exch. Bank *v.* Hartford, etc., R. Co., 8 R. I. 375, 91 Am. Dec. 237, 5 Am. Rep. 582.

South Carolina.— Langston *v.* South Carolina R. Co., 2 S. C. 248.

Texas.— San Antonio *v.* Lane, 32 Tex. 405.

Vermont.— North Bennington First Nat. Bank *v.* Mount Tabor, 52 Vt. 87, 36 Am. Rep. 734.

Virginia.— Arents *v.* Com., 18 Gratt. 750.

Wisconsin.— Mills *v.* Jefferson, 20 Wis. 50; Clark *v.* Janesville, 10 Wis. 136.

United States.— Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; Clark *v.* Iowa City, 20 Wall. 583, 22 L. ed. 427; Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Marshall County *v.* Schenck, 5 Wall. 772, 18 L. ed. 556; Thompson *v.* Lee County, 3 Wall. 327, 18 L. ed. 177; Murray *v.* Lardner, 2 Wall. 110, 17 L. ed. 857; Meyer *v.* Muscatine, 1 Wall. 384, 17 L. ed. 564; Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. ed. 520; Mercer County *v.* Hacket, 1 Wall. 83, 17 L. ed. 548; Moran *v.* Miami County, 2 Black 772, 17 L. ed. 342; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. ed. 488; White *v.* Vermont, etc., R. Co., 21 How. 575, 16 L. ed. 221; Knox County *v.* Aspinwall, 21 How. 539, 16 L. ed.

porate bonds which have been indorsed by the state.[43] It is especially true where the law of the state under whose laws they are issued has abolished the use of private seals.[44]

(B) *Non-Payment of Interest Does Not Render Bonds Non-Negotiable.* The non-payment of an instalment of interest, when due, does not affect the negotiability of corporate bonds, or of the subsequent coupons, until the maturity of the bonds themselves, or of the coupons; and a purchaser for value, without notice of their invalidity as between antecedent parties, will take them discharged from all infirmities.[45]

(C) *Bonds Issued in Blank, Holder May Fill Up Blank.* Again if the bonds of a corporation are issued to a payee not named, or in other words are payable in blank, and have in this condition passed from hand to hand it is competent for the holder to fill the blank, so as to make the bond payable to him or to his order, and he can then maintain suit upon it in his own name.[46]

(II) *Doctrine That Negotiable Quality of Bonds Extends to Mortgage*—(A) *Statement of Doctrine.* Although a mortgage may be given to secure a debt evidenced by a promissory note or other negotiable security, yet the mortgage itself is not a negotiable security, unless there is a statute making it so, and it is doubtful whether any such statutes have been enacted. A mortgage cannot, in the absence of a statute authorizing it, be assigned at law. It can be assigned in equity, but only in equity; and a court of equity, in giving effect to an assignment of it, will be careful not to sacrifice the superior equities of others. An assignment of a note, bond, or other evidence of debt which is secured by a mortgage, carries with it in equity an assignment of the mortgage; and if the security is negotiable, a *bona fide* purchaser of that will take it free from any equities, that is to say, free from any defenses which might have been set up by the maker or those claiming under him; but he will take the mortgage subject to such equities or defenses.[47]

(B) *Exceptions to Foregoing Rule.* An exception to this principle is said to be that a court of equity will protect the assignee of the mortgage against the latent equities of third persons.[48] Another exception is said to be that if the intending assignee applies to the mortgagor, and the mortgagor consents to the assignment, this will estop him from setting up any equities against the assignee.[49]

i. **Rights of Bona Fide Purchasers For Value**—(I) *Good in Hands of Bona Fide Purchaser, Although Voidable in Hands of Original Taker.* Corporate bonds payable to the bearer, being negotiable securities, are good in the hands of *bona fide* purchasers for value, notwithstanding the circumstances under which they have been issued may be such as to render them voidable in the hands of the original taker.[50]

(II) *This Doctrine Applicable Where Bonds Are Issued in Pledge.* The foregoing doctrine is applicable to cases where bonds are issued in pledge by a corporation as security for its debts.[51]

208; Durant *v.* Iowa County, 8 Fed. Cas. No. 4,186, Woolw. 72; Memphis *v.* Brown, 16 Fed. Cas. No. 9,415, 1 Flipp. 188.

43. Reid *v.* Mobile Bank, 70 Ala. 199.

44. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

45. Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681. To the same effect see National Bank of North America *v.* Kirby, 108 Mass. 497; Boss *v.* Hewitt, 15 Wis. 260; Indiana, etc., Cent. R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554.

46. Chapin *v.* Vermont, etc., R. Co., 8 Gray (Mass.) 575; White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221.

47. Melendy *v.* Keen, 89 Ill. 395; Olds *v.* Cummings, 31 Ill. 188; Westfall *v.* Jones, 23 Barb. (N. Y.) 9; Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566.

48. Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441; Pryor *v.* Wood, 31 Pa. St. 142; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566. *Compare* Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Chicago, etc., R. Co. *v.* Loewenthal, 93 Ill. 433.

49. Melendy *v.* Keen, 89 Ill. 395; Matthews *v.* Wallwyn, 4 Ves. Jr. 118.

50. Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Gibson *v.* Lenhart, 101 Pa. St. 522.

51. New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206.

(III) *Consequences of This Doctrine.* Every transfer of such bonds before maturity to a new holder for value, and without notice of any equities or infirmities attaching to them, will give the latter a good title to them as against the former holder. Moreover the transferee of such a bond is presumed, in the absence of evidence to the contrary, to be a *bona fide* holder for value. Where there is evidence tending to rebut this presumption, the question whether the holder is a *bona fide* purchaser for value is a question of fact for a jury.[52]

(IV) *Defense of Ultra Vires Unavailing Against Such Bona Fide Purchaser* — (A) *In General.* This principle applies to the subject under consideration so as to validate bonds issued by private corporations in the hands of *bona fide* purchasers for value, although the bonds were issued in violation of a restriction in the charter.[53]

(B) *Illustration of Foregoing in Case of Excessive Bond Issue.* Thus where a corporation was empowered to issue mortgage bonds to the amount of two thirds of its capital paid in, and it issued such bonds to an amount less than two thirds of its authorized capital, but to an amount much more than its capital then paid in, it was held that the bonds were enforceable in the hands of *bona fide* purchasers for value.[54]

(C) *Application of Principle Where Restriction Is For Benefit of Shareholders.* The principle is of especial application where the statutory restriction is for the benefit of the shareholders, which they may therefore waive. When therefore bonds are issued in violation of such a restriction, but nevertheless the shareholders stand by and allow the bonds of the corporation to be issued and sold, and see the corporation avail itself of the benefits arising therefrom, they are concluded from setting up the defense of *ultra vires* against *bona fide* purchasers for value.[55]

(D) *Illustration of Doctrine in Case of Fraudulent Overissue of Bonds.* Where negotiable railroad bonds, indorsed by the state, are regular on their face, and recite in the indorsement a compliance by the company with the conditions of the statute under which they are issued, an innocent purchaser for value takes them unaffected by any fraud or mistake in their overissue; nor will the fact that unpaid interest coupons are attached to them charge him with notice of any defect in them.[56]

(V) *When Purchaser Bound to Take Notice of Governing Statute.* Where the negotiable bonds of a corporation are issued or indorsed under authority conferred by a statute, and the statute is referred to on the face of the bonds, every purchaser of such bonds is thereby put upon inquiry as to the terms of the statute, and is bound at his peril to take notice of them.[57]

(VI) *Circumstances Putting Intending Purchasers Upon Inquiry* — (A) *Bound to Take Notice of What Appears on Face of Bonds* — (1) In General. Intending purchasers are bound to take notice of whatever appears

52. Gibson *v.* Lenhart, 101 Pa. St. 522.

53. Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553 [*affirming* 33 Hun (N. Y.) 7].

For an application of this principle to municipal bonds see Washington, etc., Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433.

54. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548.

55. Tyrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294, where the defense was that the bonds were issued by the directors without the consent or authorization of the shareholders.

56. State *v.* Cobb, 64 Ala. 127.

For other applications of this principle in the case of fraudulent overissues of railroad bonds indorsed by the state see Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566 [*reaffirmed* in Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590]; State *v.* Cobb, 64 Ala. 127.

Circumstances under which bona fide purchasers of such bonds were subrogated to the rights of the state under the deed of trust. Clews *v.* Brunswick First Mortgage Bondholders, 54 Ga. 315.

57. Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590; Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566; McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129.

Circumstances under which an intending purchaser of bonds was not chargeable with notice of any outstanding indebtedness, the same not being referred to in the governing statute, see Spence *v.* Mobile, etc., R. Co., 79 Ala. 576.

upon the face of the bonds themselves;[58] and if on the face of the bonds reference is made to the statute under which they are issued, this reference will charge an intending purchaser with notice of the terms of the statute as fully as if it has been set out in full on the face of the bonds.[59]

(2) WHAT IF RECITALS LULL INQUIRY. But if on the other hand the recitals of the bonds and the mortgage are such as to lull inquiry he is not bound to look further. Here, as in the case of the intending purchaser of corporate shares, he is not bound to suspect fraud or to make inquiries where everything appears to be fair, honest, and conformable to law.[60]

(B) *Put Upon Inquiry by Reference in Bonds to Mortgage.* If such bonds on their face contain a reference to the mortgage, such reference will affect intending purchasers with the terms of the mortgage, so that it will have to be read, in determining their rights, together with the bond, as one contract.[61] If in such case the mortgage provides that the whole debt shall become due ninety days after a refusal, on demand, to pay a semiannual instalment of interest, then an intending purchaser of the bonds, knowing that such a demand and refusal has taken place, cannot claim the status of an innocent purchaser.[62]

(C) *Whether Put Upon Inquiry by Presence of Past-Due Coupons.* It seems that an intending purchaser of the bonds is not put upon inquiry with respect to them by the mere fact of the presence upon them, undetached, of past-due coupons,[63] although this may be a material fact which together with other facts may make up an aggregate of suspicious circumstances sufficient to put him on inquiry.[64]

(D) *Other Circumstances Putting Intending Purchasers Upon Inquiry.* Intending purchasers are put upon inquiry, in the case of stolen bonds which have never been issued, by the absence of the indorsement of the president of the corporation and by the circumstance of their being offered and sold at a very small consideration;[65] and in the case of railroad mortgage bonds, by the circumstances of their being put upon the market by the trustee named in the mortgage, and sold at a very small per centum of their face value.[66]

(E) *Status of Purchaser of Bond Which Has Stipulation Fraudulently Detached From It.* It has been held that an instrument in the form of an ordinary corporate bond, with interest coupons attached, is a promissory note, notwithstanding it contains the added stipulation that upon its surrender the holder will be entitled to shares of capital stock of the company;[67] and that if such an additional stipulation is detached from such a bond at the time when it is negotiated by one holder to a new purchaser, the circumstance will not be evidence of such bad faith as will deprive the new purchaser of the status of an innocent

58. Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,297, 2 Woods 523.

To what extent put upon inquiry by the numbers of the bonds see State *v.* Cobb, 64 Ala. 127; Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,297, 2 Woods 523.

59. See *supra*, XVIII, A, 1, i, (V).

60. Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,297, 2 Woods 523.

61. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299.

62. Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590.

There is a holding which seems opposed to the principle that where the bond refers to the terms and condition of the mortgage the purchaser of the bond is bound to look into those terms and conditions and is affected by them. That holding is to the effect that a bond with that recital does not affect the purchaser with notice of a condition in the mortgage that the bondholder shall have no recourse to the private liability of the shareholder. Raymond *v.* Spring Grove R. Co., 10 Ohio Dec. (Reprint) 416, 21 Cinc. L. Bul. 103. The decision is believed to be unsound.

63. State *v.* Cobb, 64 Ala. 127.

64. Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590; Illinois, etc., Cent. R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681.

65. Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457.

66. Riggs *v.* Pennsylvania, etc., R. Co., 16 Fed. 804.

67. Hodges *v.* Shuler, 22 N. Y. 114.

purchaser, although the absent stipulation is referred to in the body of the bond at the time when he takes it.[68]

(F) *Distinction Between Redeemability and Payability With Respect to Question Whether Bonds Are Past Due.* The fact that a bond which by its terms or by the terms of its governing statute is redeemable within a prescribed period by the corporation or by the state issuing it is not redeemed within such period does not dishonor it so as to make it subject to equities in the hands of one who purchases it.[69]

(VII) *Who Is Bona Fide Holder.* In order to take a purchaser of negotiable corporate bonds out of the category of *bona fide* holders, it is necessary that there should be something more than facts or circumstances raising a mere suspicion in the mind of a cautious person with respect to the validity of the paper, and something more than even gross negligence on his part in taking it. There must be something which is tantamount to bad faith, guilty knowledge, or wilful ignorance, and the burden of this rests upon the party seeking to impeach the paper.[70] It is therefore no defense to an action on such a bond that the books of the company do not show value received for the same, or that a former president of the company did not make a return of the proceeds of the same to the company.[71]

(VIII) *Purchaser Not Bound to See to Application of Purchase-Money*—(A) *In General.* Provided the corporation have the power to issue the bonds, the purchaser is not charged with the duty of seeing that it makes a lawful or proper application of the purchase-money; but he may rightfully presume that its agents will do their duty in this respect, and that it has sufficiently provided for its own safety in the matter; so that all that he has to do is to pay his money and take his bond.[72]

(B) *Otherwise Where Purchaser Has Notice of Unauthorized Purpose*—(1) In General. But where the purchaser has notice that the agent is disposing of the bonds to him for an unauthorized purpose, he takes them at his peril and shoulders the risk of the corporation ratifying the unauthorized act.[73]

(2) Circumstances Under Which Rule Does Not Deprive Lender of Remedy. This principle does not extend so far as to deprive the lender of his remedy against the corporation, where the money is borrowed to the knowledge of the lender, for the purpose of carrying out a transaction which, although not prohibited by statute, is *ultra vires* the corporation. Here the corporation cannot be allowed to get the benefit of the loan and then escape the payment of it by setting up the defense that it borrowed the money for the purpose of carrying

68. Welch *v.* Sage, 47 N. Y. 143, 7 Am. Rep. 423. *Compare* Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645 [*affirming* 12 Fed. Cas. No. 6,719, 10 Blatchf. 384], where certain railroad bonds which had a stipulation attached to them making them exchangeable for "scrip preferred stock" were stolen, and the stipulation was detached from them before negotiation.

69. Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044 [*overruling* it seems Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227 (*reaffirmed* in Huntington *v.* Texas, 16 Wall. (U. S.) 402, 21 L. ed. 316)]; Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295.

70. Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645; Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 865. See also Pittsburgh Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934.

71. Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574. See also the following cases:

Illinois.— Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899; Bradley *v.* Ballard, 55 Ill. 413, 8 Am. Rep. 656.

Iowa.— Thompson *v.* Lambert, 44 Iowa 239.

New York.— Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303, 33 N. Y. St. 318 [*affirming* 44 Hun 130].

Pennsylvania.— Justice *v.* Stroup, 4 Phila. 348, 18 Leg. Int. 109.

United States.— Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

And see *supra*, XVII, B, 1, b, (IX); XVII, F, 2, f.

72. See *supra*, XVII, F, 2, f.

73. Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899; Chew *v.* Henrietta Min., etc., Co., 2 Fed. 5, 1 McCrary 222.

out a transaction in which it had no power to engage and that the lender knew that such was its purpose.[74]

(IX) *WHO IS PURCHASER FOR VALUE.* Laying out of view the effect of constitutional or statutory restraints as to the value at which corporations can issue their bonds, the true view seems to be that the purchaser of them occupies, in respect of the question of the value at which he may lawfully purchase them, the same position as that occupied by the purchaser of any other species of commercial paper. He will be protected as a *bona fide* purchaser where he purchased for any value, subject to the principle that an offer of sale at a grossly inadequate value is always a circumstance putting an intending purchaser upon inquiry.[75]

(X) *INTERPRETATION OF BONDS AND MORTGAGE WITH REFERENCE TO DATE OF MATURITY.* In case of a discrepancy between the recitals in the bonds and those in the mortgage as to the date at which the debt, evidenced by the bonds and secured by the mortgage, matures, the bonds will govern, because the bonds are the instruments which constitute the evidence of the debt and the mortgage is a mere security.[76]

j. Questions Relating to Payment of Bonds — (I) *WHETHER TRANSACTION IS PAYMENT OR PURCHASE.* There are holdings to the effect that here as in other cases the question whether the corporation or its legal representative, in taking up its bonds, intends to pay them, or merely to take them up as an investment so as to be able to reissue them, is a question of fact and intent. Where the intent of the corporation or its representative concurs with that of the bondholders, and the mere object of the transaction is to surrender all the bonds and to substitute new ones under the same mortgage, then of course there is no payment, but a mere substitution, and the lien continues.[77] But where the intent of the bondholders does not concur with that of the corporation or its representative, but it becomes a mere question of the intent of the corporation, then there is more difficulty. Nevertheless one court has held, where the receivers of a corporation purchased its outstanding bonds with its money and entered them on the books of the corporation as investments, and for years reported them as outstanding, and then reissued them for value, that the bonds had not been paid, but that the holders of the reissued bonds were entitled to the benefits of the original lien, and to share *pari passu* with other bondholders secured thereby.[78]

(II) *DEMAND OF PAYMENT, WHERE MADE.* Although the bonds of a corporation are on their face made payable at the office of the corporation in a particular way, yet if when they fall due the corporation has no office at that place, a demand elsewhere may be sufficient.[79]

k. Suits in Equity For Surrender and Cancellation of Bonds Unlawfully or Fraudulently Issued. Where the directors of a corporation, in breach of their trust, organize themselves into a construction company to build a railroad, which the corporation was created to build, and through this agency contract with themselves to build the road, and in order to pay themselves for so doing put a fraudu-

74. Wright *v.* Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412.

That an injunction will be granted to restrain the sale of corporate property under a mortgage given to secure bonds which the president of the corporation took and converted to his own use, under the alleged authority of a resolution which he procured the directors to pass without the assent of the shareholders, distributing the bonds *pro rata* among the shareholders, where the issue and distribution were never ratified by the shareholders and no consideration passed to the corporation, see Virginia Tide-Water Coal Co. *v.* Mercantile Trust Co., 12 N. Y. Suppl. 529, 35 N. Y. St. 141.

75. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566. See also Gould *v.* Segee, 5 Duer (N. Y.) 260; Phelan *v.* Moss, 67 Pa. St. 59, 5 Am. Rep. 402 (both cited in the preceding case to this doctrine); Kennicott *v.* Wayne County, 14 Fed. Cas. No. 7,711, 6 Biss. 138 (bonds issued by the corporation in payment for goods).

76. Illinois, etc., Cent. R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554.

77. Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228.

78. Gibbes *v.* Greenville, etc., R. Co., 15 S. C. 304, Simpson, J., dissenting.

79. Alexander *v.* Atlantic, etc., R. Co., 67 N. C. 198.

lent mortgage upon the properties of the railroad company and issue bonds thereunder, the corporation cannot maintain a bill in equity to set aside and cancel the mortgage as a cloud upon its title, as against innocent third persons.[80] And where the corporation has pledged its bonds in violation of a statute,[81] no action in equity can be maintained for the surrender and cancellation of them by the corporation, or by a shareholder in right of the corporation, without first tendering the amount due to the pledgee, this being merely an application of the maxim that he who seeks equity must do equity.[82] It has been held that a mortgage given by a corporation for money borrowed and applied in the payment of real estate purchased by the corporation will not be canceled at the instance of the corporation or its members, on the ground that the corporation also issued to the lender certain shares of stock, together with certain notes of its officers, as collateral security; since the lender had the right to all the collateral security he could get, and it came with an exceeding ill grace for the company or any of its members to seek to invalidate such security in his hands without first repaying to him his money.[83]

l. Bonds Convertible Into Stock. The obligation of selling the unissued shares of the corporation only at their par value in money or money's worth cannot be evaded by the device of issuing bonds convertible into stock.[84] If the potential capital of the corporation has been filled up, clearly it would be beyond the power of the corporation to execute the contract in such bonds, by exchanging them for share certificates at the request of the bondholders.[85] But here as in other cases the contract may be valid in part, although void in part; and the fact that the bonds may not be convertible into stock, and that so much of the contract is consequently illegal, does not prevent them from standing as a security, or furnish a defense to an action to foreclose the mortgage upon the property of the company given to secure them.[86]

m. Sinking-Fund Arrangements. Where a sinking fund is provided as an additional security to the bondholder under the terms of a statute, the statute is of course a part of the contract and is to be looked to to determine the rights of the parties.[87] A court of equity has the power, on a proper application and with the proper parties before it, to direct a trustee, who is required by the instrument of trust to invest the trust funds in a certain way, to vary the investment and invest them in other securities.[88] But the power is exercised very sparingly and only on a principle of necessity, and not even then according to some views where all the beneficiaries in the trust are *sui juris* without their unanimous consent.[89]

80. Lewis *v.* Meier, 14 Fed. 311, 4 McCrary 286.

81. In this case the statute of Wisconsin prohibiting the issuing or pledging of bonds by corporations for less than seventy-five per cent of their par value. See *supra*, XVIII, A, 1, b, (IV), (B), (1).

82. Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21 [*citing* Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463].

83. Powell *v.* Blair, 133 Pa. St. 550, 19 Atl. 559.

84. See Sturges *v.* Stetson, 23 Fed. Cas. No. 13,568, 3 Phila. (Pa.) 304, 15 Leg. Int. (Pa.) 404, 1 Biss. 246.

85. See *supra*, VII, A, 2, b, (I).

86. Wood *v.* Whelen, 93 Ill. 153.

With respect to the question whether the bondholder presented his bonds in time to enable him to demand such a conversion, and whether, in case the corporation had transferred its shares so as to disable itself from making the conversion, the bondholder was entitled to specific shares, or merely to indemnity by way of damages, see Chaffee *v.* Middlesex R. Co., 146 Mass. 224, 16 N. E. 34. See also Targart *v.* Northern, etc., Cent. R. Co., 29 Md. 557, where the rights of a bondholder whose bonds were convertible into stock were determined on a particular state of facts.

Exchanging one kind of corporate security for another, and circumstances which will not permit the corporation to withdraw the power granted to a trust company to make the exchange, see Wakefield Water Co. *v.* New England Trust Co., 175 Mass. 478, 56 N. E. 703. Right of holders of mortgage bonds on land grant of railroad to exchange bonds for land see Wood *v.* Dubuque, etc., R. Co., 28 Fed. 910.

87. See for instance Wilds *v.* St. Louis, etc., R. Co., 64 How. Pr. (N. Y.) 418.

88. See the learned note of Mr. Stewart in 36 N. J. Eq. 406, and cases there cited.

89. Fidelity Ins. Trust, etc., Co. *v.* United New Jersey R., etc., Co., 36 N. J. Eq. 405.

n. Status of Bonds Executed by Two Corporations Jointly. Neither of two corporations organized under the general laws of Texas, the charter of one of which provides for the purchase, subdivision, and sale of lands in cities, and the other for the construction and maintenance of street railways, can bind itself by bonds issued to promote the success of the other, although such success tends to increase its own business. Each of the parties to such a transaction, the street railway company and the land company, thus issuing bonds jointly to raise money needed in their business, becomes liable thereon for the amount used in its own business, but not for the amount used by the other corporation.[90]

2. Remedies of Bondholders[91] — a. Remedies Available to Individual Bondholders. An individual bondholder has a right: (1) To an action at law against

Further note on the subject of corporate bonds.— Lien of new bonds exchanged for old ones see Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228; Hand *v.* Savannah, etc., R. Co., 12 S. C. 314 [*explaining* 5 S. C. 182; State *v.* Spartanburg, etc., R. Co., 8 S. C. 129]. *Compare* Hand *v.* Savannah, etc., R. Co., 17 S. C. 219, where the previous decision is further explained. The same case on former appeals is reported in 6 S. C. 307, 8 S. C. 207, and 10 S. C. 406. Rights in respect of lost or destroyed bonds see Rogers *v.* Chicago, etc., R. Co., 6 Abb. N. Cas. (N. Y.) 253. Effect of the consolidation of two or more corporations upon their bonded indebtedness see Spence *v.* Mobile, etc., R. Co., 79 Ala. 576; People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657; Polhemus *v.* Fitchburg R. Co., 123 N. Y. 502, 26 N. E. 31, 34 N. Y. St. 420; Stevens *v.* Union Trust Co., 57 Hun (N. Y.) 498, 11 N. Y. Suppl. 268, 33 N. Y. St. 130; Young *v.* The Steamboat Key City, 14 Wall. (U. S.) 653, 20 L. ed. 896 (case of a lien on a vessel). Status of bonds guaranteed or indorsed by the state see Memphis, etc., R. Co. *v.* State, 37 Ark. 632, 642; Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228; Tompkins *v.* Little Rock, etc., R. Co., 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615 [*affirming* 18 Fed. 344, 5 McCrary 597, and *overruling* 15 Fed. 6, 18]; Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999. Right of holders of state-indorsed bonds to be subrogated to the lien of the state see Forest *v.* Liddington, 68 Ala. 1. The rights of bondholders under more or less similar conditions of fact to be subrogated to the lien of the state was declared in Hand *v.* Savannah, etc., R. Co., 12 S. C. 314; and in Tompkins *v.* Little Rock, etc., R. Co., 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615 [*affirming* 18 Fed. 344, 5 McCrary 597, and *overruling* 15 Fed. 6]. And see Rice's Appeal, 79 Pa. St. 168, where the principle is stated. Circumstances under which fraudulent state-indorsed bonds sold in a foreign country were valid, the purchasers being *bona fide* purchasers for value, see Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118, 26 L. ed. 327. *Compare* State *v.* Jacksonville, etc., R. Co., 16 Fla. 708; State *v.* Florida Cent. R. Co., 15 Fla. 690. For a heterogeny of holdings with respect to state-indorsed bonds of the state of Arkansas see State *v.* Little Rock, etc., R. Co., 31 Ark. 701; Tompkins *v.* Little Rock, etc., R. Co., 18 Fed. 344, 5 McCrary 597; Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6, 22. And see dissenting opinion of Caldwell, J., in 21 Fed. 370; and Tompkins *v.* Little Rock, etc., R. Co., 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615 [*affirming* 18 Fed. 344, and *distinguishing* Ketchum *v.* St. Louis, 101 U. S. 306, 29 L. ed. 999]. Subscriptions to railway bonds on condition that a certain number of the bonds shall be subscribed for, not binding until the number has been so subscribed, see Galena, etc., R. Co. *v.* Ennor, 116 Ill. 55, 4 N. E. 762. The same rule applies in the case of subscriptions to stock. See *supra*, VI, H, 14, a *et seq.* Non-liability to creditors of subscribers to the bonds of a corporation for the amount unpaid on their agreement. Pettibone *v.* Toledo, etc., R. Co., 148 Mass. 411, 19 N. E. 337, 1 L. R. A. 787.

90. Northside R. Co. *v.* Worthington, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778 [*reversing* 27 S. W. 746].

91. Other holdings relating to rights and remedies of holders of corporate bonds.— Measure of damages recoverable from a corporation for failure to deliver corporate bonds in pursuance of its contract see Galena, etc., R. Co. *v.* Ennor, 123 Ill. 505, 14 N. E. 673. *Compare* Rice's Appeal, 79 Pa. St. 168; Fidelity Ins. Trust, etc., Co. *v.* Shenandoah Valley R. Co., 33 W. Va. 761, 11 S. E. 58. A bank which loans money secured by a deposit of corporate bonds, under an agreement that it should occupy the place of the bondholders so that the notes given for the sum borrowed until paid should take precedence over the bonds, does not hold them as trustee for the borrower, who, upon foreclosure sale of the entire property of the corporation and its purchase by a committee of reorganization representing the lender and other bondholders, cannot compel the bank to transfer to him the property without tender or payment of the amount due it. Brown *v.* Anderson, 104 Ga. 30, 30 S. E. 412. That the validity of bonds issued by corporation A which had been assumed by corporation B in consideration of the transfer of property belonging to corporation A will not be investigated in an action to which corporation A is not a party see Smith *v.* Ferries, etc., R. Co., (Cal. 1897) 51 Pac. 710. That the courts of New Jersey have no jurisdiction of an action by a purchaser of bonds in New Jersey from an agent of a foreign corporation issuing the bonds, against a foreign trust company for a wrong-

the corporation to recover on the unpaid coupons, or on the bonds, provided they have become due under the terms of the contract by reason of the non-payment of the coupons; since "if there is an agreement to pay interest, and it is not paid, there is a breach of the bond for which the holder can maintain an action";[92] (2) to demand that the trustees in the mortgage shall proceed to take possession under the powers therein conferred, or shall bring an appropriate action to foreclose the mortgage; and (3) in case the trustees refuse to do so, and in some of the state jurisdictions without any demand upon, or refusal of, the trustees so to proceed, the bondholder may himself proceed in equity to have the mortgage foreclosed, bringing the action not only for himself, but for all other bondholders standing on a common footing with him.[93]

b. Such Remedies Not Concluded by Non-Action of Majority. While the principle is no doubt gaining ground that a majority of the bondholders are to rule, yet the non-action of the majority will not conclude the rights of an individual bondholder unless it is so stipulated in the mortgage or in the governing statute; but he may file a bill in equity for the enforcement of the security by foreclosure of the mortgage and the sale of the mortgaged property.[94] But separate remedies are not open to the individual bondholder unless this be a just construction of the entire contract.[95]

ful certification of the bonds, see Polhemus *v.* Holland Trust Co., 61 N. J. Eq. 654, 47 Atl. 417 [*reversing* 45 Atl. 534]. Condition of fact under which a new and reorganized corporation had no right to demand the sale of securities which had been deposited with a trustee, the new company undertaking to exchange therefor new debentures of its own, with the conclusion that as against the holder of outstanding debentures secured by such deposit such a sale was fraudulent and voidable see Anthony *v.* Campbell, 112 Fed. 212, 50 C. C. A. 195. Conditions recited in a debenture bond under which the holder could not sue upon the covenant for payment until he had given six months' notice to the trustees requiring them to take the necessary steps for the protection of the debentureholders and until they had neglected for six months so to act see Rogers *v.* British, etc., Colliery Supply Assoc., 68 L. J. Q. B. 14, 79 L. T. Rep. N. S. 494, 6 Manson 305.

92. Marlor *v.* Texas, etc., R. Co., 19 Fed. 867, 868, per Wallace, J. A stipulation in a railroad mortgage that in case of default in the payment of interest for sixty days, the trustees, on written request of one third in interest of the bondholders, must take possession, operate, and "sell" the road, etc., is a cumulative remedy, and not exclusive of the remedies given by law. Dow *v.* Memphis, etc., R. Co., 20 Fed. 260 [*affirmed* in 124 U. S. 652, 8 S. Ct. 673, 31 L. ed. 565]. See Langston *v.* South Carolina R. Co., 2 S. C. 248, which was an action on railroad bonds and attached coupons. Another federal court has held, in conformity with the doctrine of the above text, that dissenting bondholders may sue in assumpsit for the amount of their unpaid coupons, although the majority in interest have consented to waive the rights secured by the mortgage. Manning *v.* Norfolk Southern R. Co., 29 Fed. 838. In Pennsylvania, and probably in all other American jurisdictions, the holder of bonds issued by a corporation, payable to bearer, may maintain an action on them in his own name, possession being *prima facie* evidence of ownership. Carr *v.* Le Fevre, 27 Pa. St. 413. The Pennsylvania court has more recently held that an action will lie by one bondholder against a corporation for interest due on a bond, although the principal is not yet due, and notwithstanding the fact that the mortgage securing the bond provides that upon default in payment of interest the trustees to whom the mortgage was executed shall, at the request of the holders of a certain amount of bonds, proceed by scire facias to collect interest and principal for the benefit of all bondholders equally. Montgomery County Agricultural Soc. *v.* Francis, 103 Pa. St. 378. But in the view of the same court he cannot have execution out of the mortgaged property. See *infra*, XVIII, A, 2, c. So where a railroad mortgage provided that in the event of a failure of net earnings sufficient to pay interest on the bonds secured by it the company can at its option issue certain scrip in lieu thereof, a bondholder is not bound to accept scrip unless the condition supervenes which authorizes the company to issue it, and the burden is on them to prove that it has supervened, and he is not bound to prove the contrary in the first instance; but his right of action is *prima facie* perfect upon the proof of the non-payment of interest on the presentation of his bond at the same time and place where the interest is made payable. Marlor *v.* Texas, etc., R. Co., 19 Fed. 867.

93. 5 Thompson Corp. § 6210.

94. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 27 L. ed. 47. The conclusion of the court is scarcely weakened by the fact that three of the justices dissented, but merely on a construction of the terms of the mortgage.

95. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299.

c. Separate Bondholder Cannot Levy Execution Upon Mortgaged Property. Although a separate bondholder may sue the corporation at law and recover a judgment for what is due to him with respect to his security, yet he cannot levy his execution upon the property which has been conveyed in trust for all the bondholders, but he must proceed against the trustee not merely for himself individually, but for all the bondholders standing with him as a class.[96]

d. When Separate Bondholder May Sue For Interest but Not For Principal. A mortgage securing corporate bonds underwent construction before the court of appeals of New York, with the conclusion that an individual bondholder might sue and recover upon past-due coupons, but could not sue and recover with respect to the bonds, because the remedy upon the bonds was prescribed by the mortgage and was vested in a majority of the bondholders and was in its nature exclusive.[97]

e. Doctrine That Bondholders Are Represented in Litigation by Trustees in Mortgage — (I) *Statement of Doctrine.* It is coming to be the doctrine of the courts of the United States, although not of the courts of all the states, that the bondholders in a corporate mortgage are represented for the purposes of any litigation affecting their rights by the trustees in the mortgage, so that a decree in a proceeding to which the trustees were parties will bind the bondholders, although they were not made parties.[98] It is suggested that this rule can have no just application except under mortgages which confer upon the trustees the power to represent the bondholders so as to bind them in litigations, the reason being that the trustees in a corporate mortgage cannot be trustees of any larger powers than have been committed to them by the terms of the instrument.

(II) *This Not Doctrine of All State Courts.* It is to be kept in mind that the foregoing doctrine is not the doctrine of all the state courts, but that one authoritative state court has held that the bondholders are necessary parties to a suit in equity to cancel the mortgage and the bond secured by it, and that service of process on the trustees in the mortgage is not sufficient to conclude the bondholders.[99]

f. Cross Bill Between Several Bondholders Asserting Antagonistic Interests. Where a judgment creditor of an insolvent railroad corporation brought a suit in equity, seeking among other things to impeach the validity of a mortgage and of the bonds secured by the mortgage, it was held that a cross bill between the several bondholders who asserted antagonistic interests under the mortgage was proper and necessary.[1]

g. Remedy of Debenture-Holders Under English Law Where Debenture Becomes Immediately Payable in Consequence of Winding-Up. Under English law a debenture of a limited company in the usual form of a floating security, charging all the property of the company, both present and future, including its

96. Com. *v.* Susquehanna, etc., R. Co., 122 Pa. St. 306, 321, 15 Atl. 448, 7 L. R. A. 225. Closely allied to this case in principle and treatment is the case of Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596. Much to the same effect see Guaranty Trust Co. *v.* Troy Steel Co., 33 Misc. (N. Y.) 484, 68 N. Y. Suppl. 915, the reason being that by suing on the coupons the bondholder affirms the validity of the mortgage and becomes estopped to proceed in contravention of its terms.

97. Batchelder *v.* Council Grove Water Co., 131 N. Y. 42, 29 N. E. 801, 42 N. Y. St. 614, Finch and Gray, JJ., dissenting.

98. Thus to state the strongest possible case illustrating the principle it has been held that a decree in equity canceling bonds of one railroad corporation and a mortgage given by another railroad corporation upon its property to secure the payment of the same, upon a bill filed by the latter company against the former and also against the surviving trustee under the mortgage, binds all the bondholders, unless obtained by fraud. Beals *v.* Illinois, etc., R. Co., 133 U. S. 290, 10 S. Ct. 314, 33 L. ed. 608. See also Richter *v.* Jerome, 123 U. S. 233, 8 S. Ct. 106, 31 L. ed. 132; Shaw *v.* Little Rock, etc., R., 100 U. S. 605, 25 L. ed. 757; Kerrison *v.* Stewart, 93 U. S. 155, 23 L. ed. 843.

99. Harrisburg, etc., R. Co.'s Appeal, (Pa. 1888) 15 Atl. 459, 1 L. R. A. 230.

1. Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590, opinion by Somerville, J.

uncalled capital, confers upon the registered holder, in the event of the debenture becoming immediately payable in consequence of a winding-up, the ordinary mortgagee's remedy by foreclosure against the uncalled capital, as well as the other property comprised in the security.[2] Under that law the working out of a foreclosure decree in the absence of the debenture-holders is not construed to be a dealing by the company with its property in the ordinary course of its business.[3]

B. Corporate Mortgages — 1. Power of Corporations to Mortgage Their Property and Franchises — a. Implied Power of Corporations to Mortgage. The power to borrow money carries with it by necessary implication the power to give the usual security for the loan. It is therefore a settled doctrine that every corporation, saving always those whose property is dedicated to the performance of public duties, has, in the absence of any prohibition in its charter or governing statute, the power to borrow money for the purpose of carrying out the rightful objects of its creation, and may mortgage its real and personal property to secure the loan.[4]

2. Sadler *v.* Worley, [1894] 2 Ch. 170, 63 L. J. Ch. 551, 70 L. T. Rep. N. S. 494, 8 Reports 194, 42 Wkly. Rep. 476.

3. Wallace *v.* Evershed, [1899] 1 Ch. 891, 68 L. J. Ch. 415, 80 L. T. Rep. N. S. 523, 6 Manson 351.

4. *Alabama.*— Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751, holding that a railroad has implied power to borrow money and execute bond and mortgage as security for loan.

Illinois.— West *v.* Madison County Agricultural Board, 82 Ill. 205; Aurora Agricultural Soc. *v.* Paddock, 80 Ill. 263; Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302.

Iowa.— Thompson *v.* Lambert, 44 Iowa 239.

Kansas.— State *v.* Topeka Water Co., 61 Kan. 547, 60 Pac. 337, where it was held that a water-supply company had power to mortgage its property and franchises, including the right to occupy public streets with its pipes, etc.

Kentucky.— Farmers' Bank *v.* Ohio River Line Steamboat Co., 108 Ky. 447, 56 S. W. 719, 22 Ky. L. Rep. 132 (assumption by steamboat corporation of a debt which the seller of the boats had contracted in the construction of the boats, and the execution of a mortgage to secure the debt, were within the powers of the corporation); Bell, etc., Co. *v.* Kentucky Glass Works Co., 106 Ky. 7, 48 S. W. 440, 50 S. W. 2, 1092, 51 S. W. 180, 20 Ky. L. Rep. 1089, 1684, 21 Ky. L. Rep. 133, 156 (holding that the power to contract debts necessarily implies the power to mortgage its property to secure the debts); Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. 199, 81 Am. Dec. 541.

Maryland.— Susquehanna Bridge, etc., Co. *v.* General Ins. Co., 3 Md. 305, 56 Am. Dec. 740.

Michigan.— Eureka Iron, etc., Works *v.* Bresnahan, 60 Mich. 332, 27 N. W. 524; Detroit *v.* Mutual Gas Co., 43 Mich. 594.

Mississippi.— Wood *v.* Meyer, (1890) 7 So. 359.

New Hampshire.— Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

New Jersey.— Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York.— New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 88 Hun (N. Y.) 569, 34 N. Y. Suppl. 890, 69 N. Y. St. 54 (gaslight companies in New York possess power under various enabling statutes); Clark *v.* Titcomb, 42 Barb. 122; Jackson *v.* Brown, 5 Wend. 590; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280.

Ohio.— Burt *v.* Rattle, 31 Ohio St. 116.

Pennsylvania.— Watts' Appeal, 78 Pa. St. 370; Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

Tennessee.— Hunt *v.* Memphis Gaslight Co., 95 Tenn. 136, 31 S. W. 1006.

Texas.— Threadgill *v.* Pumphrey, 87 Tex. 573, 30 S. W. 356 [*affirming* 9 Tex. Civ. App. 184, 28 S. W. 450], holding that gaslight companies in Texas may mortgage their properties, franchises, and easements.

Wisconsin.— Lehigh Valley Coal Co. *v.* West Depere Agricultural Works, 63 Wis. 45, 22 N. W. 831.

United States.— Cleveland Sav., etc., Co. *v.* Bear Valley Irr. Co., 112 Fed. 693, where a corporation borrowing money from another corporation, retaining it, and executing a mortgage of its property to secure the loan, was not permitted to deny its power to mortgage.

See 12 Cent. Dig. tit. "Corporations," § 1775.

This power under English law.— In the English law the power to mortgage their property is generally conceded to companies, where such power is not restrained by their charters, deeds of settlement, or other governing instruments; and the validity of the mortgage will generally depend upon the validity of the debt which it was intended to secure. *In re* Patent File Co., L. R. 6 Ch. 83, 40 L. J. Ch. 190, 19 Wkly. Rep. 193; Lindley Comp. L. (5th ed.) 202.

Prohibitory statute does not extend to mortgages for purchase-money.— A statute prohibiting corporations organized under it from mortgaging its property or giving any lien thereon has been construed as not intended to prevent corporations from giving a mortgage or lien upon property which they may purchase to secure the unpaid purchase-

b. To What Corporations This Power Has Been Ascribed. This power has been ascribed to an agricultural society, in the absence of a prohibition, so as to enable it to mortgage its fair grounds, to raise money to advance the objects of its incorporation;[5] to a company formed for the purpose of erecting a public exchange building;[6] to a banking corporation, having power by its charter to purchase, hold, and convey such real estate as is requisite for the prosecution of its business, etc.;[7] to a trading corporation;[8] to a gaslight corporation;[9] to steamship companies in England;[10] and to manufacturing companies in the same country.[11] A corporation organized to supply heat to buildings in a city, by means of pipes laid in the public streets is an ordinary manufacturing corporation, and not a quasi-public corporation, for the purpose of determining whether it has the power to mortgage its property; and being such it may make a mortgage of its property without special authority.[12]

c. From What Other Powers Power to Mortgage Has Been Implied. The power of a corporation to mortgage its property is necessarily implied in the power to contract debts, since in making a mortgage to secure a debt which it has contracted, it merely appropriates its property to the payment of its debt, which the law would do *in invitum* in case the debt were not secured and should go unpaid. As a mortgage is merely a conditional sale, or a sale with a right of defeasance, and consequently, viewed in either light, something less than and included in an absolute sale, it must follow that the general power conferred upon a corporation to sell or otherwise alien its property includes by necessary implication the power to mortgage it for any lawful purpose.[13] The power of a corporation to mortgage its land, on a proper occasion and for a proper purpose, has been in like manner implied from a granted power to dispose of its land by deed or lease.[14] So the power of a corporation to pledge its securities for the payment of its debts has been held to be included in the power to sell such securities for that purpose.[15] In short the power of a corporation to mortgage its real estate has been held to be incidental to the power of acquiring and holding real estate

money. McMurray *v.* St. Louis Mfg. Co., 33 Mo. 377.

5. Aurora Agricultural, etc., Soc. *v.* Paddock, 80 Ill. 263; Thompson *v.* Lambert, 44 Iowa 239; Preston *v.* Loughran, 58 Hun (N. Y.) 210, 12 N. Y. Suppl. 313, 34 N. Y. St. 391 (under a statute).

6. Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

7. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Jackson *v.* Brown, 5 Wend. (N. Y.) 590.

8. Wood *v.* Meyer, (Miss. 1890) 7 So. 359; Deffell *v.* White, L. R. 2 C. P. 144, 12 Jur. N. S. 902, 36 L. J. C. P. 25, 15 L. T. Rep. N. S. 211, 15 Wkly. Rep. 68; Shears *v.* Jacob, L. R. 1 C. P. 513, Harr. & R. 492, 12 Jur. N. S. 785, 35 L. J. C. P. 241, 14 L. T. Rep. N. S. 286, 14 Wkly. Rep. 609.

9. Detroit *v.* Mutual Gaslight Co., 43 Mich. 594, 5 N. W. 1039.

10. Australian Auxiliary Steam Clipper Co. *v.* Mounsey, 4 Jur. N. S. 1224, 4 Kay & J. 733, 27 L. J. Ch. 729, 6 Wkly. Rep. 734.

11. *In re* Patent File Co., L. R. 6 Ch. 83, 40 L. J. Ch. 190, 19 Wkly. Rep. 193; *In re* General Provident Assur. Co., L. R. 14 Eq. 507, 41 L. J. Ch. 823, 27 L. T. Rep. N. S. 433, 20 Wkly. Rep. 939.

12. Evans *v.* Boston Heating Co., 157 Mass. 37, 31 N. E. 698.

13. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Willamette Woolen Mfg. Co. *v.* Bank of British Columbia, 119 U. S. 191, 7 S. Ct. 187, 30 L. ed. 384. "A mortgage," it has been well observed, "is a conveyance or deed. It is an alienation of the estate." Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728. A power to sell includes a power to mortgage, even under the statute of uses, which is strictly construed; and *a fortiori*, it ought to include it under a statutory grant, which is to be beneficially construed in furtherance of the object of the grant. Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75. A corporation authorized to acquire, purchase, dispose of, and convey real and personal property, to negotiate its paper, and to borrow credits, has power to mortgage its property to secure such loans. Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229. To much the same effect see Booth *v.* Robinson, 55 Md. 419; McAllister *v.* Plant, 54 Miss. 106. The power to mortgage has been held to be granted by such words as the following: "To purchase and hold" certain property, and to "sell and dispose of it at their pleasure." Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75.

14. Watts' Appeal, 78 Pa. St. 370.

15. Leo *v.* Union Pac. R. Co., 17 Fed. 273.

and of making contracts;[16] and a grant of "all powers incident and useful to corporations" has been held broad enough to include a power to make a chattel mortgage.[17] A comprehensive statement of the foregoing is that "the power of a corporation to sell and convey its property, and to borrow money, and make contracts, implies the power to mortgage its property, real or personal, to secure the payment of its debts."[18] But while the power to sell necessarily carries with it the power to mortgage, it does not follow that the want of a power to sell is an inhibition on the power to mortgage; and it has been held that it is not.[19] Nor does the power to mortgage include the power to mortgage for purposes not within the general powers of the corporation, or not connected with the object for which it was created, although, on principles elsewhere considered, where there is a general power, the equities of the mortgage will not be defeated by the fact that the power was exercised for an improper or unauthorized purpose in the particular instance.[20] From the principle of the American law that the power of corporations to mortgage their properties is presumed, it has been held, even in respect of railway companies, but in decisions which do not seem to have been well considered, because such power is not presumed in the case of railway companies,[21] that a special power to mortgage will not be construed as taking away or abridging any general power which the company may possess.[22] A general power to mortgage the whole of any property of a corporation necessarily carries with it the power to mortgage a part of such property, provided the property is of such nature as to be divisible without detriment to the public interests. It has accordingly been held that the power, granted to a railroad company, to mortgage its road, enables it to mortgage any part of it.[23] So a general power to mortgage its property enables a plank-road company to mortgage its franchise of taking tolls on a part of its road, provided the road is capable of being divided, so that separate tolls may be taken on that part.[24]

16. Aurora Agricultural Soc. *v.* Paddock, 80 Ill. 263.

17. Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302.

18. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127, 135 [*citing* Pierce *v.* Emery, 32 N. H. 484; Flint *v.* Clinton Co., 12 N. H. 430; Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Jackson *v.* Brown, 5 Wend. (N. Y.) 590; Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. (N. Y.) 119, 3 N. Y. 238, 242; Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75].

19. Krider *v.* Western College, 31 Iowa 547; Middletown Sav. Bank *v.* Dubuque, 15 Iowa 394. So an inhibition on the power to sell has been held not an inhibition on the power to lease. Dubuque *v.* Miller, 11 Iowa 583.

20. See *supra*, XVII, F, 1, f.

That **corporations organized under Ill. Act Feb. 18, 1857, had power to mortgage their** property see Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155; Gaytes *v.* Lewis, 10 Fed. Cas. No. 5,288, 2 Biss. 136.

21. See *supra*, XVI, C, 2, a; *infra*, XVIII, B, 1, f.

22. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Allen *v.* Montgomery R. Co., 11 Ala. 437.

23. Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35.

24. Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

Enabling acts relating to mortgages by corporations were construed in the following cases, with the conclusions stated: That the corporation was authorized to loan money on bond and mortgage for either of three purposes; and that the burden of proof was not on the corporation, in a suit to enforce such bonds and mortgages, to show that they arose from some of its lawful pursuits. Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. (N. Y.) 339. That a water-power company had power to mortgage its franchises, including the right to the use of the water. Willamette Woolen Mfg. Co. *v.* Bank of British Columbia, 119 U. S. 191, 7 S. Ct. 187, 30 L. ed. 384. That the purchase by a railroad company, incorporated in Tennessee, of a majority of the stock of another, a Kentucky corporation, for the purpose of gaining the control and practical ownership of the latter's railroad with its franchises, and the issue of its bonds for the construction and equipment of the road, was in the direction, among the purposes, and within the powers granted and authorized by such general laws. Wehrbane *v.* Nashville, etc., R. Co., 4 N. Y. St. 541. That so much of the Tennessee act of March 24, 1877, amending the statute in relation to the consolidation of railways, as limited the power of such companies to execute mortgages or liens affecting particular classes of their creditors, is not repealed by the Tennessee act of March 15, 1881, empowering such companies to execute mortgages, etc. Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537.

d. Statutory Power to Mortgage Liberally Construed. Contrary to the general rule by which grants of power to corporations are construed strictly,[25] statutory grants of power to corporations to mortgage their property and franchises for the purpose of effectuating the objects of their creation are generally construed liberally so as to advance the legislative purpose, the reason being that such grants are in no sense opposed to common right.[26]

e. Power to Mortgage All the Corporate Property. Corporations undoubtedly possess, without any express grant, the power to mortgage all their corporate property just as a natural person may,[27] although it has been said that the fact that a corporation pledges, mortgages, or conveys in trust all its property is a badge of fraud.[28] But it does not appear why this should be so. It is plain, however, that such a conveyance is subject to be impeached in equity at the suit of a creditor, just as a similar conveyance of a natural person might be.[29]

f. Railway Companies Possess No Implied Power to Mortgage Their Property and Franchises. As the property of railway companies is devoted to the discharge of public duties, it is generally held that such companies have no power to mortgage, lease, or otherwise alien their property and franchises such as are necessary to the performance of those duties, unless the legislature has expressly granted it, and that an attempt to exercise such power will not exonerate them from responsibility for the performance of those duties.[30] Such a company cannot therefore make a general mortgage covering its franchise, its railroad, and all its other property, without the authority of the legislature.[31] This doctrine has been held to apply to a horse railroad company as well as to a steam railroad company.[32] It also follows from this that a purchaser of railway property, at a sale to foreclose a mortgage thereon, does not stand in the position of an innocent

That a turnpike company may mortgage its road to secure the contractor for constructing it. Greensburgh, etc., Turnpike Co. *v.* McCormick, 45 Ind. 239. That the Florida Central Railroad Company had power to execute a bond which was to be a mortgage by virtue of the statute, and without the execution of an additional mortgage to secure it, and as to the effect of such bond when executed. State *v.* Florida Cent. R. Co., 15 Fla. 690. That the Union Pacific Railroad Company is not required to pay interest on the bonds issued by the company to the government until the principal becomes due. U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 24 L. ed. 224. That a supplement to a charter does not limit the power to the completion of the road as authorized at the time of its passage, but extends to the necessary acquisition of rolling-stock and the building or acquiring of branches subsequently authorized. Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211.

Rights of holders of bonds issued by railroad companies in Florida see State *v.* Anderson, 91 U. S. 667, 23 L. ed. 290.

25. Hood *v.* New York, etc., R. Co., 23 Conn. 609; McSpedon *v.* New York, 7 Bosw. (N. Y.) 601, 20 How. Pr. (N. Y.) 395. See also *supra*, XVI, B, 1.

26. Central Gold Min. Co. *v.* Platt, 3 Daly (N. Y.) 263.

27. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472, 488; Allen *v.* Montgomery R. Co., 11 Ala. 437; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

Power to mortgage all the property except its franchise to be a corporation is denied in England under a deed of settlement, which confers power to borrow money "on the security of the funds and property of the association." Such a mortgage, in the opinion of Knight Bruce, L. J., was a plain breach of trust on the part of the directors, because it was inconsistent with the continuance of the society. *Re* British Provident L., etc., Assur. Soc., 33 L. J. Ch. 535.

28. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472.

29. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Allen *v.* Montgomery R. Co., 11 Ala. 437.

30. See *supra*, XVI, C, 2, a *et seq.*; Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950. On the contrary that such companies have the general power to mortgage their property and secondary franchises for the purpose of equipping their roads see Miller *v.* Rutland, etc., R. Co., 36 Vt. 452; Eldridge *v.* Smith, 34 Vt. 484.

31. Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

32. Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700. It has been ruled in Alabama that the general powers of a railroad corporation extend to the creation of a lien on all its property, without reference to the mode of creating the debt. This being so a provision in the charter of such a corporation authorizing it to mortgage its property for a particular purpose, such as "to borrow money to carry into effect the objects of the charter" did not restrict its power to mort-

purchaser without notice, but that he must inquire at his peril whether the company had power to make the mortgage; otherwise he will take the property subject to obligations subsisting against it, which the mortgage if valid might have displaced.[33]

g. Corporations May Mortgage Their Property to Secure Preëxisting Debts. An express power, conferred upon a corporation by statute, of securing its debts by a mortgage of any or all of its real estate, empowers it to execute a mortgage to secure a preëxisting indebtedness; and the fact that the notes representing the indebtedness were executed subsequently to the mortgage is of no consequence, provided the debt, although in another form, existed before.[34]

h. Power to Mortgage Franchises — (I) *Cannot Mortgage Primary Franchises Without Consent of Legislature.* The courts are united upon the proposition that a corporation has no power, independently of the express grant of the legislature, to mortgage or otherwise alien its franchise of being a corporation.[35] It follows that those who purchase at a judicial or other sale the property and franchises of a corporation do not thereby become a corporation. The purchase may vest in them all that is bought, as property, but they cannot prosecute the enterprise, as being a corporation, until they have been duly incorporated. Nor are they entitled to the restriction upon individual liability of members or shareholders accorded to the shareholders of the old corporation. If they issue bonds before becoming incorporated, they are liable thereon as ordinary obligors are; and the fact that they use the name of the old corporation in issuing such bonds makes no difference.[36]

(II) *Can Mortgage Secondary Franchises Not Necessary For Performance of Public Duties* — (A) *In General.* But as already seen the secondary franchises of a corporation are assignable, except such franchises as are necessary to the performance of public obligations, and those are assignable only with the express consent of the legislature.[37]

(B) *Such as Franchise of Receiving Tolls.* The franchise of receiving tolls is a secondary franchise, which is in its nature assignable, at least with the consent of the legislature; and it has been held that authority in the governing statute of a plank-road company "to mortgage the road or other property" carries with it the right to mortgage the franchise of receiving tolls, although not to

gage it for another purpose, within the general scope of the objects for which the company was created. Allen *v.* Montgomery R. Co., 11 Ala. 437.

33. Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537.

Rolling-stock.— In England a railway company may transfer all its rolling-stock to a creditor by way of security (Blackmore *v.* Yates, L. R. 2 Exch. 225, 36 L. J. Exch. 121, 16 L. T. Rep. N. S. 288, 15 Wkly. Rep. 750), but this is plainly not the American law (see *supra*, XVI, C, 12).

Statutes have frequently been enacted in the United States conferring upon railway and other corporations formed for public objects the power to mortgage their franchises. See for example Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700, and statutes there cited.

34. Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303, 33 N. Y. St. 318 [*affirming* 44 Hun (N. Y.) 130, 8 N. Y. St. 265].

35. *Illinois.*— Hays *v.* Ottawa, etc., R. Co., 61 Ill. 422.

Kentucky.— Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. 199, 206, 81 Am. Dec. 541.

Maryland.—State *v.* Consolidation Coal Co., 46 Md. 1.

Massachusetts.— Richardson *v.* Sibley, 11 Allen 65, 87 Am. Dec. 700; East Boston Freight R. Co. *v.* Hubbard, 10 Allen 459 note; Com. *v.* Smith, 10 Allen 448, 87 Am. Dec. 672.

Mississippi.— Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Nebraska.— Clarke *v.* Omaha, etc., R. Co., 4 Nebr. 458, 465.

New Hampshire.— Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372. 75 Am. Dec. 518.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126; Stewart's Appeal, 56 Pa. St. 413; Wood *v.* Bedford, etc., R. Co., 8 Phila. 94.

Vermont.— Eldridge *v.* Smith, 34 Vt. 484.

See also *supra*, XVI, C, 1.

36. Chaffe *v.* Ludeling, 27 La. Ann. 607.

37. See *supra*, XVI, C, 1.

mortgage any franchise essentially corporate in its nature, and such as cannot be enjoyed by a natural person.[38]

i. Power to Mortgage After-Acquired Property — (I) *When This Power Exists.* Whenever a corporation has power to mortgage its property generally, it has, in the absence of any restraining statute, power to mortgage property to be by it thereafter acquired, in like manner as a natural person has.[39] Such mortgages are indeed invalid at law, it being a fundamental maxim of the common law that a man cannot grant or convey what he does not own.[40] But it has long been settled, both in England and this country, that courts of equity will uphold and give effect to such mortgages, in so far as they do not conflict with the rights of subsequent creditors and purchasers without notice.[41]

(II) *When Railroads Have This Power.* Where the power to mortgage their property and franchises has been expressly conferred upon railroad corporations, this is held to carry with it by a reasonable implication the same power to mortgage their after-acquired property that a natural person possesses.[42] For instance a railroad company which has power under its charter to pledge its property, franchises, rights, and credits may mortgage property to be by it subsequently acquired. The power to pledge its franchises and rights carries with it as an incident the power to pledge everything that may be necessary to the enjoyment of the franchise, and such a mortgage is good as against subsequent creditors.[43]

38. Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

39. Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 43; Fisk *v.* Potter, 2 Abb. Dec. (N. Y.) 138, 2 Keyes (N. Y.) 64.

40. *Massachusetts.*—Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357; Rice *v.* Stone, 1 Allen 566; Barnard *v.* Eaton, 2 Cush. 294; Moody *v.* Wright, 13 Metc. 17, 46 Am. Dec. 706; Jones *v.* Richardson, 10 Metc. 481; Winslow *v.* Merchants' Ins. Co., 4 Metc. 306, 38 Am. Dec. 368.

New Hampshire.—Pierce *v.* Emery, 32 N. H. 484.

New Jersey.— Looker *v.* Peckwell, 38 N. J. L. 253; Smithurst *v.* Edmunds, 14 N. J. Eq. 408.

New York.— Van Hoozer *v.* Cory, 34 Barb. 9; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. 284 (per E. D. Smith, J.); Otis *v.* Sill, 8 Barb. 102.

Ohio.— Chapman *v.* Weimer, 4 Ohio St. 481.

England.— Gale *v.* Burnell, 7 Q. B. 850, 10 Jur. 198, 14 L. J. Q. B. 340, 53 E. C. L. 850; Lunn *v.* Thornton, 1 C. B. 379, 9 Jur. 350, 14 L. J. C. P. 161, 50 E. C. L. 379; Robinson *v.* Macdonnell, 5 M. & S. 228. But a grant of a thing which the grantor has potentially, although not actually, is good. Grantham *v.* Hawley, Hob. 132. See also Chidell *v.* Galsworthy, 6 C. B. N. S. 471, 95 E. C. L. 471; Congreve *v.* Evetts, 2 C. L. R. 1253, 10 Exch. 298, 18 Jur. 655, 23 L. J. Exch. 273; Hope *v.* Hayley, 5 E. & B. 830, 2 Jur. N. S. 486, 25 L. J. Q. B. 155, 85 E. C. L. 830.

41. *New Hampshire.*— Pierce *v.* Emery, 32 N. H. 484.

New York.— Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435.

Vermont.— Miller *v.* Rutland, etc., R. Co., 36 Vt. 452.

Wisconsin.— Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203; Farmers' L. & T. Co. *v.* Fisher, 17 Wis. 114.

United States.— Pennock *v.* Coe, 23 How. 117, 16 L. ed. 436; Mitchell *v.* Winslow, 17 Fed. Cas. No. 9,673, 2 Story 630.

England.— Doe *v.* Pott, Dougl. (3d ed.) 710; Langton *v.* Horton, 1 Hare 549, 6 Jur. 910, 11 L. J. Ch. 299, 23 Eng. Ch. 549; *Ex p.* Cotton, 6 Jur. 1045; Metcalfe *v.* York, 1 Myl. & C. 547, 13 Eng. Ch. 547, 6 L. J. Ch. 65, 6 Sim. 224, 9 Eng. Ch. 224; Noel *v.* Bewley, 3 Sim. 103, 6 Eng. Ch. 103; Seabourne *v.* Powel, 2 Vern. 11.

The old cases on this subject are reviewed at length by Paige, J., in Otis *v.* Sill, 8 Barb. (N. Y.) 102. See also White *v.* Carpenter, 2 Paige (N. Y.) 217; Matter of Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395.

A covenant to give a mortgage on subsequently acquired property is equivalent to an equitable mortgage thereon, and good in equity, except as to subsequent purchasers without notice. Fletcher *v.* Morey, 9 Fed. Cas. No. 4,864, 2 Story 555; Pie *v.* Danbury, 3 Brown C. C. 595; Robertson *v.* Morton, 1 Dr. & W. 195; Metcalfe *v.* York, 1 Myl. & C. 547, 13 Eng. Ch. 547, 6 L. J. Ch. 65, 6 Sim. 224, 9 Eng. Ch. 224; Burn *v.* Burn, 3 Ves. Jr. 573. Where a railroad company executed and recorded a mortgage of all the lands it owned or should thereafter acquire, etc., and an agent of the company sold and conveyed land to the company, it was held that he must be deemed to have waived any claim to a vendor's lien for the price as against the mortgagees and those claiming under them. Fisk *v.* Potter, 2 Abb. Dec. (N. Y.) 138, 2 Keyes (N. Y.) 64.

42. Pierce *v.* Emery, 32 N. H. 484.

43. Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729. See further in confirmation and illustration of this doctrine

j. Mortgage or Pledge of Future Earnings. A railway or other corporation having a general power to mortgage may on like grounds make a valid mortgage or pledge of its future net earnings to raise money for the construction and equipment of its road or other property.[44] The validity of such mortgages is supported on the same ground which supports the validity of other mortgages of subsequently acquired property. They are necessarily good as against subsequent creditors, otherwise they would convey no preference, and would be of no value as security. A railroad company authorized by statute[45] to mortgage the income of its property may, in order to make the mortgage effectual, stipulate therein that upon default the trustee may take possession, operate the road, and receive its earnings.[46]

k. Power to Mortgage Subscriptions to Capital Stock. It is not perceived upon what tenable ground the power of a corporation to mortgage the subscriptions to the shares of its capital stock for the purpose of raising money to carry out the purposes of its creation can be denied; but it has been denied, although in a decision which seems open to challenge and criticism.[47]

Ludlow *v.* Hurd, 1 Disn. (Ohio) 522, 12 Ohio Dec. (Reprint) 791; Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596 (learned discussion by Sharswood, J., *quoting* with approval Covey *v.* Pittsburg, etc., R. Co., 3 Phila. (Pa.) 173, 15 Leg. Int. (Pa.) 228, and *distinguishing* Roberts' Appeal, 60 Pa. St. 400). Also see Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, which contains an elaborate discussion of the whole subject.

Effect of a mortgage of after-acquired property belongs to the subject of mortgages, and not specially to the subject of corporations. See, generally, MORTGAGES; and 5 Thompson Corp. § 6145. Effect of such a mortgage upon a subsequent vendor's lien see 5 Thompson Corp. § 6146, and cases cited. Whether such mortgages will cut under the liens of mechanics and materialmen see 5 Thompson Corp. § 6147, and cases cited.

44. Galena, etc., R. Co. *v.* Menzies, 26 Ill. 121; Dunham *v.* Isett, 15 Iowa 284; Jessup *v.* Bridge, 11 Iowa 572, 79 Am. Dec. 513. Such a mortgage was construed in Texas, etc., R. Co. *v.* Marlor, 123 U. S. 687, 8 S. Ct. 311, 31 L. ed. 303, the court sustaining an action against the corporation by a bondholder to recover annual interest in money, on failure of the company to exercise its option to pay in scrip. "We know of no law which prevents a corporation from leasing portions of its works or even causing some of its works to be built with an understanding with the contractor that he shall be permitted to reimburse himself by the receipt of the tolls arising from the same. The contractor in such case becomes the agent of the company, and it is responsible for his acts." Boykin *v.* Shaffer, 13 La. Ann. 129, per Merrick, C. J. [*citing* Rabassa *v.* Orleans Nav. Co., 5 La. 461, 25 Am. Dec. 200, which see]. That a railway company, having no express power in its charter so to do, cannot lawfully issue deferred income bonds see McCalmont *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 479, 38 Leg. Int. (Pa.) 168.

45. In this case Minn. Gen. Stat. (1878), c. 34, § 70.

46. Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 246, 53 N. W. 1151.

47. Morris *v.* Cheney, 51 Ill. 451. With respect to mortgages of uncalled capital such a power would have to be exercised in subjugation to the discretionary power of the directors to make calls; but where a call has already been made there is no clear ground upon which the power can be denied; for the call becomes a debt subject to garnishment (3 Thompson Corp. §§ 3578, 3579), and is consequently assignable for any lawful purpose of the corporation. That calls actually made may be assigned by way of mortgage or pledge see *In re* Sankey Brook Coal Co., L. R. 10 Eq. 381, 22 L. T. Rep. N. S. 784, 18 Wkly. Rep. 914; *In re* International L. Assur. Soc., L. R. 10 Eq. 312, 39 L. J. Ch. 667, 23 L. T. Rep. N. S. 350, 18 Wkly. Rep. 970. For the state of the English law upon this question see 5 Thompson Corp. § 6150 [*citing* and discussing the following cases: *In re* Sankey Brook Coal Co., L. R. 10 Eq. 381, 22 L. T. Rep. N. S. 784, 18 Wkly. Rep. 914; Matter of Companies Act, L. R. 6 P. C. 265, 44 L. J. P. C. 76, 32 L. T. Rep. N. S. 277, 23 Wkly. Rep. 668; King *v.* Marshall, 33 Beav. 565, 10 Jur. N. S. 921, 34 L. J. Ch. 163, 10 L. T. Rep. N. S. 557, 12 Wkly. Rep. 971; Howard *v.* Patent Ivory Mfg. Co., 38 Ch. D. 156, 57 L. J. Ch. 878, 58 L. T. Rep. N. S. 395, 36 Wkly. Rep. 801; English Channel Steamship Co. *v.* Rolt, 17 Ch. D. 715, 44 L. T. Rep. N. S. 135; *In re* Colonial Trusts Corp., 15 Ch. D. 465; Matter of Joint-Stock Co.'s Winding-up Acts, 4 De G. J. & S. 407, 69 Eng. Ch. 313; *Re* Colonial, etc., Gas Co., 23 L. T. Rep. N. S. 759, 19 Wkly. Rep. 344]. The authority of the last case was denied by the privy council in Matter of Companies Act, L. R. 6 P. C. 265, 44 L. J. P. C. 76, 32 L. T. Rep. N. S. 277, 23 Wkly. Rep. 668. Mortgage of the "undertaking" in English law see 5 Thompson Corp. § 6151; 8 & 9 Vict. c. 16, §§ 2, 41, 42, and schedule (C); Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201, 36 L. J. Ch. 323, 15 L. T. Rep. N. S. 552, 15 Wkly. Rep. 324; King *v.* Marshall, 33 Beav. 565, 10 Jur. N. S. 921, 34 L. J.

l. Mortgages to Secure Future Advances. A corporation possessing power to mortgage its property can make a valid mortgage thereof to secure future advances.[48] Such mortgages are legal, and have priority over liens which do not intervene before the advance is made.[49]

m. Power of Corporation to Mortgage Its Real Property Situated in Another State. If a corporation has under its charter, under a statute subsisting in the state of its creation, or under the general principles of law as detailed in this article, the general power to mortgage its real estate, then it must be concluded that this power will enable it to mortgage its real estate situated in another state, unless such a mortgage is prohibited by the law of that state.[50] The law of the state creating the corporation determines whether it had power to mortgage its real property; everything relating to the execution and enforcement of the mortgage is governed by the local law where the property is situated. Where the trustees, under a deed of trust so executed, proceed to foreclose or otherwise enforce it in accordance with its terms, and in conformity with the common law, its enforcement will not be enjoined unless it can be shown that it was not executed in accordance with the law of the state where the property is, or that the proceedings to enforce it are in derogation of that law.[51]

n. Mortgages Prohibited by Statute — (I) *Prohibition Against Selling Includes Prohibition Against Mortgaging.* Plainly a statute prohibiting a corporation from selling its property includes by necessary implication a prohibition against mortgaging its property, since a mortgage may become by defeasance an absolute sale.[52]

(II) *Doctrine That Mortgages in Violation of Statutory Prohibitions Are Void In Toto, and Not Severable.* There is judicial authority to the effect that where there is a statute containing a general prohibition upon particular corporations as to mortgaging their property, a mortgage made in violation of it will be deemed void *in toto*, and the court will not separate particular arti-

Ch. 163, 10 L. T. Rep. N. S. 557, 12 Wkly. Rep. 971; *In re* Hull, etc., R. Co., 40 Ch. D. 119, 58 L. J. Ch. 205, 59 L. T. Rep. N. S. 877, 37 Wkly. Rep. 145. Unregistered debentures under English Companies Act see 5 Thompson Corp. § 6152; 25 & 26 Vict. c. 89, § 43; *In re* Patent Bread Machinery Co., L. R. 7 Ch. 289, 26 L. T. Rep. N. S. 228, 20 Wkly. Rep. 347; *In re* Wynn Hall Coal Co., L. R. 10 Eq. 515, 39 L. J. Ch. 695, 23 L. T. Rep. N. S. 348, 18 Wkly. Rep. 1128; Wright *v.* Horton, 12 App. Cas. 371, 52 J. P. 179, 56 L. J. Ch. 873, 56 L. T. Rep. N. S. 782, 36 Wkly. Rep. 17; *In re* International Pulp, etc., Co., 6 Ch. D. 556, 46 L. J. Ch. 625, 37 L. T. Rep. N. S. 351, 25 Wkly. Rep. 822; *In re* Borough of Hackney Newspaper Co., 3 Ch. D. 669; *In re* Native Iron Ore Co., 2 Ch. D. 345, 45 L. J. Ch. 517, 34 L. T. Rep. N. S. 777, 24 Wkly. Rep. 503; *Re* Globe New Patent Iron, etc., Co., 48 L. J. Ch. 295, 40 L. T. Rep. N. S. 580, 27 Wkly. Rep. 424.

48. Jones *v.* Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030. See on the general subject of mortgages to secure future advances or liabilities and their validity Brinkerhoff *v.* Marvin, 5 Johns. Ch. (N. Y.) 320; Lansing *v.* Woodworth, 1 Sandf. Ch. (N. Y.) 43; Lawrence *v.* Tucker, 23 How. (U. S.) 14, 16 L. ed. 474.

Mortgage to secure more than is due is valid as against subsequent creditors. Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75. See Irwin *v.* Tabb, 17 Serg. & R. (Pa.) 419.

49. Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280. That a statute prohibiting such a mortgage will not be so construed as to avoid a mortgage made for the purpose of raising money to take up antecedent debts of the corporation see Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127. That a corporation may execute subsequent mortgages subject to the lien of prior mortgages until this power is exhausted see Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

50. Bassett *v.* Monte Christo Gold, etc., Min. Co., 15 Nev. 293; American Waterworks Co. *v.* Farmers' L. & T. Co., 72 Fed. 956, 20 C. C. A. 133. When therefore a corporation had mortgaged its property and franchises, situated both in the state of its creation and in an adjoining state, it was held that a court of the United States, sitting within the state of its creation, had jurisdiction of a bill in equity, filed by the beneficiary in the mortgage, to compel the trustees named therein to sell such of the property covered by the mortgage as was situated in the adjoining state. Randolph *v.* Wilmington, etc., R. Co., 11 Phila. (Pa.) 502, 33 Leg. Int. (Pa.) 221.

51. Central Gold Min. Co. *v.* Platt, 3 Daly (N. Y.) 263.

52. Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700. See also Mannhardt *v.* Illinois Staats Zeitung Co., 90 Ill. App.

cles of property from the residue and hold it good as to them; since the plain intent of the corporation is not to transfer the few articles separate from the entire mass of its property included within its mortgage, and the prohibition of the statute is general. But at the same time it is held that creditors, by accepting from a corporation a mortgage void on its face, that is, a mortgage which the corporation had no power to issue, do not thereby estop themselves from pursuing their ordinary legal remedies as general creditors against the corporation.[53]

(III) *Mortgages to Secure Debts in Excess of Charter Limits.* Where the charter or governing statute fixes a limit to the indebtedness which the corporation may contract, and to secure which it may mortgage its property, sound reasoning would seem to result in the conclusion that a mortgage in excess of such limits is void and not enforceable, unless made good by the principle of estoppel. Thus a statute of Georgia forbidding the mortgage of after-acquired property operates to prevent a corporation from making a valid mortgage upon its future income without express legislative authority.[54] One decision is found, however, to the effect that where the articles of incorporation fix a limit to the indebtedness which the corporation may contract, an indebtedness in excess of such limit and a mortgage securing the same are not void, although the directors creating the debt and the mortgage may be answerable to the shareholders for their negligence or breach of trust; and the sense of justice of the court was such as to hold that such a mortgage was not void, although made in favor of a director and to secure him in preference to other creditors.[55] Nor will the fact that the directors of a railroad company violated its charter by issuing mortgage bonds in an amount greater than twice its paid-up capital entitle its general creditors, who become such with notice of the mortgage, to share in the proceeds of the foreclosure sale on an equality with *bona fide* purchasers of the bonds.[56] Plainly, where only a portion of the debt secured by the mortgage exceeds the statutory limit, the mortgage will be good as a security for so much of the debt as is within the limit, but void for the excess only.[57]

(IV) *Mortgages Issued Without Consent of Requisite Number of Shareholders*—(A) *Brief Statement of These Statutes.* Statutes exist in many states restraining the power of corporations to mortgage their property to cases where shareholders of a given number or value consent thereto; and these statutes have given rise to a variety of decisions which will now be noticed. Where the statute prescribes the value of the shares of capital stock that must assent to a mortgage made by the corporation, and that the assent must be expressed by a vote had at a meeting of the shareholders called for the purpose, and that thirty days' notice must be given to the shareholders of the time and place of the meeting and of the purpose for which it is called, the execution of a mortgage by the corporation to secure a loan in any other manner than that prescribed by the statute is *ultra vires*, and (subject, it may be assumed, to qualifications elsewhere stated) a mortgage so executed is void.[58]

(B) *Do Not Apply to Mortgages For Unpaid Purchase-Money.* Such a statute does not apply to mortgages for unpaid purchase-money given contemporaneously with the reception by the corporation of the deed of conveyance of land which it has purchased.[59]

315. But to the contrary see *supra*, XVIII, B, 1, c.

53. Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

54. Lubroline Oil Co. *v.* Athens Sav. Bank, 104 Ga. 376, 30 S. E. 409.

55. Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 1, 2 Am. St. Rep. 263; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461.

56. Fidelity Ins., etc., Co. *v.* West Pennsylvania, etc., R. Co., 138 Pa. St. 494, 21 Atl. 21, 21 Am. St. Rep. 911.

57. Bell, etc., Co. *v.* Kentucky Glass Works Co., 106 Ky. 7, 48 S. W. 440, 50 S. W. 2, 1092, 20 Ky. L. Rep. 1089, 1684, 51 S. W. 180, 21 Ky. L. Rep. 133, 156.

58. Southern Bldg., etc., Assoc. *v.* Casa Grande Stable Co., 128 Ala. 624, 29 So. 654.

59. Farmers' L. & T. Co *v.* Equity Gaslight Co., 84 Hun (N. Y.) 373, 32 N. Y. Suppl. 385 65 N. Y. St. 591. Similarly, see McMurray

(c) *Assent May Be Given Contemporaneously With Execution of Mortgage.* Where the statute recites that the written assent "shall first be filed," it is sufficiently complied with if the assent of the shareholders is given contemporaneously with the execution of the mortgage,[60] at least where the question arises as between the parties to the mortgage and their privies,— for example, between an assignee of the mortgage and a receiver of the corporation.[61]

(d) *Such Assent May Be Given Subsequently if Intervening Rights Do Not Arise.* Such assent, even if given after the execution of the mortgage, will validate the mortgage, if there are no intervening rights, even though the assent is not filed in the office of the clerk of the county where the mortgaged property is situated;[62] and as elsewhere seen[63] the want of such assent may be cured by a subsequent ratification.

(e) *Such Assent Where All Shares Are Owned by One or by Two Persons.* If more than two thirds of the capital stock is owned by one person of course he is competent to give the statutory consent;[64] and so the fact that there are but two shareholders assenting to the mortgage makes no difference, provided they own the requisite amount of shares.[65]

(f) *Such Assent Where Corporation Attempts to Own Its Own Shares.* If the corporation is itself the owner of a portion of its stock, assuming that there can be such a solecism as a corporation owning its own shares,[66] it cannot give the assent required by the statute; nor can the assenting shareholders be deemed to represent a proportionate amount of the stock owned by the corporation.[67]

(g) *Such Assent Where Portion of Shares Have Not Been Paid For.* The fact that a portion of the shares represented in the assent have not been paid for in full has been held immaterial.[68] Persons who have subscribed for shares and who hold offices in the company, but who have received no certificates and made no payment, as well as persons who have subscribed and made substantial payment for their shares, either in cash or in work, are shareholders for the purpose of giving their assent, although no certificate of shares has been issued to them.[69]

(h) *Such Assent Where Corporation Has Assigned Its Shares as Security For Debt.* If the corporation has made an assignment, absolute on its face, of certificates of stock owned by it, as collateral security for a debt, the shares thus transferred cannot be deducted from the whole number, in estimating whether the required consent has been given; but it seems that the assignee of the shares stands in the position of a shareholder and has a right to a vote upon the question of giving the mortgage.[70]

(i) *Such Assent Given by Shareholders Owning Debt Intended to Be Secured.* The fact that the consent was given by shareholders owning the debt intended to be secured by the mortgage does not invalidate the mortgage;

v. St. Louis Oil Mfg. Co., 33 Mo. 377; McComb *v.* Barcelona Apartment Assoc., 134 N. Y. 598, 31 N. E. 613, 45 N. Y. St. 784 [*affirming* 10 N. Y. Suppl. 546, 31 N. Y. St. 325].

60. Welch *v.* Importers', etc., Nat. Bank, 122 N. Y. 177, 25 N. E. 269, 33 N. Y. St. 452; Everson *v.* Eddy, 12 N. Y. Suppl. 872, 36 N. Y. St. 763.

61. Welch *v.* Importers', etc., Nat. Bank, 122 N. Y. 177, 25 N. E. 269, 33 N. Y. St. 452. The provision that the written assent "shall first be filed" is said to have merely the effect of preventing the mortgage from taking effect as a valid instrument until the assent is filed. Greenpoint Sugar Co. *v.* Kings County Mfg. Co., 7 Hun (N. Y.) 44 [*affirmed* in 69 N. Y. 328].

62. Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303, 33 N. Y. St. 318 [*affirming* 44 Hun (N. Y.) 130, 8 N. Y. St. 265]; Rochester Sav. Bank *v.* Averell, 96 N. Y. 467. See also Lord *v.* Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909.

63. See *supra*, XV, B, 7, a, (I).

64. Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303, 33 N. Y. St. 318 [*affirming* 44 Hun (N. Y.) 130, 8 N. Y. St. 265].

65. Welch *v.* Importers', etc., Nat. Bank, 122 N. Y. 177, 25 N. E. 269, 33 N. Y. St. 452.

66. As to which see *supra*, XVII, B, 5.

67. Vail *v.* Hamilton, 85 N. Y. 453.

68. Lyceum *v.* Ellis, 8 N. Y. Suppl. 867, 30 N. Y. St. 242.

69. McComb *v.* Barcelona Apartment Assoc., 134 N. Y. 598, 31 N. E. 613, 45 N. Y. St. 784 [*affirming* 10 N. Y. Suppl. 546, 31 N. Y. St. 325].

70. Vail *v.* Hamilton, 85 N. Y. 453.

because a corporation, unless prohibited, may become indebted to its own shareholders, and may give them security for the debt,[71] although such a circumstance will subject the transaction to judicial scrutiny. In such a case the mortgage will pass judicial scrutiny if the indebtedness proves to be genuine, and if the shareholders voting the execution of the mortgage are not individually benefited, for the reason that it does not increase the liability of the company to them;[72] and the same is true where a mortgage is made to a trustee of a corporation.[73]

(J) *Such Statutes Mean Subscribed Stock and Not Merely Potential Stock.* In determining the question whether the assent of two thirds of the capital stock has been given, the statute is construed to mean two thirds of the stock actually issued or actually subscribed for, and not two thirds of the nominal amount to which the capital of the company is limited in the certificate of incorporation. In other words it refers to its actual subscribed capital and not to its potential capital.[74]

(K) *Sufficiency of Instrument Expressing Consent.* The instrument expressing the consent of the shareholders will be sufficient if it contains reasonable evidence of the consent of two thirds of their number, and sufficiently identifies the mortgage to the making of which the assent is intended to be given; and the fact that the amount of indebtedness intended to be secured is not expressed in the assent has been held not to vitiate it.[75]

(L) *Statutes Providing That Such Assent Must Be Given at Meeting Duly Notified in Manner Prescribed* — (1) IN GENERAL. Other statutes have been devised to prevent unauthorized mortgages being laid upon the property of corporations without the consent of a stated majority of their shareholders, which provide that such consent must be given at a meeting, duly notified for that purpose, in a manner prescribed. Where the assent is not given in the prescribed manner the mortgage is void, unless rendered valid by principles elsewhere considered.[76]

(2) WHAT IF MEETING AUTHORIZES MORTGAGE FOR LARGER AMOUNT THAN THAT EXPRESSED IN NOTICE. Where such a statute forbade a manufacturing corporation from mortgaging its property, unless authorized thereto by a vote of its shareholders holding three fifths of its capital stock, who should be notified of the object of the meeting called to obtain such vote, and which provided that without such notice the proceedings should not be valid, it was held that where a meeting had been called pursuant to a notice which specified the object of the meeting to be to authorize the issue of bonds to the extent of one hundred thousand dollars secured by mortgage, and the meeting actually authorized an issue to the extent of one hundred and fifty thousand dollars, the proceedings were valid, so long as the shareholders for whose protection the statute was intended raised no objection.[77]

(3) WHAT LANGUAGE IN NOTICE EXPRESSING OBJECT OF MEETING HAS BEEN HELD SUFFICIENT. Where the governing statute required the assent of the shareholders to be given "at a meeting called for the purpose,"[78] a notice given of a meeting, which stated the object to be "to consider the question of an issue of bonds of the company secured by a mortgage on its property," was held sufficient, although the notice did not especially indicate that final action was to be taken at the meeting. Nor did the fact that after the directors had been thus authorized

71. See *supra*, VI, F, 3, a.

72. Rittenhouse *v.* Winch, 11 N. Y. Suppl. 122, 32 N. Y. St. 506 [*affirmed* in 133 N. Y. 678, 31 N. E. 623, 45 N. Y. St. 931].

73. Welch *v.* Importers', etc., Nat. Bank, 122 N. Y. 177, 25 N. E. 269, 33 N. Y. St. 452.

74. Greenpoint Sugar Co. *v.* Kings County Mfg. Co., 7 Hun (N. Y.) 44 [*affirmed* in 69 N. Y. 328].

75. Greenpoint Sugar Co. *v.* Kings County Mfg. Co., 7 Hun (N. Y.) 44 [*affirmed* in 69 N. Y. 328].

76. Southern Bldg., etc., Assoc. *v.* Casa Grande Stable Co., 128 Ala. 624, 29 So. 654.

77. Beecher *v.* Marquette, etc., Rolling Mill Co., 45 Mich. 103, 7 N. W. 695.

78. As is done for example by Mass. Pub. Stat. c. 106, § 23.

to purchase certain land in which the corporation then had a leasehold estate, and to mortgage "any or all of the rights, estate, property, and franchises" of the corporation, the corporation acquired title to the lands in fee simple, invalidate the authorization. In other words a vote by the shareholders authorizing the directors to mortgage "any or all of the rights, estate, property, and franchises" of the corporation, gives them power to mortgage the land of which the corporation acquires the fee subsequently to the vote.[79]

(4) ASSENT GIVEN AT MEETING HELD OUTSIDE STATE — (a) IN GENERAL. It seems that this not being a constituent act the assent of the shareholders may well be given at a meeting held outside the state, unless the governing statute otherwise prescribes.[80]

(b) SHAREHOLDERS MAY WAIVE INFORMALITY OF HOLDING MEETING OUTSIDE STATE. Assuming that such a meeting cannot lawfully be held in a foreign jurisdiction, yet the question is one which goes to the form and mode of executing a power possessed by the corporation, and not to the existence of the power itself; and therefore, like any other matter relating to the manner of executing corporate powers, the informality may be waived, and the act ratified by the subsequent consent and acquiescence of all the shareholders.[81]

(M) *Statute Requiring Such Assent to Sale Requires Such Assent to Mortgage.* A statute prohibiting a corporation from making a conveyance of its real estate without a two-thirds vote of its shareholders renders invalid a mortgage of its real estate without such a vote; since a mortgage by a defeasance may ripen into an absolute sale.[82]

(N) *Creditors Cannot Assail Corporate Mortgages on This Ground.* It has been held that the creditors of a corporation cannot attack the validity of a mortgage executed by it, on the ground that it did not receive the consent of the holders of the amount of stock required by the charter; since such provision was enacted solely for the protection of the shareholders.[83]

(O) *Nor Can Subsequent Purchasers.* Nor can a subsequent purchaser of the mortgaged premises who assumes the mortgage debt and agrees to pay it.[84]

(P) *Shareholders Alone Can Raise This Objection.* Only shareholders can take advantage of a failure to comply with such a statute.[85]

(Q) *Failing to File Written Assent in Office of Public Registration.* It is not necessary, in order to the validity of the mortgage, to file the written authorization of the holders of more than two thirds in value of the shares, which is required by the statute, in the office of the clerk of the county within which the mortgaged property is situated.[86]

(R) *Where Officers of Corporation Own More Than Statutory Amount of Shares.* Where the officers of a corporation who join in executing a mortgage on its property own more than the statutory amount of the shares, their mere act of executing the mortgage is a sufficient assent to satisfy the requirements of the statute.[87]

(S) *Consent Need Not Be That of Registered Shareholders.* Original subscribers for the capital stock of a corporation need not have their holdings entered

79. Evans *v.* Boston Heating Co., 157 Mass. 37, 31 N. E. 698.

80. Thompson *v.* Natchez Water, etc., Co., 68 Miss. 423, 9 So. 821.

81. Stutz *v.* Handley, 41 Fed. 531 [*reversed* on other grounds in 139 U. S. 417, 11 S. Ct. 417, 35 L. ed. 227].

82. Mannhardt *v.* Illinois Staats Zeitung Co., 90 Ill. App. 315. See also Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700. But to the contrary see *supra*, XVIII, B, 1, c.

83. Barrett *v.* Pollak Co., 108 Ala. 390, 18 So. 615, 54 Am. St. Rep. 172; Bishop *v.* Kent, etc., Co., 20 R. I. 680, 41 Atl. 255. See also Anderson *v.* Bullock County Bank, 122 Ala. 275, 25 So. 523.

84. Alvord *v.* Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27.

85. *In re* New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133.

86. Hailey First Nat. Bank *v.* G. V. B. Mining Co., 89 Fed. 439.

87. G. V. B. Mining Co. *v.* Hailey First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633 [*modifying* 89 Fed. 439].

in the stock-book required to be kept by statute, in order to make their consent to the execution of a mortgage by the corporation valid and effectual.[88]

(T) *Statute Must Be Complied With, Although President and His Wife Own All Shares.* It has been held that such a statute, requiring the consent of two thirds of the shareholders to the mortgage to be expressed in writing and filed in the office of the clerk or the register of the county where a corporation has its principal place of business, or else that it be given by a vote of the shareholders at a special meeting and a certificate thereof filed and recorded, must be complied with even with respect to a chattel mortgage given by the corporation and executed by its president to secure a debt owing by him and his wife for an amount in excess of the capital stock, although the president and his wife own all the stock, and the mortgagee holds fifty-five per cent of it as collateral security for the debt secured by the mortgage.[89]

(V) *How Far Legislature May Validate Void Mortgages.* But as it is within the competency of the legislature to authorize a corporation to mortgage or otherwise convey its property and franchises so the legislature of a state may, within the limits hereafter stated, by a curative act, validate such a conveyance, by waiving any public objections to the same; that is to say, "the legislature may waive the public right to object to the acts of others, because they are opposed to the public interests, and where any act is invalid for want of legislative assent, may waive the objection, and ratify such act by a subsequent statute."[90] But the legislature obviously cannot, by such a curative statute, change the rights of individuals in respect of such void mortgage or other conveyance, which have already become vested; but such rights are to be determined according to the laws in force when they accrued.[91] It cannot revive a void mortgage so as to give it precedence over a subsequent lien, which is by its terms made subject thereto, or in respect of which the subsequent lienor is entitled to stand in the position of an innocent purchaser.[92] Nor can it confirm a fraudulent foreclosure sale of the mortgaged property of a corporation.[93] Nor can the legislatures in many states pass special acts of this nature because of constitutional inhibitions.[94]

o. Fraudulent Corporate Mortgages — (I) *Principles Governing This Subject.* The question of fraud in mortgages given by corporations rests upon substantially the same considerations as in the case of other fraudulent conveyances.[95] There is, however, this peculiarity with respect to the question where the conveyance has been made by the corporation or by those who managed its affairs and contracted in its name, whether the mortgage is fraudulent as against creditors merely, or as against the corporation itself in the sense that shareholders may challenge and impeach it under principles already considered. If such a transaction is immoral and corrupt and injurious to the corporation, and consequently to its shareholders, then those shareholders who are not concerned in it may denounce it and repudiate it, and acting in behalf of the corporation may have relief against it in a court of equity.[96] A mortgage of the property of a corporation, void for want of authority and as creating a preference in favor of a

88. Hamilton Trust Co. *v.* Clemes, 17 N. Y. App. Div. 152, 45 N. Y. Suppl. 141.

89. Quee Drug Co. *v.* Plaut, 51 N. Y. App. Div. 607, 64 N. Y. Suppl. 52, action by mortgagor to have chattel mortgage and note set aside — relief granted.

90. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127, 136 [*citing* Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162; Pierce *v.* Emery, 32 N. H. 484].

91. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127 [*citing* Rich *v.* Flanders, 39 N. H. 304].

92. Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127, 137 [*citing* Rich *v.* Flanders, 39 N. H. 304].

93. White Mountains R. Co. *v.* White Mountains R. Co., 50 N. H. 50.

94. See *supra*, I, I, 1.

95. See, generally, FRAUDULENT CONVEYANCES.

96. Wardell *v.* Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509 [*affirming* 29 Fed. Cas. No. 17,164, 4 Dill. 339]. That a mortgage made by a corporation after receiving a reconveyance of its property after a sale

director, even as between the immediate parties thereto, does not create a trust in behalf of the creditors of the corporation to whom the sureties, sought to be indemnified by such mortgage, are bound; nor can such creditors take anything by subrogation, since the sureties have no right to which they can be subrogated.[97]

(II) *When Bondholders Entitled to Equitable Compensation.* But notwithstanding the fact that such a contract may be avoided by the corporation, or by its shareholders where the corporation fails or refuses to sue, under principles already stated,[98] equity will not for that reason deprive those who have advanced money to, or conferred benefits upon, the corporation under it, of their right to equitable compensation. For instance in the case above stated the holder of the bonds will be allowed, in a suit to foreclose the mortgage, to take a decree for the payment of the sums actually expended for construction under the contract and remaining unpaid, which were payable and paid in bonds thus declared void.[99]

(III) *Mortgages to Shareholders.* A mortgage by a corporation of its property to one of its shareholders is not invalid either at law or in equity, although the circumstance may subject it to greater scrutiny by a court of equity, the principle being that the corporation and the individual shareholders who compose it are distinct persons in law, and may deal with each other at arm's length.[1] It has been held that the fact that a person to whom a mortgage was executed by a corporation was the principal shareholder in such corporation does not render the mortgage invalid, and it cannot be impeached or its foreclosure resisted on that ground by one who contracted with the corporation for the purchase of the mortgaged property years after its execution, and while it was of record.[2]

p. Who May, and Who May Not, Impeach Void Corporate Mortgages — (I) *Party For Whose Benefit Omitted Statutory Formalities Were Prescribed.* Where a mortgage is voidable, by reason of the failure to comply with a statutory formality in its authorization or execution, then, upon the question of the right to impeach it, it will be necessary to consider for whose benefit the statutory formalities were prescribed. Where for instance the meeting of the shareholders called to authorize the giving of the mortgage was not notified

of it had been set aside as an attempted embarrassment of the court in dealing with the corporate assets is void and will be set aside was held in Grant *v.* Lowe, 89 Fed. 881, 32 C. C. A. 379.

97. Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624, 17 S. E. 968.

98. See *supra*, XI, B, 7 *et seq.*

99. Thomas *v.* Brownville, etc., R. Co., 109 U. S. 522, 3 S. Ct. 315, 27 L. ed. 1018. That directors who make a contract with themselves will not be allowed to recover on the contract, but will be allowed in equity a *quantum meruit*, see Gardner *v.* Butler, 30 N. J. Eq. 702; Wardell *v.* Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509 [*affirming* 29 Fed. Cas. No. 17,164, 4 Dill. 339]. Action by a single shareholder to remedy the breach of trust of the president and general manager of a railway company in appropriating its bonds to the payment of the debts of other corporations. Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899. Action by bondholders against corporation, grounded on fraud and deceit in issuing the bonds. Raymond *v.* Spring Grove, etc., R. Co., 10 Ohio Dec. (Reprint) 416, 21 Cinc. L. Bul. 103. Where a railroad company contracted with certain parties, who were associated together as a construction company, for the construction of a portion of its road, and agreed to make payment in its mortgage bonds, and two of its directors were beneficial parties in the contract, and as a part of the transaction the other contracting parties agreed to assume subscriptions by all individual directors of the railway company to its capital stock, which was worthless, and to relieve them from all liability under it, it was held that the contract was immoral and corrupt, and such as could not be enforced in equity; and that the mortgage bonds issued under it to the construction company were voidable at election of the parties affected by the fraud, save in the hands of *bona fide* purchasers for value, and that they were consequently void in the hands of those who took them under circumstances which ought to have put them on inquiry as to their validity. Thomas *v.* Brownville, etc., R. Co., 109 U. S. 522, 3 S. Ct. 315, 27 L. ed. 1018. It has been held that where a railroad company which owns a majority of the stock of another such company procures the latter to issue bonds to it, furnishing a sufficient consideration therefor, and using no improper means to procure the issue, it is immaterial to the validity of the transaction that the former procured and used such bonds as security to float a loan made for its own exclusive benefit. Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 21 Atl. 211.

1. See *supra*, VI, F, 3, a.

2. Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76.

in compliance with the statute, it was held that the mortgage could not for that reason be impeached by subsequent lien creditors, because the statutory provision was intended for the protection of the shareholders, and more especially where the corporation and shareholders had become estopped from impeaching it by the fact of the corporation having received and retained the benefits accruing under it.[3]

(II) *When Subsequent Creditors Cannot.* Subsequent creditors cannot impeach an executed contract of a corporation, where their dealings with it, of which they claim the benefit, occurred after the contract became executed.[4]

(III) *When Subsequent Mortgagee Without Notice Can Attack Prior Mortgage Collaterally.* But it has been held that where bonds, and a mortgage to secure the same, have been issued by a corporation without authority of law, such bonds and mortgage may be attacked collaterally by a subsequent mortgagee without notice, whose mortgage has not been taken subject to the existence of the prior lien. In such a case it is not a good argument that the corporation would be estopped to impeach the bonds and mortgage, and that a subsequent mortgagee could not have any higher or better title than its mortgagor could confer.[5]

(IV) *When Second Mortgagee Cannot.* But it is held that the second mortgagee cannot in such a case maintain a bill in equity to impeach the validity of a prior mortgage, for the reason that being void and subject to collateral attack as such by any party whose rights are thereby injuriously affected, the holders of the mortgage have no title which they can maintain against the subsequent mortgagee, and the latter has a plain, complete, and adequate remedy at law, for any interference with the mortgaged property.[6]

(V) *Volunteer or Purchaser of Equity of Redemption.* Where bonds of a corporation were pledged as collateral security for corporate notes instead of being sold for cash, it was held that the objection that this disposition was unlawful, while open to the corporation or its shareholders, was not open to one who held the property of the corporation under a voluntary conveyance, or by a purchaser of an equity of redemption in the property of the corporation at an execution sale.[7]

(VI) *Creditor After Ratification*—(A) *In General.* When a mortgage, informally executed, has become good, as to the corporation making it, by ratification, a creditor of the corporation, who became such after the lapse of a sufficient time from which to assume a ratification, cannot impeach it. He can have no higher right in this regard than the corporation through which he claims.[8]

(B) *After Formal Mortgage Executed in Lieu of Informal One.* So where certain members of a corporation mortgaged their interest in the corporation for money which was applied to corporate purposes, and the corporation afterward issued a formal mortgage of the corporate property in lieu of the same, this latter was held a good mortgage as against general creditors.[9]

(VII) *Receiver Where Assent of Requisite Value of Shareholders Has Not Been Obtained.* A receiver of a corporation, after it passes into

3. Campbell *v.* Argenta Gold, etc., Min. Co., 51 Fed. 1.

4. Porter *v.* Pittsburg Bessemer Steel Co., 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830; Graham *v.* La Crosse, etc., R. Co., 102 U. S. 148, 26 L. ed. 106.

5. Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

6. Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

7. Beecher *v.* Marquette, etc., Rolling Mill Co., 45 Mich. 103, 7 N. W. 695, opinion by Cooley, J.

8. Accordingly where a mortgage of corporate property was made by a majority of the directors who had met for that purpose on an illegal day, and without notice of any kind to those directors who did not attend, it was held that a creditor who became such after the lapse of eight months, during which time the corporation did nothing to repudiate the mortgage, although the absent members had notice of its existence from the minutes, could not claim payment of his debt out of the proceeds of a sale of the corporate property. Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75.

9. Head *v.* Horn, 18 Cal. 211.

insolvency, has a standing in court to maintain an action to set aside a mortgage executed by it without the requisite consent of its shareholders, because he does not stand merely in the shoes of the corporation, but is also a representative of its general creditors.[10]

(VIII) *STRANGERS TO TITLE OF MORTGAGED LAND.* Where a corporation has mortgaged its land to secure a debt due to an individual, and a suit is brought to enjoin the removal of timber from the land, to which suit the corporation is a party, strangers to the title cannot question the power of the corporation to execute the mortgage.[11]

(IX) *WHEN TRUSTEE IN BANKRUPTCY CANNOT.* Where the directors of a corporation borrowed money of defendant and executed a deed as security, it was held that the fact that the corporation kept no record of their meetings constituted no ground for annulling the deed at the instance of a trustee in bankruptcy of the corporation.[12]

q. Estoppels With Respect to Corporate Mortgages — (I) *CORPORATION ESTOPPED TO REPUDIATE ITS OWN MORTGAGE AFTER RECEIVING AND APPROPRIATING BENEFIT.* A corporation, after having borrowed money on a mortgage of its property, and applied the money so raised to its corporate uses, will not be heard to deny the authority of its directors or their agents to execute the mortgage.[13] Accordingly it was held no defense to a bill to foreclose a mortgage of corporate property that the persons who executed the mortgage were not directors of the company, or authorized to bind the company by it, it being admitted that the corporation got the benefit of the money advanced to it.[14]

(II) *ESTOPPED TO IMPEACH ITS OWN TITLE TO MORTGAGED PROPERTY.* On stronger grounds, where a corporation has exceeded its powers in acquiring property which it has afterward mortgaged, it cannot defeat the title of its mortgagee by setting up its want of power to acquire the property. A corporation will not be allowed thus to impeach its own executed contracts, and to take advantage of its own wrong. Neither can its mortgagee, who has sold the property under the mortgage, excuse himself on such a ground from crediting the corporation with the proceeds of the sale.[15]

r. Other Holdings With Respect to Corporate Mortgages. A deed of trust conveying the real property of a corporation is not rendered invalid by a provision therein that it shall not operate to prevent the corporation from using or expending its moneys and assets in extending its work; since such provision refers merely to money and personal assets which are not included in the mortgage; or by a provision that the mortgaged premises may be sold or exchanged by the corporation when it will not decrease the security; since the reservation of such a power does not invalidate the right to convey.[16] The question of the illegality of the purpose for which a corporation was originally formed cannot be raised in a suit to foreclose a mortgage upon its property, where the mortgage was made while the corporation had power to make it, and where the illegality

10. Vail *v.* Hamilton, 85 N. Y. 453.

11. Collins *v.* Rea, 127 Mich. 273, 86 N. W. 811.

12. Murray *v.* Beal, 23 Utah 548, 65 Pac. 726.

13. *Illinois.*— West *v.* Madison County Agricultural Bd., 82 Ill. 205; Aurora Agricultural, etc., Soc. *v.* Paddock, 80 Ill. 263; Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336.

Iowa.— Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197.

Missouri.— Tyrrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294.

New Jersey.— De Kay *v.* Voorhis, 36 N. J. Eq. 37.

Vermont.— Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228.

Washington.— Circumstances under which a corporation could not be heard in a court of equity to plead its former incapacity to lend money on mortgage. Blair *v.* Metropolitan Sav. Bank, 27 Wash. 192, 67 Pac. 609.

United States.— Dimpfel *v.* Ohio, etc., R. Co., 7 Fed. Cas. No. 3,918, 9 Biss. 127, opinion by Drummond, J.

14. Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336.

15. Parish *v.* Wheeler, 22 N. Y. 494.

16. *In re* New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206.

was wholly extrinsic to the mortgage.[17] Where a banking corporation takes a mortgage from a manufacturing corporation whereby it agrees to carry on the business of the mortgagor, the agreement being *ultra vires* and void under the banking corporation's governing statute and articles of incorporation, the mortgagee bank is not liable for a breach of the contract in the mortgage for the sale of the goods, made by the mortgagor corporation or its agent.[18] The validity of a corporate mortgage is not affected by the fact that it was made while the corporation was inchoate, before it had perfected its legal organization by filing its final certificate, provided it was actually engaged in business as a *de facto* corporation, and afterward became a corporation *de jure* and received and enjoyed the benefits accruing from the mortgage.[19]

2. AUTHORITY OF MINISTERIAL OFFICERS TO EXECUTE — a. Authorization by Directors — (I) *IN GENERAL.* The ministerial officers of a corporation, for example, the president and the cashier, have presumptively no authority to take so important a step as the execution of a mortgage of the property of the corporation; but an authorization from the board of directors must in some form appear. Where the governing statute of the corporation provides that all the affairs, concerns, and property of the corporation shall be managed by a board of directors, a mortgage of corporate realty, although formally executed by the president and cashier of the company, is voidable, if it is shown that these officers had no authority from the board of directors so to execute it.[20] On principles elsewhere considered,[21] an authorization by the directors to the ministerial officers of the corporation, to execute even so important an instrument as a mortgage of its properties, need not be shown by any formal resolution of their board;[22] but the presence of the corporate seal upon the instrument, with the signatures of the proper officers, generally the president and secretary, is presumptive evidence that the proper precedent authority had been given.[23] If such officers execute the instrument with the knowledge and concurrence of the directors, or with their subsequent and long-continued acquiescence, it will be regarded as the act of the corporation, although there was no precedent authority by a formal resolution or vote.[24] Moreover the existence of the resolution may be proved by circumstances; and the fact that it has not been recorded in the proper corporate book will not render the mortgage invalid, provided it has been executed by its president and secretary with the corporate seal attached.[25] Still less is it necessary that a corporate vote, authorizing the execution of a mortgage deed in its behalf, should be evidenced by an instrument under the seal of the corporation; since it is not like an ordinary power of attorney to convey land. Nor is it necessary that such a vote should be recorded with the deed, as in the case of an ordinary conveyance under power of attorney.[26]

(II) *WHERE THERE ARE NO DIRECTORS.* If the articles of incorporation do not provide for a board of directors, and if in fact there are no directors, then the executive officers of the corporation to whom the management of its business is committed by the articles may, with the consent of the other shareholders, exercise the power of the corporation of mortgaging its property.[27]

17. Dickerman *v.* Northern Trust Co., 176 U. S. 181, 20 S. Ct. 311, 44 L. ed. 423 [*affirming* 80 Fed. 450, 25 C. C. A. 549].

18. Blitz *v.* Commonwealth Bank, 55 S. W. 697, 21 Ky. L. Rep. 1554.

19. Forest Glen Brick, etc., Co. *v.* Gade, 55 Ill. App. 181.

20. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

21. See *supra*, XII, A, 2 *et seq.*

22. Sherman *v.* Fitch, 98 Mass. 59. Doctrine recognized in England *v.* Dearborn, 141 Mass. 590, 6 N. E. 837.

23. Schallard *v.* Eel River Steam Nav. Co., 70 Cal. 144, 11 Pac. 590; Southern California Colony Assoc. *v.* Bustamente, 52 Cal. 192. See also *supra*, X, D, 1, j; XII, A, 2 *et seq.*

24. Sherman *v.* Fitch, 98 Mass. 59, opinion by Wells, J.

25. Schallard *v.* Eel River Steam Nav. Co., 70 Cal. 144, 11 Pac. 590.

26. Beckwith *v.* Windsor Mfg. Co., 14 Conn. 594.

27. Bell, etc., Co. *v.* Kentucky Glass Works Co., 106 Ky. 7, 48 S. W. 440, 50 S. W. 2, 1092, 20 Ky. L. Rep. 1089, 1684, 51 S. W. 180, 21 Ky. L. Rep. 133, 156.

(III) *Where Executive Officers Are Invested With All Functions of Directors and Directors Are Entirely Inactive.* Where the shareholders of a corporation, by their direct act or acquiescence, invest the executive officers of the company with the powers and functions of the board of directors as a continuous and permanent arrangement, the board being entirely inactive, and the officers discharging all its duties, a mortgage on the property of the corporation, made and executed in its behalf by such officers, is valid, although not authorized by any vote of the shareholders or directors.[28]

b. Must Take Place at Meeting Duly Assembled — (I) *In General.* But in the absence of circumstances of assent and acquiescence such as may afford circumstantial or presumptive evidence of a precedent authorization, then on principles already discussed[29] the directors can give a valid authorization of so important a measure as a mortgage of the property of the corporation, only when acting and consulting together as a board, duly assembled; and if the charter prescribes five members as necessary to a quorum, a mortgage authorized by a resolution passed by the board when but four members are present will be a nullity.[30] So if the meeting is not assembled in conformity with the requirements of the by-laws a mortgage authorized at the meeting will be invalid unless there is a ratification by the subsequent approval of the minutes of the meeting at another valid meeting of the board, or unless there is a ratification in some other form.[31]

(II) *Place of Meeting of Board* — (A) *Outside State.* As the execution of a mortgage is not what is called a constituent act, that is, an act affecting the organization of the corporation itself, but a mere business act, it may, unless the charter or governing statute otherwise provides, be authorized and executed at a meeting held outside the state in which the corporation was created;[32] but it is not so where the charter or governing statute of the corporation forbids meetings of its directors to be held outside the limits of the state within which it is created and exists, but such a mortgage is void, although the corporation is organized to do business in the state where the mortgaged property is situated, and the mortgage is made to secure its only creditor in that state and to procure the means to continue its business.[33]

(B) *At What Place Within State.* The fact that a mortgage is executed by the officers of the corporation having authority in the premises, at a distance from its home office, will not invalidate it where it is not repudiated by the directors within a reasonable time.[34]

(III) *Notice of Meeting* — (A) *Necessity of Notice to All Directors Where Meeting Is Not Stated Meeting* — (1) General Rule. On principles already discussed,[35] if the authorization takes place at other than a stated meeting of the board of directors, notice must be given to all the directors, and all must have a right to appear and be consulted, in order to the validity of the authorization; since, if any other rule were allowed to prevail, it would be possible, with a board of twelve members, for four directors to convene a meeting of seven, by giving notice to three, and withholding it from five others, and thus to bind the corporation by an act which has been in fact condemned by eight, that is to say, by two thirds of the full board.[36] The fact that a mortgage was made, not on a charter day or a day appointed by law, but at a special meeting convened without

28. Cunningham *v.* German Ins. Bank, 101 Fed. 977, 41 C. C. A. 609.

29. See *supra*, IX, E, 1, a *et seq.*

30. Coryell *v.* New Hope Delaware Bridge Co., 9 N. J. Eq. 457.

31. Curtin *v.* Salmon River Hydraulic Gold Min., etc., Co., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132.

32. Hervey *v.* Illinois Midland R. Co., 28 Fed. 169.

33. Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560.

34. Hailey First Nat. Bank *v.* G. V. B. Mining Co., 89 Fed. 439.

35. See *supra*, IV, D, 2 *et seq.*; IX, F, 3, a *et seq.*

36. Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302 [*cited* with approval in Little Rock Bank *v.* McCarthy, 55 Ark. 473, 478, 18 S. W. 759, 29 Am. St. Rep. 60].

notice, verbal or written, to those directors who did not attend, did not enable a subsequent creditor to impugn the mortgage and claim the proceeds of a sale of the mortgaged property.[37] The failure to give notice of the meeting becomes immaterial, when all the persons having any beneficial interest as shareholders in the property of the corporation ratify the act with full knowledge.[38]

(2) Exception to Rule. Where a corporate mortgage was challenged on the ground that its directors had not been duly notified, it was conceded by the objecting counsel "that a director cannot put a stop to corporate business by simply leaving its jurisdiction; and that, if after a reasonable search, the parties are unable to find him, the remaining directors may attend to the necessary affairs"; and this concession was quoted with approval by the court. This indicated to the court that an exception to the rule which requires a notice to all the directors might arise upon a concurrence of three conditions: (1) The impracticability of the notice; (2) the existence of an emergency for action; and (3) a reasonable necessity for the action taken. When therefore a mortgage of the property of a corporation had been executed by a majority of its directors, at a meeting of which an absent director had no notice, the conclusion was that it was not binding, in the absence of a showing that it was impracticable to give notice, and that an emergency existed demanding the immediate execution of the instrument.[39]

(3) Mortgagee Not Chargeable With Knowledge Whether or Not Notice Was Given. It has been held that the validity of a corporate mortgage executed by two of three directors is not affected by the fact that no notice of the meeting of directors was given to the third director, in the absence of knowledge by the mortgagee of want of such notice, as he is not bound to examine into the subject.[40]

(B) *Notice Must Be Personal Notice.* The kind of notice which is to be given, in the absence of a statutory prescription, has been already stated.[41] It must be a personal notice to each director; and a written notice left at the usual place of residence of a director, during the temporary absence of himself and family, has been held insufficient.[42]

c. Authority of General Agents, Superintendents, and Executive Committees. It may be conceded that the general agent of a manufacturing corporation, in one instance a person who held the two offices of president and treasurer, has no power to mortgage all its personal property, except its book-accounts, to secure the payment of a preëxisting debt, without a previous authority communicated in some form expressly or tacitly.[43] But on the other hand where such a corporation loosely commits all its business affairs to a superintendent, and he executes a chattel mortgage to secure a depositor who threatens to withdraw his deposit, the mortgage will be sustained so as to allow the depositor a preference on final distribution after insolvency.[44] Again where the constitution of an association for the promotion of agricultural fairs provided for the election of an executive committee, to be composed of three members of the board of directors, who should be "competent to transact any official business, unless otherwise instructed," and such committee was especially instructed to negotiate a loan, it was held that they possessed the power to make a mortgage to secure the loan, not by virtue of the special instruction, but under a general power in the constitution.[45]

37. Gordon *v.* Preston, 1 Watts (Pa.) 385, 387, 26 Am. Dec. 75, opinion by Gibson, C. J.

38. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375.

39. Little Rock Bank *v.* McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. Rep. 60.

40. Kuser *v.* Wright, 52 N. J. Eq. 825, 31 Atl. 397.

41. See *supra*, IV, D, 12.

42. Little Rock Bank *v.* McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. Rep. 60.

43. England *v.* Dearborn, 141 Mass. 590, 6 N. E. 837. *Compare supra*, X, C, 3, a *et seq.*

44. Poole *v.* West Point Butter, etc., Assoc., 30 Fed. 513.

45. Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

d. Status of Mortgages Executed Without Proper Authority. The natural suggestion upon this subject would be that a mortgage executed without proper authority is, like any other act done by an assumed agent without proper authority, in the absence of a ratification or of circumstances of estoppel, void.[46]

e. Circumstances Which Do Not Invalidate Corporate Mortgages. A mortgage given by a corporation is not rendered invalid by the fact that the instrument fails to show the authority of the officers of the corporation to borrow the money to secure which the mortgage was executed; since, the corporation having received the money, such authority will be presumed.[47] Nor is a chattel mortgage rendered invalid by the circumstance that it was acknowledged three days before the passage of the resolution by which its execution was authorized, where it was not delivered and filed for record until after the passage of the resolution.[48]

f. Construction of Various Resolutions of Directors and of Other Instruments Authorizing Corporate Mortgages. An express authority conferred by the shareholders upon the ministerial officers of the corporation to prepare and execute mortgages for the purpose of borrowing money carries with it an implied authority to prepare and execute bonds for the payment of the money as one of the usual evidences of the loan, and the execution of the mortgages reciting the bonds is tantamount to a ratification of them.[49] Authority conferred by a corporation upon its president to execute a mortgage does not carry with it by implication an authority to execute, in addition thereto, a collateral undertaking with a second lien to a stranger.[50] The omission in the resolution of the corporation to state who the president is, or who it is that is authorized to execute and deliver the mortgage as president of the corporation, is cured by the authentication and seal of the corporation affixed to the mortgage purporting to be executed by him as president and in its name.[51] A resolution of the board of directors of a corporation that the bonds ordered to be issued shall be secured by mortgage, "with the usual covenants and agreements to fully secure the payment of said bonds," authorizes the insertion of a covenant that the trustee shall be entitled to just compensation and shall be reimbursed for all necessary expenditures, "including expenses of all necessary attorneys, counsel, or agents in and about said trust."[52] Others will be briefly noted in the margin.[53]

g. Mortgages Made by Promoters Prior to Organization. If the promoters of a private corporation assume to act as directors before the corporation has been regularly organized, and in that character issue bonds of the supposed corporation and make a mortgage securing them, and if, after the company has become organ-

46. Broughton *v.* Jones, 120 Mich. 462, 79 N. W. 691 (chattel mortgage executed without meeting of shareholders, and it not being shown that all of them consented thereto, treated as void); Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560 (mortgage authorized at a meeting of the directors held outside the state contrary to the charter).

47. Turner *v.* Kingston Lumber Co., 106 Tenn. 1, 58 S. W. 854 [*affirming* (Tenn. Ch. App. 1900, 59 S. W. 410].

48. Gilbert *v.* Sprague, 88 Ill. App. 508.

49. Pomeroy *v.* New York Smelting, etc., Co., (N. J. Ch. 1901) 48 Atl. 395.

50. Bangor, etc., R. Co. *v.* American Bangor Slate Co., 203 Pa. St. 6, 52 Atl. 40.

51. Gilbert *v.* Sprague, 88 Ill. App. 508.

52. Southern California Motor Road Co. *v.* Union L. & T. Co., 64 Fed. 450, 12 C. C. A. 215.

53. *Alabama.*— Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555, what language authorizes the insertion of a provision for a foreclosure upon default of payment of interest for six months.

Indiana.— Greensburgh, etc., Turnpike Co. *v.* McCormick, 45 Ind. 239, holding that a resolution authorizing a mortgage of the whole authorizes a mortgage of part.

Iowa.— Shaver *v.* Hardin, 82 Iowa 378, 48 N. W. 68, what language authorizes the giving of a new note for old indebtedness and the execution of a mortgage securing it.

Maine.— Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34, 12 Atl. 732, language sufficient to confer authority, especially after eight years' recognition of the corporation.

England.— Howard *v.* Patent Ivory Mfg. Co., 38 Ch. D. 156, 57 L. J. Ch. 878, 58 L. T. Rep. N. S. 395, 36 Wkly. Rep. 801, holding that authority to mortgage all or any part of the company's "properties or rights" authorizes a mortgage of uncalled capital.

ized, the directors authorize a sale of the bonds and a delivery of the mortgage, this will be equivalent to an original authority to issue the bonds and to execute the mortgage, and will render the question of the power of the promoters to bind the future corporation immaterial.[54]

h. Ratification of Informal or Invalid Corporate Mortgages. This question depends upon principles already considered and amplified.[55] It is therefore thought sufficient for the present purpose to refer to some additional decisions in the marginal note.[56]

i. Release of Corporate Mortgages. The president of a corporation has no power by virtue of his office to release a mortgage given to the corporation, without a general or special authorization.[57]

54. Wood *v.* Whelen, 93 Ill. 153. The validity of bonds and mortgage securing the same, issued by a defectively organized corporation, was established in Bergan *v.* Porpoise Fishing Co., 42 N. J. Eq. 397, 8 Atl. 523 [*reversing* 41 N. J. Eq. 238, 3 Atl. 404]. Similarly see Burhop *v.* Milwaukee, 21 Wis. 257.

55. See *supra*, XV.

56. Cozart *v.* Georgia R., etc., Co., 54 Ga. 379; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127. Such a mortgage is not ratified by the mere act of levying an assessment upon shareholders to pay the debt secured. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373. Such a mortgage, where the power of directors to make it is disputed, is ratified by the act of the shareholders at a subsequent annual meeting, approving the minutes of the board of directors which authorized the borrowing of the money and the giving of the mortgage. Aurora Agricultural, etc., Soc. *v.* Paddock, 80 Ill. 263. Ratification by acquiescence until the money is expended. Browning *v.* Mullins, 13 S. W. 427, 12 Ky. L. Rep. 41. That the prior assent of the directors to the execution of a mortgage by the president and secretary, without a formal meeting of the board, with full knowledge of the facts, will be equivalent to a ratification by the board was held in Nevada Nickel Syndicate *v.* National Nickel Co., 96 Fed. 133. Circumstances under which a long delay by the shareholders to bring an action for the cancellation of the bonds and mortgage deed of trust securing them does not cut off their right to equitable relief. Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899. Proceedings for the judicial confirmation of the validity of bonds of irrigating districts, under Cal. Stat. (1889), p. 212, see Modesto Irr. Dist. *v.* Tregea, 88 Cal. 334, 26 Pac. 237. When a ratification of a part of such a transaction as the creation of the debt and the giving of a note for it ratifies the whole and confirms the mortgage see Krider *v.* Western College, 31 Iowa 547.

57. Smith *v.* Smith, 117 Mass. 72. Where a mortgage deed of trust only authorizes the trustee to release certain water rights on their sale for a specified price, on the price being paid to the trustee to apply on the mortgage, a release is invalid unless made in furtherance of such a sale. Lamar Land, etc., Co. *v.* Belknap Sav. Bank, 28 Colo. 344, 64 Pac. 210, holding further that where a trust deed given by a land company authorizes the trustee to release water claims sold by the company, on receipt of the price to apply on the mortgage, and no water rights are sold, but the trustee advances money to pay interest on the mortgage, a release of such water rights by the trustee to the mortgagor or its successors, after a repayment of such interest to the trustee, is wrongful; since the payment of the interest is for the protection of the mortgagor or its successors. Release of a mortgage given to a corporation, executed by its officers fraudulently and without authority, does not bind the corporation. Olney Loan, etc., Assoc. *v.* Rush, 97 Ill. App. 349. Where the treasurer of a savings-bank, who had been authorized by a vote of the trustees to discharge and release mortgages, fraudulently interpolated in the record of the vote the word "assign" between the words "discharge" and "release," it was held that as between the bank and one who, misled by the record, took an assignment of a mortgage for value and in good faith the bank must bear the loss. Holden *v.* Phelps, 141 Mass. 456, 5 N. E. 815.

Other incidents of corporate mortgages.— Filing for record and recording, under New York statutes. Guaranty Trust Co. *v.* Troy Steel Co., 33 Misc. (N. Y.) 484, 68 N. Y. Suppl. 915. Filing copy of articles of incorporation in county where the mortgaged land is situated not necessary under California statutes. Savings, etc., Soc. *v.* McKeon, 120 Cal. 177, 52 Pac. 305 [*distinguishing* California Sav., etc., Soc. *v.* Harris, 111 Cal. 133, 43 Pac. 525; Ontario State Bank *v.* Tibbits, 80 Cal. 68, 22 Pac. 66]. That notice to the secretary of a building and loan association, who is also president of a bank, acquired while acting as president of the bank, of a prior unrecorded mortgage on property on which the building association accepted mortgages a year later, is not of itself notice to the building association of the prior mortgage see Asbury Park Bldg., etc., Assoc. *v.* Shepherd, (N. J. Ch. 1901) 50 Atl. 65. Advances made on condition that the lender have control of the corporation not fraudulent in law. Kitchen *v.* St. Louis, etc., R. Co.,

j. Equitable Liens and Mortgages — (i) *In General.* If a corporation or its directors have power in a given case to create a mortgage or pledge of the company's property to secure a debt, and the instruments by which it is sought to carry into effect this intention are imperfectly executed, equity will give effect to them and hold them a valid pledge upon the property, on the familiar principle that what is agreed to be done is considered as done.[58] An obvious exception to this doctrine is that it cannot be invoked to the prejudice of subsequent creditors and *bona fide* purchasers without notice. But the mere fact that the money advanced by a creditor was to meet the most pressing necessities of the corporation, and was used for the most meritorious corporate purposes, does not necessarily create an equitable lien in favor of such creditor as against prior mortgagees. It was so held where a creditor had advanced moneys for the payment of interest on the debentures of the corporation, and for taxes, and for the purchase of its right of way.[59]

(ii) *Equity Will Give Effect to Informal Corporate Mortgage Against Subsequent Purchaser With Notice.* This results from the principle of the preceding paragraph. Thus a mortgage made by the president of a corporation, in pursuance of authority thereto, and executed by him without the formality of the corporate seal, will receive effect in equity, as against the holders of bonds under subsequent mortgages, who have notice through their respective trustees of the first encumbrance.[60]

(iii) *When Equity Will Reform Informal Corporate Mortgages.* So the power which courts of equity possess to reform a deed to make it conform to the agreement of the parties will be exercised to reform a deed of trust of corporate property intended to be the deed of the corporation, but executed by its officers in their own names.[61] Accordingly where a corporate mortgage was not executed in the corporate name, but showed on its face that it was the mortgage of the corporation, a decree foreclosing it was sustained.[62]

XIX. TORTS AND CRIMES OF CORPORATIONS.

A. Civil Liability of Corporations For Torts — **1. General Rule That Corporations Are Liable For Torts of Their Agents.** Disregarding ancient theories and fictions the modern law is that whenever the agent of a corporation, proceeding within the general scope of its powers and of the powers delegated by it to him, commits a wrong, the corporation must pay damages to the person injured, just as a natural person would be compelled to do under like circumstances.[63]

69 Mo. 224. That the trustee in a corporate mortgage may under the general principles of equity maintain a suit to cancel a lease executed by the officers of the corporation upon the mortgaged premises at a time when the corporation is in default in the payment of interest, which lease is made in opposition to the wishes of a majority of the shareholders, see Guardian Trust Co. *v.* White Cliffs Portland Cement, etc., Co., 109 Fed. 523. That a proviso in a mortgage securing corporate bonds that if the interest should be in default for ninety days the whole of the principal of all outstanding bonds should become due should not be construed as requiring the option to be exercised by all of the bondholders was held in Atlantic Trust Co. *v.* Crystal Water Co., 72 N. Y. App. Div. 539, 76 N. Y. Suppl. 647. That a debt arising from the assumption of a mortgage by a corporation, and an agreement to pay it as part of the purchase-money of the mortgaged land, is not a mortgage debt of the corporation was held in Barron *v.* Burrill, 86 Me. 72, 29 Atl. 938. Complication of circumstances under which the bondholders of a corporation were entitled to recover back one thousand shares of the corporate stock wrongfully diverted by the shareholders see Great Western Min., etc., Co. *v.* Harris, 111 Fed. 38.

58. Matter of Strand Music Hall Co., 3 De G. J. & S. 147, 13 L. T. Rep. N. S. 177, 14 Wkly. Rep. 6, 68 Eng. Ch. 113.

59. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

60. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472 (instrument not signed or sealed by the company itself, but by the agent merely); Miller *v.* Rutland, etc., R. Co., 36 Vt. 452.

61. West *v.* Madison County Agricultural Bd., 82 Ill. 205.

62. Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336.

63. *Illinois.*— Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162 [with which *compare* Illi-

2. Are Liable on Same Footing as Individuals. It is but another way of stating the doctrine under consideration to say that private corporations, in respect of their liability for the acts of their agents or servants, stand before the law on the same footing as individuals.[64]

nois Cent. R. Co. *v.* Downey, 18 Ill. 259; Arasmith *v.* Temple, 11 Ill. App. 39; Chicago, etc., R. Co. *v.* Casey, 9 Ill. App. 632]; Northwestern R. Co. *v.* Hack, 66 Ill. 238; Chicago, etc., R. Co. *v.* Dickson, 63 Ill. 151, 14 Am. Rep. 114.

Massachusetts.— Haskell *v.* New Bedford, 108 Mass. 208; Hawks *v.* Charlemont, 107 Mass. 414; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; Bigelow *v.* Randolph, 14 Gray 541; Moore *v.* Fitchburg R. Corp., 4 Gray 465, 64 Am. Dec. 83; Thayer *v.* Boston, 19 Pick. 511, 31 Am. Dec. 157; Baker *v.* Boston, 12 Pick. 184, 22 Am. Dec. 421; Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35.

Missouri.— Alexander *v.* Relfe, 74 Mo. 495.

New York.— New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30.

Ohio.— Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73; Western College *v.* Cleveland, 12 Ohio St. 375; Crawford *v.* Delaware, 7 Ohio St. 459; Rhodes *v.* Cleveland, 10 Ohio 159, 36 Am. Dec. 82; Scovil *v.* Geddings, 7 Ohio 211, Pt. II; Goodloe *v.* Cincinnati, 4 Ohio 500, 22 Am. Dec. 764.

Pennsylvania.— Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675.

United States.— Clark *v.* Washington, 12 Wheat. 40, 6 L. ed. 544.

England.— Smith *v.* Birmingham, etc., Gas Light Co., 1 A. & E. 526, 3 L. J. K. B. 165, 3 N. & M. 771, 28 E. C. L. 254; Yarborough *v.* Bank of England, 16 East 6, 14 Rev. Rep. 272.

See 12 Cent. Dig. tit. "Corporations," § 1903.

The scope of the liability and the reasons supporting it are clearly stated by Shaw, C. J., in Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157.

64. *Alabama.*— Jordan *v.* Alabama, etc., R. Co., 74 Ala. 85, 49 Am. Rep. 800.

Connecticut.— Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Delaware.— Wilson *v.* Rockland Mfg. Co., 2 Harr. 67.

Illinois.— Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

Indiana.— Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111.

Iowa.— Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Kansas.— Wheeler, etc., Co. *v.* Boyce, 36 Kan. 350, 59 Am. Rep. 571; Western News Co. *v.* Wilmarth, 33 Kan. 510; Kansas Pac. R. Co. *v.* Little, 19 Kan. 267; Kansas Pac. R. Co. *v.* Kessler, 18 Kan. 523; Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456; Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 426.

Kentucky.— Louisville, etc., R. Co. *v.* Collins, 2 Duv. 114, 87 Am. Dec. 486.

Louisiana.— Vinas *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 367; Ware *v.* Barataria, etc., Canal Co., 15 La. 169, 35 Am. Dec. 189, per Morphy, J.

Maine.— Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Maryland.— Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277.

Massachusetts.— Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Haskell *v.* New Bedford, 108 Mass. 208; Hawks *v.* Charlemont, 107 Mass. 414; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; Moore *v.* Fitchburg R. Co., 4 Gray 465, 64 Am. Dec. 83; Lowell *v.* Boston, etc., R. Corp. 23 Pick. 24, 34 Am. Dec. 33; Thayer *v.* Boston, 19 Pick. 511, 31 Am. Dec. 157.

Michigan.—Bath *v.* Caton, 37 Mich. 199.

Mississippi.—Williams *v.* Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494; New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395.

Missouri.— Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413.

New Hampshire.—Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287, opinion by Perley, C. J.

New Jersey.— Vance *v.* Erie R. Co., 32 N. J. L. 334, 90 Am. Dec. 665.

New York.— Booth *v.* Farmers', etc., Bank, 50 N. Y. 396; Lee *v.* Sandy Hill, 40 N. Y. 442; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; First Baptist Church *v.* Scheneotady, etc., R. Co., 5 Barb. 79; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313.

North Carolina.— Peebles *v.* Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447; Meares *v.* Wilmington, 31 N. C. 73, 49 Am. Dec. 412.

Ohio.— Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Pittsburg, etc., R. Co. *v.* Slusser, 19 Ohio St. 157; Little Miami R. Co. *v.* Stevens, 20 Ohio 415.

Pennsylvania.— Fenton *v.* Wilson Sewing Mach. Co., 9 Phila. 189, 31 Leg. Int. 132.

South Carolina.— Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681; Main *v.* Northeastern R. Co., 12 Rich. 82, 75 Am. Dec. 725.

Tennessee.— Wheless *v.* Second Nat. Bank, 1 Baxt. 469, 25 Am. Rep. 783.

Texas.— Hays *v.* Houston, etc., R. Co., 46 Tex. 272.

Vermont.— Lyman *v.* White River Bridge Co., 2 Aik. 255, 16 Am. Dec. 705.

United States.— Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374; Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 16 L. ed. 73; Clark *v.* Washington, 12 Wheat. 40, 6 L. ed. 544.

3. Liable For Torts Committed by Agent or Servant Within Scope of His Employment — a. Rule Stated. Under the rule of *respondeat superior*, a corporation is civilly liable for torts committed by its agent or servant while acting within the scope of his employment, although the corporation neither authorized the doing of the particular act nor ratified it after it was done.[65]

b. Although He May Have Exceeded His Orders. This is true although the agent or servant may have exceeded his orders.[66]

c. Or Acted Without Orders or Against Orders. The rule applies equally whether the principal or master is a natural person or a corporation in cases where the agent or servant in doing the wrong acts without orders or even against orders, provided the act is done within the scope of his employment, and not outside of his employment for the purpose of accomplishing some object of his own.[67]

England.— Smith *v.* Birmingham, etc., Gas Light Co., 1 A. & E. 526, 3 L. J. K. B. 165, 3 N. & M. 771, 28 E. C. L. 254; Maund *v.* Monmouthshire Canal Co., C. & M. 606, 41 E. C. L. 330, 2 Dowl. N. S. 113, 6 Jur. 932, 11 L. J. C. P. 317, 4 M. & G. 452, 43 E. C. L. 452, 3 R. & Can. Cas. 159, 5 Scott N. R. 457; Rex *v.* Medley, 6 C. & P. 292, 25 E. C. L. 439; Yarborough *v.* Bank of England, 16 East 6, 14 Rev. Rep. 272.

See 12 Cent. Dig. tit. "Corporations," § 1903.

65. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560.

Illinois.— Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696; Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489.

Indiana.— Pittsburgh, etc., R. Co. *v.* Kirk, 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675; Indianapolis, etc., R. Co. *v.* Anthony, 43 Ind. 183.

Iowa.— Lewis *v.* Schultz, 98 Iowa 341, 67 N. W. 266.

Kansas.— Atchison, etc., R. Co. *v.* Randall, 40 Kan. 421, 19 Pac. 783.

Massachusetts.— Hickey *v.* Merchants', etc., Transp. Co., 152 Mass. 39, 24 N. E. 860; Southwick *v.* Estes, 7 Cush. 385; Powell *v.* Deveney, 3 Cush. 300, 50 Am. Dec. 738.

Michigan.— Engel *v.* Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549.

Minnesota.— Ellegard *v.* Ackland, 43 Minn. 352, 45 N. W. 715.

Missouri.— Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Garretzen *v.* Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Meade *v.* Chicago, etc., R. Co., 68 Mo. App. 92; Schmidt *v.* Adams, 18 Mo. App. 432.

New Jersey.—McCann *v.* Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236 (although the act was not necessary for the proper performance of the servant's duty to his master, or was even contrary to the master's orders); Driscoll *v.* Carlin, 50 N. J. L. 28, 11 Atl. 482; Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.— Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Montgomery *v.* Sartirano, 16 N. Y. App. Div. 95, 44 N. Y. Suppl. 1066 (porter of lodging-house keeper using unnecessary force in ejecting an intruder); Clark *v.* Koehler, 46 Hun 536, 12 N. Y. St. 573; Haack *v.* Fearing, 5 Rob. 528, 35 How. Pr. 459; Leviness *v.* Post, 6 Daly 321; McCauley *v.* Hutkoff, 20 Misc. 97, 45 N. Y. Suppl. 85.

Pennsylvania.— McClung *v.* Dearborne, 134 Pa. St. 396, 19 Atl. 698, 26 Wkly. Notes Cas. 42, 19 Am. St. Rep. 708, 8 L. R. A. 204.

Texas.— Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

West Virginia.— Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819.

United States.— Singer Mfg. Co. *v.* Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440; Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. ed. 502; Heenrich *v.* Pullman Palace Car Co., 20 Fed. 100.

England.— Whatman *v.* Pearson, L. R. 3 C. P. 422, 37 L. J. C. P. 156, 18 L. T. Rep. N. S. 290, 16 Wkly. Rep. 649; Reg. *v.* Stephens, L. R. I. Q. B. 702, 12 Jur. N. S. 961, 35 L. J. Q. B. 251, 14 L. T. Rep. N. S. 593, 14 Wkly. Rep. 859; Page *v.* Defries, 7 B. & S. 137 [*overruling* Lamb *v.* Palk, 9 C. & P. 629, 38 E. C. L. 367]; Rex *v.* Medley, 6 C. & P. 292, 25 E. C. L. 439; Limpus *v.* London Gen. Omnibus Co., 1 H. & C. 526, 9 Jur. N. S. 333, 32 L. J. Exch. 34, 7 L. T. Rep. N. S. 641, 11 Wkly. Rep. 149.

See 12 Cent. Dig. tit. "Corporations," § 1903.

66. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Kirk, 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675.

Massachusetts.— Hickey *v.* Merchants', etc., Transp. Co., 152 Mass. 39, 24 N. E. 860.

Missouri.— Meade *v.* Chicago, etc., R. Co., 68 Mo. App. 92.

New York.— Leviness *v.* Post, 6 Daly 321.

England.— Page *v.* Defries, 7 B. & S. 137 [*overruling* Lamb *v.* Palk, 9 C. & P. 629, 38 E. C. L. 367].

67. *Arkansas.*— St. Louis R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881; Duggins *v.* Watson, 15 Ark. 118, 16 Am. Dec. 560.

Illinois.— Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696; Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489.

Iowa.— Lewis *v.* Schultz, 98 Iowa 341, 67 N. W. 266.

d. Or Acted in Fraud of His Own Principal, Other Party to Transaction Being Innocent. The rule applies so as to charge the principal or master with liability for the fraud of the agent, even though the fraud was directed against the principal himself, provided the other party to the transaction was innocent.[68]

4. Not Liable Where Agent or Servant Steps Outside Line of His Employment to Accomplish Some Purpose of His Own — a. Rule Stated. A well-defined exception to the rule, and a distinction which should be constantly kept in mind, is between cases where the agent or servant is acting within the general scope of his employment, and where he steps outside the line or scope of his employment and commits the wrong, to accomplish some purpose, not of his principal or master, but of his own.[69]

b. Mode of Proving Agency and Scope of Authority — (I) *In General.* This calls up the question of the mode of proving the fact of agency and the scope of the authority of agents and servants, a question which has already been considered.[70]

(II) *By Proving Habit of Acting.* Whether a corporation has made a delegation of authority large enough to bring within its scope the particular tort for which it is sought to make it civilly liable may be proved, as in other cases of agency, by proving the corporation's habit of acting.[71] Thus where it is proved that a railroad company permits its engineers to allow their firemen to handle the locomotives, and damages are caused by the incompetency of a fireman when temporarily so acting, the company will be liable therefor.[72]

(III) *Authorization Under Seal or by Matter of Record Not Necessary.* In determining whether a tort, committed by the agent or servant of a corporation, was done within the scope of his employment so as to charge the

Kansas.— Atchison, etc., R. Co. *v.* Randall, 40 Kan. 421, 19 Pac. 783.

Massachusetts.—Southwick *v.* Estes, 7 Cush. 385; Powell *v.* Deveney, 3 Cush. 300, 50 Am. Dec. 738.

Michigan.— Engel *v.* Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549.

Minnesota.— Ellegard *v.* Ackland, 43 Minn. 352, 45 N. W. 715.

Missouri.—Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Garretzen *v.* Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Meade *v.* Chicago, etc., R. Co., 68 Mo. App. 92; Schmidt *v.* Adams, 18 Mo. App. 432.

New Jersey.—McCann *v.* Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236 (although the act was not necessary for the proper performance of the servant's duty to his master, or was even contrary to the master's orders); Driscoll *v.* Carlin, 50 N. J. L. 28, 11 Atl. 482; Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.— Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Higgins *v.* Watervliet Turnpike, etc., R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Montgomery *v.* Sartirano, 16 N. Y. App. Div. 95, 44 N. Y. Suppl. 1066 (porter of lodging-house keeper using unnecessary force in ejecting intruder); Clark *v.* Koehler, 46 Hun 536, 12 N. Y. St. 573; Haack *v.* Fearing, 5 Rob. 528, 35 How. Pr. 459; McCauley *v.* Hutkoff, 20 Misc. 97, 45 N. Y. Suppl. 85.

Oregon. — Oliver *v.* North Pacific Transp. Co., 3 Oreg. 84.

Pennsylvania.— McClung *v.* Dearborne, 134 Pa. St. 396, 19 Atl. 698, 26 Wkly. Notes Cas. 42, 8 L. R. A. 204.

Texas.— Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

West Virginia.— Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819.

United States.— Singer Mfg. Co. *v.* Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440; Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. ed. 502; Heenrich *v.* Pullman Palace Car Co., 20 Fed. 100.

England.— Betts *v.* De Vitre, L. R. 3 Ch. 429, 37 L. J. Ch. 325, 18 L. T. Rep. N. S. 165, 5 New Rep. 165, 16 Wkly. Rep. 529; Whatman *v.* Pearson, L. R. 3 C. P. 422, 37 L. J. C. P. 156, 18 L. T. Rep. N. S. 290, 16 Wkly. Rep. 649; Reg. *v.* Stephens, L. R. 1 Q. B. 702, 12 Jur. N. S. 961, 35 L. J. Q. B. 251, 14 L. T. Rep. N. S. 593, 14 Wkly. Rep. 859; Rex *v.* Medley, 6 C. & P. 292, 25 E. C. L. 439; Limpus *v.* London Gen. Omnibus Co., 1 H. & C. 526, 9 Jur. N. S. 333, 32 L. J. Exch. 34, 7 L. T. Rep. N. S. 641, 11 Wkly. Rep. 149.

68. Thus where the general manager of a corporation who was authorized to collect its checks, etc., presented a check belonging to it to a bank for payment, and the bank overpaid him by mistake, it was held that the corporation, whose agent he was, was liable to the bank for the overpayment, without regard to whether he accounted to the corporation for the amount or not. Kansas Lumber Co. Jr. *v.* Central Bank, 34 Kan. 635, 9 Pac. 751.

69. Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.

70. See *supra*, X, D, 1, f, (I) *et seq.*

71. Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157, per Shaw, C. J.

72. Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353.

corporation, it is not necessary to prove that the agent had such authority under the corporate seal, nor is it necessary to prove an order entered on the books of the corporation.[73]

c. Whether Question of Fact For Jury. It has been held that the question whether a given act was done within the scope of the employment of the actor is a question of fact for a jury;[74] but this will manifestly depend upon the state of the evidence as in other cases; and where the facts are settled or undisputed the conclusion will often be a conclusion of law to be drawn by the court.[75]

5. Not Liable For Torts of Independent Contractors. Another principle is that a corporation, in common with an individual, is not liable for torts committed by independent contractors or by their servants with whom the corporation contracts for the doing of a specific piece of work, leaving the contractor to his own methods and to the employment and control of his own servants, but holding him responsible only for the production of certain results. The distinction is between the case where the contractor engages to produce certain results merely, and where the proprietor reserves control over him with respect to his methods and the conduct of the men whom he employs. In the former case the proprietor is not liable for the torts of the contractor; in the latter case he is.[76] This subject is treated in the leading works on the law of negligence, and as it does not appertain specially to corporations it will not be further pursued here.[77]

6. Corporations Are Liable For Ultra Vires Torts — a. In General. According to strict logic, a corporation has no power to commit a tort, since the legislature has not conferred upon it any such power, and therefore it cannot commit a tort at all, every tort being *ultra vires*. A doctrine so dangerous to the public and so profoundly opposed to public policy, could not be allowed to stand in a civilized system of jurisprudence; and hence logic has yielded to justice and necessity, and it is now well settled that it is no defense on the part of a corporation when proceeded against to charge it with civil liability for a tort, that the commission of the tort was not authorized by its charter or governing statute, in other words that it was *ultra vires*.[78]

73. Hooe *v.* Alexandria, 12 Fed. Cas. No. 6,666, 1 Cranch C. C. 90. See also *supra*, X, D, 1, f, (I) *et seq.*; *infra*, XIX, B, 2.

74. Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.

75. Drew *v.* Sixth Ave. R. Co., 1 Abb. Dec. (N. Y.) 555, where the court held that the driver or brakeman of a horse-car acts within the line of his duty in assisting young and infirm passengers to alight. See also Eaton *v.* Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513, holding that a freight conductor has no power with respect to the transportation of passengers, as the business of carrying freight and carrying passengers is separated into two departments of service.

76. New Orleans, etc., R. Co. *v.* Hanning, 15 Wall. (U. S.) 649, 21 L. ed. 220.

77. See 1 Thompson Neg. (2d ed.) § 621 *et seq.*, and numerous cases there examined.

78. *Alabama.*— Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; South, etc., R. Co. *v.* Chappell, 61 Ala. 527.

Illinois.— German Nat. Bank *v.* Meadowcroft, 95 Ill. 124, 35 Am. Rep. 137.

Missouri.— Alexander *v.* Relfe, 74 Mo. 495.

Nebraska.— Rich *v.* State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382.

New Jersey.— State *v.* Morris, etc., R. Co., 23 N. J. L. 360.

New York.— New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30 [*overruling* on this point Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599]. See Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 42 Hun 153, 3 N. Y. St. 450 [*affirmed* in 106 N. Y. 669, 12 N. E. 826, action against corporation for slander].

North Carolina.— Hussey *v.* Norfolk Southern R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312; Gruber *v.* Washington, etc., R. Co., 92 N. C. 1.

Tennessee.— Hutchinson *v.* Western, etc., R. Co., 6 Heisk. 634.

Washington.— Pronger *v.* Old Nat. Bank, 20 Wash. 618, 56 Pac. 391.

United States.— Grand Forks First Nat. Bank *v.* Anderson, 172 U. S. 573, 19 S. Ct. 284, 43 L. ed. 558 [*affirming* 6 N. D. 497, 72 N. W. 916, national bank liable as for a conversion for purchasing notes which it held as collateral security, although not within its powers to sell them to itself as agent of owner]; Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, 7 S. Ct. 1286, 30 L. ed. 1146; Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. ed. 750; Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008; Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 16 L. ed. 73; Nevada Bank *v.* Portland Nat.

b. Acts Authorized by Valid Statutes Not Torts. In dealing with this question it is to be kept in mind that all torts are necessarily *ultra vires*, since if an act is authorized by a valid statute it is for that reason lawful and not a tort.[79] Care must be taken in applying this principle, since in many cases the public authorization to do an act is made on the implication that the corporation will pay the damages to private owners which happen in consequence of doing it.[80]

c. Liable For Ultra Vires Torts Committed in Performing Unnecessary or Gratuitous Acts. If a corporation undertakes to do more than is required by its charter or governing statute it will be answerable for any damages which may happen through the negligent doing of it. Thus where a turnpike company was required by its charter to construct its road thirty feet wide, but constructed it wider, it was held liable for an injury sustained in consequence of an obstruction within the road as made, but outside the road if its width had been limited to the width designated by the statute.[81] So a turnpike company, crossing a public bridge, became liable for an injury happening in consequence of a non-repair of one of the sidewalks of the bridge, by reason of having once or twice repaired such sidewalk.[82] So if a railway company obtains permission from the public authorities to build a bridge in order to pass over its tracks a highway which for many years has passed them on a level it is bound to keep such bridge and its approaches in repair, and is responsible for any damages which may happen in consequence of non-repair.[83]

d. Torts Which Are Ultra Vires the Agent or Servant Committing Them. It is no defense to the liability of a corporation for a tort that it was *ultra vires* the servant or agent who committed it, in the sense of not being authorized by the corporation; but if as already stated he was acting within the general scope of his employment, and was not stepping out of it to accomplish some purpose of his own, the corporation will be liable.[84]

7. Liability in Consequence of Ratifying Wrongful Act. A municipal corporation,[85] and for stronger reasons a private corporation,[86] may make itself liable for the wrongful act of its agent or servant by subsequently ratifying it, provided the ratification is something more than the negative acquiescence with knowledge, which sometimes estops a corporation, such as failing to discharge the servant who did the wrong,[87] or accepting a job of work from an independent contractor who has inflicted a negligent injury upon a third person in performing it.[88]

8. Corporations Not Included in General Statutes Giving Penalties. On the principle that penal statutes are to be strictly construed and are not to be extended

Bank, 59 Fed. 338; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 12 Fed. 773, 11 Biss. 334.

See 12 Cent. Dig. tit. "Corporations," § 1902.

79. Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336.

80. McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508; Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335; Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739. *Compare* Beseman *v.* Pennsylvania R. Co., 50 N. J. L. 235, 13 Atl. 164; Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

81. Franklin Turnpike Co. *v.* Crockett, 2 Sneed (Tenn.) 263.

82. Wayne County Turnpike Co. *v.* Berry, 5 Ind. 286.

83. Hayes *v.* New York Cent., etc., R. Co., 9 Hun (N. Y.) 63.

84. See *supra*, XIX, A, 3, a *et seq.*

85. Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361; McGary *v.* Lafayette, 12 Rob. (La.) 674, 43 Am. Dec. 239; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157. *Compare* McGary *v.* Lafayette, 4 La. Ann. 440.

86. Mitchell *v.* Rockland, 52 Me. 118; Malecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17; San Antonio, etc., R. Co. *v.* Grier, 20 Tex. Civ. App. 138, 49 S. W. 148.

87. Edelmann *v.* St. Louis Transfer Co., 3 Mo. App. 503. *Compare* Malecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17.

88. Coomes *v.* Houghton, 102 Mass. 211.

For declarations of the managing officer approving the wrongful act which will afford evidence of a ratification see Malacek *v.* Tower Grove, etc., R. Co., 57 Mo. 17.

That slight acts of ratification will be sufficient to charge the corporation with liability for the tort of its agent was held in Perkins *v.* Missouri, etc., R. Co., 55 Mo. 201.

so as to include subjects not within their terms, it has sometimes been held that statutes denouncing penalties for the doing of certain acts do not include corporations, unless these artificial bodies are specially named; so that a statute imposing a penalty upon "the owner, agent, or superintendent of any manufacturing establishment," for employing any child under twelve years of age, and giving a private action for the penalty, did not include a manufacturing corporation;[89] and so that a statute denouncing a penalty for carrying away sawlogs without the consent of the owner and making the offense larceny did not include corporations.[90] Such a principle of interpretation is odious to sense and justice, in that it ignores the principle that statutes are to be applied to corporations, whenever they can be applied, as well to corporations as to natural persons,[91] and for the further reason that it confers upon an aggregate body of persons, acting together, an immunity from liability for their torts which single individuals are not permitted to enjoy. Other courts have followed the sensible and just rule of interpretation, and have held for example that a corporation which sells intoxicating liquors in violation of a statute is liable in a civil action for the penalty thereby denounced in like manner as an individual.[92]

9. Statutes Giving Penalties Merely Supply Cumulative Remedies. Where a statute gives a penalty for an infraction of a common-law right it is deemed merely to supply a cumulative remedy and the injured party may ignore the statute and sue at common law. Thus if a statute enjoining upon a railway company the duty of fencing its track gives double damages to a person whose cattle are killed or injured by the non-performance of this duty, a corporation neglecting this duty will be liable in a common-law action to a party thus injured.[93] It is otherwise where a statute creates a right which does not exist at common law, and prescribes a special remedy for its enforcement.[94]

10. When Corporation May Be Sued Jointly With Agent Who Committed Tort — a. In General. On well-understood grounds all who join in furthering a wrongful act injurious to another are regarded in the law as principals, and are liable to be sued jointly as such. Upon this ground, and contrary to an earlier misconception,[95] it is now settled that a corporation may be joined as a defendant with its agent or servant in an action to recover damages for a tortious act committed by the agent in the general line of his previously conferred authority, or where there has been a subsequent ratification by the corporation of his wrongful act, as for instance where the wrong consists of the negligence of the servant,[96] or of an assault and battery committed by him;[97] or where he has, when acting for the corporation, become liable for the malicious prosecution of a criminal

89. Benson *v.* Monson, etc., R. Co., 9 Metc. (Mass.) 562. That a statute denouncing a penalty for malicious injuries to canals did not include municipal corporations see Cumberland, etc., Canal Corp. *v.* Portland, 56 Me. 77.

90. Androscoggin Water Power Co. *v.* Bethel Steam Mill Co., 64 Me. 441.

91. South Carolina R. Co. *v.* McDonald, 5 Ga. 531; Stewart *v.* Waterloo Turn Verein, 71 Iowa 226, 32 N. W. 275, 60 Am. Rep. 786; Wales *v.* Muscatine, 4 Iowa 302.

92. Stewart *v.* Waterloo Turn Verein, 71 Iowa 226, 32 N. W. 275, 60 Am. Rep. 786.

93. Norris *v.* Androscoggin R. Co., 39 Me. 273, 63 Am. Dec. 621; Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469; Calvert *v.* Hannibal, etc., R. Co., 34 Mo. 242, 38 Mo. 467.

94. See Actions, 1 Cyc. 679.

95. Orr *v.* U. S. Bank, 1 Ohio 36, 13 Am. Dec. 588 (Anno 1821).

96. Wright *v.* Compton, 53 Ind. 337; Holmes *v.* Wakefield, 12 Allen (Mass.) 580, 90 Am. Dec. 171. This is no more than an extension of the well-understood principle which allows a principal and his agent, or a master and his servant, to be joined as defendants, in actions for wrongs committed by the agent or servant. 2 Thompson Neg. (1st ed.) p. 890, § 11; Hewett *v.* Swift, 3 Allen (Mass.) 420; Whitamore *v.* Waterhouse, 4 C. & P. 383, 19 E. C. L. 565 (per Parke, J.). *Compare* Moreton *v.* Hardern, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553. The case of Losee *v.* Buchanan, 61 Barb. (N. Y.) 86, which holds the doctrine of the text was reversed on appeal on other points in 51 N. Y. 476, 10 Am. Rep. 623 [*affirming* 42 How. Pr. (N. Y.) 385].

97. St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Hewett *v.* Swift, 3 Allen (Mass.) 420; Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.)

action.[98] Where the corporation is thus joined with its managing agents who did the act upon which the action is predicated a recovery may be had against the corporation only.[99]

b. Circumstances Under Which They Cannot Be Joined. Where the liability is for a mere nonfeasance, that is to say, for a failure on the part of the corporation to perform a duty which the corporation owes to the party seeking to maintain the action, then the agent or servant of the corporation, through whom the corporation has failed in the performance of the duty, cannot be joined, since he owes the duty to the corporation and not to the party aggrieved and is not in privity with him.[1]

B. Liability For Trespasses and Malicious Injuries — 1. Liable For Wilful and Criminal Acts of Servant Done Within Scope of His Employment — a. Rule Stated. Contrary to ancient conceptions,[2] which were to the effect that a master will not be liable for the wilful or criminal acts of his servant, although done at a time when he is pursuing his master's business, and although done with the means which the master has placed in his hands for the discharge of such business,[3] unless it be shown that the master authorized the particular act or ratified it after it was committed,[4] the modern law, supported by the great weight of

465, 64 Am. Dec. 83; Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659.

98. Hussey *v.* Norfolk Southern R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312. Upon this principle it has been held that a railroad corporation, by whose direction a contractor enters and builds its road, upon lands which it has acquired subject to an existing lease, is liable, as a joint tort-feasor with him and his servants, for the damages done to the crops of the lessee. Ullman *v.* Hannibal, etc., R. Co., 67 Mo. 118.

99. Bingham *v.* Lipman, 40 Oreg. 363, 67 Pac. 98.

1. For illustrations of this principle see Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80. Woodward *v.* Webb, 65 Pa. St. 254. *Compare* Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.) 465, 64 Am. Dec. 83. For a discussion of this subject see 1 Thompson Neg. (2d ed.) § 611.

Shadowy distinctions at common law between direct and indirect injuries.— Shadowy distinctions have been taken where the common-law system of pleading prevails with respect to joining the corporation and its servant, where the tort of the servant was direct and where the tort of the master was deemed to be indirect. Parsons *v.* Winchell, 5 Cush. (Mass.) 592, 52 Am. Dec. 745. *Compare* an old case, where plaintiff was hurt by ungovernable horses in the hands of a servant of defendant and an action on the case was maintained against both the master and the servant. Michell *v.* Allestry, 3 Keb. 650, 2 Lev. 172, 1 Vent. 295. Another court has held that a master and servant are not jointly liable, in an action on the case, for an injury occasioned by the negligence of the servant, while driving the horse and carriage of the master in his absence. Parsons *v.* Winchell, 5 Cush. (Mass.) 592, 52 Am. Dec. 745. That an action at common law will lie both against the master and the servant in such a case was conceded in Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

Construction of a statute providing that a mortgage given by a corporation shall not exempt its property from execution on a judgment for its tort, with the conclusion that the remedy of the injured party is to reduce his claim to judgment and levy his execution upon the mortgaged lands. Williams *v.* West Asheville, etc., R. Co., 126 N. C. 918, 36 S. E. 189.

2. Voiced in such decisions as McManus *v.* Crickett, 1 East 106, 5 Rev. Rep. 518; Middletown *v.* Fowler, 1 Salk. 282.

3. *Illinois.*— Pritchard *v.* Keefer, 53 Ill. 117; Halty *v.* Markel, 44 Ill. 225, 92 Am. Dec. 182; Oxford *v.* Peter, 28 Ill. 434; Tuller *v.* Voght, 13 Ill. 277; Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416.

Iowa.— Cooke *v.* Illinois Cent. R. Co., 30 Iowa 202; De Camp *v.* Mississippi, etc., R. Co., 12 Iowa 348.

Mississippi.— New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356; McCoy *v.* McKowen, 26 Miss. 487, 59 Am. Dec. 264.

New York.— Fraser *v.* Freeman, 43 N. Y. 566, 3 Am. Rep. 740; Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315; Ryan *v.* Hudson River R. Co., 33 N. Y. Super. Ct. 137; Steele *v.* Smith, 3 E. D. Smith 321; Garvey *v.* Dung, 30 How. Pr. 315; Wright *v.* Wilcox, 19 Wend. 343, 32 Am. Dec. 507.

North Carolina.— Wesson *v.* Seaboard, etc., R. Co., 49 N. C. 379.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. 143.

Tennessee.— Puryear *v.* Thompson, 5 Humphr. 397.

England.— Jones *v.* Hart, 2 Salk. 441.

4. *Alabama.*— Lindsay *v.* Griffin, 22 Ala. 629.

Illinois.— Illinois Cent. R. Co. *v.* Downey, 18 Ill. 259.

Maryland.— Brown *v.* Purviance, 2 Harr. & G. 316.

Michigan.— Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

authority, is that the master will be liable for the wrongful acts of his servant done within the scope of his employment whereby injury is inflicted upon a third person, without reference to the question whether such act was wanton, malicious, criminal, or merely negligent, and wholly without reference to the state of mind of the servant when he committed the act,[5] provided the servant in doing it did not step outside the course of his employment to accomplish some purpose of his own or of a third person other than his master.[6]

b. Illustration Where Servant Authorized to Use Force Uses Too Much Force. The modern rule is that if a servant authorized to use force about his master's business uses excessive force, his master must answer in damages to the person thereby injured, wholly without reference to the state of mind under which the servant acted.[7] If he is required to use force, and is left to his discretion as to

Pennsylvania.— Snodgrass *v.* Bradley, 2 Grant 43; Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. 143.

5. *Arkansas.*— Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560.

California.— Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

Illinois.— Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162 [with which *compare* Illinois Cent. R. Co. *v.* Downey, 18 Ill. 259; Arasmith *v.* Temple, 11 Ill. App. 39; Chicago, etc., R. Co. *v.* Casey, 9 Ill. App. 632]; Northwestern R. Co. *v.* Hack, 66 Ill. 238; Chicago, etc., R. Co. *v.* Dickson, 63 Ill. 151, 14 Am. Rep. 114; Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489.

Indiana.— Pittsburgh, etc., R. Co. *v.* Theobald, 51 Ind. 246; Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103.

Kansas.— Western News Co. *v.* Wilmarth, 33 Kan. 510, 6 Pac. 786.

Kentucky.— Sherley *v.* Billings, 8 Bush 147, 8 Am. Rep. 451; Hawkins *v.* Riley, 17 B. Mon. 101.

Louisiana.— Keene *v.* Lizardi, 5 La. 431, 25 Am. Dec. 197, 6 La. 315, 26 Am. Dec. 478.

Maine.— Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Massachusetts.— Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 5 N. E. 500; Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Hawes *v.* Knowles, 114 Mass. 518, 19 Am. Rep. 383; Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311; Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200; Howe *v.* Newmarch, 12 Allen 49.

Missouri.— Malecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17; Gillett *v.* Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653; Perkins *v.* Missouri, etc., R. Co., 55 Mo. 201; Buckley *v.* Knapp, 48 Mo. 152; Eckert *v.* St. Louis Transfer Co., 2 Mo. App. 36.

Nevada.— Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757, per Hawley, C. J.

New Jersey.— Vance *v.* Erie R. Co., 32 N. J. L. 334, 90 Am. Dec. 665; Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659.

New York.— Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Shea *v.* Sixth Ave. R. Co., 62 N. Y. 180, 20 Am. Rep. 480; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Morton *v.* Metropolitan L. Ins. Co., 34 Hun 366 [*affirmed* in 103 N. Y. 645]; Rounds *v.* Delaware, etc., R. Co., 3 Hun 329 [*affirmed* in 64 N. Y. 129, 21 Am. Rep. 597]; Wolfe *v.* Mersereau, 4 Duer 473; Metcalf *v.* Baker, 34 N. Y. Super. Ct. 10.

Pennsylvania.— Pittsburgh, etc., Pass. R. Co. *v.* Donahue, 70 Pa. St. 119.

Wisconsin.— Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

United States.— Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. ed. 502; Pendleton *v.* Kinsley, 19 Fed. Cas. No. 10,922, 3 Cliff. 416.

England.— Croft *v.* Alison, 4 B. & Ald. 590, 23 Rev. Rep. 407, 6 E. C. L. 614; Green *v.* London Gen. Omnibus Co., 7 C. B. N. S. 290, 6 Jur. N. S. 228, 29 L. J. C. P. 13, 1 L. T. Rep. N. S. 95, 8 Wkly. Rep. 88, 97 E. C. L. 290. In Edwards *v.* Midland R. Co., 6 Q. B. D. 287, 45 J. P. 374, 50 L. J. Q. B. 281, 43 L. T. Rep. N. S. 494, 29 Wkly. Rep. 609, the question reserved for decision was whether a corporation could be liable for an act which required malice in order to be actionable. Mr. Justice Fry delivered an opinion, holding that a company could be so liable, reviewing the following authorities: Green *v.* London Gen. Omnibus Co., 7 C. B. N. S. 290, 6 Jur. N. S. 228, 29 L. J. C. P. 13, 1 L. T. Rep. N. S. 95, 8 Wkly. Rep. 88, 97 E. C. L. 290; Stevens *v.* Midland Counties R. Co., 2 C. L. R. 1300, 10 Exch. 352, 18 Jur. 932, 23 L. J. Exch. 328; Yarborough *v.* Bank of England, 16 East 6, 14 Rev. Rep. 272; Goff *v.* Great Northern R. Co., 3 E. & E. 672, 7 Jur. N. S. 286, 3 L. T. Rep. N. S. 850, 30 L. J. Q. B. 148, 107 E. C. L. 672; Whitfield *v.* South Eastern R. Co., E. B. & E. 115, 4 Jur. N. S. 688, 27 L. J. Q. B. 229, 6 Wkly. Rep. 545, 96 E. C. L. 115.

6. Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Croft *v.* Alison, 4 B. & Ald. 590, 23 Rev. Rep. 407, 6 E. C. L. 614.

7. *Illinois.*—St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Chicago, etc., R. Co. *v.* Parks, 18 Ill. 460, 68 Am. Dec. 562.

Massachusetts.— Hewett *v.* Swift, 3 Allen 420; Moore *v.* Fitchburg R. Corp., 4 Gray 465, 64 Am. Dec. 83.

New York.— Cohen *v.* Dry Dock, etc., R. Co., 69 N. Y. 170; Rounds *v.* Delaware, etc.,

how much he shall use, the master will, upon either view of the subject, be answerable if he uses too much force through negligence.[8]

c. Difficulty in Determining When Act Is Within and When Without Scope of Authority. In many cases there is great difficulty in determining whether the act of the servant is to be deemed within or without the scope of his employment or authority, as where the force employed by him is so extreme[9] or where the act is so unusual[10] as to repel the presumption of authority.

2. Corporation Can Commit Trespass Same as Natural Person — a. Rule Stated. The ancient law was that a corporation could not commit a trespass except by a writing under its seal;[11] but the modern law is, with respect to private corporations,[12] that such a corporation may commit a trespass and may be held answerable in damages for a trespass in like manner as a natural person may be.[13]

b. Illustrations in Cases of Cutting Timber on Private Lands. If a railroad company, in order to facilitate its business, allows a telegraph company the use of its right of way for a telegraph line, such company may cut down timber on the right of way in order to prevent interference with its poles and wires, without incurring liability to an action by the landowner for damages. The railway company would have this right,[14] and the telegraph company might acquire it from the railroad company, where the telegraph line was intended to promote the business of the railway company.[15] If, however, the trees are not on the right of way, the telegraph company will be liable for damages, without reference to the question whether its line has been built by itself alone or jointly with the railroad company.[16]

R. Co., 64 N. Y. 129, 21 Am. Rep. 597 [*affirming* 3 Hun 329, 5 Thomps. & C. 475].

Texas.— Echols *v.* Dodd, 20 Tex. 190.

England.—Seymour *v.* Greenwood, 6 H. & N. 359, 30 L. J. Exch. 189, 9 Wkly. Rep. 518 [*affirmed* in 7 H. & N. 355, 30 L. J. Exch. 327, 4 L. T. Rep. N. S. 833, 9 Wkly. Rep. 785].

Contra, Cantrell *v.* Colwell, 3 Head (Tenn.) 471.

8. Puryear *v.* Thompson, 5 Humphr. (Tenn.) 397; Croft *v.* Alison, 4 B. & Ald. 590, 23 Rev. Rep. 407, 6 E. C. L. 614; Seymour *v.* Greenwood, 6 H. & N. 359, 30 L. J. Exch. 189, 9 Wkly. Rep. 518.

9. New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356; Jones *v.* St. Louis, etc., Packet Co., 43 Mo. App. 398; Pittsburg, etc., R. Co. *v.* Donahue, 70 Pa. St. 119.

10. Marsh *v.* South Carolina R. Co., 56 Ga. 274, hindering access to a witness.

Contrary and untenable decisions on this question.— Illinois Cent. R. Co. *v.* Downey, 18 Ill. 259; Childs *v.* State Bank, 17 Mo. 213; Jackson *v.* Second Ave. R. Co., 47 N. Y. 274, 7 Am. Rep. 448 [*compare* Fraser *v.* Freeman, 43 N. Y. 566, 3 Am. Rep. 740, an opinion written by the same judge]; Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418. See also Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293.

11. See 5 Thompson Corp. § 6302 and note, where much of the ancient twaddle in support of this proposition is set out.

12. Rehoboth Second Precinct *v.* Catholic Cong. Church, 23 Pick. (Mass.) 139 note; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363; Eastern Counties R. Co. *v.* Broom, 6 Exch. 314, 15 Jur. 297, 20 L. J. Exch. 196.

13. *Delaware.*— Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. 514, 33 Am. Dec. 411.

Florida.— Edwards *v.* Union Bank, 1 Fla. 136.

Illinois.— Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260, per Breese, J. See Chicago, etc., R. Co. *v.* McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Hinde *v.* Wabash Nav. Co., 15 Ill. 72; Lesher *v.* Wabash Nav. Co., 14 Ill. 85, 56 Am. Dec. 494.

Massachusetts.— Moore *v.* Fitchburg R. Corp., 4 Gray 465, 64 Am. Dec. 83. See Hewett *v.* Swift, 3 Allen 420.

Michigan.— See Bath *v.* Caton, 37 Mich. 199.

New York.— Hay *v.* Cohoes Co., 3 Barb. 42 [*affirmed* in 2 N. Y. 159, 51 Am. Dec. 279].

England.— Smith *v.* Birmingham, etc., Gas Light Co., 1 A. & E. 526, 3 L. J. K. B. 165, 3 N. & M. 771, 28 E. C. L. 254; Maund *v.* Monmouthshire Canal Co., C. & M. 606, 41 E. C. L. 330, 2 Dowl. N. S. 113, 6 Jur. 932, 11 L. J. C. P. 317, 4 M. & G. 452, 43 E. C. L. 452, 3 R. & Can. Cas. 159, 5 Scott N. R. 457. See Yarborough *v.* Bank of England, 16 East 6, 14 Rev. Rep. 272; Giles *v.* Taff Vale R. Co., 2 E. & B. 822, 75 E. C. L. 822; Goff *v.* Great Northern R. Co., 3 E. & E. 672, 7 Jur. N. S. 286, 30 L. J. Q. B. 148, 3 L. T. Rep. N. S. 850, 107 E. C. L. 672; Limpus *v.* London Gen. Omnibus Co., 1 H. & C. 526, 9 Jur. N. S. 333, 7 L. T. Rep. N. S. 641, 11 Wkly. Rep. 149.

14. St. Joseph, etc., R. Co. *v.* Dryden, 11 Kan. 186.

15. Western Union Tel. Co. *v.* Rich, 19 Kan. 517, 27 Am. Rep. 159.

16. Western Union Tel. Co. *v.* Rich, 19 Kan. 517, 27 Am. Rep. 159.

c. Rule Extends to Trespasses Upon the Person — (I) *In General.* The rule in question extends to trespasses upon the person, and makes the corporation liable for the act of its servant in committing such a trespass, although accompanied with malice on the part of the servant, of which we have frequent illustrations in the cases of wrongful expulsions of passengers from railway trains by the servants of the railway corporation;[17] or where the servant of one corporation was wounded by the servants of another corporation in forcibly driving off the servants of the latter and taking possession of its property.[18]

(II) *Hence Liable in Damages For Assault and Battery* — (A) *In General.* A common illustration of the principle of the preceding section is found in those modern cases which hold that a corporation may be answerable *civiliter* in damages for assault and battery committed by its agents and servants in the course of their agency or employment.[19]

(B) *As in Cases of Assaults on Passengers.* An illustration of the foregoing

17. *Arkansas.*— St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

California.— Carr *v.* Eel River, etc., R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354, ejection from moving train.

Georgia.— Smith *v.* Savannah, etc., R. Co., 100 Ga. 96, 27 S. E. 725 (liable where child pushed off by employee not authorized to eject); Fink *v.* Ash, 99 Ga. 106, 24 S. E. 976 (liable where trespasser falls off while attempting to avoid missiles thrown by employees).

Illinois.— St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488, liable for wilful violence.

Indiana.— Pittsburgh, etc., R. Co. *v.* Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767 (not when train could not be safely stopped); Pennsylvania Co. *v.* Bray, 125 Ind. 229, 25 N. E. 439; Cleveland, etc., R. Co. *v.* Beckett, 11 Ind. App. 547, 39 N. E. 429; Chicago, etc., R. Co. *v.* Graham, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256.

Kansas.— Union Pac. R. Co. *v.* Mitchell, 56 Kan. 324, 43 Pac. 244 (whether train running too fast for ejection a question for jury); Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345, 46 Pac. 975.

Kentucky.— Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 23 S. W. 652, 15 Ky. L. Rep. 390, 21 L. R. A. 72, liable for unnecessary violence.

Michigan.— Hufford *v.* Grand Rapids, etc., R. Co., 53 Mich. 118, 18 N. W. 630.

Minnesota.— Carsten *v.* Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 20 Am. St. Rep. 589, 9 L. R. A. 688.

Mississippi.—Southern R. Co. *v.* Hunter, 74 Miss. 444, 21 So. 304 (liable for violent ejection from rapidly moving train); Thompson *v.* Yazoo, etc., R. Co., 72 Miss. 715, 17 So. 229 (the trespassing boy had been in the habit of jumping on and off slowly moving trains, and others had alighted in safety).

Missouri.— Farber *v.* Missouri Pac. R. Co., 139 Mo. 272, 40 S. W. 932; Perkins *v.* Missouri, etc., R. Co., 55 Mo. 201; Kellett *v.* Chicago, etc., R. Co., 22 Mo. App. 356.

Nevada.— Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

New Jersey.— Delaware, etc., R. Co. *v.* Walsh, 47 N. J. L. 548, 4 Atl. 323.

New York.— Eddy *v.* Syracuse Rapid-Transit R. Co., 50 N. Y. App. Div. 109, 63 N. Y. Suppl. 645; Ray *v.* Cortland, etc., Traction Co., 19 N. Y. App. Div. 530, 46 N. Y. Suppl. 521.

Texas.— St. Louis Southwestern R. Co. *v.* Huffman, (Civ. App. 1895) 32 S. W. 30, liable when greater force than necessary used.

Virginia.— Chesapeake, etc., R. Co. *v.* Anderson, 93 Va. 650, 25 S. E. 947, expulsion not duty of brakeman, but authority may be inferred from custom.

United States.— New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 12 S. Ct. 356, 37 L. ed. 71.

England.— Dancey *v.* Grand Trunk R. Co., 19 Ont. App. 664.

18. Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, 7 S. Ct. 1286, 30 L. ed. 1146. There is in the opinion in this case written by Harlan, J., a valuable exposition of the liability of corporations for the torts of their servants. Contrast this decision with the following untenable decisions: Selma, etc., R. Co. *v.* Webb, 49 Ala. 240 (holding that a railway company is not liable for an injury to animals run over by its cars, unless the act was done by the company's direction or assent; and that its conductor, engineer, or subordinate trainman is not its agent for the purpose of giving such assent); Fairchild *v.* New Orleans, etc., R. Co., 60 Miss. 931, 45 Am. Rep. 427 (holding that a railway company is not liable where its servants, in violation of their orders, in erecting a telephone line, cut trees on private property outside the right of way); Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315 (holding that a corporation is not liable for the wilful trespasses of its agent, although authorized and sanctioned by its president and general agent).

19. *California.*— Maynard *v.* Firemen's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

Illinois.— St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

Iowa.— McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Maine.— Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

Massachusetts.— Coleman *v.* New York, etc., R. Co., 106 Mass. 160; Monument Nat.

could be drawn from a very numerous class of cases, where corporations performing the office of common carriers have been held liable for assaults and batteries committed upon passengers, either in expelling them from the carrier's vehicle when they are rightfully there, or in expelling them by the use of excessive force and violence when they are wrongfully there.[20] Here there is not much room for refinement upon the question whether the servant in committing the assault has stepped outside the line of his duty to accomplish some purpose of his own, since the incorporated carrier has assumed the office of carrying the passenger safely, and has undertaken to perform it by means of the servant who is the immediate author of the injury, and it is hence a violation of the duty of the master, whatever the motive of the servant may be.[21]

3. Liable in Common-Law Actions of Trespass, Trover, Etc. It results from the foregoing that, wherever the rules of common-law pleading prevail, corporations may be held liable, in appropriate states of fact, in the common-law actions of trespass, trover, trespass on the case *ex delicto*, etc., for torts commanded or authorized by them.[22] For instance it is now settled that an action of trespass *vi et armis*, at common law, may be maintained against a corporation aggregate.[2]

Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Moore *v.* Fitchburg R. Corp., 4 Gray 465, 64 Am. Dec. 83.

New Jersey.— Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659.

Ohio.— Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78.

England.— Eastern Counties R. Co. *v.* Broom, 6 Exch. 314, 15 Jur. 297, 20 L. J. Exch. 196.

See 12 Cent. Dig. tit. "Corporations," § 1904.

20. *Massachusetts.*— Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200.

Missouri.— Melecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17; Perkins *v.* Missouri, etc., R. Co., 55 Mo. 201.

New York.— Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293.

Tennessee.—Springer Transp. Co. *v.* Smith, 16 Lea 498, 1 S. W. 280.

United States.— Pendleton *v.* Kinsley, 19 Fed. Cas. No. 10,922, 3 Cliff. 416.

21. Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451; Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78 (conductor wrongfully ejected a passenger — his malicious motive immaterial); Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504 (train conductor kissed a female passenger — railway company paid damages). See also among many other cases the following:

Indiana.—Terre Haute, etc., R. Co. *v.* Fitzgerald, 47 Ind. 79.

Iowa.— McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Massachusetts.— Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311; Holmes *v.* Wakefield, 12 Allen 580, 90 Am. Dec. 171.

New York.— Higgins *v.* Watervliet Turnpike, etc., R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Hamilton *v.* Third Ave. R. Co., 13 Abb. Pr. N. S. 318, 44 How. Pr. 294.

United States.— Pendleton *v.* Kinsley, 19 Fed. Cas. No. 10,922, 3 Cliff. 416.

England.— The Thetis, L. R. 2 A. & E. 365, 38 L. J. Adm. 42; Bayley *v.* Manchester, etc., R. Co., L. R. 7 C. P. 415, 3 Moak 308; Seymour *v.* Greenwood, 7 H. & N. 355, 30 L. J. Exch. 327, 4 L. T. Rep. N. S. 833, 9 Wkly. Rep. 785.

Numerous other instances under this head will be found in 5 Thompson Corp. § 6309.

22. *Connecticut.*— Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Illinois.— Chicago, etc., R. Co. *v.* Fell, 22 Ill. 333; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105.

Indiana.— Crawfordsville, etc., R. Co. *v.* Wright, 5 Ind. 252.

Kentucky.— Underwood *v.* Newport Lyceum, 5 B. Mon. 129, 41 Am. Dec. 260.

Massachusetts.— Hazen *v.* Boston, etc., R. Co., 2 Gray 574; Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35.

New York.— Hawkins *v.* Dutchess, etc., Steamboat Co., 2 Wend. 452; Beach *v.* Fulton Bank, 7 Cow. 485.

Ohio.— Goodloe *v.* Cincinnati, 4 Ohio 500, 22 Am. Dec. 764; Hamilton County *v.* Cincinnati, etc., Turnpike Co., Wright 603.

Pennsylvania.— McCready *v.* Guardians of Poor, 9 Serg. & R. 94, 11 Am. Dec. 667; Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675.

Vermont.— Barnard *v.* Stevens, 2 Aik. 429, 16 Am. Dec. 733; Lyman *v.* White River Bridge Co., 2 Aik. 255, 16 Am. Dec. 705.

23. Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; Underwood *v.* Newport Lyceum, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260. In Orr *v.* U. S. Bank, 1 Ohio 36, 13 Am. Dec. 588, it was held that an action of trespass for an assault and battery will not lie against a corporation aggregate, and that such a corporation cannot be joined as defendant with natural persons in such an action. The principle on which this case proceeded was reaffirmed in Foote *v.* Cincinnati, 9 Ohio 31, 34 Am. Dec. 420. The former of these cases does not

Contrary to an early misconception in Ohio,[24] it is now settled that a common-law action of trespass *quare clausum fregit* may be maintained against a corporation under a state of facts which would warrant a like action against an individual, as against a bridge company, for breaking and entering plaintiff's close and erecting thereon a bridge, etc.[25] For stronger reasons an action of trespass on the case will lie against a corporation aggregate, upon any state of facts which would make the action an appropriate one against a natural person.[26] Thus an action on the case for a vexatious suit may be sustained against a corporation aggregate.[27] It results from what is stated heretofore that where the common-law rules of pleading prevail an action of trespass will lie against a municipal corporation.[28] Accordingly an action of trespass against such a body for entering plaintiff's close, cutting his timber, etc., in an attempt to lay out a road through it, has been sustained.[29] In like manner a town in Illinois has been held liable, in trespass *de bonis asportatis*, for the act of its constable in wrongfully levying an execution on the plaintiff's goods.[30]

4. Liable For Malicious Libel — a. In General. A corporation aggregate may be liable in a civil action for damages for publishing a malicious libel, although necessarily the act of publishing is done by its agents or servants.[31] This must be obvious in the case of a corporation organized for the very purpose of printing and publishing newspapers or books.[32] But the rule is by no means confined to such cases. Even a railroad company may be liable in damages for a malicious libel published by its agents, acting in its behalf in the course of its business and of their employment.[33] And it has been held that a railroad company operating a line of telegraph may be liable in a civil action for a libel in transmitting over its line to different stations libelous matter concerning a person.[34] In like manner a railroad company has been held liable in a civil action for the act of its directors in publishing, in the course of its business, a libel injuriously reflecting on a stranger to the company.[35]

seem to have been distinctly overruled in Ohio, although it has been entirely discredited by later decisions in that state, such as Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382, and Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78.

24. Foote *v.* Cincinnati, 9 Ohio 31, 34 Am. Dec. 420.

25. Lyman *v.* White River Bridge Co., 2 Aik. (Vt.) 255, 16 Am. Dec. 705.

26. Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35; Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675.

27. Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439. See also *infra*, XIX, B, 6, a *et seq.*

28. Allen *v.* Decatur, 23 Ill. 332, 76 Am. Dec. 692.

29. Allen *v.* Decatur, 23 Ill. 332, 76 Am. Dec. 692.

30. Wolf *v.* Boettcher, 64 Ill. 316.

31. *California.*— Maynard *v.* Firemen's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672 [*reaffirmed* as to this point on rehearing in 47 Cal. 207].

Georgia.— Howe Mach. Co. *v.* Souder, 58 Ga. 64.

Louisiana.— Vinas *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 367.

Missouri.— Johnson *v.* St. Louis Dispatch Co., 2 Mo. App. 565 [*affirmed* in 65 Mo. 539, 27 Am. Rep. 293].

United States.— Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 16 L. ed. 73.

England.— Lawless *v.* Anglo-Egyptian Cotton, etc., Co., L. R. 4 Q. B. 262, 10 B. & S. 226, 38 L. J. Q. B. 129, 17 Wkly. Rep. 498; Whitfield *v.* Southeastern R. Co., E. B. & E. 115, 4 Jur. N. S. 688, 27 L. J. Q. B. 229, 6 Wkly. Rep. 545, 96 E. C. L. 115.

See 12 Cent. Dig. tit. "Corporations," § 1904.

32. Johnson *v.* St. Louis Dispatch Co., 2 Mo. App. 565 [*affirmed* in 65 Mo. 539, 27 Am. Rep. 293 (*overruling* Childs *v.* Missouri Bank, 17 Mo. 213)]; Evening Journal Assoc. *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606.

33. Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202, 16 L. ed. 73.

34. Whitfield *v.* South Eastern R. Co., E. B. & E. 115, 4 Jur. N. S. 688, 27 L. J. Q. B. 229, 6 Wkly. Rep. 545, 96 E. C. L. 113.

35. Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202, 16 L. ed. 73.

On the other hand it seems that a libel may be committed against a corporation, as where a corporation is engaged in a business which depends upon credit, and a defamatory publication is made which injures its credit. Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 6 Abb. Pr. N. S. (N. Y.) 9. That a corporation may have

b. Not So Liable Where Agent Not Acting Within Scope of His Authority. But where an action against a corporation is predicated upon libelous matter contained in a letter written by its agent, a judgment against the corporation will not be sustained where there is no evidence from which a jury could properly infer express or implied authority on the part of the author of the letter to act as agent or to make any communication in behalf of the company.[36]

5. When Not Liable For Slander. The liability of a corporation for oral slanders uttered by its agent seems to stand on a somewhat different footing, the law ascribing them to the personal malice of the agent rather than to an act performed in the course of his employment and in aid of the interest of his employer, and exonerating the company unless it authorized, approved, or ratified the act of the agent in uttering the particular slander.[37]

6. Liable For Malicious Prosecution — a. In General. It is now settled that a corporation may be liable for the malicious prosecution of a criminal action, instituted by its authorized agents in the carrying out of its policy, or in the furtherance of its business.[38]

an order for the arrest of defendant, on the ground that the wrong is an injury to "character," under the New York Code of Civil Procedure see Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 6 Abb. Pr. N. S. (N. Y.) 9. That a corporation may maintain an action for slander see Temperance Mut. Ben. Assoc. *v.* Schweinhard, 3 Pa. Co. Ct. 353.

For a discussion of the liability of corporations for libel see 29 Centr. L. J. 72.

36. Southern Express Co. *v.* Fitzner, 59 Miss. 581, 42 Am. Rep. 379.

37. Redditt *v.* Singer Mfg. Co., 124 N. C. 100, 32 S. E. 392.

38. *Alabama.*— Jordan *v.* Alabama, etc., R. Co., 74 Ala. 85, 49 Am. Rep. 800 [*overruling* Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560, in which the supreme court of Alabama denied the doctrine of the text, but this decision is founded upon the overruled case of Childs *v.* State Bank, 17 Mo. 213, the discredited case of Stevens *v.* Midland Counties R. Co., 2 C. L. R. 1300, 10 Exch. 352, 18 Jur. 932, 23 L. J. Exch. 328, and the case of McLellan *v.* Cumberland Bank, 24 Me. 566].

Connecticut.— Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Illinois.—A manufacturing corporation was held not liable, in an action for damages for false imprisonment, brought by one who had been arrested in proceedings conducted by a detective at the instance of a superintendent of the mills of the corporation, no special authority having been given by the corporation to the superintendent. Pinkerton *v.* Gilbert, 22 Ill. App. 568. Such a corporation was held not liable for damages for a criminal prosecution for forgery, where it appeared that the prosecution was instituted by the agent of his own motion, and under circumstances likely to cause him to profit by it. Springfield Engine, etc., Co. *v.* Green, 25 Ill. App. 106.

Indiana.— Pennsylvania Co. *v.* Weddle, 100 Ind. 18; American Express Co. *v.* Patterson, 73 Ind. 430.

Kansas.— Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

Maryland.— The case of Carter *v.* Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311, resembled in its circumstances the Missouri case of Gillett *v.* Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653, and it was held that, although a corporation is liable to an action for malicious prosecution, yet in such a case the agent must be shown to have express authority for his act or it must have been ratified, a limitation not upheld by the current of authority.

Massachusetts.— Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Dec. 468.

Mississippi.— Williams *v.* Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494.

Missouri.— Woodward *v.* St. Louis, etc., R. Co., 85 Mo. 142; Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413 [*reversing* 7 Mo. App. 591, and *overruling* Gillett *v.* Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653]; Iron Mountain Bank *v.* Mercantile Bank, 4 Mo. App. 505. The case of Gillett *v.* Missouri Valley R. Co. limited Childs *v.* State Bank, 17 Mo. 213, which had denied the liability of a corporation for an assault and battery, malicious prosecution, or slander, and conceded its liability in such cases where the act comes within the purview of its charter powers, and is within the scope of the agent's authority, or is ratified. But the alleged malicious prosecution in that case being a criminal prosecution for embezzlement, it was held that it was not within the scope of the corporation's general or special powers, and therefore that the action would not lie. This last case, in so far as it imposes such limitation on the right of action, is now expressly overruled and exploded in Missouri. Woodward *v.* St. Louis, etc., R. Co., 85 Mo. 142; Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413 [*reversing* 7 Mo. App. 591].

Nevada.— Ricord *v.* Central Pac. R. Co., 15 Nev. 167.

b. Authority of Agent to Institute and Carry On Prosecution. While it is not necessary to prove an express authorization of the particular prosecution by the governing body of the corporation, yet it is necessary to show that the act of the agent who authorized, instituted, or incited it was either within his special powers or within the general scope of his employment or authority.[39]

c. To What Corporations This Liability Has Been Ascribed. Upon the foregoing grounds, liability to pay damages for the malicious prosecution of civil or criminal actions has been ascribed to corporations aggregate, without regard to the object which such corporations were organized to promote, such for instance as a banking company,[40] a sewing-machine company,[41] an express company,[42] a railroad company,[43] a grocery company,[44] and a restaurant company.[45]

7. Liable For False Imprisonment. On like grounds a corporation may be liable in damages for that species of wrong which is commonly called false imprisonment, which generally, although not always, results from the malicious prosecution of a criminal action;[46] as where a railway passenger is detained in jail over night for failing to surrender his ticket before passing through the gate of a station in compliance with the regulations of the company;[47] or where a railway trainman finding a person asleep in a car, acting in pursuance of the gen-

New Jersey.— Vance *v.* Erie R. Co., 32 N. J. L. 334, 90 Am. Dec. 665.

New York.—Morton *v.* Metropolitan L. Ins. Co., 34 Hun 366.

North Carolina.—Hussey *v.* Norfolk Southern R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312.

Pennsylvania.— Fenton *v.* Wilson Sewing Mach. Co., 9 Phila. 189, 31 Leg. Int. 132.

Tennessee.— Wheless *v.* Second Nat. Bank, 1 Baxt. 469, 25 Am. Rep. 783.

United States.—Copley *v.* Grover, etc., Sewing Mach. Co., 6 Fed. Cas. No. 3,213, 2 Woods 494.

England.— Cornford *v.* Carlton Bank, [1899] 1 Q. B. 392, 68 L. J. Q. B. 196, 80 L. T. Rep. N. S. 121 [*affirmed* on other grounds in [1900] 1 Q. B. 22, 68 L. J. Q. B. 1020, 81 L. T. Rep. N. S. 415]; Edwards *v.* Midland R. Co. 6 Q. B. D. 287, 45 J. P. 374, 50 L. J. Q. B. 281, 43 L. T. Rep. N. S. 694, 29 Wkly. Rep. 609; Walker *v.* South Eastern R. Co., L. R. 5 C. P. 640, 39 L. J. C. P. 346, 23 L. T. Rep. N. S. 14, 18 Wkly. Rep. 1032.

See 12 Cent. Dig. tit. "Corporations." § 1904.

39. Walker *v.* Culman, 9 Kan. App. 691, 59 Pac. 606. Where the secretary of a corporation, acting on the advice of its counsel, had an employee arrested and tried on a criminal charge without probable cause, the corporation was held liable therefor in an action for malicious prosecution. Scott *v.* Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321, 64 N. Y. Suppl. 1016. In the absence of any evidence tending to show that the act of the president, who was also the manager, of a commercial corporation in procuring the arrest of a person for embezzlement was not within the scope of the powers conferred upon him by the by-laws, and where it appeared that he consulted with the attorney of the corporation before causing the arrest, and that neither he nor the attorney had any apparent interest in the matter except by virtue of their official connection with the corporation, the corporation was held liable. Schwarting *v.* Van Wie New York Grocery Co., 69 N. Y. App. Div. 282, 74 N. Y. Suppl. 747. The same conclusion was reached where a railway station agent having charge of the property and cars of the company and the duty of protecting them from trespassers instructed the employees to lock the door in case any one should be found in an empty car, and, acting under this instruction, an employee finding a person asleep in a car locked him in and sent for the sheriff. Texas, etc., R. Co. *v.* Parker, (Tex. Civ. App. 1902) 68 S. W. 831.

40. Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439; Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468.

41. Copley *v.* Grover, etc., Sewing Mach. Co., 6 Fed. Cas. No. 3,213, 2 Woods 494.

42. American Express Co. *v.* Patterson, 73 Ind. 430.

43. Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 5 N. E. 500; Ricord *v.* Central Pac. R. Co., 15 Nev. 167.

44. Schwarting *v.* Van Wie New York Grocery Co., 69 N. Y. App. Div. 282, 74 N. Y. Suppl. 747.

45. Scott *v.* Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321, 64 N. Y. Suppl. 1016.

46. Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.) 465, 64 Am. Dec. 83; Lynch *v.* Metropolitan El. R. Co., 24 Hun (N. Y.) 506; Bayley *v.* Manchester, etc., R. Co., L. R. 8 C. P. 148, 42 L. J. C. P. 78, 28 L. T. Rep. N. S. 366; Moore *v.* Metropolitan R. Co., L. R. 8 Q. B. 36, 42 L. J. Q. B. 23, 27 L. T. Rep. N. S. 579, 21 Wkly. Rep. 145; Goff *v.* Great Northern R. Co., 3 E. & E. 672, 7 Jur. N. S. 286, 30 L. J. Q. B. 148, 3 L. T. Rep. N. S. 850, 107 E. C. L. 672; Eastern Counties R. Co. *v.* Broom, 6 Exch. 314, 15 Jur. 297, 20 L. J. Exch. 196; Chilton *v.* London, etc., R. Co., 11 Jur. 149, 16 L. J. Exch. 89, 16 M. & W. 212, 5 R. & Can. Cas. 4.

47. Lynch *v.* Metropolitan El. R. Co., 24 Hun (N. Y.) 506.

eral directions of the station agent applicable to such cases, locked him up and sent for the sheriff.[48]

8. Liable For Malicious and Vexatious Prosecution of Civil Actions. In the limited class of cases where the law gives actions for damages founded upon the malicious and vexatious prosecution of civil actions, corporations are liable equally with individuals provided as in other cases the agent instituting the civil action acted within the scope of his authority.[49]

9. Liable For Damages Done in Pursuance of Conspiracy. Upon like grounds an action may be maintained against a corporation to recover damages caused by a conspiracy to which the corporation was a party.[50]

10. Liable For Vexatiously and Maliciously Interfering With Business of Another. On like grounds it has been held that one corporation may be civilly liable in damages for vexatiously and maliciously interfering with the business of another, as where a company established for conveying passengers by an omnibus in the streets of London, by its servant, wrongfully, vexatiously, and maliciously did certain acts with the view to obstruct and annoy plaintiff in the conduct of a similar trade, and which acts had the effect intended.[51]

C. Liability For Frauds — 1. Ancient Doctrine That Corporation Could Not Commit Fraud. It was formerly supposed by some judges that corporations were not answerable for the frauds of their agents. This supposition rested upon the notion that the agent of a corporation could not be deemed its agent for the purpose of committing a fraud, since no such power had been delegated to him. If therefore he committed a fraud it was deemed his own fraud and not the fraud of his principal.[52]

48. Texas, etc., R. Co. *v.* Parker, (Tex. Civ. App. 1902) 68 S. W. 831. See also Nichols *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 306, Clev. L. Rep. 268.

49. Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439, malicious prosecution of a suit by attachment. To the same effect is Western News Co. *v.* Wilmarth, 33 Kan. 510, 6 Pac. 786. See also Iron Mountain Co. *v.* Mercantile Co., 4 Mo. App. 505, suing out an injunction maliciously and without probable cause — principle recognized, but action failed because of insufficiency of petition. As to the grounds of such an action see further Keber *v.* Mercantile Co., 4 Mo. App. 195.

50. Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 106 N. Y. 669, 12 N. E. 825 [*affirming* 38 Hun (N. Y.) 637]; West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

51. Green *v.* London Gen. Omnibus Co., 7 C. B. N. S. 290. 6 Jur. N. S. 228, 29 L. J. C. P. 13, 1 L. T. Rep. N. S. 95, 8 Wkly. Rep. 88, 97 E. C. L. 290.

52. Duranty's Case, 26 Beav. 268, 4 Jur. N. S. 1068, 28 L. J. Ch. 37, 7 Wkly. Rep. 70; Matter of Hull, etc., L. Assur. Co., 2 De G. & J. 275, 59 Eng. Ch. 219 (per Lord Chelmsford, L. C.); Matter of Joint Stock Co.'s Winding-up Acts, Johns. 451, 5 Jur. N. S. 216, 28 L. J. Ch. 325. On this ground shareholders were held to their contracts in Holt's Case, 22 Beav. 48. In *In re* United Kingdom Ship Owning Co., 2 De G. J. & S. 456, 11 Jur. N. S. 52, 11 L. T. Rep. N. S. 613, 13 Wkly. Rep. 305, 67 Eng. Ch. 356, it was ruled that if a person has been deceived into taking shares in a company, he has no remedy against the company on that ground. His remedy is against the person who deceived him. *Compare* Barry *v.* Croskey, 2 Johns. & H. 1. In Dodgson's Case, 3 De G. & Sm. 85, 90, Vice-Chancellor Knight Bruce held that "directors, . . . cannot be the agents of the body of shareholders to commit a fraud. The directors only are liable for their conduct." This opinion was adopted by Vice-Chancellor Parker in Matter of North of England Joint Stock Banking Co., 5 De G. & Sm. 283, 289, 16 Jur. 810, 21 L. J. Ch. 468, where he said: "Dodgson's Case shews that the directors cannot be the agents of the Company to commit a fraud; and, therefore, if Mr. Bernard had been induced to take shares by misrepresentation of the directors, there was no reason why he should not be a contributory." But in *Re* Royal British Bank, 4 Drew. 205, 3 Jur. N. S. 879, 26 L. J. Ch. 855, 5 Wkly. Rep. 858, where the directors of the Royal British Bank, in their published reports, misrepresented the state of the company, and Brockwell, relying upon the truth of these reports, purchased some new shares, which were issued by the company, upon which it was sought to make him a contributory, Vice-Chancellor Kindersley held, principally upon the authority of the National Exch. Co. *v.* Drew, decided in the house of lords, 2 Macq. 103, that reports made by directors of the company, if they get into circulation, must be considered as reports of the company; and Brockwell was removed from the list of contributories. Brockwell's Case was overruled by Lord Chancellor Campbell and the Lords Justices, in Matter of Joint Stock

2. Modern Doctrine That Corporations Are Liable For Frauds Just as Natural Persons Are — a. Statement of Doctrine. As corporations can act only through the agency of individuals, this doctrine was equivalent to a declaration that while a corporation may be clothed with power to conduct every species of business, banking, trading, mining, and manufacturing, it cannot commit fraud or be made liable for fraud. Such a conclusion was on a par with the conclusion that a corporation could not be guilty of a malicious tort or of a trespass, since its charter or governing statute had clothed it with no power to do such an act. If therefore its agent acting in its behalf committed a fraud whereby a third person was cheated and damnified, it was the fraud of the agent merely and not that of the corporation. As the agent might be insolvent and as corporations in dealing with the public can act only through agents, such a conclusion left the public at an enormous disadvantage in dealing with these artificial bodies. If the contract were fraudulent, the corporation got the benefit of the fraud and shifted the fraud over upon the responsibility of its insolvent agent. Such a rule accorded to aggregate bodies, often possessing great wealth and wielding great power, an immunity from responsibility for the frauds of their agents which individuals did not possess. As the other party contracted on the faith of the responsibility of the corporation this conclusion, which involved the repudiation of the usual rule of *respondeat superior*, was destitute at once of juridical and of common sense and was profoundly unjust, oppressive, and opposed to a sound public policy. Such a doctrine could not long remain in an enlightened system of jurisprudence. Although there remain some doubts as to the rule which obtains in English courts of chancery,[53] yet it is the settled rule in England in cases at law,[54] and in America both at law and in equity, that a corporation is responsible for the frauds of its agent when acting within the powers of the corporation, and within the scope of his agency, precisely as a natural person is.[55]

b. Provided Agent Acts Within General Scope of His Authority. As in other cases of tort,[56] the distinction here evidently is between the case where the agent

Co.'s Winding-up Acts, 4 De G. & J. 575, 586, 1 L. T. Rep. N. S. 19, 7 Wkly. Rep. 677, 61 Eng. Ch. 454, which was also a case connected with the Royal British Bank. Lord Campbell in his judgment said: "Clearly there was a fraud, a gross fraud, on the part of the directors, and I have no doubt that he was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors, which cannot be attributed to the company;" and Mixer was continued on the list of contributories. But this case was in its turn overruled by the house of lords. *Compare supra*, VI, K, 1, a, (1) *et seq.*

53. See the cases cited in the preceding note; also Green's Brice's Ultra Vires (2d ed.) p. 335 *et seq.*

54. Swift *v.* Winterbottom, L. R. 8 Q. B. 244; Kennedy *v.* Panama, etc., Co., L. R. 2 Q. B. 580, 589; Barwick *v.* English Joint-stock Bank, L. R. 2 Exch. 259.

55. *Georgia.*— Scofield Rolling Mill Co. *v.* State, 54 Ga. 635.

Illinois.— Derrick *v.* Lamar Ins. Co., 74 Ill. 404.

New York.— Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. 493.

North Carolina.— Peebles *v.* Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447.

Texas.— Henderson *v.* San Antonio R. Co., 17 Tex. 560, 67 Am. Dec. 675.

Wisconsin.— McClellan *v.* Scott, 24 Wis. 81.

United States.— Butler *v.* Watkins, 13 Wall. 456, 20 L. ed. 623.

England.—Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147; Oakes *v.* Turquand, L. R. 2 H. L. 325, 344, 36 L. J. Ch. 949, 15 Wkly. Rep. 1201 (per Lord Chelmsford); Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145; Mackay *v.* New Brunswick Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31, 30 L. T. Rep. N. S. 180, 22 Wkly. Rep. 473; Swift *v.* Winterbotham, L. R. 8 Q. B. 244, 42 L. J. Q. B. 111, 28 L. T. Rep. N. S. 338, 21 Wkly. Rep. 562; Kennedy *v.* Panama, etc., Royal Mail Co., L. R. 2 Q. B. 580, 8 B. & S. 571, 36 L. J. Q. B. 260, 17 L. T. Rep. N. S. 62, 15 Wkly. Rep. 1039; *Re* England L. Assoc., 34 Beav. 639; Ayre's Case, 25 Beav. 513, 4 Jur. N. S. 596, 27 L. J. Ch. 579; *Re* Royal British Bank, 4 Drew. 205, 3 Jur. N. S. 879, 26 L. J. Ch. 855, 5 Wkly. Rep. 858; New Brunswick, etc., R., etc., Co. *v.* Conybeare, 9 H. L. Cas. 711, 31 L. J. Ch. 297, 6 L. T. Rep. N. S. 109, 10 Wkly. Rep. 305; Ranger *v.* Great Western R. Co., 5 H. L. Cas. 72; Glasgow Nat. Exch. Co. *v.* Drew, 2 Macq. 103, 1 Paton App. Cas. 482; *Ex p.* Ginger, 5 Ir. Ch. N. S. 174.

See 12 Cent. Dig. tit. "Corporations," § 1906.

56. See *supra*, XIX, A, 3, a *et seq.*

acts within the general scope of his agency and professedly for his principal and where the defrauded person supposes that he is so acting, and the case where he steps aside from his agency and commits the fraud to accomplish some purpose of his own. In the former case the corporation will be liable for the consequences of the fraudulent act or misrepresentation, under the rule of *respondeat superior*. In the latter case the corporation will be exonerated unless, the act being within the apparent scope of his agency, the other contracting party supposed that he was acting fairly for the corporation and not fraudulently for himself. But it has been well said that an act cannot be extrinsic to his employment which is adopted as the means of accomplishing the object of his agency.[57]

3. Liable For Damages For Deceit — a. In General. Contrary it seems to the English law,[58] and to occasional misconceptions found in American cases,[59] the American law is that an action of deceit lies against a corporation to recover the damages sustained in consequence of acting upon false representations put forth by the corporation,[60] such as false representations contained in a prospectus issued by it, whereby plaintiff has been induced to subscribe for or to purchase its shares;[61] or in the case of a manufacturing or mercantile corporation for the fraud or deceit resorted to by its agent in order to effect a sale of its goods[62] or of its lands.[63]

b. Whether Liable For Deceit of Officers or Agents When Acting Ultra Vires the Corporation. There is authority for the proposition that a corporation is not answerable in damages for the deceit of its officers or agents when contracting with respect to a matter which is beyond the scope of its corporate powers, as in the case of a national bank selling the bonds of a railroad company on commission.[64] This, if sound, forms an exception to the rule that the defense of *ultra vires* is no answer to the liability of a corporation for its torts.[65]

4. Liable For Fraud Where It Adopts Contract. Where a contract is procured on behalf of a corporation by its agent through fraud, the corporation makes itself answerable for the fraud by adopting the contract with knowledge; since by so adopting the contract it necessarily adopts the means by which it was procured.[66]

57. Fishkill Sav. Inst. *v.* Fishkill Nat. Bank, 80 N. Y. 162, 36 Am. Rep. 595, reasoning of Danforth, J. See also Holden *v.* New York, etc., Bank, 72 N. Y. 286; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30.

58. Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145.

59. Such as Houston, etc., R. Co. *v.* McKinney, 55 Tex. 176.

60. Fifth Ave. Bank *v.* Forty-second St., etc., R. Co., 137 N. Y. 231, 33 N. E. 378, 50 N. Y. St. 712, 33 Am. St. Rep. 712, 19 L. R. A. 331; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Frank *v.* Bradley, etc., Co., 42 N. Y. App. Div. 178, 58 N. Y. Suppl. 1032; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 493; Erie City Iron Works *v.* Barber, 106 Pa. St. 125, 51 Am. Rep. 508.

61. Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290 (fraudulent representations made by officers and shareholders); Benedict *v.* Guardian Trust Co, 58 N. Y. App. Div. 302, 68 N. Y. Suppl. 1082.

62. Peebles *v.* Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447; Erie City Iron Works *v.* Barber, 106 Pa. St. 125, 51 Am. Rep. 508. On the other hand false representations made by the seller of an article to the promoters of a corporation organized to sell it are in effect made to the corporation, and afford a foundation for an action on the case by the corporation. Iowa Economic Heater Co. *v.* American Economic Heater Co., 32 Fed. 735. It has been held that an action for deceit will lie against a corporation for the breach of an express contract of warranty, but not for the breach of an implied contract of warranty. Erie City Iron Works *v.* Barber, 102 Pa. St. 156. *Compare* as to the remedy at common law for a breach of an express contract of warranty Vanleer *v.* Earle, 26 Pa. St. 277.

63. Lynch *v.* Mercantile Trust Co., 18 Fed. 486, 5 McCrary, 623.

64. Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95.

65. See *supra*, XIX, A, 6, a *et seq.*

66. Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92; Henderson *v.* San Antonio I. Co., 17 Tex. 560, 67 Am. Dec. 675; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116; Oakes *v.* Turquand, L. R. 2 H. L. 325, 344, 36 L. J. Ch. 949, 15 Wkly. Rep. 1201 (per Lord Chelmsford); Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145. See on the general principle Atwood *v.* Wright, 29 Ala. 346; Bowers *v.* Johnson, 10

5. Remedies Against Corporations Committing Frauds. Under any theory, the liability of a corporation for fraud extends to an obligation to return what it has acquired through the fraud of its agent, with interest. This may be compelled by an action of assumpsit at common law, or by an action of that nature under the modern codes of procedure, for money had and received;[67] in the view of some courts, although not of others,[68] by a common-law action for damages for the fraudulent representations or deceit of the agent of the corporation acting in its behalf, whereby plaintiff was entrapped into the contract or course of action complained of;[69] by a bill in equity for the rescission of the contract, for a restitution of the money which the corporation has acquired by the fraud,[70] and for an injunction against the bringing of suits on such contract.[71] On the other hand where the fraud has been practised by an agent of the corporation, to the prejudice of the corporation and of its shareholders, the corporation, suing for itself and as the representative of its shareholders, may have an appropriate relief in equity, as for instance in the case of an issue of spurious stock, by having the stock canceled as a cloud upon title,[72] leaving the defrauded taker of the spurious shares to his action for damages.[73]

D. Liability For Negligence — 1. Corporations Liable For Negligence Just as Individuals Are. A corporation aggregate, having, or supposed to have, a corporate fund, is liable, in an action at common law, for negligence in the performance of its duties, in the conduct of its business, or in the care of its property, just as an individual is.[74]

Sm. & M. (Miss.) 169; Meadows *v.* Smith, 42 N. C. 7; Harris *v.* Delamar, 38 N. C. 219; Huguenin *v.* Baseley, 2 White & T. Lead. Cas. 597, 14 Ves. Jr. 273; Bridgman *v.* Green, 2 Ves. 627, 28 Eng. Reprint 399.

67. See *supra*, XVII, F, 1, r, (III).

68. See *supra*, XIX, C, 3, a.

69. Reasoning in Scofield, etc., Co. *v.* State, 54 Ga. 635, and in New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534.

70. *Alabama.*—Rives *v.* Montgomery South Plank-Road Co., 30 Ala. 92.

Iowa.— Davis *v.* Dumont, 37 Iowa 47.

Mississippi.— Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655.

Missouri.—Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205.

Virginia.— Crump *v.* U. S. Mining Co., 7 Gratt. 352, 56 Am. Dec. 116.

England.— Bwlch-Y-Plwm Lead Min. Co. *v.* Baynes, L. R. 2 Exch. 324. 36 L. J. Exch. 183, 16 L. T. Rep. N. S. 597, 15 Wkly. Rep. 1108; New Brunswick, etc., R., etc., Co. *v.* Muggeridge, 1 Dr. & Sm. 363, 7 Jur. N. S. 132, 30 L. J. Ch. 242, 3 L. T. Rep. N. S. 651, 9 Wkly. Rep. 193; Glamorganshire Iron, etc., Co. *v.* Irvine. 4 F. & F. 947.

71. Henderson *v.* Lacon, L. R. 5 Eq. 249, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 328; Smith *v.* Reese River Co., L. R. 2 Eq. 264, 12 Jur. N. S. 616, 14 L. T. Rep. N. S. 283, 14 Wkly. Rep. 606 [*affirmed* in L. R. 4 H. L. 64]; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821.

Practice in such cases.— *In re* Ruby Consol. Min. Co., L. R. 9 Ch. 664, 43 L. J. Ch. 633, 31 L. T. Rep. N. S. 55, 22 Wkly. Rep. 833 (where the shares, the purchase of which it was alleged was brought about by the fraud of the company's agent, having been fully paid up, it was ruled that the merits ought to be tried at law, in an action to recover the purchase-money, and not by a motion in chancery, under section 35 of the Companies Act of 1862, to have plaintiff's name excluded from the list of shareholders); Thorpe *v.* Hughes, 3 Myl. & C. 742 (where an injunction was denied).

72. New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592, 34 N. Y. 30, on a subsequent appeal. *Compare supra*, VI, K, 5, c, (II), (A).

73. See *supra*, VI, K, 5, c, (II), (A). A subscriber to the stock of a corporation, who affirms his subscription after learning of a fraud by which he was induced to make it, cannot maintain an action against the corporation to recover damages for the fraud. Wilson *v* Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837; Houldsworth *v.* Glasgow City Bank, 5 App. Cas. 317, 42 L. T. Rep. N. S. 194, 28 Wkly. Rep. 677.

Additional note on the subject of frauds by corporations.— That a corporation cannot be held liable to the creditors of an insolvent corporation by reason of having secured from such corporation the preferential payment of its own claims, through undue influence exerted upon it, where the influence is merely the moral influence resulting from being its creditor, and the corporation has not acquired control of its affairs, see National Bank of Commerce *v.* Allen, 90 Fed. 545, 33 C. C. A. 169. Circumstances under which the fact that one of the shareholders voted for a resolution authorizing the purchase of land on the assurance that certain of the directors would look after the payment of the purchase-money was not evidence of fraud against the corporation see Jenkins *v.* Bradley, 104 Wis. 540, 80 N. W. 1025.

74. Fowle *v.* Alexandria, 9 Fed. Cas. No. 4,993, 3 Cranch C. C. 70, and other cases cited in this subdivision.

2. Liability Rests Upon Rule of Respondeat Superior. As a corporation can from its very nature act only through the instrumentality of natural persons or of other corporations, it follows that in every case where it is sought to charge a corporation with liability on the ground of negligence the initial inquiry is, whether the agent through whose misconduct the negligent act or omission took place was at the time and with reference to the subject-matter acting within the scope of his employment or agency. This subject has already been sufficiently discussed in a previous subdivision of this article to show the principles on which the liability rests.[75]

3. Negligence in Performance of Ultra Vires Acts. Upon a principle elsewhere considered,[76] it will be no defense on the part of a corporation to an action to charge it with damages for a negligent injury that the injury was committed by its agents or servants while engaged in a business upon which it had no power under its charter or governing statute to enter. Thus a passenger may recover for personal injuries occasioned to him by the negligence of a street railway corporation which was transporting him on a railway which it had leased unlawfully, but which it was using and maintaining without objection from its owners or the commonwealth.[77]

4. Liability For Negligence in Performance of Duties Toward Individuals Which It Has Voluntarily Assumed — a. In General. Where a corporation undertakes, although gratuitously, the performance of a duty in favor of an individual, the confidence induced by the undertaking to perform the service is a sufficient consideration to create a duty to exercise care in the performance of it.[78] On a similar principle, where a corporation, in pursuance of a franchise granted to it by the legislature, undertakes to construct and to maintain works to be used by the public distributively, it thereby assumes the obligation of using reasonable care in the maintenance of such works; and it becomes liable, independently of statute, to any person who may be damaged, in making a lawful use of such works, in consequence of its negligence or nonfeasance in failing to keep them in a reasonable state of repair.[79]

b. Liability Illustrated in Case of Private Corporations Owning and Operating Works of Public Utility For Which They Receive Compensation From Public. The general rule of law under this head may be stated thus: When a corporation is clothed by its charter, by the legislature, or by prescription, which presumes a charter, with power to construct or improve turnpikes,[80] plank roads,[81] bridges,[82]

75. See *supra*, XIX, A, 3, a *et seq.*

76. See *supra*, XIX, A, 6, a *et seq.*

77. Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720. *Compare* Bathe *v.* Decatur County Agricultural Soc., 73 Iowa 11, 34 N. W. 484, 5 Am. St. Rep. 651.

78. Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468, 14 L. ed. 502. The same principle is reaffirmed and applied in Glavin *v.* Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

79. Parnaby *v.* Lancaster Canal Co., 11 A. & E. 223, 9 L. J. Exch. 338, 3 Nev. & P. 523, 3 P. & D. 162, 39 E. C. L. 139. An interesting question of pleading was also decided. The declaration was framed under a statute, but as it contained allegations which showed a duty at common law it was held good.

80. Southworth *v.* Lathrop, 5 Day (Conn.) 237 (where a second subcontractor was held under his contract liable to pay damages which a traveler had recovered of a turnpike company for injuries resulting from non-repair, and which the company had recovered over from the principal contractor, the intermediate subcontractor being insolvent); Brookville, etc., Turnpike Co. *v.* Pumphrey, 59 Ind. 78, 26 Am. Rep. 76. See further, as to the obligation of a turnpike company to repair, the following cases:

Connecticut.— Goshen, etc., Turnpike Co. *v.* Sears, 7 Conn. 86.

Kentucky.— Shelby County Bd. Internal Improvement *v.* Scearce, 2 Duv. 576.

Maine.— Orcutt *v.* Kittery Point Bridge Co., 53 Me. 500.

Massachusetts.— Com. *v.* Worcester Turnpike Corp., 3 Pick. 327.

New Jersey.— Ward *v.* Newark, etc., Turnpike Co., 20 N. J. L. 323; State *v.* Morris Turnpike Co., 4 N. J. L. 165, 7 Am. Dec. 579.

81. Ireland *v.* Oswego, etc., Plank Road Co., 13 N. Y. 526; Davis *v.* Lamoille County Plank Road Co., 27 Vt. 602. *Compare* Sims *v.* Yazoo, etc., Plank Road Co., 38 Miss. 23.

82. *Georgia.*— Tift *v.* Jones, 52 Ga. 538.

Indiana.— Wayne County Turnpike Co. *v.* Berry, 5 Ind. 286.

ferries,[83] railways,[84] canals,[85] docks,[86] wharves,[87] waterworks,[88] gas-works,[89] to improve navigable streams,[90] or to do other like work of a public nature for the benefit of members of the public distributively, and to take toll therefor,[91] it is bound to keep its works in repair and is liable in a civil action to an individual who has sustained damages in consequence of a failure of its duty in this particular.[92]

Maine.— Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

New York.— Hayes *v.* New York Cent., etc., R. Co., 9 Hun 63.

South Carolina.— Grigsby *v.* Chappell, 5 Rich. 443.

England.— Nicholl *v.* Allen, 1 B. & S. 916, 31 L. J. Q. B. 283, 6 L. T. Rep. N. S. 699, 10 Wkly. Rep. 741, 101 E. C. L. 916; Rex *v.* Lindsey, 14 East 317, 12 Rev. Rep. 529; Rex *v.* Kent, 13 East 220, 12 Rev. Rep. 330.

83. Murray *v.* Hudson River R. Co., 47 Barb. (N. Y.) 196; Oakland R. Co. *v.* Fielding, 48 Pa. St. 320.

84. Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; Cumberland Valley R. Co. *v.* Hughes, 11 Pa. St. 141, 51 Am. Dec. 513.

85. Weitner *v.* Delaware, etc., Canal Co., 4 Rob. (N. Y.) 234; Pennsylvania R. Co. *v.* Patterson, 73 Pa. St. 491; Saylor *v.* Smith, 2 Wkly. Notes Cas. (Pa.) 687; Winch *v.* Thames Conservators, L. R. 9 C. P. 378, 43 L. J. C. P. 167, 31 L. T. Rep. N. S. 128, 22 Wkly. Rep. 879; Parnaby *v.* Lancaster Canal Co., 11 A. & E. 223, 9 L. J. Exch. 338, 3 P. & D. 184, 39 E. C. L. 139; Walker *v.* Goe, 4 H. & N. 350, 5 Jur. N. S. 737, 28 L. J. Exch. 184, 7 Wkly. Rep. 289. See also Heacock *v.* Sherman, 14 Wend. (N. Y.) 58; Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549; Witherley *v.* Regent's Canal Co., 12 C. B. N. S. 2, 3 F. & F. 61, 2 L. J. C. P. 190, 6 L. T. Rep. N. S. 255, 104 E. C. L. 2; Manley *v.* St. Helen Canal, etc., Co., 2 H. & N. 840, 27 L. J. Exch. 159, 6 Wkly. Rep. 297.

86. Smith *v.* London, etc., Docks Co., L. R. 3 C. P. 326, 37 L. J. C. P. 217, 18 L. T. Rep. N. S. 403, 16 Wkly. Rep. 728; Mersey Docks, etc., Bd. *v.* Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 12 Jur. N. S. 571, 35 L. J. Exch. 225, 14 L. T. Rep. N. S. 677, 14 Wkly. Rep. 872; Gibson *v.* Inglis, 4 Campb. 72, 15 Rev. Rep. 727; Mersey Docks, etc., Bd. *v.* Penhallow, 7 H. & N. 329, 8 Jur. N. S. 486, 30 L. J. Exch. 329, 5 L. T. Rep. N. S. 112; Gibbs *v.* Liverpool Docks, 1 H. & N. 439 [*reversed* in 3 H. & N. 164, 4 Jur. N. S. 636, 27 L. J. Exch. 321].

87. Wendell *v.* Baxter, 12 Gray (Mass.) 494; Radway *v.* Briggs, 37 N. Y. 256; Albany *v.* Cunliff, 2 N. Y. 165. See also Jeffersonville *v.* Louisville, etc., Steam Ferry Co., 27 Ind. 100, 89 Am. Dec. 495, 35 Ind. 19; Seaman *v.* New York, 3 Daly (N. Y.) 147; Buckbee *v.* Brown, 21 Wend. (N. Y.) 110; Prescott *v.* Duquesne, 48 Pa. St. 118; Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65; Mersey Docks, etc., Bd. *v.* Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 12 Jur. N. S. 571, 35 L. J. Exch. 225, 14 L. T. Rep. N. S. 677, 14 Wkly. Rep. 872; Mersey Docks, etc., Bd. *v.* Penhallow, 7 H. & N. 329, 8 Jur. N. S. 486, 30 L. J. Exch. 329, 5 L. T. Rep. N. S. 112; Gibbs *v.* Liverpool Docks, 1 H. & N. 439 [*reversed* in 3 H. & N. 164, 4 Jur. N. S. 636, 27 L. J. Exch. 321].

88. Bayley *v.* Wolverhampton Waterworks Co., 6 H. & N. 241, 30 L. J. Exch. 57. In Atkinson *v.* Newcastle, etc., Waterworks Co., 2 Ex. D. 441, 46 L. J. Exch. 775, 36 L. T. Rep. N. S. 761, 25 Wkly. Rep. 794, it was ruled by the English court of appeal, reversing the court of exchequer (L. R. 6 Exch. 404, 20 Wkly. Rep. 35), that an action would not lie against a waterworks company for failing to keep its pipes charged as required by its governing statute, by reason of which neglect the plaintiff's premises burned down. The ground of the decision was that the statute creating the duty gave a penalty of £10, one half to any informer and the other half to the overseers of the parish, for a neglect of this duty, and that the penalty excluded a right of action for damages. The court question the authority of Couch *v.* Steel, 2 C. L. R. 940, 3 E. & B. 402, 18 Jur. 515, 23 L. J. Q. B. 121, 2 Wkly. Rep. 170, 77 E. C. L. 402, which governed the court below. In that case it was held that a statute (7 & 8 Vict. c. 112, § 18) making it the duty of a ship-owner to have on board a proper supply of medicines for the voyage, created a duty to each sailor, for the breach of which action might be sustained by any one thereby injured, although the statute gave a penalty.

89. See Hutchinson *v.* Boston Gas Light Co., 122 Mass. 219; Bartlett *v.* Boston Gas Light Co., 117 Mass. 533, 19 Am. Rep. 421, 122 Mass. 209; Flint *v.* Gloucester Gas Light Co., 9 Allen (Mass.) 552; Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697; Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410; Holly *v.* Boston Gas Light Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Lannen *v.* Albany Gas Light Co., 44 N. Y. 459 [*affirming* 46 Barb. (N. Y.) 264]; Butcher *v.* Providence Gas Co., 18 Alb. L. J. 372; Burrows *v.* March Gas, etc., Co., L. R. 7 Exch. 96, 41 L. J. Exch. 46, 26 L. T. Rep. N. S. 318, 20 Wkly. Rep. 493; Holden *v.* Liverpool New Gas, etc., Co., 3 C. B. 1, 10 Jur. 883, 15 L. J. C. P. 301, 54 E. C. L. 1; Mose *v.* Hastings, etc., Gas Co., 4 F. & F. 324; Blenkiron *v.* Great Cent. Gas Consumers Co., 2 F. & F. 437; Weld *v.* Gas Light Co., 1 Stark. 189, 2 E. C. L. 78.

90. Rex *v.* Kent, 13 East 220, 12 Rev. Rep. 330.

91. Brown *v.* South Kennebec Agricultural Soc., 47 Me. 275, 74 Am. Dec. 484.

92. Most of the foregoing cases either sustain or illustrate the text. Some of them, however, were cases where the negligence

c. Liability Same Where Duty Is Imposed in Express Terms by Charter or Governing Statute. Upon a principle applicable alike to persons and to corporations, that where an obligation is imposed by statute, the person upon whom it is imposed becomes liable to any one who may have been injured by or in consequence of its non-performance or negligent performance,[93] where the charter of a corporation, or other governing statute, makes it the duty of the corporation to keep in repair a bridge, dike, canal, or other public work, an individual injured by a neglect of the statutory duty may maintain an action therefor.[94] The same rule is applicable to chartered municipal corporations.[95]

d. When so Liable on Principle of Nuisance or Special Damage. The liability of corporations for the non-repair of roads or bridges, which they are under a duty by their charter to keep in repair, is often put on the common-law ground that they are the authors of a nuisance which has resulted in special damage to plaintiff. Accordingly, where the charter of a canal company required it to "build and keep in good repair suitable and convenient bridges over the canal," and one of the bridges, being defective, gave way while plaintiff was driving over it, it was held that he might recover damages, upon this principle, for the injury thus received.[96] Where such an injury happens to plaintiff through the negligent failure of defendant to perform a duty enjoined upon it by its charter, to be performed on behalf of the public generally, an action for the injury which plaintiff has received is supportable, not indeed on the theory of privity of contract, but as an action on the case for an injury which plaintiff has sustained through the malfeasance of defendant in failing to perform a duty toward him, although springing from a contract with another.[97]

5. Private Corporations How Liable For Non-Exercise of Granted Powers. It does not follow, however, that because power to construct or maintain a railway or other public work is granted to a person or corporation for his or its private emolument, such person or corporation will be compelled by mandamus to execute the power or be liable to a private action for a non-exercise of such power. Such a statute will it seems be deemed permissive unless its terms plainly import the contrary.[98] But a railway company which has so far entered upon the execution of its statutory powers as to condemn land to build part of its line will be compelled by mandamus to complete it, unless it shows that it has become

amounted not to a mere nonfeasance in the performance of a duty voluntarily assumed but to a positive malfeasance. As to the duty of a street railroad to keep the pavement between its tracks in repair under the provisions of its charter see Troy *v.* Troy, etc., R. Co., 3 Lans. (N. Y.) 270.

93. Mersey Docks, etc., Bd. *v.* Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 12 Jur. N. S. 571, 35 L. J. Exch. 225, 14 L. T. Rep. N. S. 677, 14 Wkly. Rep. 872; Coe *v.* Wise, L. R. 1 Q. B. 711, 7 B. & S. 831, 37 L. J. Q. B. 262, 14 L. T. Rep. N. S. 891, 14 Wkly. Rep. 865; Gray *v.* Pullen, 5 B. & S. 970, 34 L. J. Q. B. 265, 11 L. T. Rep. N. S. 569, 13 Wkly. Rep. 257, 117 E. C. L. 970; Bessant *v.* Great Western R. Co., 8 C. B. N. S. 368, 98 E. C. L. 368.

94. Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35; Pennsylvania R. Co. *v.* Patterson, 73 Pa. St. 491; Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549; Harrison *v.* Great Northern R. Co., 3 H. & C. 231, 10 Jur. N. S. 992, 33 L. J. Exch. 266, 10 L. T. Rep. N. S. 621, 12 Wkly. Rep. 1081; Bayley *v.* Wolverhampton Waterworks Co., 6 H. & N. 241, 30 L. J. Exch. 57 (where the waterworks company was held liable to a traveler whose horse was injured by their failing to keep a fire-plug in repair, as directed by a statute, although the plug belonged to the local board of health, which was liable to the waterworks company for the expense of the repairs).

95. Erie *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87.

96. Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549 [*citing* Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582; Pittsburgh *v.* Scott, 1 Pa. St. 309; Hughes *v.* Heiser, 1 Binn. (Pa.) 463, 2 Am. Dec. 459; Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Wilkes *v.* Hungerford Market Co., 2 Bing. N. Cas. 281, 1 Hodges 281, 2 Scott 446, 29 E. C. L. 537].

97. Reasoning of Sharswood, C. J., in Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549.

98. Nicholl *v.* Allen, 1 B. & S. 916, 932, 31 L. J. Q. B. 283, 6 L. T. Rep. N. S. 699, 10 Wkly. Rep. 741, 101 E. C. L. 916 (per Crompton, J.); Reg. *v.* York, etc., R. Co., 1 E. & B.

impossible for it to do so;[99] and if after such a railway has been built the company takes up its rails a mandamus will lie to compel it to reinstate them.[1] So the proprietor of a toll-bridge must keep the same in repair so long as he exercises the privilege, accorded him by a statute, of receiving tolls, or else he must pay damages to any one thereby specially injured. He cannot escape this liability by maintaining a ferry, and collecting ferriage in lieu of the statutory pontage.[2] It seems that a corporation created by the legislature of a state, and which under a contract with the state has assumed the exclusive duty of repairing the levees upon a certain river within the state, for the purpose of preventing the overflow of cultivable lands, is liable for damages to a private landowner for the nonperformance of the duty; but where sufficient time had not elapsed between the date at which the corporation became empowered to enter upon the discharge of the duty so assumed and the happening of the injury for which plaintiff brought his action, it was held that the corporation was not liable.[3]

E. Indictment of Corporations — 1. Corporations Indictable Under Ancient Law. The law on the subject of the criminal liability of corporations has had a growth and development analogous to that relating to the civil liability of corporations for torts. Decisions and *dicta* are not wanting in the ancient, and even in the modern books of our law, which deny, in the broadest terms, that a corporation can be indicted or criminally impleaded. Lord Holt is reported to have said that "a corporation is not indictable, but the particular members of it are";[4] and the superior court of Virginia declared, in the year 1823, in general terms, that a corporation cannot be impleaded *criminaliter* by its artificial name.[5] But apart from the notorious inaccuracy of the so-called Modern Reports, and the suspicion which always attaches to the anonymous cases reported in that series,[6] it has been pointed out[7] that in the time of Lord Holt there were many instances of indictments against counties, which were quasi-corporations, for their neglect to keep their roads and bridges in repair.[8] It has often been urged in behalf of corporations that it is unnecessary to hold them liable criminally for acts of malfeasance, since their officers who do the act may be so prosecuted. "Of this," said Lord Denman, C. J., "there is no doubt. But the public knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those

178, 72 E. C. L. 178 (per Erle, J.); Rex *v.* Birmingham Canal Nav. Co., 2 W. Bl. 708 (per Lord Mansfield, C. J., and Astion, J.).

99. Reg. *v.* York, etc., R. Co., 1 E. & B. 178, 72 E. C. L. 178. *Compare* Edinburgh, etc., R. Co. *v.* Philip, 3 Jur. N. S. 249, 2 Macq. 514, 1 Paton App. Cas. 681, 29 Sc. Jur. 242, 5 Wkly. Rep. 377.

1. Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

2. Nicholl *v.* Allen, 1 B. & S. 916, 31 L. J. Q. B. 283, 6 L. T. Rep. N. S. 699, 10 Wkly. Rep. 741, 101 E. C. L. 916.

3. Louque *v.* Louisiana Levee Co., 27 La. Ann. 134.

4. Anonymous, 12 Mod. 559.

5. Com. *v.* Swift Run Gap Turnpike Co., 2 Va. Cas. 362.

6. Lord Holt himself complained of his reporters, who seem to have been mere private note-takers in the court, and not officially appointed, "that the stuff which they published would make posterity think ill of his understanding, and that of his brethren on the bench." But the fame of Lord Holt as a master of the common law is too well established to be shaken even by the travesties of his decisions which appear in the Modern Reports.

7. By Chief Justice Green, of New Jersey, in his learned opinion in State *v.* Morris, etc., R. Co., 23 N. J. L. 360, 364.

8. Reg. *v.* Cluworth, Holt 239, 6 Mod. 163, 1 Salk. 359; Reg. *v.* Saintiff, 6 Mod. 255 (where Lord Holt himself presided, and held that if a common footway be in decay, an indictment will lie for it of necessity, because an action will not lie without special damage); Reg. *v.* Wilts, 1 Salk. 359. That an indictment was the settled method of compelling counties and municipal corporations to keep their highways in repair is shown by the following cases: Rex *v.* Great Broughton, 5 Burr. 2700; Rex *v.* West Riding, 5 Burr. 2594, 2 East 342, Lofft 238, 2 W. Bl. 685; *In re* Langforth Bridge Case, Cro. Car. 365; Rex *v.* Stratford-Upon-Avon, 14 East 348; Rex *v.* Liverpool, 3 East 86; Rex *v.* Clifton, 5 T. R. 498, 2 Rev. Rep. 657.

who truly commit it, that is, the corporation, acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings."[9] We may conclude that it is a settled principle of modern jurisprudence that an indictment will lie against a corporation aggregate, although not for every species of crime or misdemeanor.[10]

2. INDICTABLE FOR OFFENSES DENOUNCED AGAINST "PERSONS." There is judicial authority for the conclusion that a corporation is indictable for a statutory offense denounced against "persons," as where the statute recites that "if any person shall," etc.[11]

3. FOR WHAT OFFENSES CORPORATIONS ARE INDICTABLE — a. For Misfeasance as Well as For Nonfeasance. Having concluded upon judicial authority that corporations are indictable, the next inquiry will be for what offenses they are indictable; and this inquiry can be best answered by discovering for what offenses they are not indictable, and excluding that class of offenses from consideration. The ancient theory was that a corporation aggregate was indictable only for acts of nonfeasance, that is for the failure to perform some public duty, such as keeping a highway in repair. The theory was that it was not indictable for acts of misfeasance, because it had no power, under its charter, to commit such acts, but that, when those who professed to act in its behalf committed acts of misfeasance they were acting *ultra vires*, and their acts were personal acts, and not the acts of the corporation. The rule was strictly analogous to the ancient doctrine that evil intent or motive cannot be imputed to a corporation, and that a corporation cannot be made liable in a civil action for a trespass or other malicious injury unless committed by deed.[12] This idea that a corporation cannot be punished criminally for a malfeasance has inhered to some extent in modern decisions;[13] but it is now thoroughly settled, both in England and in America, that a corporation may be prosecuted by indictment for a misfeasance as well as for a nonfeasance.[14]

b. For Creating or Permitting Public Nuisances — (i) *IN GENERAL.* Under the foregoing principles a corporation is indictable for committing a public nuisance, whether the commission of it involves acts of nonfeasance or misfeasance; for, to quote again the observation of Lord Denman, "it is as easy to charge one person, or body corporate, with erecting a bar across a public road, as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission."[15] Thus a canal company is liable to indictment for the nuisance

9. Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16, 58 E. C. L. 315.

10. State *v.* Morris, etc., R. Co., 23 N. J. L. 360 (where the subject was fully examined on the English precedents); Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 278, 2 G. & D. 236, 6 Jur. 804, 3 R. & Can. Cas. 148 (where the subject underwent full examination).

11. State *v.* Clark First Nat. Bank, 2 S. D. 568, 51 N. W. 587; State *v.* Clark Security Bank, 2 S. D. 538, 51 N. W. 337 (indictment for usury). *Compare supra*, XIX, A, 8; *infra*, XIX, E, 3, d, (I).

As to whether corporation is included in word "person" in penal statutes see *supra*, XIX, A, 8.

12. See *supra*, XIX, B, 2, a.

13. State *v.* Ohio, etc., R. Co., 23 Ind. 362; State *v.* Great Works Milling, etc., Co., 20 Me. 41, 37 Am. Dec. 38.

14. *Kentucky.*— Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 197, 17 S. W. 442, 13 Ky. L. Rep. 468.

Maine.— State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586 [*overruling* State *v.* Great Works Milling, etc., Co., 20 Me. 41, 37 Am. Dec. 38]; State *v.* Portland, etc., R. Co., 57 Me. 402; State *v.* Freeport, 43 Me. 198 (*semble*).

Massachusetts.— Com. *v.* New Bedford Bridge, 2 Gray 339.

New Jersey.— State *v.* Morris, etc., R. Co., 23 N. J. L. 360.

New York.— People *v.* Albany, 11 Wend. 539, 27 Am. Dec. 95.

Tennessee.— Louisville, etc., R. Co. *v.* State, 3 Head 523, 75 Am. Dec. 778.

Vermont.— State *v.* Vermont, etc., R. Co., 27 Vt. 103.

England.— Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16, 58 E. C. L. 315.

See also People *v.* Equitable Gaslight Co., 5 N. Y. Suppl. 19; State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

15. Louisville, etc., R. Co. *v.* Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205; State *v.* Morris, etc., R. Co., 23 N. J. L. 360; Northern

created by the water of its canal being suffered to percolate through its tow-path upon the land of an adjacent proprietor, causing stagnant and noxious pools to form thereon, creating a public nuisance.[16]

(II) *Keeping Disorderly House.* A disorderly house is unquestionably a public nuisance; and if a corporation is indictable for any public nuisance which it is capable of committing, a corporation formed, we will say, for the purpose of carrying on a hotel, may become indictable for carrying it on as a disorderly house; and it has been held that a corporation aggregate may be prosecuted by indictment for such an offense.[17]

(III) *Obstructing Public Navigation.* On the same principle a corporation is indictable for obstructing a navigable river or other navigable water. Thus a corporation which has been permitted, under its governing statute, to erect a toll-bridge across a navigable river, but upon the condition of erecting draw-bridges of a prescribed width, is indictable for not erecting such bridges.[18]

(IV) *Obstructing Public Highway.* A species of nuisance for which indictments have often been sustained against corporations, and especially against railway companies, has consisted of obstructing the public highway.[19] Thus a street railway company may be indicted both at common law and under statutes for failing to restore the surface of the street which it has occupied and disrupted, and for failing to keep that portion of it which is occupied by its tracks in a reasonable state of repair for ordinary travel.[20] So if a steam railroad company is authorized by its governing statute to change the site of any turnpike or public road, but upon condition of reconstructing the same at its own expense, if it fails so to reconstruct it it is liable to an indictment and fine.[21] It seems also

Cent. R. Co. *v.* Com., 90 Pa. St. 300; Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16, 58 E. C. L. 315. It should be observed that some of the obsolete and overruled decisions related to the liability of corporations to be prosecuted criminally for nuisances consisting of acts of malfeasance. Thus in an early Virginia case it was held that a corporation is not indictable for a public nuisance which consists in obstructing a highway by digging it up and placing thereon large quantities of stone or dirt. Com. *v.* Swift Run Gap Turnpike Co., 2 Va. Cas. 362. In like manner the early case in Maine which laid down the doctrine that a corporation cannot be indicted for a crime or misdemeanor consisting of a positive or affirmative act was a case where it was sought to prosecute a corporation criminally, for committing a public nuisance in erecting a dam across a navigable river. State *v.* Great Works Milling, etc., Co., 20 Me. 41, 37 Am. Dec. 38 [*overruled* in State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586].

16. Delaware Division Canal Co. *v.* Com., 60 Pa. St. 367, 100 Am. Dec. 570. Upon the same principle one court has held that a municipal corporation is indictable for so constructing its sewers as to create a public nuisance. State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586. But another court has held that such a corporation is not indictable for a public nuisance which consists in the drainage, by private persons, of filthy water into the gutters of its streets. But this decision proceeds upon the ground that the nuisance is created personally by private individuals, and that the suffering it to remain consists merely of the non-exercise of its governmental powers, for which in general a municipal corporation is not indictable. State *v.* Burlington, 36 Vt. 521. It has been held that a statute providing that a railway or other corporation may be indicted for maintaining a public nuisance may apply to nuisances created prior to the adoption of the statute, if continued thereafter in defiance of it. State *v.* Louisville, etc., R. Co., 86 Ind. 114.

17. State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

18. Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339, erecting a bridge across a navigable stream.

19. *Missouri.*—State *v.* White, 96 Mo. App. 34, 69 S. W. 684.

New Jersey.— State *v.* Morris, etc., R. Co., 23 N. J. L. 360, erecting a depot across a public highway.

Pennsylvania.— Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300.

Tennessee.— Louisville, etc., R. Co. *v.* State, 3 Head 523, 75 Am. Dec. 778.

Vermont.— State *v.* Vermont Cent. R. Co., 27 Vt. 103, erecting a depot across a public highway.

England.— Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16, 58 E. C. L. 315.

20. Memphis, etc., R. Co. *v.* State, 87 Tenn. 746, 11 S. W. 946.

21. Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192. Many of the decisions cite the case of Lyme Regis *v.* Henley, 3 B. & Ad. 77, 92, 23 E. C. L. 43, 5 Bing. 91, 15 E. C. L. 486, 6 L. J. C. P. O. S. 222, 30 Rev. Rep. 542, where Lord Tenterden, C. J., said: "We think the obligation to repair the banks and

that where a steam railroad company is permitted to cross the public streets or highways at grade, if it allows its trains to obstruct such highways beyond the time prescribed by the governing statute, an indictment may be prosecuted against it therefor.[22] So a steam railway company authorized to intersect with its track ordinary highways must so construct its track that it will not impede the passage or transportation of persons or property over the track, and if it so constructs it that it becomes a serious inconvenience or a dangerous obstruction to ordinary public travel along the road or way it may be indicted therefor.[23]

(v) *Failing to Keep Their Works in Repair* — (A) *In General.* By the principles of the common law, as well as under various statutes, public corporations or quasi-corporations, such as counties, towns, and cities,[24] turnpike companies,[25] plank-road companies,[26] bridge companies,[27] and railway companies,[28] are liable to indictment for the public nuisance arising from their suffering their works to fall into decay or otherwise to be so used as to create a public nuisance.

(B) *How Rule Applied With Respect to Railway Companies.* It has been so held where a railway company allowed a hand-car to stand upon its road with buckets and clothing hanging upon it, so as to frighten horses upon the adjacent street, and to obstruct the same and endanger life;[29] and where such a company obstructed a turnpike road in the building of its railroad, and failed to restore the turnpike road within a reasonable time.[30] For the purpose of such an indictment a street is obstructed when by reason of the impediment or obstruction ordinary travel upon it becomes inconvenient or dangerous; and it is not necessary that there should be an actual injury to any person or vehicle in order to sustain such indictment.[31] So a railway company is indictable for failure to keep its highway crossings in repair, as by leaving them wet, and with the rails projecting several inches above the street.[32] Such a corporation may be indicted, in England, for disobeying an order of two justices, under a statute, to build certain arches and culverts.[33]

sea-shores is one which concerns the public, in consequence of which an indictment might have been maintained against the plaintiffs in error for their general default."

22. Com. *v.* Boston, etc., R. Co., 135 Mass. 550.

23. Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300.

24. State *v.* Murfreesboro, 11 Humphr. (Tenn.) 217; State *v.* Barksdale, 5 Humphr. (Tenn.) 154; Rex *v.* Liverpool, 3 East 86. What is said of municipal corporations relates to the non-repair of their highways. See also Rex *v.* Hendon, 4 B. & Ad. 628, 24 E. C. L. 276; Reg. *v.* Stretford, 2 Ld. Raym. 1169.

25. State *v.* Godwinsville, etc., Road Co., 49 N. J. L. 266, 10 Atl. 666, 60 Am. Rep. 611 (conviction quashed upon specious reasoning); Waterford, etc., Turnpike Co. *v.* People, 9 Barb. (N. Y.) 161 (indictment at common law, and conviction affirmed); White's Creek Turnpike Co. *v.* State, 16 Lea (Tenn.) 24.

26. Syracuse, etc., Plank Road Co. *v.* Tully, 66 Barb. (N. Y.) 25.

27. Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242; Com. *v.* Newburyport Bridge, 9 Pick. (Mass.) 142 (where an act creating a corporation to build a bridge allowed three years for the completion of the bridge, and prescribed that it should be built with a draw and piers, and the corporation erected the bridge and took tolls for more than a year without building any piers, it was held that it was liable to indictment for such neglect, notwithstanding the three years had not elapsed).

28. *Indiana.*— State *v.* Louisville, etc., R. Co., 86 Ind. 114.

Kentucky.— Cincinnati R. Co. *v.* Com., 80 Ky. 137.

New Jersey.— State *v.* Morris, etc., R. Co., 23 N. J. L. 360.

Pennsylvania.— Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300; Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29.

Tennessee.— Louisville, etc., R. Co. *v.* State, 3 Head 523, 75 Am. Dec. 778.

England.— Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16, 58 E. C. L. 315.

29. Cincinnati R. Co. *v.* Com., 80 Ky. 137.

30. Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.) 523, 75 Am. Dec. 778. See also Pittsburgh, etc., R. Co. *v.* Com., 104 Pa. St. 583.

31. Cincinnati R. Co. *v.* Com., 80 Ky. 137.

32. Paducah, etc., R. Co. *v.* Com., 80 Ky. 147; Com. *v.* Hancock Free Bridge Corp., 2 Gray (Mass.) 58 (under a statute).

33. Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 278, 2 G. & D. 236, 6 Jur. 804, 3 R. & Can. Cas. 148.

A shadowy and untenable distinction has been taken between an indictment against a turnpike company for neglecting to construct

(c) *How Rule Applied With Respect to Turnpike Companies.* It has been held that a turnpike company is liable to an indictment at common law for a nuisance, in suffering its road to be out of repair, notwithstanding that by the terms of its charter a specific penalty is provided for its neglect to keep its road in repair; and although the act giving the penalty is silent with respect to an indictment, provided that its charter contains no negative words, nor any expression indicating the intention to impair the remedy which the public have at common law.[34] In order to render a turnpike road a nuisance by reason of its non-repair, so as to sustain such an indictment, it is not essential that it should be unsafe or impassable; but any contracting or narrowing of the roadway has been held to be a nuisance; and so is the leaving of any obstruction in the road, rendering it less convenient for public use. And with reference to this question it has been ruled that the public have a right that a turnpike road shall be continued substantially in the same manner, as to width and safety, which its charter required at its first construction.[35] It is no defense against such an indictment that the company had no funds with which to repair the road.[36]

c. For Failing to Perform Their Public Duties — (i) *In General.* As already indicated[37] it is the settled law that a corporation may be indicted for the failure to perform those public duties which are devolved upon it by the principles of the common law, or by the terms of its charter or governing statute.[38]

(ii) *Failure to Keep Highways in Repair.* The most frequent illustration of this principle is found in cases where counties and incorporated boroughs or cities have been proceeded against by indictment for failing to keep their highways in repair, or for creating or suffering public nuisances to exist within their limits.[39]

its road in the manner prescribed by its charter, and such an indictment for failing to maintain it in the condition of repair therein prescribed, so that it becomes a public nuisance, with the conclusion that for a neglect to construct the company is not indictable, but for a neglect to repair it is. The reasoning is inconclusive and specious, and it is not made to appear why a turnpike company is not indictable for assuming to shut up a highway against free travel and to demand tolls of travelers, without putting it in the state of usefulness required by its charter. State *v.* Godwinsville, etc., Road Co., 49 N. J. L. 266, 10 Atl. 666, 60 Am. Rep. 611.

34. Waterford, etc., Turnpike Co. *v.* People, 9 Barb. (N. Y.) 161.

35. See *supra*, XIX, E, 3, b, (v), (a). Under a statute providing that "whenever any person, liable to the payment of toll shall sustain any injury, by reason of any turnpike being insufficient or out of repair, the corporation owning said road shall be answerable for such injury, and also liable to indictment for such insufficiency and want of repair of their road," a corporation owning a turnpike road and neglecting to keep it in repair is liable to indictment, although no person liable to the payment of tolls has sustained injury by reason of such want of repair. Com. *v.* Hancock Free Bridge Corp., 2 Gray (Mass.) 58.

36. Com. *v.* Hancock Free Bridge Corp., 2 Gray (Mass.) 58. Although indictments against municipal corporations for permitting their streets to remain out of repair run against the corporation by the name in which it is properly impleaded, and consequently by the name of the mayor and aldermen, etc., yet these officers are not individually responsible for the nonfeasance (State *v.* Barksdale, 5 Humphr. (Tenn.) 154), but the judgment, if in favor of the state, results in a pecuniary fine against the corporation (State *v.* Murfreesboro, 11 Humphr. (Tenn.) 217). Municipal corporations are liable, under the principles of the common law, to indictment or presentment for failing to keep their streets in repair. State *v.* Murfreesboro, 11 Humphr. (Tenn.) 217; State *v.* Barksdale, 5 Humphr. (Tenn.) 154; Rex *v.* Stratford-Upon-Avon, 14 East 348; Rex *v.* Liverpool, 3 East 86. It has been held that a provision in the charter of a toll-bridge corporation that the bridge should "at all times be kept in good, safe, and passable repair" requires the company to light the bridge, if the jury find, on the trial of an indictment, that such lighting is necessary to make the bridge safe and convenient for passage at night. Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242.

37. See *supra*, XIX, E, 3, a.

38. Com. *v.* Newburyport Bridge, 9 Pick. (Mass.) 142; Susquehanna, etc., Turnpike Co. *v.* People, 15 Wend. (N. Y.) 267; Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 278, 2 G. & D. 236, 6 Jur. 804, 3 R. & Can. Cas. 148.

39. See *supra*, XIX, E, 3, b, (v), (a). *Compare supra*, XIX, E, 3, b, (iii) *et seq.*

It has been said that the only admissible remedies for breaches of the duties charged on railroad corporations by the railroad act of

(III) *Failure of Railway Company to Furnish Reasonable Transportation Facilities.* Of this nature is the public duty imposed upon railway companies, by statute in some of the states,[40] of affording reasonable transportation facilities to the public.[41]

(IV) *Habitual Failure of Railroad Company to Give Warning Signals at Highway Crossings.* Under the principles of the common law, while a railway company may lawfully run its trains at any reasonable rate of speed, and no rate of speed is negligence *per se*, yet it is bound to take reasonable precautions to prevent the enjoyment of this privilege from injuring persons crossing its road upon the public highway. The habitual failure to give signals or warnings when its trains approach such highway crossings is therefore a nuisance indictable at common law.[42]

d. For Statutory Offenses — (I) *Sabbath-Breaking.* It has been held that a corporation may be indicted and punished for the offense of Sabbath-breaking denounced and punished by statute against "a person."[43]

(II) *Inflicting Injuries Resulting in Death.* Statutes exist in some of the New England states, giving a remedy by indictment against corporations for inflicting negligent injuries resulting in death, the fine to go to the widow or next of kin of the deceased.[44] As these statutes are designed merely to furnish a civil remedy, although in the form of a criminal action, and as they are local and peculiar, the decisions construing them will not be examined here.

(III) *Usury* — (A) *In General.* A corporation may be indicted under a statute which declares that "every person who, directly or indirectly, receives any interest, discount, or consideration upon the loan or forbearance of any money, goods or things in action, greater than is allowed by law, is guilty of a misdemeanor."[45]

(B) *National Banks so Indictable in State Courts.* It has been held that a national bank is subject to an indictment, trial, and punishment in a state court, for a violation of a state law which makes the receiving of a greater rate of interest than is allowed by law a misdemeanor, the law being the same as above quoted.[46]

(C) *What Not Necessary to State in Such Indictment.* It is not necessary to state, in an indictment under such a statute, that the usurious interest was taken either upon a "loan" or upon a "forbearance."[47]

(IV) *Omitting to Stamp Papers as Required by Statute.* During a period when the Revenue Statutes of the United States required the stamping of certain papers, it was held that a railway company was liable to indictment for

New York are mandamus, quo warranto, and indictment. People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

40. See for instance N. H. Gen. Laws, c. 163, § 2.

41. State *v.* Concord R. Co., 59 N. H. 85, holding that an indictment, under the New Hampshire statute above cited, need not allege that the acts were unlawful, or that the merchandise was the property of the person endeavoring to have it shipped.

42. Louisville, etc., R. Co. *v.* Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205.

43. State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

44. Me. Rev. Stat. (1871), p. 455, § 36. By section 7 of chapter 52 these provisions are made applicable to steamboats, stage-coaches, and common carriers. See also Mass. Stat. (1840), c. 80 (construed in Com. *v.* Boston, etc., R. Corp., 11 Cush. (Mass.) 512); Mass. Stat. 1874, c. 372, § 163 (construed in Com. *v.* Boston, etc., R. Co., 129 Mass. 500, 37 Am. Rep. 382; Com. *v.* Boston, etc., R. Corp., 126 Mass. 61); Mass. Gen. Stat. c. 63, § 98 (construed in Com. *v.* Fitchburg R. Co., 120 Mass. 372; Com. *v.* Fitchburg R. Co., 10 Allen (Mass.) 189); Mass. Gen. Stat. c. 160, § 34 (construed in Com. *v.* East Boston Ferry Co., 13 Allen (Mass.) 589); Mass. Gen. Stat. c. 63, § 97 (construed in Com. *v.* Vermont, etc., R. Co., 108 Mass. 7, 11 Am. Rep. 301); Mass. Pub. Stat. c. 112, § 212 (construed in Com. *v.* Brockton St. R. Co., 143 Mass. 501, 10 N. E. 506); N. H. Comp. Stat. p. 354, § 66 (construed in Boston, etc., R. Co. *v.* State, 32 N. H. 215).

45. State *v.* Clark First Nat. Bank, 2 S. D. 568, 51 N. W. 587; State *v.* Clark Security Bank, 2 S. D. 538, 543, 51 N. W. 337.

46. State *v.* Clark First Nat. Bank, 2 S. D. 568, 51 N. W. 587.

47. State *v.* Clark Security Bank, 2 S. D. 538, 51 N. W. 337.

the act of its officer or employee, in issuing receipts for goods without stamping them as required by the federal statute.[48]

(v) *Doing Business Without License* — (a) *In General.* It has been held that a corporation may be punished for peddling without a license, on account of sales made by its unlicensed agents, although a peddler's license cannot issue to a corporation except in the name of a designated agent, who alone can sell thereunder.[49]

(b) *Foreign Corporations.* It seems that a foreign corporation undertaking to do business within a state without the filing of the documents required by statute may be indicted and punished therefor.[50]

4. For What Offenses Corporations Are Not Indictable — a. Treason, Felony, or Breach of the Peace. A corporation cannot in general be indicted for ordinary crimes and misdemeanors, such as involve a criminal or immoral intent, and such as are often grouped, in books of the common law, under the threefold designation of treason, felony, or breach of the peace.[51]

b. Assault and Battery. Thus a corporation cannot be indicted for an assault and battery committed by its servant.[52]

c. Acts Authorized by Valid Charter or Statute Provisions — (i) *In General.* Although the doing by a corporation, even in a reasonable and proper manner, of acts authorized by its charter or governing statute, does not, under the most enlightened theories, necessarily preclude a right of action for damages in the way of compensation, by persons who are damaged by the doing of such acts,[53] yet the existence of the statutory authorization will obviously estop the state from maintaining an indictment for the doing of the act;[54] assuming of course that it is properly done and within the terms of the statutory authorization, and that the statute itself is not unconstitutional.

(ii) *Doctrine Illustrated in Case of Railway Corporations.* For instance it was held that an indictment would not lie against a railway company for frightening horses on an adjacent highway, by the passage of their locomotives and trains, parliament having conferred upon them the authority to build their railway and to operate it by locomotive engines.[55] The same has been held where a railway company occupies a portion of a public road not exceeding the extent allowed by its governing statute, and obstructs public travel to that extent and no further, for it is a legal solecism to call that a public nuisance which is maintained by public authority.[56]

5. Form and Sufficiency of Indictments Against Corporations — a. As to Name of Corporation. Regularly the indictment should be against the corporation in its corporate name.[57]

b. Averment That Defendant Is a Corporation. Regularly such an indictment ought to aver that defendant is a corporation.[58] But this has been held unnecessary, especially where the name by which defendant is indicted sufficiently

48. U. S. *v.* Baltimore, etc., R. Co., 24 Fed. Cas. No. 14,509.

49. Standard Oil Co. *v.* Com., 55 S. W. 8, 21 Ky. L. Rep. 1339.

50. Standard Oil Co. *v.* Com., 62 S. W. 897, 23 Ky. L. Rep. 302 (failing to have its corporate name painted or printed on its principal place of business as required by a statute of the domestic state); Associated Press *v.* Com., 60 S. W. 295, 523, 867, 22 Ky. L. Rep. 1229, 1369.

51. Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16, 58 E. C. L. 315; 1 Bl. Comm. 476, 477.

52. Com. *v.* Punxsutawney St. Pass. R. Co., 24 Pa. Co. Ct. 25.

53. 5 Thompson Corp. § 6371.

54. Rex *v.* Pease, 4 B. & Ad. 30, 2 L. J. M. C. 26, 1 N. & M. 690, 24 E. C. L. 24.

55. Rex *v.* Pease, 4 B. & Ad. 30, 2 L. J. M. C. 26, 1 N. & M. 690, 24 E. C. L. 24.

56. Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29.

57. Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 278, 2 G. & D. 241, 6 Jur. 804, 3 R. & Can. Cas. 148. *Compare* Sykes *v.* People, 132 Ill. 32, 23 N. E. 391.

For precedents of indictments against corporations see 3 Chitty Crim. L. 587; 4 Wentworth Prec. 157.

58. Com. *v.* Cincinnati, etc., R. Co., 6 Ky. L. Rep. 306.

imports that it is a corporation, such as the "Dry Fork Railroad Company."[59] So a designation in an indictment as "The Vermont Central Railroad Company, a corporation existing under and by force of the laws of this state, duly organized and doing business," is a sufficient averment of the existence of the corporation.[60]

c. Charging the Offense — (I) *In Case of Indictment For Non-Repair of Highways.* An indictment against a municipal corporation for the non-repair of a highway within a certain limit, charging the corporation with a liability by prescription to repair all common highways within such limit, "excepting such as ought to be repaired according to the form of the several statutes in such case made," was held bad for not showing that the highway in question was not within any of the exceptions.[61] It is necessary to aver, in an indictment against a turnpike company, for the failure to keep its road in repair, that it was under a duty or obligation so to keep it in repair.[62] But it is believed that every fulfilment of a good indictment is had, where the indictment states a given duty to repair, and negatives the performance of the duty.[63] If the manner in which the reparation shall be made is not prescribed by statute, and there is a duty of repairing at common law, then the rule of the common law is that the highway shall be kept convenient and safe, and that it becomes a nuisance when it ceases to be in that condition.[64] It has been held that an indictment against the president and directors of a turnpike company for allowing their road to become ruinous should contain an averment "that it was their duty, and of right they ought to have kept the said road in repair"; otherwise judgment will be arrested.[65] On the other hand it has been held that an indictment charging that a corporation is bound by law to "keep and maintain a bridge in such a condition as to render the same safe and convenient for travelers," etc., and that the proprietors of said bridge, "regardless of their duty in this behalf, negligently and wilfully suffered and permitted said bridge to be, and remain, in such a condition as to render it unsafe and inconvenient for travellers, by neglecting to keep the same properly and suitably lighted in the night time, to the great damage and common nuisance," etc., sufficiently charges a breach of public duty, without specially alleging that they were bound to light the bridge, the jury having found that such lighting was necessary to the safety of travelers.[66]

(II) *For Failing to Have Its Corporate Name Painted or Printed on Its Principal Place of Business as Required by Statute.* Under a statute providing for the punishment of every corporation doing business in the state which shall fail to have its corporate name painted or printed "on its principal place or places of business," an indictment charging that defendant corporation failed and refused to have its corporate name painted or printed on its principal place of business in a city named was held not sufficient.[67]

6. Proceedings Before an Examining Magistrate. Proceedings directed by statute,[68] for bringing a corporation before an examining magistrate, have been held not a condition precedent to the power of a grand jury to indict the corporation.[69]

59. State *v.* Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447. See also Louisville, etc., R. Co. *v.* Com., 11 Ky. L. Rep. 442.

60. State *v.* Vermont, etc., R. Co., 28 Vt. 583.

61. Rex *v.* Liverpool, 3 East 86.

62. State *v.* Godwinsville, etc., R. Co., 49 N. J. L. 266, 10 Atl. 666, 60 Am. Rep. 611.

63. Consult on this subject Reg. *v.* Stretford, 2 Ld. Raym. 1169.

64. Waterford, etc., Turnpike *v.* People, 9 Barb. (N. Y.) 161; Rex *v.* Hendon, 4 B. & Ad. 628, 24 E. C. L. 276.

65. State *v.* Patton, 26 N. C. 16.

66. Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242.

67. Standard Oil Co. *v.* Com., 62 S. W. 897, 23 Ky. L. Rep. 302, where this was put on the ground that the indictment failed to charge that the city named was its principal place of business, or one of its principal places of business.

68. In this case S. D. Comp. Laws, § 7279 *et seq.*

69. State *v.* Clark Security Bank, 2 S. D. 538, 542, 51 N. W. 337, where the court say that the proceedings pointed out by the statute "are only intended as a means of bring-

7. Mode of Compelling Appearance of Corporation to Answer Criminal Charge — a. Distringas. A corporation, being an intangible person, can appear only by attorney, when sued in any judicial proceeding,[70] and the proceedings to compel it to appear to any suit, by attorney, were always, at common law, by distress of its lands and goods.[71] So far as the writer knows, the writ of distringas, as a means of compelling the appearance of a corporation in judicial proceedings, is unknown and unused in the United States.

b. Warrant, but Not Summons. The supreme court of Indiana have held that a warrant is the proper process to compel such an appearance; and that where the proceeding was against a railroad company a summons issued and served by copies being left with the station-agent, and an attorney and director of the corporation, was not a sufficient service. But it is to be observed that in Indiana the whole system of criminal procedure is statutory, and that the ruling of the court is intended to comply with the local statute.[72]

c. Summons Only, and Judgment by Default. In New Hampshire a summons is the only process to be issued to a corporation to require it to appear and answer an indictment; and if a summons is regularly issued and served, and the corporation makes default of appearance, a judgment by default may be rendered upon the indictment as in civil cases.[73]

d. Summons and Indorsement of Plea of Not Guilty. In New Jersey it is provided by statute[74] that when summons on a defendant corporation shall be served, the corporation shall be considered as in court, and as appearing to the indictment; and that the court shall order the clerk to enter an appearance, and indorse the plea of not guilty on the indictment. It is held that this applies only to cases where the corporation does not voluntarily appear, and that it has no application to cases where it voluntarily appears by attorney, in which case it is not necessary to take the proceedings pointed out by the statute.[75]

e. Appearance by Duly Enrolled Attorney Prima Facie Sufficient. Where a duly enrolled attorney of the court appears for the corporation, he is not required to produce any warrant of attorney to appear; but if any other person on behalf of the corporation disputes his right to appear, the burden is upon such person to show that his appearance was unauthorized.[76]

8. Entering Plea of Not Guilty. It has been held that where a corporation appears by attorney it need not appear in the record that the trial court ordered the clerk to enter an appearance and indorse the plea of not guilty, but it will be presumed that it was done.[77]

9. Proving Fact of Incorporation in Proceeding by Indictment. On the trial of an indictment charging forgery of the notes of a bank of another state or country it is not necessary to prove by direct evidence the due incorporation of the bank, but testimony of the most general character is sufficient for the purpose, such testimony for example as that of a banker who testified that he had been in the bank, had seen banking business carried on there, that he had seen the articles of

ing the defendant corporation before the magistrate after a grand jury has returned a presentment, and are necessary only because the corporation cannot be brought before him on a bench-warrant as natural persons are." But we are not acquainted with any system of criminal procedure under which it is necessary to bring a party before an examining magistrate after indictment or presentment found by a grand jury.

70. 1 Bl. Comm. 477.

71. Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 278, 2 G. & D. 236, 6 Jur. 804, 3 R. & Can. Cas. 148; 1 Bl. Comm. 477.

72. State *v.* Ohio, etc., R. Co., 23 Ind. 362.

73. Boston, etc., R. Co. *v.* State, 32 N. H. 215.

74. N. J. Crim. Proc. Act, § 80.

75. State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

76. State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

As to when a corporation cannot be compelled to appear and answer an indictment see People *v.* Equitable Gas-Light Co., 5 N. Y. Suppl. 19.

77. State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

incorporation, etc.[78] On the other hand another court has held, in a case where an indictment of a warehouseman for defrauding a banking corporation alleged, not only that the party defrauded was a corporation, but also that it was "organized and incorporated under and by virtue of the laws of this State," that the latter averment, although perhaps unnecessarily specific, was a matter of essential description of the corporation alleged to have been defrauded, such as imposed upon the state the burden of proving the due organization of such corporation under the laws of the state, and this notwithstanding the provisions of a statute relating to evidence in criminal cases, that user shall afford *prima facie* evidence of corporate existence. The court reasoned that the statute in no way attempts to change the rules of evidence by which the corporate name may be shown when in dispute.[79]

10. Defenses to Indictments Against Corporations — a. In Case of Indictment For Failing to Repair Its Road — (I) *No Defense That It Has Not Sufficient Funds to Repair.* Where the indictment is for a failure to perform a duty which it has assumed under its charter, such as, in the case of a plank-road company, the duty of keeping its road in repair, it will be no defense that the corporation has not funds to enable it to perform the duty.[80]

(II) *Good Defense That Duty to Repair Has Been Imposed by Statute Upon Another Corporation.* It is a good defense to an indictment against a corporation for failing to repair a particular bridge, that the duty to make the reparation has been cast by statute upon another corporation.[81]

(III) *When No Defense That Legislature Has Provided Remedy For Failing to Repair.* The mere fact that the charter of a turnpike, toll-road, or bridge company provides a penalty for its failure to perform the public duty of keeping its road or bridge in a proper state of repair does not in the absence of negative words afford any bar to an indictment for the failure to perform that duty.[82]

78. People *v.* D'Argencour, 32 Hun (N. Y.) 178 [*affirmed* in 95 N. Y. 624].

79. Sykes *v.* People, 132 Ill. 32, 23 N. E. 391.

80. Waterford, etc., Turnpike *v.* People, 9 Barb. (N. Y.) 161.

That the want of funds wherewith to make the repairs is no answer to a civil action for damages growing out of such failure, where the corporation possesses the power of raising the funds, was held by the house of lords in Lyme Regis *v.* Henley, 3 B. & Ad. 77, 23 E. C. L. 43, 5 Bing. 91, 15 E. C. L. 486, 6 L. J. C. P. O. S. 222, 3 M. & P. 278, 30 Rev. Rep. 542 [*affirmed* in 1 Bing. N. Cas. 222, 27 E. C. L. 614, 8 Bligh N. S. 690, 5 Eng. Reprint 1097, 2 Cl. & F. 331, 6 Eng. Reprint 1180, 1 Scott 29], reprinted in full in 2 Thompson Neg. (1st ed.) 626. See also Milledgeville *v.* Cooley, 55 Ga. 17; Hines *v.* Lockport, 50 N. Y. 236 [*affirming* 5 Lans. (N. Y.) 16, 60 Barb. (N. Y.) 378, 41 How. Pr. (N. Y.) 435]; Hutson *v.* New York, 9 N. Y. 163, 59 Am. Dec. 526 [*affirming* 5 Sandf. (N. Y.) 289]; Peach *v.* Utica, 10 Hun (N. Y.) 477; Hyatt *v.* Rondout, 44 Barb. (N. Y.) 385 [*affirmed* in 41 N. Y. 619]; Smith *v.* Wright, 27 Barb. (N. Y.) 621; Hartnall *v.* Ryde Com'rs, 4 B. & S. 361, 10 Jur. N. S. 257, 33 L. J. Q. B. 39, 8 L. T. Rep. N. S. 574, 11 Wkly. Rep. 963, 116 E. C. L. 361. It has been so held with regard to the civil liability of overseers of highways. Hover *v.* Barkhoof, 44 N. Y. 113. In an action against local boards or commissioners in England, for damages growing out of such negligence, it is not necessary to show affirmatively that the commissioners had funds or the means of raising funds to meet any damages which might be recovered against them. Ohrby *v.* Ryde Com'rs, 5 B. & S. 743, 10 Jur. N. S. 1048, 33 L. J. Q. B. 296, 12 Wkly. Rep. 1079, 117 E. C. L. 743. But the rule seems to be different in the United States, where it is sought to recover damages from a surveyor of highways personally. Smith *v.* Wright, 27 Barb. (N. Y.) 621.

81. Rex *v.* Ecclesfield, 1 B. & Ald. 348, 1 Stark. 393, 19 Rev. Rep. 335, 2 E. C. L. 152. Where a turnpike company was indicted for not keeping a bridge in repair on the line of its road, but on an unfinished part thereof, it was held that it was not liable, because its charter provided that its power should cease and be of no effect so far as related to the unfinished part (State *v.* Morris Turnpike Co., 4 N. J. L. 165, 7 Am. Dec. 579); and as will appear from many cases the fact that some other person or corporation is liable to make the reparation in question, is the ground on which such indictments have often been contested (State *v.* Godwinsville, etc., Road Co., 49 N. J. L. 266, 10 Atl. 666, 60 Am. Rep. 611; Rex *v.* West Riding, 5 Burr. 2594, 2 East 342, Lofft 238, 2 W. Bl. 685; Rex *v.* West Riding, 7 East 588; Rex *v.* Sheffield, 2 T. R. 106, 1 Rev. Rep. 442).

82. State *v.* Godwinsville, etc., Road Co., 49 N. J. L. 266, 10 Atl. 666, 60 Am. Rep. 611; Waterford, etc., Turnpike Co. *v.* People, 9

b. In Case of Indictment Against Railway Company For Obstructing Turnpike Road — (I) *In General.* Neither is it a defense to an indictment against a railway company for obstructing a turnpike road that it would require an expenditure of from five thousand dollars to eight thousand dollars, so to lower the bed of the turnpike as to make it pass under the railway and obviate the obstruction.[83]

(II) *No Defense That Legislature Has Given Specific Remedy to Turnpike Company.* Nor does the fact that an act of the legislature gives the turnpike company a specific remedy for an injury to its rights impair the right of the commonwealth to proceed by indictment in such a case or furnish any defense to the indictment on the part of the railroad company.[84]

11. Judgment or Sentence in Criminal Proceeding Against Corporation. As already stated, according to one view, if the corporation fails to appear, a judgment by default may be taken against it as in civil cases.[85] The usual judgment is that the corporation pay a fine; although this is influenced in all cases by statutes; and we have already noted a class of statutes under which the judgment is for a fine or penalty to go to the next of kin or heirs of the person killed through the neglect of the corporation or its servants.[86] The fine as we have seen is assessed against the corporation as a political body, and not against its officers.[87] Where the indictment is for a nuisance, a part of the judgment, under the principle of the common law, is that the nuisance be abated.[88] A sentence that a corporation abate the nuisance is proper, although the nuisance may be situated on the land of another; for the owner of the soil will not be allowed to control the public right to have it abated, and what the law demands to be done for the benefit of the public an individual may not resist.[89]

F. Contempts by Corporations — 1. Corporation Cannot Be Attached For Contempt. There are early decisions to the effect that a corporation cannot be attached for a contempt of court, committed in refusing to obey its order or judgment.[90] This is obvious, when it is considered that a corporation is intangible, and has no body that can be arrested or taken by attachment or execution, and that the only means of compelling the attendance of a corporation in a court of justice at common law was by a distraint of its lands or goods.[91]

2. But May Nevertheless Be Punished For Contempt. But we may easily conclude, both upon principle and modern authority, that a corporation may be punished for those contempts which consist in the disobedience of the judgments, decrees, or orders of a court of justice, made in a case within its jurisdiction.[92]

3. Corporate Officers Punishable For Contempt — a. In General. In order to include the officers and agents of a corporation in an injunctive order directed against the corporation, it is usual to lay the restraint or command not only upon the corporation itself but also upon its officers, agents, and servants; and it is understood that in the case of its violation not only the corporation itself is amenable to punishment, but also its officers, agents, and servants, whether parties to

Barb. (N. Y.) 161; Simpson *v.* State, 10 Yerg. (Tenn.) 525.

83. Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300.

84. Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300. That a turnpike is a public highway in such a sense that an indictment will lie for obstructing it as a public nuisance see Com. *v.* Wilkinson, 16 Pick. (Mass.) 175, 26 Am. Dec. 654.

85. Boston, etc., R. Co. *v.* State, 32 N. H. 215.

86. See *supra*, XIX, E, 3, d, (II).

87. State *v.* Barksdale, 5 Humphr. (Tenn.) 154.

88. State *v.* Morris, etc., R. Co., 23 N. J. L. 360, 370 (per Green, C. J.); Reg. *v.* Cluworth, 6 Mod. 163, 1 Salk. 359; Rex *v.* Stead, 8 T. R. 142; 1 Hawkins P. C. c. 75, § 14.

89. Delaware Division Canal Co. *v.* Com., 60 Pa. St. 367, 100 Am. Dec. 570 [*citing* Smith *v.* Elliott, 9 Pa. St. 345].

As to indictment for offenses against corporations and their property see 5 Thompson Corp. § 6444, and cases there collected.

90. Smith *v.* Butler, Comb. 326; Guilford *v.* Mills, 2 Keb. 1; Mills' Case, T. Raym. 152.

91. Davis *v.* New York, 1 Duer (N. Y.) 451. See also *supra*, XIX, E, 7, a.

92. Rochester, etc., R. Co. *v.* New York, etc., R. Co., 48 Hun (N. Y.) 190, 15 N. Y.

the proceeding or not, provided they have knowledge of the terms of the order and disobey it wilfully.[93]

b. What Appearance by Corporate Officer Will Give Court Jurisdiction Over Him. Where it appeared that defendant, in a proceeding for contempt, was the president of an insolvent corporation, and that a rule *nisi* had been served upon him to show cause why he should not turn over the assets of the corporation to a receiver, in accordance with an order previously entered against the corporation, and he came into court, answered in his individual capacity, and took part in the proceedings by objecting to evidence and cross-examining witnesses, it was held that the court acquired such jurisdiction over him as would authorize it to deal with him for contempt in not obeying the order.[94]

4. Attorneys For Corporations Punishable For Contempt as Officers of the Court. The attorneys of a corporation may be made amenable to process of contempt, not so much upon the ground of being agents of the corporation, as on the ground of being officers of the court, and privy to the proceedings before the court in which they represent the corporation as counsel.[95]

XX. Insolvent Corporations.

A. Assignments For Creditors — 1. Power of Corporation to Make Assignment For Benefit of Its Creditors — a. In General. Every corporation which has the power to contract debts has, at common law and in the absence of restraints imposed by charter or statute, the power to make an assignment of all its property to a trustee for the benefit of its creditors.[96]

St. 686; People *v.* Albany, etc., R. Co., 12 Abb. Pr. (N. Y.) 171, 20 How. Pr. (N. Y.) 358.

93. 4 Wait Pr. 206 [*quoted* with approval in Tolleson *v.* People's Sav. Bank, 85 Ga. 171, 11 S. E. 599]. See also McKim *v.* Odom, 3 Bland (Md.) 407.

94. Tolleson *v.* People's Sav. Bank, 85 Ga. 171, 11 S. E. 599.

95. Accordingly it has been held that where, in an action by a creditor against a banking corporation, to wind up its affairs on the ground of insolvency, a temporary order is made, restraining defendant, its officers and agents, from paying out the funds or otherwise disposing of the effects of the corporation, it is a constructive contempt by the attorneys of defendant to advise its officers and shareholders to file a petition in bankruptcy, with a view of removing its property beyond the jurisdiction of the court, but not a contempt of such a nature as to warrant their suspension or removal as attorneys. Watson *v.* Citizens' Sav. Bank, 5 S. C. 159.

96. *Alabama.* — Chamberlain *v.* Bromberg, 83 Ala. 576, 3 So. 434; Pope *v.* Brandon, 2 Stew. 401, 20 Am. Dec. 49.

Arkansas.— Ringo *v.* Biscoe, 13 Ark. 563; *Ex p.* Conway, 4 Ark. 302.

Connecticut.—Catlin *v.* Eagle Bank, 6 Conn. 233.

Illinois.— Fietsam *v.* Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; Whithed *v.* J. Walter Thompson Co., 86 Ill. App. 76 [*affirmed* in 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51].

Iowa.— Buell *v.* Buckingham, 16 Iowa 284, 296, 85 Am. Dec. 516, per Dillon, J.

Maryland.— Tennessee Union Bank *v.* Ellicott, 6 Gill & J. 363; State *v.* State Bank, 6 Gill & J. 205, 26 Am. Dec. 561.

Massachusetts.— Sargent *v.* Webster, 13 Metc. 497, 46 Am. Dec. 743; Boston Glass Manufactory *v.* Langdon, 24 Pick. 49, 35 Am. Dec. 292; Revere *v.* Boston Copper Co., 15 Pick. 351; Russell *v.* McLellan, 14 Pick. 63.

Michigan.— Boynton *v.* Roe, 114 Mich. 401, 72 N. W. 257; Covert *v.* Rogers, 38 Mich. 363, 31 Am. Rep. 319; Town *v.* River Raisin Bank, 2 Dougl. 530.

Mississippi.— Grand Gulf R., etc., Co. *v.* State, 10 Sm. & M. 428; Montgomery *v.* Commercial Bank, Sm. & M. Ch. 632; Robins *v.* Embry, Sm. & M. Ch. 207.

Missouri. — Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865; Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260; Hutchinson *v.* Green, 91 Mo. 367, 1 S. W. 853; Shockley *v.* Fisher, 75 Mo. 498.

New York.— Vanderpoel *v.* Gorman, 140 N. Y. 563, 35 N. E. 932, 56 N. Y. St. 503, 24 L. R. A. 548, 37 Am. St. Rep. 601; De Ruyter *v.* St. Peter's Church, 3 N. Y. 238 [*affirming* 3 Barb. Ch. 119]; Hurlbut *v.* Carter, 21 Barb. 221; Hoyt *v.* Shelden, 3 Bosw. 267; Workum *v.* Caldwell, 27 Misc. 72, 58 N. Y. Suppl. 175 [*distinguishing* Tindel *v.* Park, 154 Pa. St. 36, 26 Atl. 300]; People *v.* U. S. Law-Blank, etc., Co., 24 Misc. 535, 53 N. Y. Suppl. 852, 27 N. Y. Civ. Proc. 351 (subject, in New York, to the restriction that it shall not contain preferences); Home Bank *v.* Brewster, 17 Misc. 442, 41 N. Y. Suppl. 203 (although assignments for preferences are forbidden by statute).

Pennsylvania. — Ardesco Oil Co. *v.* North

b. What Corporations May Make Such Assignments — (I) *In General.* Under this principle a banking corporation,[97] a manufacturing corporation,[98] a trading corporation,[99] a building association,[1] or even an incorporated religious society,[2] may make an assignment of all its assets for the benefit of its creditors, and in some cases with preferences, as we shall hereafter see.[3]

(II) *Foreign Corporations.* A foreign corporation may make an assignment of its property for the benefit of its creditors in Pennsylvania, although prohibited by statute from so doing in the state in which it was organized;[4] and so it may in South Dakota, although it has transacted all its business in that state in violation of a statute;[5] for, although the corporation may have violated the law in contracting the debts, it does not violate any law in turning over its property to make a ratable payment of them. Statutes not embodied in the charters of corporations prohibiting assignments and confessions of judgment by corporations, in contemplation of bankruptcy or insolvency, have no extraterritorial operation, and hence do not apply to foreign corporations.[6]

c. What Is, and What Is Not, a Common-Law Assignment For Creditors. Where a corporation, being deeply indebted, gave mortgages to certain creditors, as trustees for themselves and certain other named creditors, and the trustees began proceedings to foreclose, and a receiver was appointed, with the debtor's consent, with power to continue the business, it was held that the proceedings did not constitute a common-law assignment for the benefit of creditors, and hence an unsecured creditor was not entitled to share in the benefit of the mortgages.[7] An instrument made by the secretary of a corporation under the direction

American Oil, etc., Co., 66 Pa. St. 375; Zucker *v.* Froment, 5 Pa. Dist. 579 (power of officers to make an assignment cannot be challenged by a creditor, but only by shareholders).

South Carolina.— Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888, not invalid for want of a vote of the shareholders, since the statute requiring such vote does not apply to assignments for creditors.

South Dakota.— Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706.

Tennessee.— Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. 403.

Texas. — Miller *v.* Goddman, 91 Tex. 41, 40 S. W. 718 [*affirming* 15 Tex. Civ. App. 244, 40 S. W. 743]; Birmingham Drug Co. *v.* Freeman, 15 Tex. Civ. App. 451, 39 S. W. 626.

Washington.— Cerf *v.* Wallace, 14 Wash. 249, 44 Pac. 264 (although it cannot make a statutory assignment); McKay *v.* Elwood, 12 Wash. 579, 41 Pac. 919; Nyman *v.* Berry, 3 Wash. 734, 29 Pac. 557.

Wisconsin.— Binder *v.* McDonald, 106 Wis. 332, 82 N. W. 156, power exists independently of statute governing voluntary assignments.

See also Ames, etc., Co. *v.* Heslet, 19 Mont. 188, 47 Pac. 805, 61 Am. St. Rep. 496; and note to Sidell *v.* Missouri Pac. R. Co., 78 Fed. 724, 24 C. C. A. 216.

See 12 Cent. Dig. tit. "Corporations," § 2190.

97. *Arkansas.*— *Ex p.* Conway, 4 Ark. 302.

Georgia.— McCallie *v.* Walton, 37 Ga. 611, 95 Am. Dec. 369.

Maryland.—State *v.* State Bank, 6 Gill & J. 205, 26 Am. Dec. 561.

New Hampshire.— Flint *v.* Clinton Co., 12 N. H. 430.

New York.— Haxtum *v.* Bishop, 3 Wend. 13.

Pennsylvania. — Dana *v.* U. S. Bank, 5 Watts & S. 223.

Tennessee.— Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. 403.

Vermont.— Warner *v.* Mower, 11 Vt. 385.

United States.—Lenox *v.* Roberts, 2 Wheat. 373, 4 L. ed. 264, in effect.

98. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

99. Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49.

1. Harvey *v.* Cubbedge, 75 Ga. 792.

2. De Ruyter *v.* St. Peter's Church, 3 N. Y. 238 [*affirming* 3 Barb. Ch. (N. Y.) 119]. In this case the religious corporation had power "to sell" with the concurrence of the chancellor, and, without his concurrence, power "to give, grant, demise, lease, or otherwise dispose of" its property. It was held that it had power to make an assignment for the benefit of its creditors, under an order from the vice-chancellor, exercising, under another statute (1 N. Y. Rev. Stat. 168, § 2), the power to sell its property, the jurisdiction of the chancellor first having been obtained.

3. See *infra*, XX, B, 1, a *et seq.*

4. Benevolent Order, etc., *v.* Sanders, 28 Wkly. Notes Cas. (Pa.) 321.

5. Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706.

6. Worthington *v.* Pfister Bookbinding Co., 3 Misc. (N. Y.) 418, 23 N. Y. Suppl. 295, 52 N. Y. St. 448; Borton *v.* Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597.

7. Longley *v.* Amazon Hosiery Co., 128 Mich. 194, 87 N. W. 209.

of the board of directors, conveying all the assets of the insolvent debtor to an assignee for the benefit of all its creditors in proportion to their respective claims, is a general assignment under the Texas statutes, and it is the duty of the assignee to cause the instrument to be recorded and to execute a bond with sureties.[8] Where, after the institution of such a suit, and the appointment of a receiver therein, the corporation executes a conveyance of all its property to the receiver in his official capacity, such conveyance is in effect one made under the insolvency statute of the state, and not a voluntary common-law assignment, and as such it operates only on property within the state. As to property in other states it has only such effect as may be given it by their laws, and in general must give way to the claims of the creditors pursuing their remedies there.[9]

2. EFFECT OF STATUTES ON POWER TO MAKE ASSIGNMENT FOR BENEFIT OF CREDITORS. A statute providing for assignments by insolvent debtors, which enacted that no assignment by any debtor, otherwise than as therein provided, should be legal or binding as against creditors, has been held not to include assignments by corporations, but a common-law assignment by a corporation is valid.[10] A statute prohibiting corporations of a stated class from giving preferences to their creditors when insolvent does not impair the common-law power to make assignments for creditors without preferences.[11]

3. WHAT PASSES BY SUCH ASSIGNMENTS — a. Choses in Action. There is no doubt that the general power of a corporation to assign its property to a trustee for the benefit of its creditors enables it to assign or pledge its choses in action for such purpose.[12]

b. Unpaid Stock Subscriptions — (i) *In General.* Such an assignment passes the unpaid stock subscriptions;[13] and it follows that creditors cannot maintain

8. Birmingham Drug Co. *v.* Freeman, 15 Tex. Civ. App. 451, 39 S. W. 626.

9. Huntington *v.* Chesapeake, etc., R. Co., 98 Fed. 459.

10. McKay *v.* Elwood, 12 Wash. 579, 41 Pac. 919; Nyman *v.* Berry, 3 Wash. 734, 29 Pac. 557.

11. Creteau *v.* Foote, etc., Glass Co., 54 N. Y. App. Div. 168, 66 N. Y. Suppl. 370, 31 N. Y. Civ. Proc. 265; Hurlbut *v.* Carter, 21 Barb. (N. Y.) 221; Hill *v.* Reed, 16 Barb. (N. Y.) 280; *In re* Bowery Bank Case, 5 Abb. Pr. (N. Y.) 415.

Further decisions with respect to the operation of statutes on assignments by corporations for the benefit of their creditors are to the following effect: That Ky. Stat. § 561, empowering corporations to close their business and wind up their affairs does not apply to assignments for the benefit of creditors, see U. S. Building, etc., Assoc. *v.* Reed, 62 S. W. 1020, 23 Ky. L. Rep. 342. That the operation of the statute of Missouri, providing for a proceeding by the superintendent of insurance to wind up insolvent insurance companies, necessarily precludes the power on the part of such a company to make a general assignment for its creditors, and that any such attempted assignment is void, see McCoy *v.* Connecticut F. Ins. Co., 87 Mo. App. 73. That an ordinary proceeding by an officer of a corporation to recover a claim against the corporation is not within the statute of New York (N. Y. Laws (1890), c. 564, § 48) prohibiting assignments to its officers, see Worthington *v.* Pfister Bookbinding Co., 3 Misc. (N. Y.) 418, 23 N. Y. Suppl. 295, 52 N. Y. St. 448. That an assignment for the benefit of all its creditors by an insolvent corporation may be defeated by the commencement of proceedings by an existing creditor within sixty days after the registration of the deed of assignment, under N. C. Laws, § 685, providing for the defeat in such manner of "any conveyance of its property, whether absolute or upon condition, in trust or by way of mortgage," executed by the corporation, see Wilson Cotton Mills *v.* C. C. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770 [*rehearing denied* in 116 N. C. 647, 21 S. E. 431]. That the New York statute of 1825 "to prevent fraudulent bankruptcies by incorporated companies," etc., applied to the New York and Erie Railroad Company so as to invalidate any assignment made by that company in view of its insolvency, see Bowen *v.* Lease, 5 Hill (N. Y.) 221. As to validity of an assignment under statutes providing that no bank shall make assignments in favor of creditors and authorizing the bank commissioners to take possession of assets in insolvency see Rossman *v.* McFarland, 9 Ohio St. 369. Reviewing such an assignment by appeal where it was made pending suit in chancery begun by attachment see Hall *v.* Virginia Bank, 14 W. Va. 584.

12. Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Nelson *v.* Edwards, 40 Barb. (N. Y.) 279.

13. Chamberlain *v.* Bromberg, 83 Ala. 576, 3 So. 434; Eppright *v.* Nickerson, 78 Mo. 482; Shockley *v.* Fisher, 75 Mo. 498; Boeppler *v.* Menown, 17 Mo. App. 447; Lionberger *v.* Broadway Sav. Bank, 10 Mo. App. 499;

actions against the shareholders to enforce the payment of balances due to the corporation upon their subscriptions, because these are collectable by the assignee alone;[14] and it has been held immaterial that for whatever cause the assignee has failed to bring suit within two years.[15] The assignment of such a credit will pass without express words in the deed. It will be deemed to pass by general words which import that the corporation intends to assign all its assets for the benefit of its creditors.[16]

(II) *Does Not Pass Power to Assess Unpaid Shares or Premium Notes.* But such an assignment does not pass to the assignee the power ordinarily exercised by the directors of the corporation of assessing the share subscriptions, or, in case of a mutual insurance company, the premium notes;[17] but in the absence of a statute empowering the assignee to make such assessments it can be made only by a court of equity or by the court superintending the administration of the assigned estate;[18] although it has been held that where the total amount due and payable from all the shareholders will be not more than sufficient to pay the debts of the corporation no previous assessment, either by the corporation or by a court of equity, is necessary, but that the assignee may sue for the full unpaid balance.[19]

(III) *But Court Superintending Administration May Make Assessment.* But the court which has the superintendence of the administration may make an order requiring the payment of unpaid stock subscriptions, the same as the directors, under the authority vested in them, might have done, while the corporation was a going concern.[20] After such an assessment has been made (or where, under one theory, the whole amount will be required to liquidate the debts, without an assessment being made),[21] the assignee may maintain an appropriate action, either at law or in equity, to collect the portion assessed against the respective shareholders. In Missouri it has been held that he may maintain a suit in equity, against the corporation and its shareholders, to recover such unpaid subscriptions; and it is no objection to the equitable proceeding that certain creditors of the corporation have already proceeded against certain shareholders, by motion under a statute, to subject to the payment of their debts what is due to the corporation by such shareholders in respect of their shares, the statutory remedy being merely cumulative and not exclusive.[22] A call made by the court

Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866. See also Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57; Hatch *v.* Dana, 101 U. S. 205, 25 L. ed. 885; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349.

14. St. Louis Sav. Assoc. *v.* O'Brien, 51 Hun (N. Y.) 45, 3 N. Y. Suppl. 764, 20 N. Y. St. 826; Hamilton *v.* Glenn, 85 Va. 901, 9 S. E. 129. The right to collect unpaid subscriptions passed by an assignment under the late bankrupt law. Hatch *v.* Dana, 101 U. S. 205, 25 L. ed. 885; Glenny *v.* Langdon, 98 U. S. 20, 25 L. ed. 43; Erwin *v.* U. S., 97 U. S. 392, 24 L. ed. 1065; Webster *v.* Upton, 91 U. S. 65, 23 L. ed. 384; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220.

15. Lane *v.* Nickerson, 99 Ill. 284. See also Trimble *v.* Woodhead, 102 U. S. 647, 26 L. ed. 290.

16. Lionberger *v.* Broadway Sav. Bank, 10 Mo. App. 499. To the same effect is Eppright *v.* Nickerson, 78 Mo. 482. It seems that in Massachusetts such an assignment does not by its own vigor pass the liability of shareholders and directors; because we find a decision in that state where, interpreting such a deed of assignment, to which the particular creditor was a party, it was held that it did not operate to release his right to bring an action against the corporation and the shareholders, to enforce their statutory liability. The reasoning of the court assumes that the right to enforce the statutory liability of shareholders and directors remains in the creditors, and does not pass by an assignment; and all it holds is that the language of the particular deed of assignment ought not to be construed as showing an intent to release such a right. Nonantum Worsted Co. *v.* Holliston Mills, 149 Mass. 359, 21 N. E. 670.

17. Hurlbut *v.* Carter, 21 Barb. (N. Y.) 221.

18. Boeppler *v.* Menown, 17 Mo. App. 447. *Compare* Shulz *v.* Sutter, 3 Mo. App. 137.

19. Boeppler *v.* Menown, 17 Mo. App. 447.

20. Marson *v.* Deither, 49 Minn. 423, 52 N. W. 38. See also *supra*, VIII, B, 4, c, (III).

21. Boeppler *v.* Menown, 17 Mo. App. 447.

22. Lionberger *v.* Broadway Sav. Bank, 10 Mo. App. 499. It was at one time reasoned that such an assignment passes only the right to collect such subscriptions, where calls have been previously made by the directors, and

upon the shareholders in the exercise of this power does not of course determine their liability; it merely makes due and payable any sum for which they may be justly liable; suit may be brought therefor by the assignee subject to any defenses which they may have against it.[23] The authority of the court to order the call depends upon the necessity of making it in order to raise money to liquidate the debts of the corporation.[24]

c. Passes What Franchises. In the absence of an enabling statute, such an assignment passes only those franchises which are in the nature of property belonging to the corporation and does not pass those primary or unalienable franchises which the corporation cannot sell because they are not its property. Such an assignment does not therefore entitle the assignee to an order of court granting him leave to sell "all the rights, privileges, powers and immunities which were granted by said act incorporating said bank."[25]

d. Whether Passes Rights of Action Ex Delicto. Such an assignment, according to some opinion, passes the right of action which the corporation may have *ex delicto* against its directors to recover damages for their mismanagement of its affairs.[26]

4. Assignments Made by Directors — a. Power of Directors to Make Such Assignment Without Authorization of Shareholders. Such an assignment does not necessarily destroy the corporation, and is therefore not strictly a constituent act, but rather a business act done in pursuance of the duty of the directors to provide for the payment of the debts of the corporation.[27] It follows that the directors have the discretionary power to make an assignment of all the assets of the corporation for a ratable distribution among its creditors, without the assent of the shareholders, and even in opposition to their will,[28] unless the charter or governing statute enacts or implies the contrary.[29] Assuming that the authority

where the corporation has the present right to sue. Shultz *v.* Sutter, 3 Mo. App. 137. But this conception really involved the result that a chose in action may be assigned in part, which is not the law, the right to assign a part of a chose in action being denied, because it operates to multiply lawsuits and oppress debtors. Love *v.* Fairfield, 13 Mo. 300, 53 Am. Dec. 148; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87. Subsequently it was held in Missouri, in the cases first above cited, that such an assignment passed both the called and uncalled stock subscriptions. Upon the question whether such an assignment passes the individual superadded statutory liability of shareholders there is a difference of opinion. The superadded individual liability of shareholders in national banks is enforceable by the receiver. 3 Thompson Corp. § 3561. That an individual statutory liability does not pass under general words in a deed of assignment see Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. (Tenn.) 1, 53 Am. Dec. 742.

23. *Re* Minnehaha Driving Park Assoc., 53 Minn. 423, 55 N. W. 598.

24. *Re* Minnehaha Driving Park Assoc., 53 Minn. 423, 55 N. W. 598.

25. Fietsam *v.* Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492. *Compare* Lehigh Iron Co.'s Estate, 12 Pa. Co. Ct. 257.

26. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. See also *supra*, VI, P, 11, f, (IV).

27. See the observations of Black, J., in Hutchinson *v.* Green, 91 Mo. 367, 375, 1 S. W. 853.

28. Hutchinson *v.* Green, 91 Mo. 367, 1 S. W. 853; Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239 [*qualifying* Eppright *v.* Nickerson, 78 Mo. 482, where it was held that such an assignment, if made by the directors without the consent of the shareholders, would be *ultra vires* and void, but only against the shareholders; and that a creditor of the corporation could not make the objection].

29. *Connecticut.*—Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

Indiana.— De Camp *v.* Alward, 52 Ind. 468.

Maryland.— Merrick *v.* Metropolis Bank, 8 Gill 59.

Massachusetts.— Sargent *v.* Webster, 13 Metc. 497, 46 Am. Dec. 743.

Minnesota. — Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400, 43 N. W. 60, under a statute.

Missouri.— Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260; Hutchinson *v.* Green, 91 Mo. 367, 1 S. W. 853; Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239; Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429.

Pennsylvania. — Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375; Dana *v.* U. S. Bank, 5 Watts & S. 223; Boardman *v.* Keystone Standard Watch Case Co., 8 Lanc. L. Rev. 25. To the same effect see Le-

of the shareholders may be necessary in a particular case, then it is held that the assignment is presumed to have been made by their authority until the contrary is shown.[30]

b. Validated by Ratification, Acquiescence, or Laches. Such an assignment, even if made without original power on the part of the directors, would be validated by the subsequent assent or acquiescence of the shareholders;[31] and on the other hand a shareholder may be precluded by his laches from questioning such an assignment.[32] Although made without the authority of the shareholders which in the particular case may be necessary, yet if it has been acquiesced in for a considerable time, or if the shareholders have taken positive affirmative action under it, and if its impeachment would disturb the *status quo*, the shareholders will be barred by their laches and acquiescence from contesting its validity to the prejudice of other parties.[33]

c. Validity of Assignments Made by Directors De Facto. Such an assignment cannot be impeached at the instance of shareholders in a collateral proceeding, on the ground that some of the directors were not legally elected, where they were directors *de facto*.[34] The principle which upholds the acts of the directors of a corporation, who are such *de facto*, although possibly not *de jure*,[35] upholds an assignment made for the benefit of creditors by a board of directors elected outside the state creating the corporation.[36]

d. Directors Do Not Execute Instrument Personally. The directors do not exercise the power held to exist in them by the decisions cited above, by formally executing the assignment themselves. They authorize the proper officers of the corporation to execute it.[37]

5. Formalities Required in Making Assignment — a. In General. Where there is a statute providing the formalities necessary in making a deed of assignment by a corporation for the benefit of its creditors, that of course must be followed.[38] Where there is no such statute, the instrument of assignment ought to fulfil the requisites of a formal deed of the corporation to pass the property intended to be passed by it, whether real or personal.[39]

b. Necessity of Using Corporate Seal. A *bona fide* assignment has been held good, notwithstanding the corporate seal was not used.[40]

c. Informalities Which Do Not Vitiate. A tendency is discovered to overlook informalities in such deeds of assignment, when they are not matter of substance,

high Iron Co.'s Estate, 12 Pa. Co. Ct. 257; Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706. There is a note on this subject in 19 Am. & Eng. Corp. Cas. 128.

30. Young *v.* Improvement Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670. In Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59, there was previous authorization by the shareholders.

31. Lehigh Iron Co.'s Estate, 12 Pa. Co. Ct. 257. See also *supra*, XV, C, 2, e.

32. Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239. See also *supra*, XI, B, 15, a *et seq.*

33. Young *v.* Improvement Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670.

34. Boardman *v.* Keystone Standard Watch Case Co., 8 Lanc. L. Rev. 25.

35. See *supra*, IX, B, 1 *et seq.*

36. Milliken *v.* Steiner, 56 Ga. 251; Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706.

37. Thus an assignment of all the property and assets of a bank to certain trustees for the benefit of creditors, executed by the president of the corporation and sealed with its seal, in pursuance of an ordinance of the board of directors, was held valid in *Ex p.* Conway, 4 Ark. 302. In the case of a bank, where the assets to be assigned consist of securities, they may, it has been held, authorize the president or one of their own number to assign such securities. Stevens *v.* Hill, 29 Me. 133; Northampton Bank *v.* Pepoon, 11 Mass. 288; Spear *v.* Ladd, 11 Mass. 94. And see Bank Com'rs *v.* Brest Bank, Harr (Mich.) 106.

38. Tripp *v.* Northwestern Nat. Bank, 45 Minn. 383, 48 N. W. 4, where it was held that a resolution by the directors of an insolvent corporation, authorizing its officers to assign all its assets for the equal benefit of all its creditors, is sufficient to authorize such an assignment, under the Minnesota Insolvent Law of 1881, as against a subsequent attachment of the corporate property. See also *supra*, XII, B, 1, a *et seq.*

39. Thus in Texas, where the use of the corporate seal is necessary to convey land, an unsealed instrument of assignment is invalid, although the inventory shows only personalty. Shropshire *v.* Behrens, 77 Tex. 275, 13 S. W. 1043.

40. Teitig *v.* Boesman, 12 Mont. 404, 31 Pac. 371. But see Shropshire *v.* Behrens, 77 Tex. 275, 13 S. W. 1043.

where the assignee enters upon the discharge of his duties and obtains possession and control of the property. It was so held even where the deed was not made by any authorized officer of the corporation.[41] The following informalities have been held not to render such an assignment void: That the board of trustees of the corporation had not been reëlected and maintained to the extent of the number required by the statute; that the assignment was not authorized at a regular meeting of the shareholders or of the trustees; that no corporate seal was affixed to the instrument of assignment, it appearing that no seal had ever been adopted by the corporation; it further appearing that the corporation had been created with but three members, who had elected themselves as its trustees, and that, upon one of them retiring, it had sunk to the status of a mere joint-stock partnership, the two remaining shareholders being in substance the absolute owners of the property assigned;[42] that the notice of the shareholders' meeting at which the assignment was authorized to be made was given to the transferees, and not to the transferrers, of certain shares, the transfers of which were insufficient to pass the legal title, because not formally made on the transfer-books;[43] and that the schedule attached to the deed of assignment is defective or that no schedule at all is attached.[44]

d. Necessity of Assent of Assignee or Trustee. There is no necessity that the assignee, trustee, or trustees to whom the assignment is made should join in the execution of the deed,[45] or enter into covenants to perform the trusts. The moment the deed is made, the right of property passes and vests in the assignee, trustee, or trustees named therein, and the relation of trustee and *cestui que trust*, as between them and the creditors, is at once established, so that the corporation cannot recall the deed.[46] Any act done by them which shows their assent will make the deed obligatory upon them; and equity will enforce the trust, and will not allow it to fail for want of a trustee.[47]

e. Necessity of Recording. In respect of the necessity of recording such a deed of assignment, it has been held that the act of one bank delivering to another a mass of notes and bills of exchange, as collateral security for an advance to be used in redeeming the notes of the bank executing the pledge, is not an assignment for the benefit of creditors, within a statute requiring such an assignment to be recorded, and that such a delivery is not invalid for that reason.[48]

f. Effect of Ratification of Informal or Invalid Assignments. An assignment which is invalid by reason of some informality which is not so serious that it cannot be cured by a ratification, as for example an assignment executed by the vice-president without any previous authority from the board of directors, does not, on the principle already stated,[49] become valid by a subsequent ratification in

41. Bell, etc., Co. *v.* Kentucky Glass Works Co., 106 Ky. 7, 48 S. W. 440, 50 S. W. 2, 1092, 20 Ky. L. Rep. 1089, 1684, 51 S. W. 180, 21 Ky. L. Rep. 133, 156.

42. Teitig *v.* Boesman, 12 Mont. 404, 31 Pac. 371.

43. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551, 23 Atl. 795.

44. *Ex p.* Conway, 4 Ark. 302; Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207. Where an insolvent bank executed an assignment of "all and every of its property and effects, rights and credits of each and every kind and character whatsoever, in as full and complete a manner as the same are now owned, held and possessed by it," and the assignee accepted the trust, the right of property passed to them, together with the right to sue for and recover the rights, credits, etc., belonging to the bank. Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

45. *Ex p.* Conway, 4 Ark. 302; Flint *v.* Clinton Co., 12 N. H. 430.

46. *Ex p.* Conway, 4 Ark. 302.

47. *Ex p.* Conway, 4 Ark. 302.

That only a part of the trustees to whom the assignment has been made have signed the deed of assignment has been held no objection to an action to possess themselves of assets being maintained in the names of all, provided they are all before the court; since the court can transfer the possession to those who have signed, and allow them to hold it for the others, and to come in and execute the necessary bonds; and if they fail to come in and execute such bonds within a reasonable time the court can remove them and appoint others. And it has been held that in such a case the trustees who have qualified are entitled to an injunction to aid them in getting possession of the assets of the corporation, the remedy by an action of replevin being inadequate and incomplete. *Ex p.* Conway, 4 Ark. 302.

48. Griffin *v.* Rogers, 38 Pa. St. 382.

49. See *supra*, XV, B, 7, h.

such a sense as to cut off the rights of intervening creditors in a contest for preferences.[50]

6. VALIDITY OF CONDITIONS IN SUCH ASSIGNMENTS. These do not relate specially to corporations, but to the general subject of assignments for the benefit of creditors, and are treated in the article on that subject[51] and are consequently omitted here.

7. CHARTER DETERMINES VALIDITY OF ASSIGNMENT — a. In General. The validity of such an assignment must of course be decided by the charter or governing statute under which the corporation is organized. An assignment contrary to the provisions of the charter will not be upheld.[52]

b. Determined by Law of State of Organization. The validity of such an assignment, in so far as it operates as the foundation of a right of action by the assignee against the shareholders, resident and non-resident, must in general be determined in accordance with the laws of the state creating the corporation, and within which it is domiciled.[53]

c. Validity of Assignments Where Charter Makes Shareholders Liable For Corporate Debts. There is nothing in the suggestion that the charter leaves the shareholders liable for the debts of the corporation which affects the validity of an assignment of all its property for the benefit of its creditors any more than there would be in the case of a natural person who is liable for his own debts.[54]

8. QUESTIONING VALIDITY OF ASSIGNMENT — MAY BE ASSAILED AND SUPPORTED COLLATERALLY. An assignment for the benefit of creditors, not being a judicial proceeding, may of course be assailed and defended collaterally by any person whose interest in the subject-matter of it entitles him so to do. As against a stranger the burden rests upon any person asserting rights under it to show at least that it is valid on its face; and the other party may show that it is invalid by reason of extrinsic facts, as that it was not authorized by a legal meeting of the directors. It has been so held where a judgment creditor proceeded to enforce the liability of shareholders, and they set up by way of defense that there had been a general assignment by the corporation for the benefit of creditors, whereby the sole right to collect money due by them for their stock had passed to the assignee.[55]

9. VALIDITY OF BOARD MEETING AT WHICH ASSIGNMENT WAS AUTHORIZED — a. Regularity of Meeting Presumed Until Contrary Is Shown. If the validity of such an assignment is assailed on the ground that it does not appear that notice of the meeting of the board of directors at which the assignment was authorized had been communicated to all the members of the board, the validity of the authorization will be supported on the presumption of right-acting, unless it appear affirmatively that such notice was not given.[56]

50. Friedman *v.* Lesher, 198 Ill. 21, 64 N. E. 736 [*affirming* 99 Ill. App. 42].

51. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 185 *et seq.*

52. Ringo *v.* Biscoe, 13 Ark. 563.

53. Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866. Previously to this decision the court of appeals of Maryland, examining the question with reference to the decisions in Virginia, had reached the conclusion that the deed was valid under the laws of Virginia. Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688.

54. Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49.

55. Doernbecher *v.* Columbia City Lumber Co., 21 Oreg. 573, 28 Pac. 899, 28 Am. St. Rep. 766.

56. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743 [*quoted* with approval in Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64]. See also Lane *v.* Brainerd, 30 Conn. 565. On like grounds where it was shown in support of the proceedings of the board of directors that notice was sent to the absent directors at their respective residences, it was presumed, in the absence of evidence to the contrary, that the notice specified the purpose for which the meeting had been called. Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64. The record of a meeting of the directors of a corporation, at which an assignment of the assets of the corporation for the benefit of its creditors was made, began as follows: "At a special meeting of the directors . . . called for the purpose of making an assignment of its estate in insolvency for the benefit of all the creditors, pursuant to the statute," etc. It was held that upon this record, until the

b. Regularity of Notice of Meeting. Such an assignment has been held to be not rendered invalid by the circumstance that actual notice was not communicated to the directors who did not attend the meeting, when they were absent at the time from the state, and were notified by telegrams sent to their respective addresses within the state, although such telegrams were not received by them. The reason is that a rule which would require actual notice to be communicated to such of the directors as had departed from the state, in order to the validity of such an assignment, would be a perilous rule; for in such cases the exigency may demand immediate action to save the property and to prevent expense.[57]

c. No Notice Necessary Where All Assemble and Act. On a principle already stated the want of the appropriate notice to the directors will be cured where all assemble and act, or where all, being together, act without objection.[58]

d. Assignment May Be Authorized by Majority of Assembled Quorum. Where the charter, the statute law, the articles of incorporation, the by-laws, or other governing instrument prescribes what shall constitute a quorum of the directors to transact ordinary business, then, if such a quorum is regularly assembled, a majority of this quorum may make an assignment for creditors of the corporation, although this may result in the passage of the resolution by the minority;[59] but not if this quorum has not been duly assembled, in pursuance of the governing statute or other instrument, by the proper legal notice.[60] Nor will it take the case out of the rule that the votes of the absent directors if they had been present would not have changed the result, since they are entitled to be present for the purpose of consultation and of being heard.[61]

10. What Resolution of Directors Will Authorize Such Assignment. It has been held that a resolution of the directors authorizing the president and secretary to execute "judgment notes, chattel mortgages, bills of sale, or other instruments, in their judgment necessary to the financial interest of the company" gives them power to execute an assignment of book-accounts to secure a debt.[62] Another court has held that a resolution of the directors of an insolvent corpo-

contrary was shown, it would be presumed that the purpose of the meeting was specified in the notice sent to the respective directors. Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

57. Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

58. See *supra*, IV, D, 9.

59. Chase *v.* Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260. See also *supra*, IX, E, 3, i.

60. Simon *v.* Sevier Assoc., 54 Ark. 58, 14 S. W. 1101; Doernbecher *v.* Columbia City Lumber Co., 21 Oreg. 573, 28 Pac. 899, 28 Am. St. Rep. 766.

61. See *supra*, IV, D, 2; IX, F, 3, a; Doernbecher *v.* Columbia City Lumber Co., 21 Oreg. 573, 29 Pac. 899, 28 Am. St. Rep. 766 (where a judgment creditor of a corporation sued its shareholders to enforce their liability for unpaid subscriptions for stock. During the pendency of the suit, three of the directors, without any notice to the other two directors, privately met and passed a resolution authorizing the president and secretary to assign all its property for the benefit of its creditors; and in pursuance thereof a deed of assignment was executed. It was held that the assignment was void. Nor did the fact that one of the absent directors was beneficially interested in the judgment on which the suit was based, and was a member of the corporation, excuse the failure to notify him of the meeting).

It has been held that the record of the directors' meeting showing that four of the five directors were in attendance, and that two voted in favor of the adoption of such a resolution and one against it will be sufficient to show its adoption, where the minutes are signed and approved by the president, he being one of the four members present, and there is nothing else to show how he voted. Rollins *v.* Shaver Wagon, etc., Co., 80 Iowa 380, 45 N. W. 1037, 20 Am. St. Rep. 427. But this decision, which sustained the assignment, although some of the relatives of the directors were preferred as creditors, is not entitled to any more respect than the other decisions of the same court, which hold that conveyances by insolvent corporations for the purpose of preferring their own directors as creditors over their general creditors are valid. The record not only did not show that the resolution had been carried by a majority of the quorum present, but it showed the contrary; and the act of the president in authenticating the minutes of the corporation was in no sense a vote upon the resolution, since it would have been his duty to authenticate the minutes, although he had voted against the resolution.

62. Commercial Nat. Bank *v.* Burch, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331 [*modifying* 40 Ill. App. 505].

ration, empowering the vice-president to use all means, to do all acts, and make all deeds considered by him necessary or proper, to conserve the best interests of the association, and to use the corporate seal for such purposes, is large enough to authorize him to make an assignment of the property of the corporation for the benefit of its creditors, notwithstanding a proviso in the same resolution authorizing the treasurer to receive all moneys and to act as manager until the business is closed.[63]

11. EFFECT OF SUCH ASSIGNMENT — a. Does Not Extinguish Corporation. The assignment by a corporation of all its property for the benefit of its creditors does not extinguish it as a corporation, or disable it from maintaining an action, unless the subject-matter of the action passed from it by the assignment;[64] although it may amount to a *de facto* dissolution, such as lets in the remedies of the creditors against shareholders.[65]

b. Effect of Assignment Made Immediately Before Expiration of Charter. Where the directors of a bank, just before the expiration of its charter, transferred the property to trustees for the benefit of the shareholders, the assignment was held to terminate all the interest which the corporation had in the property, and to vest the legal title in the trustees, and the beneficial interest in the shareholders.[66]

c. Does Not Affect Rights Acquired Under Actions Previously Commenced. Such an assignment does not operate to impair rights or to change remedies under actions commenced before the date of the assignment.[67] Such an assignment does not take effect as of the time of the adoption of a resolution of the board of directors to make the same, so as to cut off intervening liens or securities which are not created under such circumstances as to constitute them parts of the assignment.[68]

12. WHO ELIGIBLE AS ASSIGNEE. It has been held that a solicitor of an insolvent corporation, who has advised and been intimately associated with its management, alleged to have been fraudulent, should be removed when appointed by it as its assignee in insolvency.[69] The fact that the assignee is or has been a shareholder or is himself insolvent does not necessarily disqualify him from exercising the trust, although it is a circumstance which a jury may consider as bearing on the question of the good faith of the assignment.[70] It has even been held that such a deed is not void, although made to the president of the corporation, who in that character executed the deed as grantor.[71] Nor is it invalid because made to persons who under the charter are ineligible to the office of trustees of the corporation.[72]

13. ASSIGNEE MAY MAINTAIN ACTIONS TO COLLECT SHARE SUBSCRIPTIONS. The assignee may of course maintain actions for unpaid share subscriptions, these being a part of the assets of the estate, provided the conditions exist under which

63. Huse *v.* Ames, 104 Mo. 91, 15 S. W. 965.

64. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

65. See *supra*, VIII, P, 1, e, (I) *et seq.*

66. Stevens *v.* Hill, 29 Me. 133.

67. London, etc., Mortg. Co. *v.* St. Paul Park Imp. Co., 84 Minn. 144, 86 N. W. 872. *Compare* Leavitt *v.* Tylee, 1 Sandf. Ch. (N. Y.) 207.

68. Pollak Co. *v.* Muscogee Mfg. Co., 108 Ala. 467, 18 So. 611, 54 Am. St. Rep. 165.

69. Failey *v.* Stockwell, 2 Pa. Dist. 197, 12 Pa. Co. Ct. 403.

70. Covert *v.* Rogers, 38 Mich. 363, 31 Am. Rep. 319.

71. Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49.

72. De Ruyter *v.* St. Peter's Church, 3 N. Y. 238. There is one extraordinary decision to the effect that an assignment made by a governing board of a banking corporation to fifteen trustees, all of them shareholders and ten of them members of the board making the assignment, the ten constituting a two-thirds' majority of such board, is not for that reason invalid. *Ex p.* Conway, 4 Ark. 302. An apology is due to the profession for even citing this decision. That the assignee, when it is a trust company, need not qualify by giving a bond provided by a trust company, but may, when such proceeding is authorized by the statute law, deposit securities with the state see Roane Iron Co. *v.* Wisconsin Trust Co., 99 Wis. 273, 74 N. W. 818, 67 Am. St. Rep. 856.

an action might have been maintained by the corporation in the absence of any assignment.[73]

B. Preferring Creditors — 1. Doctrine That Insolvent Corporation Cannot Prefer Particular Creditors — a. Statement of Doctrine. There are two doctrines upon this subject. One is that the assets of a corporation are a trust fund for its creditors;[74] that when the corporation becomes insolvent or when its affairs reach such a state that its shareholders or directors find themselves obliged to deal with its assets in view of its approaching suspension, they can deal with them only in the character of trustees for its creditors; that this necessarily means that they can deal with them only as trustees for all its creditors, and not for particular creditors whom they may desire to pay in preference to the others, that is, to pay out of money which equitably belongs to the others. This doctrine in short is that a corporation, being insolvent, or dealing with its funds in contemplation of insolvency, and not in the ordinary course of its business, has no power to prefer particular creditors.[75]

b. Statutory Affirmations of This Doctrine. Statutory affirmations of this doctrine exist under the English Bankruptcy Act of 1883, section 48;[76] under the English Companies Act of 1862, section 164;[77] under the English Companies Clauses Act of 1863, section 24;[78] under the Federal Bankruptcy Law;[79] under

73. Shockley *v.* Fisher, 75 Mo. 498; Nathan *v.* Whitlock, 9 Paige (N. Y.) 152.

74. See *supra*, VI, M, 1, b, (I); VIII, B, 1 *et seq.*

75. *Alabama.*— Corey *v.* Wadsworth, 99 Ala. 68, 11 So. 350, 42 Am. St. Rep. 29, 23 L. R. A. 618; Goodyear Rubber Co. *v.* George D. Scott Co., 96 Ala. 439, 11 So. 370; Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357, 11 So. 365 [all *overruled* in Corey *v.* Wadsworth, 118 Ala. 488, 25 So. 503, 44 L. R. A. 766; O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205, 17 So. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707].

Michigan.— Kendall *v.* Bishop, 76 Mich. 634, 43 N. W. 645, *semble*.

Minnesota.— Tripp *v.* Northwestern Nat. Bank, 45 Minn. 383, 48 N. W. 4, under a statute.

Missouri.—State *v.* Brockman, 39 Mo. App. 131; Kankakee Woolen Mills Co. *v.* Kempe, 38 Mo. App. 229.

New York.— Gillet *v.* Moody, 3 N. Y. 479.

Ohio.— Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378; Remington *v.* Central Press Assoc., 4 Ohio S. & C. Pl. Dec. 337, 3 Ohio N. P. 258; Philips *v.* Ammon-Stevens Co., 3 Ohio S. & C. Pl. Dec. 418, 2 Ohio N. P. 187 (holding that a transfer by an insolvent corporation of all its property to some of its creditors is fraudulent and constitutes a general assignment in trust for all its creditors).

Rhode Island.— Olney *v.* Conanicut Land Co., 16 R. I. 597, 18 Atl. 181, 27 Am. St. Rep. 767, 5 L. R. A. 361.

South Dakota.— Adams, etc., Co. *v.* Deyette, 8 S. D. 119, 65 N. W. 471, 59 Am. St. Rep. 751, 31 L. R. A. 497.

Texas.— Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802 [*affirmed* in 88 Tex. 468, 27 S. W. 100]; Rogers *v.* Southern Pine Lumber Co., 21 Tex. Civ. App. 48, 51 S. W. 26; Florsheim Bros. Dry Goods Co. *v.* Wettermark, 10 Tex. Civ. App. 102, 30 S. W. 505; Harrigan *v.* Quay, (Civ. App. 1894) 26 S. W. 512.

Washington.— Burrell *v.* Bennett, 20 Wash. 644, 56 Pac. 375 (where the relations of the pledgee and the officers of the bank, and their knowledge of its affairs, are such as to advise them of its condition); Van Brocklin *v.* Queen City Printing Co., 19 Wash. 552, 53 Pac. 822; Biddle Purchasing Co. *v.* Port Townsend Steel Wire, etc., Co., 16 Wash. 681, 48 Pac. 407; Conover *v.* Hull, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810; Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

West Virginia.— Hope *v.* Valley City Salt Co., 25 W. Va. 789.

Wisconsin.— Ford *v.* Plankinton Bank, 87 Wis. 363, 58 N. W. 766; Haywood *v.* Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184.

United States.— Smith Middlings Purifier Co. *v.* McGroarty, 136 U. S. 237, 10 S. Ct. 1017, 34 L. ed. 346 (under laws of Ohio); Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62; Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. 496, 11 C. C. A. 320; Consolidated Tank-Line Co. *v.* Kansas City Varnish Co., 45 Fed. 7; Howe *v.* Sanford Fork, etc., Co., 44 Fed. 231; Adams *v.* Kehlor Milling Co., 35 Fed. 433; White, etc., Mfg. Co. *v.* Henry B. Pettes Importing Co., 30 Fed. 864; Lippincott *v.* Shaw Carriage Co., 25 Fed. 577.

76. *In re* Washington Diamond Min. Co., [1893] 3 Ch. 95, 62 L. J. Ch. 895, 69 L. T. Rep. N. S. 27, 41 Wkly. Rep. 681.

77. *In re* Blackburn, [1899] 2 Ch. 725, 68 L. J. Ch. 764, 81 L. T. Rep. N. S. 520, 7 Manson 47, 48 Wkly. Rep. 186.

78. *In re* Mersey R. Co., [1895] 2 Ch. 287, 64 L. J. Ch. 625, 72 L. T. Rep. N. S. 735, 12 Reports 345.

79. Act Cong. July 1, 1898; 30 U. S. Stat. at L. c. 541, p. 544, as amended by Act Cong. Feb. 5, 1903; 32 U. S. Stat. at L. (pt. 1), c. 487, p. 797.

the various state statutes relating to insolvent banks;[80] under the statute of New York relating to moneyed corporations,[81] construed as applicable to insolvent mutual insurance companies;[82] under the New York statute to prevent fraudulent bankruptcies by corporations;[83] under the statute of New York of 1882 relating to transfers by banking corporations of effects exceeding in value one thousand dollars;[84] under the Public Laws of New Jersey of 1896, page 298, section 64;[85] under the Code of North Carolina, section 685,

80. Such as Ga. Code, § 4429. Hill v. Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

81. N. Y. Rev. Stat. 591, §§ 9, 10.

82. Furniss *v.* Sherwood, 3 Sandf. (N. Y.) 521.

83. 3 N. Y. Rev. Stat. (8th ed.) p. 1729, § 4. This statute was intended to prevent an assignment which should give a preference to the officers or shareholders, and to secure the making of a fair dividend among the *bona fide* creditors. An assignment made not in contemplation of insolvency, and made to assignees who are not officers or shareholders of the corporation, in trust for the payment of all its debts *pro rata*, is valid. Hurlbut *v.* Carter, 21 Barb. (N. Y.) 221; Hill *v.* Reed, 16 Barb. (N. Y.) 280; Haxton *v.* Bishop, 3 Wend. (N. Y.) 13; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. (N. Y.) 119. *Contra*, Harris *v.* Thompson, 15 Barb. (N. Y.) 62.

Further as to what payments and transfers this statute avoids see Paulding *v.* Chrome Steel Co., 94 N. Y. 334 (holding that the fact of insolvency at the time of the transfer is not conclusive, but that the act must have been done because of the insolvency); Dutcher *v.* Importers', etc., Nat. Bank, 59 N. Y. 5 (holding that payments made in the usual course of business, under such circumstances that they would have been made if the corporation had been entirely solvent, are not within the prohibition of the statute); Robinson *v.* Attica Bank, 21 N. Y. 406 (holding and illustrating the principle that the statute avoids transfers made after an actual suspension); Curtis *v.* Leavitt, 15 N. Y. 9 [*modifying* 17 Barb. (N. Y.) 309, and holding that both the intent to prefer particular creditors and the insolvency of the corporation must be alleged and proved]; Heroy *v.* Kerr, 8 Bosw. (N. Y.) 194, 21 How. Pr. (N. Y.) 409 (seemingly frittering away the statute by construing the words "in contemplation of insolvency"). What transfers the statute does not avoid see Everson *v.* Eddy, 12 N. Y. Suppl. 872, 36 N. Y. St. 763 (conveyances made when solvent); Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267 (statute does not invalidate rights of *bona fide* subpurchasers for value); New York Fourth Nat. Bank *v.* American Mills Co., 137 U. S. 234, 11 S. Ct. 52, 34 L. ed. 655 (transfer of goods to one who has a valid factor's lien upon them for more than their value, accompanied with possession). How far this statute prohibits preferences obtained by means of actions against the corporation see Varnum *v.* Hart, 119 N. Y. 101, 23 N. E. 183, 28 N. Y. St. 262 [*reversing* 2 Silv. Supreme (N. Y.) 478, 6 N. Y. Suppl. 346, 25 N. Y. St. 755, and holding that the statute only applies to unjust discriminations happening through the affirmative action of the corporation, and not through its negligently suffering creditors to recover judgments by default against it, thereby obtaining preferences]. That a judgment against the corporation is not void under the statute unless recovered by the active procurement of an officer of the corporation see Dickson *v.* Mayer, 12 N. Y. Suppl. 651, 35 N. Y. St. 482, 26 Abb. N. Cas. (N. Y.) 257. This statute does, however, operate to invalidate an attachment levied on the assets of the corporation by a creditor who is one of its directors, although such attaching creditor has no control over the assets at the time of the levy, and although the proceeding is strictly hostile as between him and the corporation. Throop *v.* Hatch Lithographic Co., 125 N. Y. 530, 26 N. E. 742, 35 N. Y. St. 816 [*affirming* 58 Hun (N. Y.) 149, 11 N. Y. Suppl. 532, 33 N. Y. St. 880]. To the same effect is King *v.* Union Iron Co., 11 N. Y. Suppl. 603, 33 N. Y. St. 545. But in such a case no judgment by way of punishment will be rendered against the creditor. King *v.* Union Iron Co., 11 N. Y. Suppl. 603, 33 N. Y. St. 545. For a case not within this principle upon these facts see Bicknell *v.* Speir, 18 N. Y. Suppl. 590, 45 N. Y. St. 651. As this statute has no extraterritorial force it does not forbid a preference made by an insolvent corporation organized under the laws of another state. Hill *v.* Knickerbocker Electric Light, etc., Co., 18 N. Y. Suppl. 813, 45 N. Y. St. 761. *Compare* Demarest *v.* Flack, 128 N. Y. 205, 28 N. E. 645, 40 N. Y. St. 383, 13 L. R. A. 854. See 26 Am. L. Rev. 194; 27 Am. L. Rev. 252; 28 Am. L. Rev. 414; U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 38 N. E. 729. This statute was held in one case to invalidate an assignment made in contemplation of insolvency by a corporation, of all of its property, in trust for the ratable payment of its creditors (Harris *v.* Thompson, 15 Barb. (N. Y.) 62); but as above seen the contrary is the settled construction of the statute.

84. 2 N. Y. Rev. Stat. (8th ed.) p. 1554, §§ 186, 187. This statute invalidated the transfer, in a single transaction, not in the ordinary course of business, by the cashier of a bank, of a number of separate securities, the value of no one of which equaled one thousand dollars, but the aggregate value of which exceeded that sum. Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178, 23 N. Y. St. 155 [*affirming* 43 Hun (N. Y.) 167].

85. Howell *v.* Keen, (N. J. Err. & App. 1899) 43 Atl. 1070 (mortgage executed by

making such transfers voidable as to creditors who commence proceedings to enforce their claims within sixty days after the registration of the deed;[86] under the General Assignment Act of Illinois, which prohibits preferences;[87] under the New York Stock Corporation Law, section 48;[88] under the statute of New

president of corporation to secure an existing indebtedness, void under the statute, notwithstanding a subsequent ratification by the directors, where the ratification was made in contemplation of insolvency); Skirm *v.* Eastern Rubber Mfg. Co., 57 N. J. Eq. 179, 40 Atl. 769 (holding that a mortgage executed by a corporation to secure an issue of proposed bonds, a part of which were afterward issued to its creditors, was void under the statute, the corporation being in fact insolvent at the time); Frost *v.* Barnert, 56 N. J. Eq. 290, 38 Atl. 956 (holding that a corporation organized under the General Corporation Act of New Jersey cannot execute a mortgage to a general creditor to secure his preëxisting debt, although he has no notice of the insolvency of the corporation).

86. Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765, holding that if proceedings are not commenced by the creditors within the sixty days limited by the statute, the conveyance will stand. As to conveyances of directors in that state see Graham *v.* Carr, 130 N. C. 271, 41 S. E. 379.

87. Chicago Title, etc., Co. *v.* Smith, 158 Ill. 417, 41 N. E. 1076, holding that the statute does not invalidate the assignment of a small fraction of the estate of a corporation to a trustee without any intent to make a general assignment under the Insolvent Debtors Act.

88. N. Y. Laws (1892), c. 688, § 48. The statute renders void payments made "with intent to give a preference" while insolvency is imminent and prevents a corporation in contemplation of insolvency from making a general assignment for the benefit of its creditors, even without preferences. Rossman *v.* Seaver, 41 N. Y. App. Div. 603, 58 N. Y. Suppl. 677 [*affirming* 22 Misc. (N. Y.) 661, 51 N. Y. Suppl. 91, and holding that where notes are given by a corporation in part for a prior indebtedness and in part for a present loan, and are split up by an officer of the corporation into sums upon which suit can be brought in an inferior court and judgment recovered at short notice, the actions not being opposed and the appointment of a receiver not being procured until after recovery of judgments therein, such judgments are "suffered," contrary to the statute, and are not valid]; Troy Waste Mfg. Co. *v.* Harrison, 73 Hun (N. Y.) 528, 26 N. Y. Suppl. 109, 56 N. Y. St. 183; Stiefel *v.* New York Novelty Co., 25 Misc. (N. Y.) 221, 55 N. Y. Suppl. 90 (holding that a payment of cash by an insolvent corporation to a creditor constitutes a "transfer" within the meaning of the statute and is void).

What payments are void under this statute.— As to what payments are void under this statute see Lopez *v.* Campbell, 163 N. Y. 340, 57 N. E. 501 [*reversing* 18 N. Y. App. Div. 427, 46 N. Y. Suppl. 91, and holding that as between a judgment rendered in favor of one creditor in November, the officers of the corporation being guilty of no other act than mere non-resistance to the action, the corporation having no valid defense thereto, and an attachment levied by another creditor upon the property of the corporation in the following December, the judgment was not within the condemnation of the statute and would prevail over the attachment]; Hilton *v.* Ernst, 161 N. Y. 226, 55 N. E. 1056 [*affirming* 38 N. Y. App. Div. 94, 57 N. Y. Suppl. 908, holding that an assignment of accounts which had been made to take the place of accounts previously assigned, and which had been wrongfully collected by the corporation, was invalid]; Creteau *v.* Foote, etc., Glass Co., 54 N. Y. App. Div. 168, 66 N. Y. Suppl. 370, 31 N. Y. Civ. Proc. 265 (holding that the statute operates to prevent a judgment creditor from maintaining an action to set aside an assignment for the benefit of creditors, since the maintenance of such action would operate to give him a preference over other creditors); Lodi Chemical Co. *v.* National Lead Co., 41 N. Y. App. Div. 535, 58 N. Y. Suppl. 717 [*modifying* 25 Misc. (N. Y.) 97, 54 N. Y. Suppl. 668, holding that the failure of creditors of an insolvent domestic corporation to make themselves parties before judgment to an action brought on their behalf to set aside transactions and judicial proceedings as conferring an unlawful preference under this statute does not deprive them of their distributive share of the assets of the debtor corporation, or entitle the plaintiff to a priority over them in the payment of his judgment]; Halpin *v.* Mutual Brewing Co., 20 N. Y. App. Div. 583, 47 N. Y. Suppl. 412 (avoiding notes given by an insolvent corporation to its officer for the purpose of putting the claim in such a shape that he could collect it readily, thus acquiring a preference over other creditors); Baker *v.* Emerson, 4 N. Y. App. Div. 348, 38 N. Y. Suppl. 576, 74 N. Y. St. 203; Milbank *v.* De Riesthal, 82 Hun (N. Y.) 537, 31 N. Y. Suppl. 522, 64 N. Y. St. 199 (holding that a judgment for a valid debt against an insolvent corporation which neither interposes any defense nor renders any assistance to plaintiff is not, without more, "a judgment suffered" within the meaning of the statute, and that it is hence valid); Dudensing *v.* Jones, 27 Misc. (N. Y.) 69, 58 N. Y. Suppl. 178; Stiefel *v.* New York Novelty Co., 25 Misc. (N. Y.) 221, 55 N. Y. Suppl. 90 (holding that the statute applies as well to preferential payments of debts contracted before, as to those contracted after, the statute took effect); Lodi Chemical Co. *v.* Charles H. Pleasants Co., 25 Misc. (N. Y.) 97, 54 N. Y. Suppl. 668 [*citing* Hayden *v.* Chemical Nat. Bank, 84 Fed. 874, 28 C. C. A.

York[89] providing that no corporation which shall have refused to pay its obligations when due, or any of its officers or directors, shall assign any of its property to any of its creditors for the payment of any debt, and that "no officer, director, or stockholder thereof shall make any transfer or assignment of its property, or any stock therein, to any person, in contemplation of its insolvency"; and under the Minnesota Laws of 1881, chapter 148, providing for the fair and honest division among the creditors of an insolvent of his unexempt assets, and forbidding passive, as well as active, fraudulent preferences.[90]

c. This Doctrine Founded on Trust-Fund Doctrine — (I) *In General.* This doctrine is founded by many of the courts upon the doctrine already considered,[91] that the assets of a corporation constitute in equity a trust fund pledged to the payment of all its debts, which necessarily means pledged to the payment of all its debts ratably and equally, giving no preference as among creditors who stand in equal degree.[92]

(II) *Qualifications of This Trust-Fund Doctrine.* Many of the courts qualify this trust-fund doctrine by saying that it does not operate to turn the assets of a corporation into a trust fund for its creditors so long as it continues a going concern;[93] so long as it continues to carry on its business in the usual course of trade;[94] where it has not ceased to do business, and there is a reasonable expectation that it can continue in business;[95] or until its condition has become such that its assets cannot be dealt with except in contemplation of insolvency and suspension.[96]

(III) *Meaning of Trust-Fund Doctrine Explained.* The meaning of the doctrine is that the assets of an insolvent corporation are not a trust fund, nor are the officers of the corporation strictly trustees with respect to those assets; but at most the assets are a quasi-trust fund, and the directors or officers are quasi-trustees, under the duty of dealing with the fund according to principles of equity and the circumstances of the case.[97] The meaning is that the property of a private corporation which is dissolved, or which becomes insolvent and determines to discontinue its business, is thereafter affected with an equitable lien or trust for the benefit of creditors in preference to shareholders.[98]

548, and holding that a corporation which refuses payment upon demand of a note due is insolvent, within the meaning of the statute]; Olney *v.* Baird, 15 Misc. (N. Y.) 385, 37 N. Y. Suppl. 815, 73 N. Y. St. 401 [*affirmed* in 7 N. Y. App. Div. 95, 40 N. Y. Suppl. 202, 74 N. Y. St. 765].

89. N. Y. Laws (1890), c. 564, § 48.

90. Yanish *v.* Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198, holding that a corporation knowing its own insolvency cannot lawfully give a preference to one creditor by permitting a judgment to be entered against it and subsequently making an assignment.

91. See *supra*, VI, M, 1, b, (I); VIII, B, 1 *et seq.* See also Coleman *v.* Howe, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133 [*affirming* 53 Ill. App. 82], which fund consists not only of the paid-in capital, but of that which the shareholders have promised to pay.

92. *Alabama.*— St. Marys' Bank *v.* St. John, 25 Ala. 566.

Illinois.— Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291, holding that directors of an insolvent corporation are trustees for its creditors, and cannot prefer themselves at the expense of other creditors. But this case does not deny the right to prefer creditors other than themselves.

Nebraska.— Stough *v.* Ponca Mill Co., 54 Nebr. 500, 74 N. W. 868.

North Carolina.— Hill *v.* Pioneer Lumber Co., 113 N. C. 173, 18 S. E. 107, 37 Am. St. Rep. 621, 21 L. R. A. 560.

Ohio.— Meisse *v.* Loren, 6 Ohio S. & C. Pl. Dec. 258, 4 Ohio N. P. 100.

Texas.— Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 88 Tex. 468, 27 S. W. 100 [*affirming* 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802].

Wisconsin.— Haywood *v.* Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184.

United States.— Washburn *v.* Green, 133 U. S. 30, 10 S. Ct. 280, 33 L. ed. 516; Butler *v.* Cockrill, 73 Fed. 945, 20 C. C. A. 122.

93. Barth *v.* Koetting, 99 Wis. 242, 75 N. W. 395.

94. Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., 89 Tex. 511, 35 S. W. 1047 [*affirming* 13 Tex. Civ. App. 103, 35 S. W. 337].

95. Ide *v.* College Park Electric Belt Line, 90 Tex. 509, 39 S. W. 915 [*affirming* 15 Tex. Civ. App. 273, 40 S. W. 64].

96. Sabin *v.* Columbia Fuel Co., 25 Oreg. 15, 34 Pac. 692, 42 Am. St. Rep. 756 [*rehearing denied* in 35 Pac. 854].

97. Gottlieb *v.* Miller, 154 Ill. 44, 39 N. E. 992.

98. Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. 496, 11 C. C. A. 320. It has been reasoned that the capital stock of a corporation is a

(iv) *Denials of Trust-Fund Doctrine.* Other courts deny the doctrine that the assets of a corporation, although insolvent, are a trust fund for its creditors in any other sense than that in which the assets of a copartnership or of an individual are a trust fund for creditors,[99] necessarily holding that the creditors of the corporation have no equitable charge or lien upon it or equitable title to it in any different sense from that which an individual or partnership creditor has upon the property of an individual or partnership debtor.[1]

d. Point of Time at Which Power of Corporation to Deal With Its Assets as an Individual May Ceases. Where the doctrine prevails that a corporation cannot use its funds so as to prefer particular creditors to the exclusion or delay of others, it often becomes necessary to consider at what point of time the ability of the corporation to deal with its funds so as to pay particular debts in full ceases. Under this head one expression is that a corporation may in good faith pay a *bona fide* debt unless it is insolvent, has ceased to be a going concern, or its business is such that the directors know, or ought to know, that suspension is impending.[2] Another expression is that so long as a corporation is a "going concern," engaged in the conduct of its regular business, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities, it is not in such a state of insolvency as will preclude its executing a mortgage on its property in good faith to secure a debt of the corporation, even though the debt is one for which the directors are security.[3] Another expression is that a corporation engaged in the business for which it was organized, in other words a corporation which continues to be a "going concern," does not necessarily become insolvent in such a sense as disables it from preferring one creditor over another, although embarrassed at the time and unable to pay its debts as fast as they mature.[4] Another court has reasoned that a corporation is insolvent within the

trust fund for the benefit of its creditors, to be held subject to the payment of their claims unless it is transferred in good faith, in payment of a debt due to a *bona fide* purchaser, for a valuable consideration, and that it cannot be withdrawn by the shareholders as such. Gilbert *v.* Washington Beneficial Endowment Assoc., 10 App. Cas. (D. C.) 316, 25 Wash. L. Rep. 149.

99. Catlin *v.* Eagle Bank, 6 Conn. 233; Union Bank *v.* Ellicott, 6 Gill & J. (Md.) 363; State *v.* State Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223.

1. Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 550, 40 N. E. 810, 52 Am. St. Rep. 435; Wehn *v.* Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397 (creditors of an insolvent corporation do not acquire any specific lien upon its assets); German Nat. Bank *v.* Hastings First Nat. Bank, 55 Nebr. 86, 75 N. W. 531; Thomson-Houston Electric Light Co. *v.* Henderson Electric, etc., Co., 116 N. C. 112, 21 S. E. 951. The meaning is that the capital of a corporation is not held in trust for creditors, except in the sense that it cannot be distributed among shareholders without first providing for the payment of corporate debts; and in this respect there is no distinction between unpaid capital and paid capital, between stock subscriptions and any other assets of a corporation. O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205, 17 So. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707 (not a trust fund for the benefit of creditors in any sense other than that when a court of equity takes possession of it upon some general principle of equity jurisdiction, wholly independent of any idea that the property constitutes a trust fund, it will be administered for the equal benefit of creditors); Grand De Tour Plow Co. *v.* Rude Bros. Mfg. Co., 60 Kan. 145, 55 Pac. 848 (corporation may prefer its creditors whenever a natural person may do so); Hospes *v.* Northwestern Mfg., etc., Co., 48 Minn. 174, 50 N. W. 1117, 51 Am. St. Rep. 637, 15 L. R. A. 470; Gould *v.* Little Rock, etc., R. Co., 52 Fed. 680 (same principle decided in conformity with the law of Arkansas, it being a rule of property to be administered in the federal courts).

2. Hinz *v.* Van Dusen, 95 Wis. 503, 70 N. W. 657.

3. Currie *v.* Bowman, 25 Oreg. 364, 35 Pac. 848; Sabin *v.* Columbia Fuel Co., 25 Oreg. 15, 34 Pac. 692, 42 Am. St. Rep. 756, 35 Pac. 854.

4. Sabin *v.* Columbia Fuel Co., 25 Oreg. 15, 34 Pac. 692, 42 Am. St. Rep. 756, 35 Pac. 854. A statute authorizing a corporation to hold, purchase, and sell such property as the "purposes" of the corporation may require applies only to powers to be used while the corporation is a "going concern" and carrying on its business, and does not confer upon it the power to execute a preferential deed of assignment after insolvency and the permanent cessation of its business. Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802 [*affirmed* in 88 Tex. 468, 27 S. W. 100].

rule as to preferring creditors, where its assets are insufficient to pay its debts and it has ceased to do business, or is in the act of taking a step which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue.[5] On the other hand it is a proposition which will command universal assent, that when a corporation is solvent and a "going concern," and not in the expectation of insolvency at the time of making a mortgage or a pledge of its property, the act cannot be attacked, in the event of its subsequently becoming insolvent, on the ground that its property was held in trust for its creditors.[6]

2. Doctrine That Insolvent Corporation Can Prefer Particular Creditors to Exclusion of Others Who Stand on Equal Footing With Those Preferred — a. Statement of Doctrine. Opposed to the doctrine first above announced[7] is the doctrine that corporations, when insolvent or in contemplation of insolvency, may dispose of their assets so as to prefer favored creditors, although the result may be to leave nothing for others, who stand on a footing equally meritorious.[8]

5. Corey *v.* Wadsworth, 99 Ala. 68, 11 So. 350, 42 Am. St. Rep. 29, 23 L. R. A. 618. Other expressions on this subject may be found in Bird *v.* Magowan, (N. J. Ch. 1898) 43 Atl. 278; Fremont First Nat. Bank *v.* Rice, 22 Ohio Cir. Ct. 183, 12 Ohio Cir. Dec. 121.

6. *In re* New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206.

7. See *supra*, XX, B, 1, a.

8. *Alabama.*— Corey *v.* Wadsworth, 118 Ala. 488, 25 So. 503, 44 L. R. A. 766 [*overruling* earlier decisions]; O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205, 17 So. 525, 54 Am. St. Rep. 51, 28 L. R. A. 707.

Arkansas.— Ringo *v.* Biscoe, 13 Ark. 563.

Colorado.—Breene *v.* Merchants', etc., Bank, 11 Colo. 97, 17 Pac. 280; John V. Farwell Co. *v.* Sweetzer, 10 Colo. App. 421, 51 Pac. 1012; Burchinell *v.* Bennett, 10 Colo. App. 150, 50 Pac. 206, 10 Colo. App. 502, 52 Pac. 51 (unless there is some element of bad faith, or fraudulent preference, or the transaction is between persons who sustain a fiduciary relation to the corporation, under circumstances that ought to preclude them from asserting the preference); West *v.* Hanson Produce Co., 6 Colo. App. 467, 41 Pac. 829.

Connecticut.— Catlin *v.* Eagle Bank, 6 Conn. 233.

Georgia.— Albany, etc., Steel Co. *v.* Southern Agricultural Works, 76 Ga. 135, 2 Am. St. Rep. 26.

Illinois.— State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519, 48 N. E. 82 [*affirming* 68 Ill. App. 25]; Chicago Title, etc., Co. *v.* Smith, 158 Ill. 417, 41 N. E. 1076 (transfer of accounts to a trustee valid, although on the same day a bill is filed for the appointment of a receiver and a winding-up; such an assignment not defeated by a statute providing for the winding-up of the business of corporations by suits in equity, although such suit is brought immediately after the assignment); Gottlieb *v.* Miller, 154 Ill. 44, 39 N. E. 992; Peoria First Nat. Bank *v.* Commercial Nat. Bank, 151 Ill. 308, 37 N. E. 1019 [*affirming* 53 Ill. App. 358, may make a valid chattel mortgage to secure a portion of its creditors]; Warren *v.* Columbus First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746 (holding that the mere insolvency of a corporation does not *eo instanti* deprive the directors and officers of the power to dispose of the corporate property in good faith, by paying or securing corporate debts, although certain creditors are thereby given a preference over others); State Nat. Bank *v.* John Moran Packing Co., 68 Ill. App. 25 [*affirmed* in 168 Ill. 519, 48 N. E. 82]; Juillard *v.* Walker, 54 Ill. App. 517 (holding that a preference to creditors of an insolvent corporation is not void or voidable because such corporation, in concert with its creditors, has determined upon winding up its affairs through a receiver); Peterson *v.* Brabrook Tailoring Co., 51 Ill. App. 249 [*affirmed* in 150 Ill. 290, 37 N. E. 242].

Indiana.— Levering *v.* Bimel, 146 Ind. 545, 45 N. E. 775; Henderson *v.* Indiana Trust Co., 143 Ind. 561, 40 N. E. 516 (may prefer any of its creditors who are not shareholders or directors, even though the preferred claims are secured by the indorsement of the directors and part of the shareholders).

Iowa.—Manton *v.* Seiberling, 107 Iowa 534, 78 N. W. 194 (provided that it does not do so by an instrument or instruments of general assignment, or which are construed to be assignments for the benefit of creditors, and therefore void by reason of preferences); Latrobe First Nat. Bank *v.* Garretson, 107 Iowa 196, 77 N. W. 856; Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461.

Kentucky.— Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. 412, 66 Am. Dec. 165.

Maryland.— State *v.* State Bank, 6 Gill & J. 205, 26 Am. Dec. 561.

Massachusetts.— Sargent *v.* Webster, 13 Metc. 497, 46 Am. Dec. 743.

Michigan.— Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477.

Mississippi.— Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590, 17 So. 236 (in the absence of fraud, notwithstanding an intention existing at the time subsequently to execute a general assignment without preference; and notwithstanding the provision of

b. Doctrine That It Can Prefer Its Own Shareholders Over Its Other Creditors. The doctrine that a corporation can prefer particular creditors to the postpone-

Miss. Code, § 847, that, on the dissolution of a corporation, the debts due to and from it shall be a charge upon its property); Palmer *v.* George W. Hutchinson Grocery Co., (Miss. 1892) 11 So. 789.

Missouri.— Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095; Meyer *v.* American Folding Chair Co., 130 Mo. 188, 32 S. W. 300 (provided it does so in good faith to secure or to pay a *bona fide* debt); Waggoner-Gates Milling Co. *v.* Ziegler-Zaiss Commission Co., 128 Mo. 473, 31 S. W. 28 (chattel mortgage to secure creditors executed by an insolvent corporation and covering its entire property is valid in the absence of fraud as against other creditors, although made in contemplation of a general assignment which was in fact executed the same day, and although some of the directors were personally liable on the debts secured thereby); Slavens *v.* John R. Cook Drug Co., 128 Mo. 341, 30 S. W. 1025 (where the corporation is still a "going concern," although in a failing condition, and although the managers have resolved to quit business); Alberger *v.* National Bank of Commerce, 123 Mo. 313, 27 S. W. 657 (if it is done in good faith while its property remains in its possession unaffected by liens or process of law); Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260 [*affirming* 16 Mo. App. 150]; St. Louis *v.* Alexander, 23 Mo. 483, 524 (per Ryland, J.); Manhattan Brass Co. *v.* Webster Glass, etc., Co., 37 Mo. App. 145; Schroeder *v.* Mason, 25 Mo. App. 190.

Nebraska.— M. A. Seeds Dry-Plate Co. *v.* Heyn Photo Supply Co., 57 Nebr. 214, 77 N. W. 660 (in the absence of fraud); German Nat. Bank *v.* Hastings First Nat. Bank, 55 Nebr. 86, 75 N. W. 531 (holding that the determination of the managing officers of a corporation, resolving to effect a consolidation with another corporation, in order to avoid trouble with the creditors, to retain a portion of the goods sold them and apply the proceeds to the payment of debts, does not constitute such goods a trust fund for the payment of creditors *pro rata* so as to prevent the corporation from giving a creditor a preference therein by mortgage, notwithstanding that the other creditors relied upon the goods being distributed *pro rata*); Wallachs *v.* Robinson, etc., Co., 50 Nebr. 469, 70 N. W. 52 (in the absence of actual fraud); Shaw *v.* Robinson, etc., Co., 50 Nebr. 403, 69 N. W. 947 [*rehearing denied* in 51 Nebr. 164, 70 N. W. 953, provided it does so in good faith].

New Jersey.— Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397, 8 Atl. 523; Vail *v.* Jameson, 41 N. J. Eq. 648, 7 Atl. 52; Wilkinson *v.* Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Stratton *v.* Allen, 16 N. J. Eq. 229.

Pennsylvania.— Moller *v.* Keystone Fiber Co., 187 Pa. St. 553, 41 Atl. 478 (an insolvent corporation may assign its interest in fire-insurance policies after loss, in such a way as to prefer one creditor to another, if the preference is honestly made to secure or satisfy a *bona fide* debt); Hall *v.* West Chester Pub. Co., 180 Pa. St. 561, 37 Atl. 106; Pairpoint Mfg. Co. *v.* Philadelphia Optical, etc., Co., 161 Pa. St. 17, 28 Atl. 1003, 34 Wkly. Notes Cas. 216 (an insolvent corporation may prefer a creditor by confession of judgment); Dana *v.* U. S. Bank, 5 Watts & S. 223.

Virginia.— Planters' Bank *v.* Whittle, 78 Va. 737.

West Virginia.— Pyles *v.* Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909; Bier *v.* Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17.

Wisconsin.— Ford *v.* Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902, but see Wisconsin cases cited *supra*, XX, B, 1, a.

Wyoming.— Conway *v.* Smith Mercantile Co., 6 Wyo. 468, 46 Pac. 1084.

United States.— Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; American Exch. Nat. Bank *v.* Ward, 111 Fed. 782, 49 C. C. A. 611, 55 L. R. A. 356 (holding that no trust in favor of creditors attaches to the assets of a corporation until possession has been taken of them by a court of equity for the purposes of administration); National Bank of Commerce *v.* Allen, 90 Fed. 545, 33 C. C. A. 169; Allis *v.* Jones, 45 Fed. 148; Lippincott *v.* Shaw Carriage Co., 25 Fed. 577.

See 12 Cent. Dig. tit. "Corporations," § 2162.

In New Jersey by the act of Feb. 16, 1829, "to prevent frauds by incorporated companies," all sales or transfers of its property, by an incorporated company, either after insolvency or suspension or in contemplation of insolvency, were forbidden and declared void as to creditors, although good as to *bona fide* purchasers for value. See N. J. Rev. (1846), p. 129. These provisions were construed as requiring the affairs of any incorporated company, on becoming insolvent, to be put in a train of proceedings, the form of which the statute prescribed, whereby its property was distributed among its creditors, and as forbidding the preference of any creditor, after insolvency, known or contemplated. Wells *v.* Rahway White Rubber Co., 19 N. J. Eq. 402; Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158; Van Wagenen *v.* Paterson Sav. Bank, 10 N. J. Eq. 13; Coryell *v.* New Hope Delaware Bridge Co., 9 N. J. Eq. 457; State Bank *v.* New Brunswick Bank, 3 N. J. Eq. 266. But in the more recent revision of the statutes of New Jersey these provisions were omitted and the act to prevent frauds by incorporated companies was repealed. N. J. Rev. p. 1395, § 411. With the statutory prohibition out of the way, the courts of that state

ment or exclusion of the others has been carried to the extent of holding that in the absence of any legislative prohibition it can prefer one of its own shareholders to the exclusion of its other creditors;[9] and this, although, under the governing statute, the shareholders are liable for the debts of the corporation, in a primary sense, as partners, so that an execution issuing from a judgment recovered against a corporation may, in the event of a deficiency of corporate assets, be levied upon the property of the shareholders.[10] As the shareholders are in substance the proprietors, it cannot escape attention that this doctrine is tantamount to the doctrine that a man engaged in business may prefer himself over his own creditors.[11]

c. Doctrine That It Can Prefer Its Own Directors and Officers Over Its Outside Creditors — (i) *In General.* It is to be regretted that some of the American courts have carried the right of an insolvent corporation to prefer creditors to the extent of holding that it may not only prefer creditors who are its own shareholders, but may prefer such as are its own directors.[12]

have fallen in line with the decisions in other states, which hold that insolvent corporations have the same power to prefer their creditors that individuals have. Bates *v.* Elmer Glass Mfg. Co., (N. J. Ch. 1888) 15 Atl. 246; Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397, 8 Atl. 523; Vail *v.* Jameson, 41 N. J. Eq. 648, 7 Atl. 520; Wilkinson *v.* Bauerle, 41 N. J. Eq. 635, 7 Atl. 514.

In Pennsylvania, under the act of 1836, an attachment execution did not lie against a corporation. Nor could the property of an insolvent corporation be seized for the benefit of a particular creditor; and the test of insolvency was the absence of tangible property. Ridge Turnpike Co. *v.* Peddle, 4 Pa. St. 490. But now it seems that a corporation may, in that state, give a judgment note for an honest debt to one of its members. Randall *v.* Jackson, 1 Pa. Dist. 726. But see *In re* Clymer Distilling Co., 2 Pa. Co. Ct. 111.

In Arkansas an assignment of all its assets by a bank, which never had any capital, except what it had borrowed under a scheme by which it was propped up by the credit of the state, was upheld, although it contained an elaborate scheme of preferences, dividing the creditors for this purpose into seven classes and making the officers of the corporation first. *Ex p.* Conway, 4 Ark. 302. This right of the same corporation to prefer creditors was reaffirmed and rendered worse by an additional holding to the effect that a creditor might buy up its bills and set them off to the extent of their face value, accrued interest, and the penalty of ten per cent per annum, denounced by the charter against the bank for suspending specie payments. Ringo *v.* Biscoe, 13 Ark. 563.

9. Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Parsons *v.* Hatton-Snowden Co., 58 Ill. App. 272; Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Whitwell *v.* Warner, 20 Vt. 425 (holding that shareholders securing to themselves a preference are not guilty of such a fraud as renders them personally liable to creditors).

10. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743, where such an assignment was made for the payment of liabilities on which the assignee was an indorser for the corporation, upon condition that the assignee give a bond to the corporation binding him to apply the proceeds of the property to the payment of such indorsed notes, and to account for such application, and pay over the balance, if any, and the court found nothing in the assignment which was void as against creditors, in such a sense as to sustain an attachment against the property assigned; and the property having been attached by another creditor the assignee recovered it in replevin. It was admitted that the conveyance would be fraudulent if made by an individual, because repugnant to the letter and spirit of the insolvent laws. But as corporations were not subject to the insolvent laws at that time, and as the court saw nothing in such an assignment which was not in furtherance of the purposes of the corporation, one of those purposes being to pay its debts and to enable it to go on successfully with its business by the aid of new assessments, or to wind up and settle upon terms most advantageous to the shareholders, the court sustained the assignment.

11. That this is not the modern law see *infra*, XX, B, 3.

12. *Alabama.*—Wilson *v.* Stevens, 129 Ala. 630, 29 So. 678, 87 Am. St. Rep. 86; Corey *v.* Wadsworth, 118 Ala. 488, 25 So. 503, 44 L. R. A. 766.

Colorado.— West *v.* Hanson Produce Co., 6 Colo. App. 467, 41 Pac. 829.

Connecticut.— Smith *v.* Skeary, 47 Conn. 47.

Illinois.— Harts *v.* Brown, 77 Ill. 226, holding that directors, after giving shareholders a chance to some in and make advances to relieve the corporation, can buy up an indebtedness honestly owing to one of the directors, and enforce the sale of the corporation property under a deed of trust given to secure such indebtedness, and thereby acquire title to the property; and the other shareholders cannot then complain.

(II) *Although Directors May Have Voted For Proposition.* This infamous doctrine has been pushed to the extent of allowing the directors and shareholders of a corporation to prefer themselves at the expense of its creditors at large, although the director or shareholder may have voted for the proposition.[13]

(III) *Although Preferred Directors Had Falsely Represented to Public That Corporation Had Certain Capital.* A conception which proceeds upon a similar level is that the fact that the directors had falsely represented to the public, by means of the letter-heads on which they conducted the business correspondence of their company, that it had a certain capital, does not estop them from preferring themselves before the general creditors of the company, whom they have thus deceived into giving credit to it.[14]

(IV) *Preferring Debts With Respect to Which Their Directors Are Sureties* — (A) *In General.* The doctrine of the last preceding paragraph carries with it the conclusion that a corporation which is insolvent, or in contemplation of suspension, may devote its assets to the payment of certain indebtedness with respect to which its own directors are sureties, in preference to other indebtedness with respect to which they are not sureties.[15] Under any theory the payment by a corporation of its valid debt does not become fraudulent as to its

Indiana.— *Compare* Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 534, 42 N. E. 924, which was a case of payment by a solvent corporation, not contemplating insolvency, of indebtedness for which its directors were security.

Iowa.— Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461; Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398; Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516. *Compare* Hallam *v.* Indianola Hotel Co., 56 Iowa 178, 9 N. W. 111.

Michigan.— Montreal Bank *v.* J. E. Potts Salt, etc., Co., 90 Mich. 345, 51 N. W. 512.

Missouri.— Butler *v.* Harrison Land, etc., Co., 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464; Schufeldt *v.* Smith, 131 Mo. 280, 31 S. W. 1039, 52 Am. St. Rep. 628, 29 L. R. A. 830; Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260 [*affirming* 16 Mo. App. 150].

New Jersey.— Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203, under Corporations Act (1875), § 80, directors may prefer themselves by mortgages.

Pennsylvania.— *In re* Mechanics' Bldg., etc., Assoc. No. 2, 202 Pa. St. 589, 52 Atl. 58, exhibiting circumstances under which the directors of a corporation who have advanced money to it to make a purchase are not subject to have their claims on account of such advance set aside in favor of other creditors of the corporation.

South Carolina.— Central R., etc., Co. *v.* Claghorn, Speers Eq. 545, where insolvency was not found as a fact.

Virginia.— Planters' Bank *v.* Whittle, 78 Va. 737, "providing they did it with the utmost good faith."

United States.—American Exch. Nat. Bank *v.* Ward, 111 Fed. 782, 49 C. C. A. 611, 55 L. R. A. 356; Brown *v.* Grand Rapids Parlor Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817; Gould *v.* Little Rock, etc., R. Co., 52 Fed. 680; Hills *v.* Stockwell, etc., Furniture Co., 23 Fed. 432 (under Michigan law).

See 12 Cent. Dig. tit. "Corporations," § 2170.

Such preference gives no right of attachment.— That the fact that the directors of an insolvent corporation have used its assets in preferring themselves gives no right of attachment to an outside creditor was the conception of courts in Missouri. Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260 [*affirming* 16 Mo. App. 150].

That the president of a corporation can prefer himself as a creditor of a third person over the corporation which is also a creditor of the same person, thus running a race of diligence with, and outrunning his *cestui que trust*, see Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, 30 Am. Rep. 398.

13. Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263; Foster *v.* Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260. Where a director and bookkeeper of a corporation which afterward failed became such on the recommendation of his ability by another corporation for the place, and as such director by his vote in the board secured a preference in favor of the corporation which had recommended him, it was held that the law would not presume that he acted under the control of the creditor corporation. National Bank of Commerce *v.* Allen, 90 Fed. 545, 33 C. C. A. 169 [*distinguishing* American Oak Leather Co. *v.* Fargo, 77 Fed. 671].

14. Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263.

15. Swift *v.* Dyer-Veatch Co., 28 Ind. App. 1, 62 N. E. 70 [*withdrawing* opinion in 60 N. E. 169] (mortgage of all the property by three directors, to secure debts for which

creditors from the mere fact that one of its officers, even its president, is also personally liable for the payment of the debt.[16]

(B) *Although Debts in Respect of Which Directors Are Preferred Have Been Contracted in Excess of Statutory Limit.* One court has proceeded upon a conception so poor as to hold that directors may, by mortgage of the corporate property, prefer themselves as creditors, although they have, in violation of their duty, allowed the corporation to become indebted in excess of the limit prescribed by its governing statute.[17]

(V) *Directors Bound to Exercise Utmost Good Faith to Protect Corporation.* While the directors may or may not be deemed fiduciaries of the creditors with respect to the assets of the corporation, yet they are fiduciaries of the corporation and of its shareholders, and under principles already explained[18] they are bound to exercise the utmost good faith to protect the rights of the corporation and its shareholders, without regard to their own personal interest.[19]

3. Doctrine That Corporation Cannot Prefer Its Own Shareholders Before Its General Creditors. We now come to a class of cases announcing the juster doctrine that a corporation cannot prefer its own shareholders over its outside creditors,[20] for the reason that they are in substance and in sense its proprietors; and hence any rule of equity which would allow a corporation to prefer its own shareholders would, by strict analogy, allow a partnership to prefer its own members; nor can the sense and justice surrounding this question be obscured by falling back upon the proposition that a corporation is one person in the law and its shareholders another person.

4. Doctrine That Corporation Cannot Prefer Its Own Directors and Officers — a. Statement of Doctrine. The better doctrine, and one resting on principles of justice too obvious for explanation or comment, is that when a corporation is insolvent, or when it reaches such a condition that its creditors see that they must deal with its assets in the view of its probable suspension, they cannot use those assets to prefer themselves, as creditors or sureties, in respect of past advances, to the prejudice of its general creditors.[21]

such directors were surety, is void, unless authorized by a quorum of board of directors, a majority of which quorum are not liable as sureties); Clapp *v.* Allen, 20 Ind. App. 263, 50 N. E. 587.

Illustrations.— It has been held that a director of an insolvent corporation, who signed a bond to indemnify a corporate creditor, for the purpose of protecting the corporate property, and thereby benefiting all the shareholders and creditors may, from the proceeds derived from the sale to him of corporate property, pay such creditor. Graham *v.* Carr, 130 N. C. 271, 41 S. E. 379, where it was also held that a director of an insolvent corporation, who is also a surety for the payment of corporate debts, cannot apply the proceeds of the sale to him of corporate property, to the payment of such debts. It has been held that a preference by an insolvent corporation of creditors whose debts have been guaranteed by directors of the corporation is not invalid, although made without the requirement or knowledge of the creditors, unless it otherwise appears that it was made for the benefit of the directors or guarantors, and not for that of the creditors themselves. Blair *v.* Illinois Steel Co., 159 Ill. 350, 42 N. E. 895, 31 L. R. A. 269.

16. Parsons *v.* Hatton-Snowden Co., 58 Ill. App. 272.

17. Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461.

18. See *supra*, IX, G, 1 *et seq.*

19. J. W. Butler Paper Co. *v.* Robbins, 151 Ill. 588, 38 N. E. 153.

20. Reagan *v.* Chicago First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701; Washington Mill Co. *v.* Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.

21. *Alabama.*— Corey *v.* Wadsworth, 99 Ala. 68, 11 So. 350, 42 Am. St. Rep. 29, 23 L. R. A. 618; Goodyear Rubber Co. *v.* George D. Scott Co., 96 Ala. 439, 11 So. 370; Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357, 11 So. 365. *Contra*, Corey *v.* Wadsworth, 118 Ala. 488, 25 So. 503, 44 L. R. A. 766.

Illinois.— Roseboom *v.* Whittaker, 132 Ill. 81, 23 N. E. 339; Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291, 14 N. E. 698 [*reversing* 23 Ill. App. 151, and *distinguishing* Merrick *v.* Peru Coal Co., 61 Ill. 472, and Harts *v.* Brown, 77 Ill. 226]; Cleveland Rolling Mill Co. *v.* Crawford, 9 R. & Corp. L. J. 171 (property already in hands of receiver).

Indiana.— Port *v.* Russell, 36 Ind. 60, 10 Am. Rep. 5; Swift *v.* Dyer-Veatch Co., 28 Ind. App. 1, 62 N. E. 70 [*withdrawing* opin-

b. This Doctrine Explained — (I) *In General.* The governing principle is that the directors and managers of insolvent corporations are trustees of the funds as well for the creditors as for the corporation, and are bound to apply them *pro rata*, and cannot use them to exonerate themselves to the injury of other creditors.[22] That such is the rule of distribution results from the principle that equity is equality, and that in the administration of assets in equity all who stand in equal relations are entitled to share equally. It need scarcely be added that any arrangement by which the directors turn the property of the company over to themselves, without consideration, or without even assuming an obligation to pay its just debts, is an arrangement which, although happy for the directors, will not be permitted to stand if properly challenged.[23]

(II) *Rule Does Not Avoid Transfers Made For Full Value.* The above rule does not of course operate to avoid a sale of the assets of a corporation made to one of its directors in good faith and for full value.[24]

c. Point of Time at Which Directors Lose Power to Prefer Themselves as Creditors. This obligation to hold the assets of the corporation as a trust fund for equal distribution among its creditors attaches to the directors, not only when

ion in 60 N. E. 169] (insolvent corporation cannot prefer a debt with respect to which its directors or officers are bound as sureties); Nappanee Canning Co. *v.* Reid, (Ind. App. 1901) 60 N. E. 1068 (mortgage creating such a preference voidable at the suit of other creditors).

Kansas.— Arkansas Valley Agriculture Soc. *v.* Eicholtz, 45 Kan. 164, 25 Pac. 613.

Maine.— Symonds *v.* Lewis, 94 Me. 501, 48 Atl. 121.

Minnesota.— Taylor *v.* Fanning, 87 Minn. 52, 91 N. W. 269.

Missouri.—State *v.* Brockman, 39 Mo. App. 131; Kankakee Woolen Mills Co. *v.* Kampe, 38 Mo. App. 229; Williams *v.* Jackson County Patrons of Husbandry, 23 Mo. App. 132.

Nebraska.— Williams *v.* Turner, 63 Nebr. 575, 88 N. W. 668; Merchants' Nat. Bank *v.* McDonald, 63 Nebr. 363, 88 N. W. 492, 89 N. W. 770; National Wall Paper Co. *v.* Columbia Nat. Bank, 63 Nebr. 234, 88 N. W. 481, 56 L. R. A. 121 (all holding that an insolvent corporation cannot prefer a debt with respect to which its directors or officers are bound as sureties).

New Hampshire.— Smith *v.* Putnam, 61 N. H. 632; Richards *v.* New Hampshire Ins. Co., 43 N. H. 263.

New Jersey.— Smith *v.* Loomis, 5 N. J. Eq. 60.

New York.— Ogden *v.* Murray, 39 N. Y. 202; King *v.* Union Iron Co., 11 N. Y. Suppl. 603, 33 N. Y. St. 545; West *v.* West, etc., Mfg. Co., 9 N. Y. St. 255.

Pennsylvania.— Finch Mfg. Co. *v.* Stirling Co., 187 Pa. St. 596, 41 Atl. 294, 43 Wkly. Notes Cas. 113 (rule that an officer or director of an insolvent corporation cannot prefer his individual debt is said to be based, not on statutory insolvency, but on the unfair and fraudulent character of the transaction); Sicardi *v.* Keystone Oil Co., 149 Pa. St. 148, 24 Atl. 163.

Rhode Island.— Olney *v.* Conanicut Land Co., 16 R. I. 597, 18 Atl. 181, 27 Am. St. Rep. 767, 5 L. R. A. 361.

Virginia.— Tate *v.* Commercial Bldg. Assoc., 97 Va. 74, 33 S. E. 382, 75 Am. St. Rep. 770, 45 L. R. A. 243.

Washington.— Smith *v.* Hopkins, 10 Wash. 77, 38 Pac. 854, where the corporation has been insolvent for a long time and is not a going concern.

West Virginia.— Sweeny *v.* Grape Sugar Refining Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88.

Wisconsin.— Haywood *v.* Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184.

United States.— Drury *v.* Milwaukee, etc., R. Co., 7 Wall. 299, 19 L. ed. 40; Hart *v.* Globe Ins. Co., 113 Fed. 307; Northwestern Mut. L. Ins. Co. *v.* Cotton Exch. Real-Estate Co., 70 Fed. 155; Farmers' L. & T. Co. *v.* San Diego Street-Car Co., 45 Fed. 518 (pledge made contrary to purpose declared in resolution); Consolidated Tank-Line Co. *v.* Kansas City Varnish Co., 45 Fed. 7; Howe *v.* Sanford Fork, etc., Co., 44 Fed. 231; Adams *v.* Kehlor Milling Co., 35 Fed. 433; Sprague-Brimmer Mfg. Co. *v.* M. J. Murphy Furnishing Goods Co., 26 Fed. 572; Lippincott *v.* Shaw Carriage Co., 25 Fed. 577.

See 12 Cent. Dig. tit. "Corporations," § 2170.

22. Richards *v.* New Hampshire Ins. Co., 43 N. H. 263; Olney *v.* Conanicut Land Co., 16 R. I. 597, 18 Atl. 181, 27 Am. St. Rep. 767, 5 L. R. A. 361.

23. Hilles *v.* Parrish, 14 N. J. Eq. 380, where it was also held that the fact that the complaining party was himself acting fraudulently toward the company will not justify a violation of their duties on the part of the directors.

24. Graham *v.* Carr, 130 N. C. 271, 41 S. E. 379. Thus where a solvent corporation sold to two of its directors, who were also the principal shareholders, certain real estate, in consideration of such purchasers assuming certain of the corporate debts, to an amount equal or greater than the value of such property, the sale was valid as against the other creditors of the corporation.

they have voted the corporation to be insolvent,[25] but whenever the fact that it must discontinue business by reason of insolvency comes to their knowledge.[26] This knowledge of insolvency is not, and cannot from the very nature of things, be a positive knowledge. It is a reasonable belief, founded upon probabilities having reference to the company's affairs. It is sufficient to put an end to the right of directors to prefer themselves as creditors for them to know that it is probably insolvent,[27] although sometimes, it is to be confessed, the courts have gone far in indulging a want of knowledge or judgment on the part of the directors in this particular.[28] The only sound principle then is that the directors of the corporation cannot prefer themselves as creditors, either when it is in fact insolvent,[29] or when its condition is such that the act is done by them in contemplation of its insolvency.[30]

5. WHETHER DIRECTORS CAN PREFER THEIR OWN RELATIVES. The power of directors of insolvent corporations to prefer their own relatives stands in reason on much the same footing as their power to prefer themselves. It has been held that such directors cannot prefer their relatives who are corporation creditors.[31] But where the rule of the particular jurisdiction allows the directors to prefer themselves, they can for just as good reasons prefer their relatives.[32]

6. VALIDITY OF ABSOLUTE ASSIGNMENT OF ALL CORPORATE PROPERTY TO PAY SINGLE DEBT. That an insolvent individual or partnership may make an absolute assignment of all its property to pay a single debt, provided the purpose be to pay the debt, and not to hinder, delay, or defraud other creditors, seems to be settled;[33] but with respect to a corporation such an assignment will be held valid or void according to the theory which obtains in the particular jurisdiction with respect to the power of a corporation to prefer particular creditors to the exclusion of others. Such an assignment has been held valid by some courts[34] and void by others.[35]

Swentzel *v.* Franklin Invest. Co., 168 Mo. 272, 67 S. W. 596.

25. Williams *v.* Jackson County Patrons of Husbandry, 23 Mo. App. 132.

26. State *v.* Brockman, 39 Mo. App. 131; Buffalo Third Nat. Bank *v.* Elliott, 42 Hun (N. Y.) 121, 3 N. Y. St. 390.

27. Lamb *v.* Pannell, 28 W. Va. 663; Lamb *v.* Cecil, 28 W. Va. 653.

28. Thus where it did not appear that a corporation was insolvent at the time its board of directors executed judgment bonds to secure debts due certain of the directors, or that there was any collusion or actual fraud, the mere entry of judgment on the bonds, after the supposed insolvency of the corporation, was held not such a fraud in law as to warrant the continuance of an injunction restraining the sale of corporate property on execution issued on the judgment. Neal's Appeal, 129 Pa. St. 64, 18 Atl. 564.

29. Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Hopkins' Appeal, 90 Pa. St. 69; Olney *v.* Conanicut Land Co., 16 R. I. 597, 18 Atl. 181, 27 Am. St. Rep. 767, 5 L. R. A. 361.

30. See the cases previously cited in this and the preceding sections; also King *v.* Union Iron Co., 11 N. Y. Suppl. 603, 33 N. Y. St. 545; West *v.* West, etc., Mfg. Co., 9 N. Y. St. 256. There is a note on this subject in 19 Am. & Eng. Corp. Cas. 98. Whether a director of an insolvent bank, with full knowledge of its insolvency, can withdraw his deposits from the bank was mooted in Lamb *v.* Laughlin, 25 W. Va. 300.

31. West *v.* West, etc., Mfg. Co., 9 N. Y. St. 256; Adams *v.* Kehlor Milling Co., 35 Fed. 433, 36 Fed. 212. Effect of the managing officer of a corporation creating fictitious debts in favor of his wife, and transferring corporate assets in pretended payment see Jeffery *v.* J. W. Butler Paper Co., 37 Ill. App. 96.

32. Blair *v.* Illinois Steel Co., 159 Ill. 350, 42 N. E. 895, 31 L. R. A. 269 (preference of a corporate creditor not unlawful although she was the aunt of three of the directors); Rollins *v.* Shaver Wagon, etc., Co., 80 Iowa 380, 45 N. W. 1037, 20 Am. St. Rep. 427.

33. Lampson *v.* Arnold, 19 Iowa 479.

34. Sargent *v.* Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743. It has been held by a court which denies the right of an insolvent corporation to prefer its creditors that the insolvency of a corporation at the time of making a conveyance of its property does not affect the validity of the conveyance, where its operation is merely to transfer, in the absolute payment of a debt, property which has been previously conveyed as security for the same debt, and at a time when the corporation was solvent, a conclusion which seems plain enough. O'Conner Min. etc., Co. *v.* Coosa Furnace Co., 95 Ala. 614, 10 So. 290, 36 Am. St. Rep. 251.

35. Kendall *v.* Bishop, 76 Mich. 634, 43 N. W. 645.

7. Rights of Creditors Against Corporation While It Continues a Going Concern. While a corporation continues to be a going concern its separate creditors, in the absence of statutory qualifications of the rule, and of course in the absence of collusion and fraud, have the same rights against it for the collection of their demands that they would have in the case of an individual debtor.[36] In a jurisdiction where the doctrine obtains that corporations may prefer particular creditors, the creditor of a corporation who, without knowledge of its insolvency or its intent to make an assignment, procures by diligence a bill of sale and chattel mortgage upon its property will, in the absence of fraud or collusion, be permitted to retain the fruits of his diligence.[37] In a jurisdiction where corporations are not allowed to prefer particular creditors, a creditor who, in the absence of collusion and without knowledge of the insolvency of the corporation, procures a payment to be made by the corporation of a debt which the corporation owes to him, will not be required to surrender the payment to its receiver after its insolvency, although the payment exhausts most of the assets of the corporation.[38] This doctrine has even been applied in a case where the giving of security in the form of a mortgage inured to the benefit of shareholders and directors, they being ignorant of the insolvent condition of the corporation at the time when such security was given.[39]

8. Payments Made by Corporation in Due Course of Business. Payments made by a corporation in due course of business and with the expectation of being able to continue the same are not fraudulent preferences in the absence of an express statute making them so.[40]

9. Protection of Bona Fide Purchasers. The mere fact of insolvency does not operate to fasten any specific lien upon the property of a corporation so as to enable its general and unsecured creditors to follow the property into the hands of a *bona fide* purchaser for value.[41] Nor will a sale of goods by a corporation to an innocent purchaser while it is a going concern be subsequently held to be fraudulent as to its creditors, although after the sale the officers of the corporation misappropriate the proceeds,[42] the principle being that a person dealing with a trustee is not, in the absence of fraud or collusion, charged with the proper application of money which he may pay to such trustee.[43]

10. Right of Creditors of Corporations to Secure Preferences by Use of Judicial Process — a. May Obtain Preferences by Attachment. A creditor of a corporation which is in fact insolvent may obtain a preference over its other creditors by an attachment levied upon its property while it continues to be a going concern;[44] although it is so circumstanced that an early cessation of its business must result

36. Slack *v.* Northwestern Nat. Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841.

37. Oakford *v.* Fischer, 75 Ill. App. 544.

38. Ford *v.* Lamson, 17 Ohio Cir. Ct. 539, 9 Ohio Cir. Dec. 374.

39. Chick *v.* Fuller, 114 Fed. 22, 51 C. C. A. 648.

40. The most conspicuous illustration of this statement is found in the case of a run on a bank which, in the hope of resisting the run, continues payment until its available resources are exhausted and then suspends. Here its assignee or receiver cannot maintain an action against a depositor who, even down to the last hour, has been fortunate enough to withdraw his deposit. In like manner it has been held that a corporation, intending in good faith to proceed with its business, can pay to its directors money borrowed from them without rendering them responsible to its creditors. Holt *v.* Bennett, 146 Mass. 437, 16 N. E. 5; Dutcher *v.* Importers', etc., Nat. Bank, 59 N. Y. 5.

41. Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

42. Levins *v.* W. O. Peeples Grocery Co., (Tenn. Ch. App. 1896) 38 S. W. 733.

43. 4 Thompson Corp. § 4930.

44. Mallette *v.* Ft. Worth Pharmacy Co., 21 Tex. Civ. App. 267, 51 S. W. 859; Pioneer Sav., etc., Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160; Ballin *v.* Merchants' Exch. Bank, 89 Wis. 278, 61 N. W. 1118, 46 Am. St. Rep. 834, 27 L. R. A. 357. To the contrary that the doctrine that the assets of a corporation constitute a trust fund for its creditors operates to prevent creditors from obtaining liens or preferences by means of the statutes relating to attachment and garnishment see Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743 [*disapproving* Roseboom *v.* Whittaker, 132 Ill. 81, 23 N. E. 339].

from the fact of levying the attachment;[45] and although its president contemplates an assignment for the benefit of all its creditors.[46]

b. Jurisdictions in Which Creditors May Not Obtain Preferences by Attachment. In a jurisdiction where the assets of an insolvent corporation are deemed to be a trust fund for the ratable satisfaction of all its creditors, a creditor will not be permitted to acquire a preference over other creditors by attachment when he would not be permitted to acquire such a preference in any other manner; but if the attaching creditor knows that the corporation is insolvent his attachment will be set aside, and the property of the corporation will be administered for the equal benefit of all its creditors.[47] In such a jurisdiction an attachment levied by consent of the corporate debtor, immediately after it has resolved to execute a general assignment for its creditors, and when it is proceeding to do so, stands on no higher ground than a mortgage or other form of security executed under the same circumstances to prefer a particular creditor, but becomes a part of the general assignment.[48]

c. Obtaining Preferences by Procuring Confessions of Judgment — (I) *In General.* In those jurisdictions where the right of a corporation to prefer one of its creditors over others is conceded, an insolvent corporation may confess a judgment in favor of a *bona fide* creditor, not an officer or a member, which judgment, with an execution thereon, will constitute a valid lien on all its property except its franchise.[49]

(II) *When Such Preferences Voidable.* Preferences obtained by judicial process have been held void under the following circumstances: Where a bank recovered a judgment by default against an insolvent corporation in an action instituted at the suggestion of an officer of the corporation after the commencement of another action instituted in the same way, in a state where insolvent corporations are not allowed to prefer particular creditors, and where, after default in the latter action, an agreement had been made between the attorneys of the respective parties that the judgments should be entered together;[50] where a corporation in failing circumstances borrowed money with which to buy in its own shares of stock, and when it became insolvent gave to the persons from whom the money was borrowed a preference over other creditors by confessing judgments in their favor, the lenders of the money having had actual knowledge of the purpose for which it was borrowed, the reason being that such conduct worked a fraud upon *bona fide* creditors and defeated the collection of their claims;[51] where judgment against an insolvent corporation was obtained upon its notes, which had been given in consideration of a sham sale of worthless securities to the corporation, which were not delivered to it, the conclusion being that an execution upon such a judgment was not a valid lien upon the property of the corporation nor upon a fund arising from the sale of such property;[52] where an attorney for certain creditors of a corporation, who was also a trustee under a deed of trust which had been executed by the corporation, split up certain accounts which his

45. Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., 13 Tex. Civ. App. 103, 35 S. W. 337 [*affirmed* in 89 Tex. 511, 35 S. W. 1047].

46. American Nat. Bank *v.* Dallas Tinware Mfg. Co., 15 Tex. Civ. App. 631, 39 S. W. 955 [*disapproving* Corey *v.* Wadsworth, 99 Ala. 68, 11 So. 350, 42 Am. St. Rep. 29, 23 L. R. A. 618].

47. Compton *v.* Schwabacher, 15 Wash. 306, 46 Pac. 338.

48. Pollak Co. *v.* Muscogee Mfg. Co., 108 Ala. 467, 18 So. 611, 54 Am. St. Rep. 165. That a creditor of a corporation which has ceased to be a going concern, and which has committed plain and open acts of insolvency, cannot gain a preference over other creditors by filing a bill (the mode of procedure in the particular jurisdiction) and by levying an attachment see Levins *v.* W. O. Peeples Grocery Co., (Tenn. Ch. App. 1896) 38 S. W. 733.

49. East Side Bank *v.* Columbus Tanning Co., 15 Pa. Co. Ct. 357 [*affirmed* in 170 Pa. St. 1, 32 Atl. 539].

50. Conover *v.* Hull, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810.

51. Adams, etc., Co. *v.* Deyette, 5 S. D. 418, 59 N. W. 214, 49 Am. St. Rep. 887.

52. Atlas Nat. Bank *v.* More, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274, opinion by Baker, J.

clients held against the corporation so as to bring them within the jurisdiction of a court of limited jurisdiction, and then instituted suit and obtained judgments thereon, the corporation making no defense to the actions because of quieting representations made by such attorney and trustee, with the conclusion that such judgments would be declared void for fraud in law, and would not be allowed to give the judgment creditors preference over other creditors;[53] where a judgment by default against an insolvent corporation had been obtained in an action in which the process had been secretly served upon the president and another officer, who were respectively the son and brother of the plaintiff creditor, at a time when the open and public institution of such proceedings would surely have inaugurated a series of suits by other creditors;[54] where judgment notes were given by a corporation immediately preceding a general assignment for its creditors, which corporation was organized under the laws of Ohio, but had subsequently removed its property and business into Pennsylvania, where it became insolvent, the object of the giving of such notes being to secure *bona fide* debts due to creditors who were non-residents of Ohio; and judgments were taken thereon in Pennsylvania, and property of the corporation was seized and sold thereon in accordance with the laws of Pennsylvania, the conclusion being that the preference thereby created was not valid under the laws of Ohio;[55] and where a judgment was rendered in an action against an insolvent corporation on the day on which service of summons in the action had been obtained, for the full amount demanded, with costs, upon an offer made by an attorney for the corporation at the suggestion of its president, after an assignment had been made for the benefit of its creditors, and while an injunction was in full force restraining the corporation, its officers, and agents, from encumbering any of its real or personal property, the conclusion being that the judgment ought to be vacated on motion of the assignee and officers of the corporation not assenting thereto, and that the assignee and corporation be allowed to defend the action upon a suggested ground of defense which, if established, would be sufficient to defeat a recovery.[56]

(III) *When Such Preferences Not Voidable.* On the other hand preferences acquired in judicial proceedings have been held not voidable under the following circumstances: Where, the corporation being insolvent, the directors had allowed a judgment against it to be taken collusively, but where the corporation had no defense to the action, and the judgment creditor was neither a shareholder nor a director;[57] and where a judgment was rendered against a corporation for a *bona fide* debt in a case where the officers of the corporation did not put in an answer, the conclusion being that it would not be set aside at the instance of a receiver of the corporation as creating an unlawful preference in favor of the judgment creditor.[58]

d. Obtaining Preferences by Other Judicial Means. For the secretary of a corporation, at the bidding of a particular creditor whom the corporation desires to prefer, to go to another state for the purpose of having process against the corporation served upon him, and for him to place the papers served upon him in the hands of an attorney to whom he is introduced by an attorney for the creditors, and who is ultimately paid by such creditors, places the corporation in the attitude of suffering a judgment in order to give a preference within the meaning of a statute[59] rendering invalid any transfer or judgment suffered by a corporation which is insolvent or whose insolvency is imminent, with an intent to prefer

53. Wilson Cotton Mills *v.* C. C. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770 [*rehearing denied* in 116 N. C. 647, 21 S. E. 431].

54. Conover *v.* Hull, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810, opinion by Dunbar, C. J.

55. Kit Carter Cattle Co. *v.* McGillin, 21 Ohio Cir. Ct. 210, 11 Ohio Cir. Dec. 413.

56. Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 63 N. W. 546.

57. Cummings *v.* American Gear., etc., Co., 87 Hun (N. Y.) 598, 34 N. Y. Suppl. 541, 68 N. Y. St. 653, a seemingly untenable decision in view of the New York statute.

58. Ridgway *v.* Symons, 4 N. Y. App. Div. 98, 38 N. Y. Suppl. 895, 74 N. Y. St. 606.

59. N. Y. Laws (1892), c. 688, § 48.

a particular creditor;[60] nor could the assignee of a claim against the corporation, who knew of the insolvency of the corporation and of its purpose to avoid the effect of a statute prohibiting the transfer to any officer or shareholder of any property of a corporation which has refused payment of its obligation, directly or indirectly, recover a judgment upon the assigned claim which would be valid as against the other creditors.[61]

11. Validity of Mortgages and Other Assignments of Corporate Property to Secure Present Advances. The inability of a corporation to deal with its property, when insolvent or in contemplation of insolvency, for the purpose of preferring particular creditors, whether this inability is imposed by judicial decision or by statute, does not extend so far as to prevent a corporation, even when insolvent, from making in good faith transfers or mortgages of its property to secure present advances of money to be used in paying its debts, in extricating itself from its difficulties, or otherwise in continuing its business;[62] and this is none the less so where the mortgage is made to an officer of the corporation.[63] So the insolvency of a corporation at the date of a deed of its property does not affect its validity, where its operation is merely to transfer, in absolute payment of a debt, property which had been previously conveyed as security therefor, at a time when the corporation was not insolvent.[64] But such transactions will be closely scrutinized whenever properly called in question in a judicial proceeding. If therefore the directors sell property of the corporation to a member of the board to raise money to pay debts, it must appear that there was a necessity for the sale, and that the property was bought by the director in open market, at a fair price, without any undue advantage over the corporation, in good faith, and without the slightest unfairness.[65]

12. Validity of Preferences to Creditors by Means of Executing Judgment Notes — a. In General. A favorite way of preferring particular creditors is by

60. Olney *v.* Baird, 15 Misc. (N. Y.) 385, 37 N. Y. Suppl. 815, 73 N. Y. St. 401 [*affirmed* in 7 N. Y. App. Div. 95, 40 N. Y. Suppl. 202, 74 N. Y. St. 765].

61. Jefferson County Nat. Bank *v.* Townley, 92 Hun (N. Y.) 172, 38 N. Y. Suppl. 584, 74 N. Y. St. 212.

62. Skinner *v.* Smith, 134 N. Y. 240, 31 N. E. 911, 47 N. Y. St. 528 [*affirming* 56 Hun (N. Y.) 437, 10 N. Y. Suppl. 81, 31 N. Y. St. 448]; Damarin *v.* Huron Iron Co., 47 Ohio St. 581, 26 N. E. 37.

63. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Strohl *v.* Seattle Nat. Bank, 25 Wash. 28, 64 Pac. 916 (president of corporation advanced money to it, took demand notes therefor, and afterward the corporation executed a mortgage to him — held valid as against its receiver); Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328. It has been held that a mortgage executed by an insolvent corporation in Indiana, in compliance with an agreement to secure an advance of money to discharge an indebtedness of the corporation, is valid as against its creditors, although the president and secretary were individually liable on the indebtedness so discharged, of which fact the mortgagee had knowledge. Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 550, 40 N. E. 810, 52 Am. St. Rep. 435. See also Blake *v.* Ray, 62 S. W. 531, 23 Ky. L. Rep. 84 (assignment by a corporation of a note to its president valid, when made to reimburse the assignee for money advanced for the corporation when it was solvent); Campbell Printing Press, etc., Co. *v.* Bellman Bros. Co., 11 Ohio Cir. Ct. 360 (a mortgage by a business corporation upon its personal property, in pursuance of an agreement with a bank advancing it money that it will execute such mortgage at any time the bank deems it necessary for its protection, is not invalid as a preference of the bank in fraud of other creditors); Hogsett *v.* Columbia Iron, etc., Co., 203 Pa. St. 148, 52 Atl. 179 (holding that a judgment confessed by a corporation to one of its directors is good against its creditors, where it is for money advanced by the director under a resolution of the board of directors and an agreement of the corporation, recognizing its insolvency, to the effect that if the director would furnish funds to operate its plant he should be secured by the first judgment confessed). In line with this theory it has been held that a mortgage by an insolvent corporation to secure advances made while it is solvent, upon the faith of a promise by one of its officers to give such security, is valid as against its creditors and receiver. Brower *v.* Brooklyn Trust Co., 21 N. Y. Suppl. 324, 50 N. Y. St. 630.

64. O'Conner Min., etc., Co. *v.* Coosa Furnace Co., 95 Ala. 614, 10 So. 290, 36 Am. St. Rep. 251.

65. Crescent City Brewing Co. *v.* Flanner, 44 La. Ann. 22, 10 So. 384, opinion by McEnery, J.

the execution of what are called judgment notes, that is to say a note containing a power of attorney to confess a judgment thereon against the maker. The execution of such a note is of course not invalid as a preference to the particular creditor, where no attempt is made to confess a judgment upon it.[66] Whether it is valid as a preference to the particular creditor where judgment is entered or confessed upon it may depend upon the rule of the particular jurisdiction with respect to the power of the corporation to prefer particular creditors, and even upon other considerations. For example in Illinois the property of a corporation is not held by it in trust for all its creditors in such a sense as to forbid it from giving judgment notes, from making confessions of judgment, from making mortgages, or from preferring one creditor to another in any other manner.[67] So it has been held that an insolvent corporation is not prohibited by the laws of Ohio from making and delivering to one of its creditors a judgment note, although it is intended that the judgment shall be recoverable thereon in another state, and property there situated be applied to its payment.[68] In the same state judgment entered upon a warrant of attorney contained in a so-called judgment note, given by a corporation while it was a going concern, has been held not invalid because entered immediately before an assignment for creditors made by the corporation, where other conditions exist making it valid.[69] It is of course not necessary for the holder of a *cognovit* note to wait until the suspension of the corporation before he takes judgment thereon; but if he has advanced money to the corporation and taken as his security therefor its *cognovit* note he will be entitled, in the absence of collusion or knowledge of the insolvency of the corporation, to recover a judgment and levy upon the property of the corporation in its possession while it is engaged in the transaction of its business.[70] A subordinate court in the same state has held that a corporation cannot by means of a judgment note give a secret preference to a particular creditor.[71]

b. Position of Judgment Notes Renewed After Insolvency. Judgment notes of a corporation renewed after its insolvency are in the same position with respect to the right of the corporation to make preferences as prior judgment notes for which the renewals were given.[72]

c. Judgment Note Given by Creditor Whose Debt Is Owned by Himself and a Director in Undistinguished Shares. A creditor of a corporation upon an indebtedness owned by himself and by directors of the corporation in undistinguished shares cannot reap any advantage over other creditors by reason of a note and warrant of attorney to take judgment, executed while the corporation is insolvent, as such creditor stands in the same position as the directors, and they have no right to prefer themselves as creditors.[73]

d. Giving Judgment Notes and Filling Offices of Directors With Nominees of Holders of Notes. The giving by an insolvent corporation of its judgment notes to certain of its creditors, and the filling of the offices of its directors by persons nominated by the holders of such notes, so as to effectuate an agreement that no notes or preferences shall be given to other creditors while the corporation con-

66. Matson *v.* Alley, 141 Ill. 284, 31 N. E. 419. Where a corporation executed judgment bonds to certain of its directors, at a time when it was solvent, without any fraudulent intent, but to protect them as indorsers for the corporation, the mere use by them of the bonds, by entering judgments and issuing executions thereon, after the corporation became insolvent, was held not of itself fraudulent. Neal's Appeal, 129 Pa. St. 64, 18 Atl. 564.

67. J. W. Butler Paper Co. *v.* Robbins, 151 Ill. 588, 38 N. E. 153.

68. Youngstown First Nat. Bank *v.* McKinney, 16 Ohio Cir. Ct. 80, 9 Ohio Cir. Dec. 1.

69. Matter of George D. Winchell Mfg. Co., 1 Ohio S. & C. Pl. Dec. 310, 1 Ohio N. P. 136.

70. Ford *v.* Lamson, 17 Ohio Cir. Ct. 539, 9 Ohio Cir. Dec. 374.

71. Benedict *v.* Market Nat. Bank, 6 Ohio S. & C. Pl. Dec. 320, 4 Ohio N. P. 231.

72. Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265 [*affirming* 53 Ill. App. 314].

73. Atwater *v.* American Exch. Nat. Bank, 152 Ill. 605, 38 N. E. 1017.

tinues its ordinary business as before, has been held fraudulent in fact as to other creditors.[74] But where three out of four of the unsecured creditors advanced their money to assist the corporation, and by an agreement with the common shareholders obtained the election of their representatives as directors and as manager, and remained in control for two and one-half years, paying the fourth creditor one third of its claim, and increasing the indebtedness of the corporation to themselves by advancing money for its use; and thereafter, when the business could no longer be carried on, caused a chattel mortgage and a trust deed of the property of the corporation to secure its creditors to be executed, wherein preference was given to the claims of themselves to the exclusion of the fourth creditor, it was held that the evidence presented a state of facts justifying the conclusion that the fourth creditor was not injured, but was the only one of the four creditors benefited by the transaction, and hence that the chattel mortgage and deed of trust were not void.[75]

13. Creditor Attempting to Obtain Unlawful Preference and Failing May Nevertheless Participate in Distribution. A creditor of an insolvent corporation who has endeavored to procure an unlawful preference over other creditors and failed is not for that reason to be punished by being deprived of the right to participate in the distribution of the assets,[76] and this, although he may even be a shareholder or a director.[77]

14. Priorities in Distribution. Under the operation of the trust-fund doctrine — and without its operation for that matter — in any distribution of the assets of an insolvent or dissolved corporation the creditors have a right of priority in payment over the shareholders,[78] unless the shareholders have secured valid liens which entitle them to preference notwithstanding the relation of shareholder. On the other hand the fact that a creditor is a shareholder or even a director, assuming that his demand is valid, does not prevent his demand from taking rank the same as that of any other creditor.[79] Valid liens already acquired are not dis-

74. American Oak Leather Co. *v.* Fargo, 77 Fed. 671. For example a trading corporation, being in financial difficulty, and largely indebted, made an arrangement with its two largest creditors by which it borrowed from them fifty thousand dollars, and gave them judgment notes covering this sum and also the amount of its prior indebtedness to them. As a part of the same arrangement, its board of directors was reorganized by placing thereon a majority of persons nominated by such creditors, and having no interest in its business, and its by-laws were amended so as to require action of the directors authorizing the giving of further judgment notes. It was agreed that the new directors should not interfere with the business of the corporation, the sole purpose of their appointment being to prevent preferences to the other creditors; and the entire arrangement was kept secret to enable the corporation to continue its business. The business was continued for six months, when the corporation suspended, having been in fact insolvent when the arrangement was made. During this time some of the indebtedness was paid off, and new indebtedness to the same and other creditors contracted. It was held that, although the laws of the state permitted the preference of creditors by an insolvent, such transaction constituted a fraud in fact on the general creditors, which not only rendered the preference given by the judgment notes invalid, but precluded the creditors so preferred from sharing with other creditors in the distribution of the assets of the corporation. U. S. Rubber Co. *v.* American Oak Leather Co., 96 Fed. 891, 37 C. C. A. 599 [*modifying* 82 Fed. 248, 27 C. C. A. 118].

75. American Exch. Nat. Bank *v.* Ward, 111 Fed. 782, 49 C. C. A. 611, 55 L. R. A. 356.

76. Brown *v.* Morristown Co-Operative Stove Co., (Tenn. Ch. App. 1897) 42 S. W. 161; U. S. Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 21 S. Ct. 670, 45 L. ed. 938 [*reversing* 96 Fed. 891, 37 C. C. A. 599 (*modifying* 82 Fed. 248, 27 C. C. A. 118)].

77. Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25. Similarly see King *v.* Union Iron Co., 11 N. Y. Suppl. 603, 33 N. Y. St. 545.

78. South Bend Toy Mfg. Co. *v.* Pierre F. & M. Ins. Co., 4 S. D. 173, 56 N. W. 98.

79. Standard Cotton Seed Oil Co. *v.* Excelsior Refining Co., 108 La. 74, 32 So. 221, where a shareholder and director made advances in good faith to meet the liabilities of the corporation. A corporation whose funds have wrongfully been taken and used to pay liabilities of an insolvent corporation, by persons who were officers in control of both, has no claim to preference in the general assets of the latter corporation. Slater

placed; but outside of this the rule of equity obtains that distribution is to be made equally to those who stand on an equal footing, in equal degree, or in equal right. Outside of a limited exception relating to claims for recent supplies furnished to railroad companies, and outside of the principles which obtain in admiralty, the rule of prior in time, prior in right, obtains; and hence the party who loans money to an embarrassed corporation which is subsequently adjudged to be insolvent, and who at the time of his loan takes security therefor, cannot in equity claim a lien on its property in preference to a mortgage existing at the time when he made his loan, nor upon the proceeds of a sale of its property under such mortgage, no matter for what purpose his loan was made or how the money which he loaned was applied, provided the mortgage bondholders were not parties to the transaction resulting in the loan, and were not as such estopped.[80] A debt due from the corporation to its president for money paid by the president for the corporation as its surety cannot be postponed to debts due shareholders for their shares sold to the corporation.[81]

15. Creditor Unlawfully Preferred Chargeable in Equity as Trustee For All Creditors — a. In General. The doctrine of these cases is that a director who uses the property of the corporation to prefer himself as a creditor may be charged in equity to the extent of the property so diverted as a trustee for all the creditors equally.[82] Where for any reason a preference attempted by a corporation in favor of a particular creditor is unlawful, the claims of all creditors will be enforced by converting the conveyee into a trustee for its shareholders, preserving the rights of *bona fide* purchasers for value.[83] Such accounting may be had in an action by a receiver of the corporation appointed at the instance of the other creditors.[84]

b. Judgment Confessed in Favor of One Creditor Inures to Benefit of All. A judgment confessed by a building association for an antecedent debt is a lien or encumbrance created by voluntary act, and creates an illegal preference under the statute law of Virginia[85] in favor of one of its creditors, and inures to the benefit ratably of all its creditors.[86]

v. Oriental Mills, 18 R. I. 352, 27 Atl. 443.

80. Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 148 N. Y. 315, 42 N. E. 707, 51 Am. St. Rep. 690, 31 L. R. A. 403. Debts arising from personal property sold to a manufacturing corporation are of course not entitled to priority over a valid mortgage executed by the corporation. Heath *v.* Big Falls Cotton Mills, 115 N. C. 202, 20 S. E. 369.

81. Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501. That an attachment by one creditor of the property of a corporation, which has been fraudulently disposed of to a preferred creditor by a conveyance subsequently declared void and declared to constitute a general assignment for creditors, is not entitled to a prior lien as against other creditors see Philips *v.* Ammon-Stevens Co., 3 Ohio S. & C. Pl. Dec. 418, 2 Ohio N. P. 187.

82. Goodyear Rubber Co. *v.* Scott Co., 96 Ala. 439, 11 So. 370; Beach *v.* Miller, 130 Ill. 162, 17 Am. St. Rep. 291 [*reversing* 23 Ill. App. 151]; Neufeld *v.* Moll, 37 Ill. App. 535; Hart *v.* Globe Ins. Co., 113 Fed. 307. There is a note on this subject of directors preferring themselves in 19 Am. & Eng. Corp. Cas. 98.

83. Kit Carter Cattle Co. *v.* McGillin, 10 Ohio S. & C. Pl. Dec. 146, 7 Ohio N. P. 575.

84. Williams *v.* Turner, 63 Nebr. 575, 88 N. W. 668, receiver may require directors to account for property unlawfully turned over to third persons to secure claims on which such directors are liable as sureties. The unsuccessful attempt on the part of a director to secure a preference of his claim under an assignment of the corporate assets for which he voted does not invalidate the other preferences lawfully created and conferred by the assignment. Moller *v.* Keystone Fibre Co., 187 Pa. St. 553, 41 Atl. 478. Creditors of an insolvent who organize a corporation to take the insolvent's property and carry on his business, and who accept his notes for the percentage of their claims against the insolvent, the stock being held by a trustee as collateral for the notes, are mere general creditors of the corporation, having no greater rights than subsequent creditors, and cannot in the absence of other facts complain of the acts of the corporation in paying particular creditors in preference to others. South Bend Chilled Plow Co. *v.* George C. Cribb Co., 97 Wis. 230, 72 N. W. 749.

85. Va. Code, § 1149.

86. Tate *v.* Commercial Bldg. Assoc., 97 Va. 74, 33 S. E. 382, 75 Am. St. Rep. 770, 45 L. R. A. 243.

16. Transfers After Insolvency to Effectuate Agreements or Equities Made During Solvency. It may be collected from some of the cases already cited that a transfer made by a corporation to a particular creditor, after it has become insolvent, in pursuance of an agreement to secure him made while it was solvent, is not an unlawful preference unless the secret nature of the agreement may have made it operate as a fraud upon other creditors.[87]

17. Taking Security For Purchase-Price of Property Sold. For a vendor to take security for the purchase-money of property sold to a corporation is not an unlawful preference of a creditor within the meaning of a statute, but is the giving of a present security for a present advance. Hence a statute making any lien or encumbrance upon the property of a corporation for the purpose of giving a preference to a particular creditor inure to the ratable benefit of all creditors does not apply to such a transaction.[88]

C. Selling Out to New Corporation — 1. Power of Private Corporation to Sell All of Its Property. A private corporation having no public duties to perform has ordinarily the same power to sell all of its property in a single transaction that an individual has,[89] although such a sale might defeat the objects of its incorporation.[90] It has the power to sell all of its property and to go out of business whenever it finds that its business is unprofitable, or whenever in its discretion it sees fit so to do.[91]

2. May Receive Pay in Stock of New Corporation. Nor is it beyond the power of such a corporation to sell all its property to a new corporation, and to receive pay therefor in stock of the new corporation, the stock being taken in lieu of money, to be distributed among those shareholders of the new corporation who are willing to receive it, or to be converted into money for those who do not desire to retain it.[92]

87. For example a transfer of accounts by a corporation to certain creditors to secure them on past-due notes given for money loaned, in place of other accounts previously transferred to secure such notes, under an agreement providing for the substitution of accounts while there is "no default on the notes," does not show an intent to give a preference to any particular creditor over other creditors, within the meaning of N. Y. Laws (1892), c. 688, § 48, since the officers of the corporation may have regarded themselves as bound in equity to make such a transfer as would comply with the conditions on which the money was originally loaned. Milbank *v.* Welch, 74 Hun (N. Y.) 497, 26 N. Y. Suppl. 705, 57 N. Y. St. 241. In a jurisdiction where insolvent corporations are not allowed to prefer particular creditors, it has been held that the payment by an insolvent corporation of outstanding valid mortgage liens upon its real estate, by a conveyance thereof to the mortgagee for the fair value of the land, cannot be avoided by other creditors of the corporation, as being a preference of one creditor above another. Klosterman *v.* Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136. Where one corporation unlawfully conveyed property to another, and a creditor of the grantee corporation held a valid obligation against it upon which he subsequently recovered a judgment against it, a reconveyance of the property to the grantor was not fraudulent as to plaintiff. Summers *v.* Glenwood Gold, etc., Min. Co., 15 S. D. 20, 86 N. W. 749. The rights of creditors obtained by judgments on notes given for money loaned a corporation to enable it to continue its business and relieve it from temporary embarrassment are not affected by the fact that some of the officers of the corporation drew from its funds in payment of obligations due from it to them, or otherwise, where such creditors had nothing to do with such withdrawal. Peterson *v.* Brabrook Tailoring Co., 51 Ill. App. 249 [*affirmed* in 150 Ill. 290, 37 N. E. 242].

88. Breed *v.* Glasgow Invest. Co., 71 Fed. 903.

89. Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865.

90. Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516. Thus a corporation organized to deal in lands may sell all of its lands in bulk, and provide for the adjustment of its debts; and such an arrangement is not a winding-up, since the proceeds will belong to it and may be reinvested, and the corporation will still exist. Sewell *v.* East Cape May Beach Co., 50 N. J. Eq. 717, 25 Atl. 929.

91. Miners' Ditch Co. *v.* Zellerback, 37 Cal. 543, 99 Am. Dec. 300; Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490.

92. Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490. *Compare In re* New South Meeting-House, 13 Allen (Mass.) 497; Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec.

3. Cannot Sell Out Its Property to Prejudice of Its Creditors — a. In General. It is not necessary to say that a corporation cannot sell, or in any way alien its property, to the prejudice of its creditors, so as to hinder, delay, or defraud them in the collection of other debts owing by it; and in general whenever a conveyance is made by a corporation under such circumstances as would characterize it as a fraud upon creditors if made by an individual, it will be set aside in equity at the suit of such creditors, or other appropriate relief will be accorded them.[93] Hence a sale by a corporation of all its assets to another corporation in consideration of the latter delivering a specified amount of its stock to the individual shareholders of the selling corporation, and guaranteeing the payment of the debts of the selling corporation, is *prima facie* fraudulent as to the creditors of the selling corporation.[94] And where the rights of a creditor have supervened, it is beyond the

728; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624. Accordingly it has been held that where a company organized for the purpose of creating a water-power finds that it can no longer profitably use its privileges, and its water-power has been extinguished by contract with the commonwealth, it may sell its lands and receive payment therefor in its own stock. Dupee *v.* Boston Water Power Co., 114 Mass. 37.

Interpretation of a shareholder's resolution held not to authorize a contract to pay all the debts of the selling corporation absolutely, in consideration of a transfer of its property. Bi-Spool Sewing Mach. Co. *v.* Acme Mfg. Co., 153 Mass. 404, 26 N. E. 991.

93. Pennsylvania Knitting Mills *v.* Bibb Mfg. Co., 12 Pa. Super. Ct. 346.

94. Couse *v.* Columbia Powder Mfg. Co., (N. J. Ch. 1895) 33 Atl. 297. So a sale of all the property of a corporation, in consideration of a greater part of the stock of another company, organized only to acquire such property, and whose stock is based only on the property, has been held invalid as against the creditors of the selling corporation. Vance *v.* McNabb Coal, etc., Co., 92 Tenn. 47, 20 S. W. 424. So it has been held that a sale by a corporation of all its property to another corporation, to be paid for in stock of the latter, which stock is to be distributed among the shareholders of the former, or any other arrangement which will have the effect to withdraw the capital of the company and turn it over to its shareholders except in the manner provided for by law, is a violation of that provision of the California Corporation Act of 1853 which forbids the trustees "to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company," and is void as to any creditor of the corporation, either prior or subsequent, who had no notice of the arrangement at the time of giving the credit. Martin *v.* Zellerback, 38 Cal. 300, 90 Am. Dec. 365. Circumstances under which creditor assigning his claim upon agreement for shares in new corporation not bound to make a tender. Manistee Lumber Co. *v.* Union Nat. Bank, 143 Ill. 490, 32 N. E. 449. So a corporation having outstanding debts cannot transfer its entire property by a lease for nine hundred and ninety-nine years, so as to prevent the application of it at its full value to the satisfaction of its debts; but the property will be followed into the hands of the lessee, and a court of equity will decree the payment by the lessee of a judgment recovered against the lessor. Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900. So where the members of a partnership agreed among themselves to incorporate for the purpose of continuing the business as a corporation, and a member of the firm, in contemplation of the proposed change, agreed to assume and pay a debt of the firm to one of its creditors, in discharge of a debt of his to the firm, the creditor of the firm having no knowledge of this, and never assenting to it, it was held that this did not constitute a novation, or in any way affect his rights as a creditor against the corporation. Andres *v.* Morgan, 62 Ohio St. 236, 56 N. E. 875. So a corporation owning a majority of the shares of another corporation which is insolvent can acquire no benefit by a lease of the property of the latter to the disadvantage of its creditors. Such a lease will not be allowed to stand as against its creditors unless it constitute an assignment as available and valuable to them as the original trust fund for which it becomes a substitute. Sidell *v.* Missouri, etc., R. Co., 78 Fed. 724, 24 C. C. A. 216. That the directors of the selling corporation cannot appropriate the proceeds of the sale to their own use see Fellrath *v.* Peoria German School Assoc., 66 Ill. App. 77. Rights of the creditors of a partnership which has been succeeded by a corporation, which corporation assumed the liabilities of the partnership and thereafter contracted debts on the faith of the partnership property which had been transferred to it see Lamkin *v.* Baldwin, etc., Mfg. Co., 72 Conn. 57, 43 Atl. 595, 1042, 44 L. R. A. 786. It has been held that a creditor of a corporation cannot have relief because of a lease of all its property to another corporation holding the majority of its stock where the property included in the lease is of no appreciable value above the encumbrances prior to the claim of such creditor, and the lease provides for the application of the rent upon the interest on the prior mortgage bonds. Sidell *v.* Missouri Pac. R. Co., 78 Fed. 724, 24 C. C. A. 216.

power of a corporation, even with the consent of its shareholders, to sell out its plant and retire from business, taking the stock of the purchasing corporation in payment therefor, and issuing it to one of its individual shareholders without any agreement on his part to pay the corporate debts.[95]

b. Circumstances Under Which Such Sales Are Ultra Vires. It has been held by a federal court in Ohio that a solvent corporation, created under the laws of that state and engaged in a profitable business, cannot sell its plant and assets for a consideration, the greater part of which consists of the stock and bonds of another corporation, to be organized to carry on the business of the former, where no exigency exists making such sale necessary for the protection of the shareholders of the former corporation; for the reason that under the laws of Ohio as established by the highest state tribunal, one corporation cannot become the owner of the stock of another, unless authority to do so is clearly conferred by statute.[96] The manager of a corporation cannot transfer all its assets in payment of its indebtedness, without the authority or consent of the board of directors.[97]

c. Cannot Give Away Its Assets. For stronger reasons a corporation cannot give away its assets to the prejudice of its creditors or its members. A majority of the members of a corporation, such as an incorporated secret or benevolent society, cannot by resolution donate the property of such corporation to a new corporation of which such majority are members.[98]

d. Creditors of Selling Corporation Have Equitable Lien Upon Assets Thus Transferred. Where one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation.[99] This is a necessary extension of the doctrine that the assets of a corporation are a trust fund for its creditors.[1] Such being the quality which equity annexes to them, when the corporation elects to go out of existence, to dispossess itself of them, and to transfer them to another corporation, equity follows the trust fund into the hands of the new taker, and charges the property in the hands of such taker with the debts of the transferrer. In other words the corporation receiving the assets is charged in equity, as a trustee in respect of such property, with the payment of the debts of the antecedent corporation.[2] And while the right to follow a trust fund into the hands of a third party depends upon the answer to the inquiry whether such third party took it with knowledge of the trust, the case being one where the trustee who transferred it to him had a power of disposition, yet in such a case as we are supposing, where one corporation transfers all its assets to another, not in the ordinary course of business, the very circumstances of the case imply full knowledge on the part of the transferee of all the facts necessary to charge the property in his hands with the debts of the transferrer; and the case is still clearer where

95. Hurd *v.* New York, etc., Steam-Laundry Co., 167 N. Y. 89, 60 N. E. 327 [*reversing* 52 N. Y. App. Div. 467, 65 N. Y. Suppl. 125].

96. Easun *v.* Buckeye Brewery Co., 51 Fed. 156. It is worthy of note that the action was for damages for a breach of the contract thus to sell. That one corporation cannot become a shareholder in another under the laws of Ohio see Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594. And see on the subject, generally, *supra*, VI, G, 2, a *et seq.*; XVII, B, 4, a *et seq.*

97. Goodyear Rubber Co. *v.* Scott Co., 96 Ala. 439, 11 So. 370.

98. Polar Star Lodge No. 1 *v.* Polar Star Lodge No. 1, 16 La. Ann. 53.

99. Heman *v.* Britton, 88 Mo. 549; Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101; Blair *v.* St. Louis, etc., R. Co., 24 Fed. 148; Fogg *v.* St. Louis, etc., R. Co., 17 Fed. 871, 5 McCrary 441; Brum *v.* Merchants' Mut. Ins. Co., 16 Fed. 140, 4 Woods 156; Harrison *v.* Union Pac. R. Co., 13 Fed. 522; Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 13 Fed. 516, 4 McCrary 432. See also Pollock Contr. p. 200 *et seq.*; Vance *v.* McNabb Coal, etc., Co., 92 Tenn. 47, 20 S. W. 424; *Re* Empress Engineering Co., 16 Ch. Div. 125.

1. See *supra*, VI, M, 1, b, (I); VIII, B, 1 *et seq.*

2. Leathers *v.* Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661; Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101.

the corporation receiving the transfer agrees to assume and pay the debts of the corporation making it, in which case, under the principles of equity and under the modern codes of procedure, the creditors of the transferring corporation may maintain a direct action against the transferee corporation upon the contract, as a contract made for their benefit.[3] The principle has no application to a sale made in the usual course of business;[4] nor does it apply in a case of a sale for a full consideration, albeit of the entire property of the selling corporation, to another; and it has been held that if the consideration for the sale is the assumption and payment by the purchasing company of the mortgage debts of the selling company, to the full value of all the property conveyed, the sale will not be set aside in favor of other unsecured creditors of the selling company, nor will they have a lien on the property for which full value has been paid in good faith.[5]

e. When Such Transactions Fraudulent and When Not. On a principle already stated[6] the mere fact that the directors sell the property of the corporation to a new corporation, of which they are directors and shareholders, will not make the sale absolutely void.[7] A sale of all the property of a corporation, which has taken place under a resolution appointing the president and secretary a committee to dispose of it, will be set aside in equity at the suit of a dissenting shareholder, where the sale is made to one who purchased it under an agreement, previously made with the secretary, for their joint acquisition of the property. The reason is that the power conferred on the president and secretary requires their joint action, and that the secretary is disqualified from acting by reason of his personal interest.[8]

f. When Buying Corporation Is Not Chargeable With Debts of Selling Corporation. Where a corporation transfers all its assets to another corporation and does not agree to assume the liabilities of the selling corporation, and both corporations maintain a separate existence, then in the absence of fraud the purchasing corporation will not be answerable for any debts of the selling corporation.[9]

4. Cannot Sell Out Its Property to Prejudice of Its Shareholders — a. In General. Where a corporation has a lawful existence after the expiration of its charter, but solely for the purpose of winding up its affairs, a majority in interest of its shareholders cannot sell its property to a new corporation, of which they are directors and shareholders, at a valuation estimated by themselves, against the will of the minority, and compel such dissenting shareholders either to receive shares of stock in the new corporation in return for their old shares, or to be paid therefor on a basis of the estimated valuation of the property; but the minority may have the property publicly sold and converted into money, and the money distributed.[10] A business corporation cannot sell all of its property to a foreign corporation, organized through its procurement, with a majority of nonresident trustees, for the purpose of taking its place and its assets and carrying on its business, this being a virtual dissolution of the preëxisting corporation. And while the shareholders who have assented to such an unlawful distribution of the corporate property may be estopped thereby, dissenting shareholders are not

3. See *supra*, II, B, 3. See also Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101. *Compare* Owensboro Deposit Bank *v.* Barrett, 13 S. W. 337, 11 Ky. L. Rep. 910.

4. Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101, per Gaines, J.

5. Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263.

6. See *supra*, XX, C, 2.

7. Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865. See also *supra*, IX, J, 1, a *et seq.*

8. Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315.

9. Goldmark *v.* Magnolia Metal Co., 44 N. Y. App. Div. 35, 60 N. Y. Suppl. 425 [*citing* Goldmark *v.* Metal Co., 30 N. Y. App. Div. 580, 52 N. Y. Suppl. 446, and *distinguishing* Brundred *v.* Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585, 19 Atl. 428, 19 Am. St. Rep. 663; Metropolitan Nat. Bank *v.* Claggett, 141 U. S. 520, 12 S. Ct. 60, 35 L. ed. 841].

10. Mason *v.* Pewabic Min. Co., 133 U. S. 50, 10 S. Ct. 224, 33 L. ed. 524. See also *supra*, XI, D, 2, d.

estopped; and the state may demand that those officers of the corporation who perpetrated the wrong shall make restitution. Nor does the fact that the trustees in making the transfer acted in good faith render the act valid; nor does the difficulty which may attend the final adjustment of rights, as between the assenting and dissenting shareholders, constitute a defense to an action by the state, prosecuted under a statute to compel the trustees of the precedent corporation to account for breaches of their trust.[11] But where a corporation sells to another corporation a specific item of property, and perhaps the rule is applicable to a case where it sells all its property, and the sale is open, fair, and free from fraud or guilty connivance, the purchasing company is not bound to see to the proper distribution of the purchase-price, whether it consists in money or in shares of the stock of the purchasing company; and therefore if the purchase-price is paid in shares of the purchasing company, a pledgee holding shares of the selling company will not have a standing in court to establish a lien on the property sold, on the ground that distribution was not made to him of his proportion of the shares of the purchasing company, which were paid over to the selling company as the purchase-price of the property sold, but that such distribution was made to his pledger.[12]

b. Ratification of Such Selling Out by Shareholders. Assuming that such a sale of all the assets of the corporation as we are considering has taken place under circumstances where dissenting shareholders are entitled to maintain a proceeding to avoid it, as where it has been done by the directors without the consent of the shareholders, expressed in general meeting or otherwise, yet here as in other cases[13] the shareholders may ratify it so as to conclude them from making further objections; and such ratification may be inferred from that species of tacit acquiescence which consists in the entire failure to protest or to take any steps to repudiate or set aside the sale.[14] A shareholder who participated in the sale will not be allowed to avoid the contract after it has been thus ratified by the acquiescence of the other shareholders.[15] But where the sale proceeds in fraud of the rights of shareholders, a majority cannot of course ratify it so as to conclude a dissenting shareholder.[16]

5. Selling Out All Its Property May Dissolve Corporation De Facto but Not De Jure. Undoubtedly the fact that a corporation sells all of its property to another corporation, and thereby disables itself from carrying out the purposes of its existence, while for certain purposes working a dissolution *de facto*,[17] will not work a technical, legal dissolution; but the corporation nevertheless continues to exist *de jure* for the purpose of suing and being sued.[18]

11. People *v.* Ballard, 134 N. Y. 269, 32 N. E. 54, 48 N. Y. St. 166, 17 L. R. A. 737 [*rehearing denied* in 136 N. Y. 639, 32 N. E. 611, 48 N. Y. St. 846].

12. Leathers *v.* Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661.

13. See *supra*, XV, B, 7.

14. Stokes *v.* Detrick, 75 Md. 256, 23 Atl. 846.

15. Berry *v.* Broach, 65 Miss. 450, 4 So. 117.

16. Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315.

17. See *supra*, VIII, P, 1, e (I) *et seq.*

18. Brinkerhoff *v.* Brown, 7 Johns. Ch. (N.Y.) 217; Island City Sav. Bank *v.* Sachtleben, 67 Tex. 420, 3 S. W. 733. See also *infra*, XXI, G, 3, a, (I) *et seq.* But where the trustees of a water company, together with the shareholders, sold the entire stock and delivered the property of the corporation to a purchaser, who took possession thereof; and three years thereafter, no intermediate act having been done by them, a majority of the trustees met, allowed an account against the company, and drew a check therefor, it was held that they were not trustees *de jure* or *de facto*, and had no power to bind the corporation. Orr Water Ditch Co. *v.* Reno Water Co., 17 Nev. 166, 30 Pac. 695. Where a steamship company went into liquidation and transferred all its property to another corporation, and subsequently, in a collision between one of the steamships so transferred and other vessels, plaintiff's intestate was killed, and she by mistake brought an action against the old company and prosecuted it to judgment, it was held that this judgment could not be enforced in equity against its former property in the hands of the new company, thus transferred before the time when the alleged cause of action arose, although the debts of the old company had been assumed by the new. Gray *v.* National Steamship Co., 115

XXI. DISSOLUTION AND WINDING UP.

A. In What Manner Corporations May Be Dissolved — 1. When Corporation Is Deemed to Be Dissolved For All Purposes. Keeping in view that a corporation is deemed to be existent for some purposes and to be dissolved for others, the test by which to determine whether a corporation is dissolved for all purposes has been said to be to consider whether it has lost its capacity to sustain itself by a new election of officers.[19] If the corporation have the power in itself to supply the deficiency in its body, its rights are not extinguished, but only dormant. If, however, that power is gone, and it cannot act until the deficiency is supplied, the corporation is dissolved. This is not a forfeiture for non-user, but is a consequence of law.[20]

2. Five Ways in Which Corporations May Be Dissolved. Although it has been frequently said that there are but four ways in which corporations may be dissolved,[21] yet on a little reflection it appears that there are five ways: (1) By the expiration of the term of existence granted by the legislature either in its charter, where it is organized under a special charter, or under its governing statute, where it is organized under a general law; (2) by an act of the legislature, where power has been reserved for that purpose either in its charter, where it is created by a

U. S. 116, 5 S. Ct. 1166, 29 L. ed. 309. Effect of such a selling out upon the right of recovery on a promissory note payable "when the first locomotive engine on the M. railroad shall arrive" in town see Askew *v.* Hooper, 28 Ala. 634.

Receiver's sales.—Circumstances under which purchasing company at void receiver's sale entitled to subrogation to rights of old company see St. Louis, etc., Co. *v.* Sandoval, etc., Co., 116 Ill. 170, 3 N. E. 370. *Compare* Kinney *v.* Knoebel, 51 Ill. 112.

19. Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469. See also *infra*, XXI, D, 1, a.

20. Philips *v.* Wickham, 1 Paige (N. Y.) 590.

21. These were said to be: (1) By the act of the legislature; (2) by the death of all the members; (3) by a forfeiture of their franchises; (4) by a surrender of their charters. Angell & A. Corp. 501; 1 Bl. Comm. 485; 2 Kent Comm. 245; 2 Kyd Corp. 447; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; Oakes *v.* Hill, 14 Pick. (Mass.) 442. More explicitly stated, it has been said that such dissolution can take place only: (1) By an act of the legislature, where power is reserved for that purpose; (2) by a surrender, which is accepted, of the charter; (3) by a loss of all its members, or of an integral part, so that the exercise of corporate functions cannot be restored; (4) by a forfeiture, which must be declared by the judgment of a court. Penobscot Boom Co. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656.

Observations more or less similar to the above, as to the mode in which a private corporation may become dissolved, will be found in the following cases:

Maine.— Hodsdon *v.* Copeland, 16 Me. 314.

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

Massachusetts.— Boston Glass Manufactory *v.* Langdon, 24 Pick. 49, 35 Am. Dec. 292; Revere *v.* Boston Copper Co., 15 Pick. 351; Russell *v.* McLellan, 14 Pick. 63.

New York.— Niagara Bank *v.* Johnson, 8 Wend. 645; Vernon Soc. *v.* Hills, 6 Cow. 23, 16 Am. Dec. 429; Wilde *v.* Jenkins, 4 Paige 481; Slee *v.* Bloom, 5 Johns. Ch. 366.

England.— Peter *v.* Kendal, 6 B. & C. 703, 5 L. J. K. B. O. S. 282, 30 Rev. Rep. 504, 13 E. C. L. 316.

See also 2 Kent Comm. 312.

Sometimes the first mode above stated is omitted by courts in cataloguing the grounds of dissolution, evidently under the theory that a dissolution by an act of the legislature is inadmissible under the rule of the Dartmouth College case. 4 Thompson Corp. § 5381. Thus we find it stated in an early case in Ohio that a private corporation in this country may be dissolved: (1) By the death of its members; (2) by the surrender of its franchises; (3) by a judgment of forfeiture for non-user or abuse. McIntire Poor School *v.* Zanesville Canal, etc., Co., 9 Ohio 203, 34 Am. Dec. 436. But we shall see that this catalogue is imperfect by reason of the omission of all reference to a legislative dissolution; and all of them are imperfect by reason of the omission of all reference to a dissolution by the expiration of the term of existence which has been granted to the corporation by the legislature. As to the limitation of the duration of corporate life see State *v.* Ladies of Sacred Heart, 99 Mo. 533, 12 S. W. 293, 6 L. R. A. 84 (statute limiting corporate life to twenty years has no application to purely charitable corporation); Elizabethtown Gas-Light Co. *v.* Green, 46 N. J. Eq. 118, 18 Atl. 844; People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240. A corporation is dissolved *ipso facto*, with all the consequences of a dissolution by any other mode, when the period of limitation fixed by its charter is reached. Supreme Lodge K. of P. *v.* Weller, 93 Va. 605, 25 S. E. 891.

special charter, or in a constitutional provision or a general statute operative upon it; (3) by a surrender of its franchises, which is accepted, and a voluntary dissolution;[22] (4) by a loss of all its members, or of an integral part, so that the exercise of corporate functions cannot be restored;[23] (5) by a forfeiture of its franchises by a judicial proceeding, usually an information in the nature of a writ of quo warranto,[24] but sometimes, under the operation of statutes, a proceeding in a court of equity, which at the same time winds up the corporation and distributes its assets.[25]

3. DISSOLUTION BY EXPIRATION OF GRANTED TERM OF CORPORATE LIFE — a. In General. If the charter or governing statute of the corporation fixes a definite period of time at which its corporate life shall expire, when that period is reached the corporation is *ipso facto* dissolved,[26] without any direct action to that end, either on the part of the state or of its members; and no powers created by the charter or governing statute can thereafter be exercised, except such as are continued, by force of the statute law, for the purpose of winding up its affairs. Where a corporation has been organized under a decree of a court in pursuance of a statute which prescribes the filing of the decree of incorporation in the office of the secretary of state, the corporate life begins, not from the date of the decree, but from the date of the filing of it in the office of the secretary of state, and it will continue from that point of time during the period limited by the governing statute; and it has been held that this is so, although there may have been a neglect to file the decree in the office of the secretary of state for several years after the granting of it, during which time the theory was that the corporation was such *de facto*.[27]

b. Rule Where Charter Contains No Limitation of Life of Corporation. A corporation which is invested by its charter with the faculty of "perpetual succession," without any restriction in other provisions of the instrument upon the meaning of this expression, has the right to exist forever, although the general law of the state limits the duration of corporations, when not otherwise provided, to the period of twenty years.[28]

c. Judicial Remedies After Expiration of Period of Corporate Life. As we shall see hereafter[29] the general rule in the absence of saving statutes is that all actions by or against a corporation abate upon the expiration of the period of existence limited in its charter or governing statute; so that whatever remedies thereafter exist in respect to its assets, for the purpose of calling them in and of distributing them among those entitled thereto, must be supplied either by the statute law or by the remedial principles of equity.[30]

22. "By surrender of its franchises into the hands of the King, which is a kind of suicide." 1 Bl. Comm. 485.

23. "By the natural death of all its members, in case of an aggregate corporation." 1 Bl. Comm. 485. It would be misleading to perpetuate this ancient doctrine with respect to a modern joint-stock corporation; since the death of all the shareholders in a common catastrophe and at the same time would not have the effect of dissolving the corporation. Their shares would pass by operation of law respectively to their personal representatives, who might continue its existence if they should see fit.

24. See, generally, QUO WARRANTO.

25. See *infra*, XXI, F, 2, a *et seq.*

26. People *v.* Anderson, etc., R. Co., 76 Cal. 190, 18 Pac. 308; Scanlan *v.* Crawshaw, 5 Mo. App. 337; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420. For instance a corporation which has the franchise of demanding tolls upon a wagon-road cannot demand such tolls after the expiration of the period named in its charter. People *v.* Anderson, etc., R. Co., 76 Cal. 190, 18 Pac. 308.

27. State *v.* American Medical College, 59 Mo. App. 264.

28. Fairchild *v.* Masonic Hall Assoc., 71 Mo. 526 [*overruling* on that point Scanlan *v.* Crawshaw, 5 Mo. App. 337]. The first section of the General Corporation Law of Missouri (Mo. Rev. Stat. (1845), c. 231), limiting the duration of corporations to a period of twenty years, unless otherwise provided in their charters, had no application to purely charitable corporations. State *v.* Ladies of Sacred Heart, 99 Mo. 533, 12 S. W. 293, 6 L. R. A. 84. Nor was this conclusion changed by the provisions of the revision of 1855 (Mo. Rev. Stat. (1855), pp. 369, 370). State *v.* Ladies of Sacred Heart, 99 Mo. 533, 12 S. W. 293, 6 L. R. A. 84.

29. See *infra*, XXI, G, 3, a, (II).

30. It was held in an early case in Missouri that legal proceedings regularly commenced

4. DISSOLUTION BY LEGISLATIVE REPEAL OF CHARTER — a. In General. Under the decision of the supreme court of the United States in Dartmouth College v. Woodward,[31] the charter of a corporation, whether embodied in a special statute or in a general statute permitting the organization of corporations under prescribed conditions, is deemed to be a contract between the state and the coadventurers who accept the conditions tendered, within the meaning of that clause of the constitution of the United States which is to the effect that no state shall pass any law impairing the obligation of contracts;[32] and therefore such charters are protected from legislative alteration or repeal, unless the power to alter or repeal has been reserved by the legislature in making the grant of the franchises, either in the particular act in which the grant is embodied or in some general law applicable to the subject.[33] In the latter case a statute dissolving a corporation and annulling its charter is not unconstitutional.[34] Where this reservation has been made, a corporation may be dissolved by an act of the legislature repealing its charter. Where the legislature has reserved to itself the power to repeal, and exercises it, the courts will not presume that the power has been improperly or unconscientiously exercised.[35]

b. Legislature Cannot Enact Forfeiture of Corporate Franchises Unless Power Has Been Reserved. Except where the power to repeal the charter of a corporation, or to revoke the franchises which it has conferred upon the coadventurers, is expressly reserved, as already stated,[36] it is not in general competent for the legislature of a state to dissolve a corporation or to declare a forfeiture of any of its franchises. The reason is that such an act is an exercise of judicial power, which by all American constitutions is vested in a separate body; which consequently is denied by implication to the legislature; and which in some states is denied to it in express terms.[37] Another reason applicable to repeals by state legislation is that such a repeal would be a law impairing the obligation of a contract within the meaning of the constitution of the United States.[38] Still another reason is that the franchises of a corporation are property; and in view of this fact there is no room for doubt upon the proposition that an act of the legislature annulling the franchises of a corporation, where the power to do so has not been reserved so as to become a part of the contract embodied in the grant itself, would be a deprivation of property without due process of law, within the inhibition of the fourteenth amendment to the constitution of the United States.

c. But Legislature May Appoint Trustee to Wind Up. But as elsewhere pointed out whenever a corporation does become dissolved in any mode known to the law it is undoubtedly competent for the legislature as a mere administrative measure in the absence of any constitutional restraint having reference to special legislation or otherwise, to appoint a trustee to take its assets and administer them in conformity with the general rules which it has prescribed, or with the rules of a court of equity, if no statutory provisions have been enacted.[39] But if no trustee is appointed by the legislature, a court of equity, which never allows a trust to fail for the want of a trustee, would see to the execution of the trust, although by the dissolution of the corporation the legal title to its property may have been changed.[40]

against a corporation were not affected by the expiration of its charter before the determination of such proceedings (Lindell v. Benton, 6 Mo. 361); but the question was not well considered, and no reasons were given for the conclusion, which might possibly have had reference to some provision of the statute law.

31. 4 Wheat. (U. S.) 518.

32. U. S. Const. art. 1, § 10.

33. See *supra*, I, K, 3, b; III, C, 1, b; VIII, F, 4; XVI, A, 5, b.

34. People v. O'Brien, 45 Hun (N. Y.) 519; McLaren v. Pennington, 1 Paige (N. Y.) 102; Erie, etc., R. Co. v. Casey, 26 Pa. St. 287.

35. State v. Curran, 12 Ark. 321; McLaren v. Pennington, 1 Paige (N. Y.) 102.

36. See *supra*, I, K, 3, b; III, C, 1, b; VIII, F, 4; XVI, A, 5, b.

37. Bruffett v. Great Western R. Co., 25 Ill. 353; State v. Noyes, 47 Me. 189; State University v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

38. See *supra*, XXI, A, 4, a.

39. Louisville, etc., Turnpike Road Co. v. Ballard, 2 Metc. (Ky.) 165.

40. Lothrop v. Stedman, 15 Fed. Cas. No. 8,519, 42 Conn. 583, 13 Blatchf. 134, opinion by Shipman, J.

5. Legislature Judge Whether Condition Upon Which Right of Repeal Is Predicated Has Happened — a. Where Right of Repeal Has Been Reserved on Happening of Certain Condition — (i) *In General.* Where the legislature reserves the unqualified right of repeal upon the happening of a certain condition, it is, in the theory of many of the state courts, exclusively within the power of the legislature to determine whether the condition has happened, and a previous judicial determination of that fact is not necessary;[41] and this is the only tenable theory.[42]

(ii) *As Where Right of Repeal Has Been Reserved in Case Corporation Misuses or Abuses Its Franchises.* This principle has been carried to the extent of holding that where the legislature reserves the right of repeal in case the corporation misuses or abuses its franchises, it is for the legislature and not for the courts to determine the fact of misuse or abuse, and that such determination, when made by the legislature, is conclusive upon the courts.[43] The meaning is that a general reservation of the power to alter, revoke, or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the legislature.[44]

(iii) *Corporations Hold Their Franchises as Mere Tenants at Will of Legislature.* It has been held that where a charter is granted, with a reservation of the right of repeal in case the franchise therein conferred should be abused or misused, and the abuse or misuse has in point of fact occurred, the corporators, after such abuse or misuse, hold the franchise as mere tenants at the will of the legislature, and the latter possesses as full power to repeal the charter as if the reservation of the right of repeal had been originally unconditional.[45]

b. Legislative Repeal Valid Although It Abates Actions. The repeal of a charter is not an infringement of any constitutional right, where the power has been reserved by the legislature, although the effect of it is, as in other cases,[46] to abate actions against the corporation; since this merely restrains the creditor who is the plaintiff in the action from prosecuting his demand to a judgment at law and thereby obtaining an advantage in the distribution of the assets over other creditors. In common with the others he still participates in the distribution; and hence the effect of the legislative repeal is not to destroy but merely to change his remedy against the corporation.[47]

c. Effect of Restoring Charter on New Conditions. If a corporation which has forfeited its charter accepts an act of the legislature restoring its charter on new conditions the old charter is thereby repealed and the corporation is estopped to deny the validity of the law to which it has thus assented.[48]

d. Repeal of Secondary Franchises Does Not Necessarily Dissolve Corporation. A repeal of what has been termed "a secondary franchise," by which is meant a franchise which is not necessary to the life of a corporation, but without which

41. Miners' Bank *v.* U. S., 1 Greene (Iowa) 553, Morr. (Iowa) 482, 43 Am. Dec. 115; Crease *v.* Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Myrick *v.* Brawley, 33 Minn. 377, 23 N. W. 549; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287. Under a general statute, reserving to the legislature the right to amend or repeal all charters thereafter to be granted, with a proviso that it will not repeal a certain class of charters unless for some violation or other default, the legislative inquiry to ascertain whether there has been a violation or other default is not a "judicial act," within the meaning of the clause of the bill of rights of Massachusetts which forbids the legislature from exercising judicial acts. Crease *v.* Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61.

42. See 4 Thompson Corp. § 5420.

43. Miners' Bank *v.* U. S., 1 Greene (Iowa) 553, Morr. (Iowa) 482, 43 Am. Dec. 115; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

44. Hamilton Gaslight, etc, Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963.

45. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

46. See *infra*, XXI, G, 3, a, (II).

47. Read *v.* Frankfort Bank, 23 Me. 318.

48. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

the corporation can exist and carry out some of the purposes of its creation, does not operate to dissolve the corporation.[49]

6. WHERE STATUTE PRESCRIBES THAT FRANCHISES SHALL REVERT TO STATE IF NOT EXERCISED WITHIN GIVEN TIME — a. In General. Where the charter prescribes that the franchises therein granted shall revert to the state unless exercised within a given time, or that within a given time the corporation shall do a certain act, upon the question whether such franchises are *ipso facto* forfeited in case they are not exercised, or in case the given act is not done within the prescribed time there is a regrettable conflict of judicial opinion.

b. Doctrine That There Is Ipso Facto Forfeiture or Reverter — (I) *STATEMENT OF DOCTRINE.* One class of decisions holds that if the franchises are not exercised within the prescribed time, or if the prescribed act is not performed within that time, the franchises are *ipso facto* forfeited, and that no act of the state, judicial or otherwise, is necessary to complete the forfeiture.[50]

(II) *WHETHER FRANCHISES FORFEITED BECOMES FACT IN PAIS.* In such a case whether the corporation has lost its existence is a fact *in pais*, which may be ascertained in any judicial proceeding, whether the question arises directly or collaterally, whenever its ascertainment becomes necessary for the protection of rights or the redress of wrongs.[51]

49. Putnam *v.* Ruch, 54 Fed. 216 [*affirmed* in 56 Fed. 416], holding for example that the withdrawal, by the adoption of a new state constitution, of the exclusive privilege given to a corporation by its charter of conducting and carrying on the business of landing and slaughtering live stock within certain limits in a city does not deprive such corporation of its existence, but leaves it with power to carry on its original business without the exclusive privilege, where the power to permit the slaughtering of animals under certain conditions and limitations within such territory is given to the city.

50. *California.*— Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181.

Connecticut. — New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196.

Illinois.— Green *v.* Green, 34 Ill. 320, by analogy.

Kansas.— Atchison St. R. Co. *v.* Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800.

New Jersey.— Elizabethtown Gas-Light Co. *v.* Green, 46 N. J. Eq. 118, 18 Atl. 844.

New York.— Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524; *In re* Brooklyn, etc., R. Co., 72 N. Y. 245, 75 N. Y. 335, 81 N. Y. 69; *In re* Kings County El. R. Co., 41 Hun 425; Kennedy *v.* Strong, 14 Johns. 128.

Pennsylvania.— Com. *v.* Lykens Water Co., 110 Pa. St. 391, 2 Atl. 63. It was so held where a statute provided that if a company incorporated under a cerain act should fail to carry on its works and construct the necessary buildings, etc., within two years from granting of letters-patent, then the rights and privileges granted should revert to the commonwealth. Here, upon the failure of the company to comply with the conditions, its rights and privileges reverted to the commonwealth, without any judicial action or further legislation; and it was competent for the commonwealth to grant those privileges to another company to be formed for that purpose. West Manayunk Gas Light Co. *v.* New Gas Light Co., 21 Pa. Co. Ct. 369.

Tennessee.— It has been held that a turnpike corporation whose franchise is amended so as to cover several new roads forfeits its entire franchise by failure to construct any of them within the time limited by its charter, and that a turnpike company which fails to complete its road within the time limited by its charter forfeits its charter under the Tennessee code, although such failure is not wilful or corrupt. State *v.* Nonconnah Turnpike Co., (Tenn. Sup. 1875) 17 S. W. 128.

Texas.— Galveston, etc., R. Co. *v.* Galveston, etc., R. Co., 63 Tex. 529. It has been held that a statute declaring that the charter of a railway not urban, suburban, or belt, shall be forfeited as to the uncompleted portion upon the company's failure to construct and operate ten miles of its roads within two years is self-executing; but that a provision therein that it shall not apply to urban, suburban, or belt railroads less than ten miles in length, provided they are completed or operated within twelve months, requires a judicial declaration of the forfeiture of such company's charter for non-compliance with the statutory requirements. Houston *v.* Houston Belt, etc., R. Co., 84 Tex. 581, 19 S. W. 786.

United States.— A constitutional provision repealing a corporate charter is self-enforcing and terminates the corporate existence. Putnam *v.* Ruch, 54 Fed. 216.

Compare Omnibus R. Co. *v.* Baldwin, 57 Cal. 160; Peavey *v.* Calais R. Co., 30 Me. 498; Toledo, etc., R. Co. *v.* Johnson, 49 Mich. 148, 13 N. W. 492.

51. *Connecticut.*— Where a statute provided that, in case any railroad company should not, within twelve months after the acceptance of its route by the commissioners, procure and pay for the right of way over all land covered by the location, such acceptance by the commissioner should be void and of no effect, it was held that its failure

c. Doctrine That There Must Be Subsequent Legislative or Judicial Declaration of Forfeiture — (i) *Statement of Doctrine.* Another class of cases holds that the grant vests in the grantees and takes effect *in præsenti*; that the condition of the grant is a condition subsequent, the non-performance of which will operate to defeat the grant; but that it is for the state to say by some affirmative action, legislative or judicial, and generally the latter, that it will insist upon the performance of the condition,[52] until which time the existence of the corporation cannot be called in question by a private person.[53]

to procure and pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the state in a direct proceeding against the company, but that the whole proceeding became of no effect after the expiration of twelve months, and it was void simply because the statute said so. New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196.

Kansas.— Atchison St. R. Co. *v.* Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800, by analogy.

New Jersey.— Elizabethtown Gas-Light Co. *v.* Green, 46 N. J. Eq. 118, 18 Atl. 844.

New York.— Where the franchise to complete a railroad had become *ipso facto* forfeited by reason of the fact of the railroad not having entered upon the building of the road within the time limited, a landowner successfully resisted its attempt to condemn his land for that purpose. *In re* Brooklyn, etc., R. Co., 72 N. Y. 245. In another case where a street railroad company had not proceeded with the building of its road within the time limited by its charter, but attempted to proceed with it thereafter, and the city interfered and prevented it from further occupying its streets, an injunction to restrain the city from so interfering was denied. Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524.

United States.— For the distinction between common-law forfeitures with respect to which there must in general be a judicial declaration of forfeiture, and legislative forfeitures where there may be a forfeiture *ipso facto* under the operation of a self-executing statute in compliance with the will of the legislature, see the reasoning of Marshall, C. J., in U. S. *v.* Grundy, 3 Cranch 337, 351, 2 L. ed. 459.

52. *District of Columbia.*— U. S. *v.* Metropolitan R. Co., 21 Wash. L. Rep. 787.

Illinois.— Chicago *v.* Chicago, etc., R. Co., 105 Ill. 73; Chicago City R. Co. *v.* People, 73 Ill. 541.

Louisiana.— Atchafalaya Bank *v.* Dawson, 13 La. 497.

Missouri.— Hovelman *v.* Kansas City Horse R. Co., 79 Mo. 632.

New York.— Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765; Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. 358; People *v.* Manhattan Co., 9 Wend. 351.

Tennessee.— La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. 420.

Texas.— Galveston, etc., R. Co. *v.* State, 81 Tex. 572, 17 S. W. 67.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

United States.— Davis *v.* Gray, 16 Wall. 203, 21 L. ed. 447.

53. *Connecticut.*— Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28, where it was held that a neglect to give bonds for completion of the work as required by charter was not available to third persons.

District of Columbia.— U. S. *v.* Metropolitan R. Co., 21 Wash. L. Rep. 787.

Illinois.— Chicago, etc., R. Co. *v.* Wright, 153 Ill. 307, 38 N. E. 1062.

Indiana.— Stoops *v.* Greensburgh, etc., Plank-Road Co., 10 Ind. 47.

Louisiana.— Atchafalaya Bank *v.* Dawson, 13 La. 497, even where the language of the charter was "shall be forfeited and void."

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1, even where the language was "shall be forfeited and ccase."

Massachusetts.— Charles River Bridge *v.* Warren Bridge, 7 Pick. 344.

New York.— Matter of Reformed Presb. Church, 7 How. Pr. 476. And see Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765; *In re* Brooklyn, etc., R. Co., 72 N. Y. 245; Caryl *v.* McElrath, 3 Sandf. 176; Mickles *v.* Rochester City Bank, 11 Paige 118, 42 Am. Dec. 103.

Tennessee.— La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. 420.

Utah.— A private individual cannot insist upon the forfeiture of the franchise of a corporation because of its failure to conform to the conditions thereof, where such forfeiture has been waived by the state or city granting the franchise, by the repeated granting of additional franchises after default in the performance of the conditions. Dern *v.* Salt Lake City R. Co., 19 Utah 46, 56 Pac. 556.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

Wisconsin.— A state which by amendment to the charter of a corporation, of which it could claim a forfeiture because of non-user, recognizes the continued existence of the corporation, waives such acts of non-user as a ground of forfeiture. Atty.-Gen. *v.* Superior, etc., R. Co., 93 Wis. 604, 67 N. W. 1138.

United States.—Wallamet Falls Canal, etc., Co. *v.* Kittridge, 29 Fed. Cas. No. 17,105, 5 Sawy. 44.

(II) *Theory That Such Conditions Are to Be Construed in Like Manner as Conditions Subsequent in Private Grants, Resulting in Conclusion That There Is No Forfeiture Until State Intervenes.* This theory confuses all distinction between public and private grants and applies to public grants the well-known rule relating to conditions subsequent in private grants, which is that where the condition is possible at the time of making the grant, but afterward becomes impossible by the act of God, the act of law, or the act of the grantor, the estate, having once become vested, is not thereby divested, but becomes absolute, resulting in the conclusion that there is no forfeiture until the state intervenes and declares it in the form of a judicial decision.[54]

d. Legislative Waiver of Forfeiture. Where the doctrine obtains that in order to create a forfeiture for the breach of a condition of the grant the state must act affirmatively in some way, it seems clear that it is competent for the legislature to waive the right of the state to exact the forfeiture unless restrained from so doing by some constitutional inhibition. Such inhibitions are found in recent state constitutions.[55]

7. Dissolution by Loss of All or Integral Part of Its Members — a. In General. The mode by which a corporation may become dissolved, as already stated,[56] namely, by the loss of all its members or of such an integral part of them as prevents the exercise of corporate functions, is no doubt applicable to municipal corporations. Thus if all the inhabitants of a village should move outside of the incorporated territory and leave no inhabitant there the corporation would become *ipso facto* dissolved. This mode of dissolution may perhaps also take place in a

54. Chicago *v.* Chicago, etc., R. Co., 105 Ill. 73. The first case cited by the court is Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121. This was the case of a deed of land to a railroad company by a private person, upon condition that the company should construct its road thereon within a limited time. Here it was held, and against the plain intention of the parties, that the failure to perform the condition did not divest the title, but that there must be an entry, or what is made by statute equivalent thereto, by the grantor or his heirs, for breach of the condition, to forfeit the estate; and that the right of entry was not a reversion or an estate in land, and would not pass by assignment or by the conveyance of the premises held subject to the condition. The decision abounds in ancient technicality, and the conclusion defeats the intention of the parties, and makes a contract for them which they never made for themselves, and is palpably unjust. See also Hovelman *v.* Kansas City Horse R. Co., 79 Mo. 632 (holding that a private person could not treat a street railway franchise as *ipso facto* determined where the terms of the grant were that in case of the failure of the company to complete the road within twelve months after the acceptance of the grant the city council might take away the franchise by a two-thirds vote); Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358 (the court in this case in like manner proceeding upon the doctrine of Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186, which related to a private grant); Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447 (holding that the state of Texas had, by plunging into the Civil war, rendered it impossible for the grantee of the franchise to fulfil the terms of the grant). See also Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765. This case follows the decision of the supreme court of Vermont in Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 2, in the interpretation of a Vermont charter. The language of the charter was: "If said corporation shall not, within ten years from the approval of this act, commence the construction of said railroad, then said corporation shall be dissolved." The New York court undertook to "distinguish" certain previous decisions of its own (Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524; *In re* Brooklyn, etc., R. Co., 72 N. Y. 245, 75 N. Y. 335), where it held the contrary, under a statute using the language "its corporate existence and powers shall cease"; but it is plain that those decisions cannot be distinguished on any differences in the language of the governing statute. That a railroad corporation cannot prolong its existence by leasing its franchise to another corporation which complies with the conditions of the grant, not for the benefit of the grantor, but for its own benefit, was held in *In re* Brooklyn, etc., R. Co., 81 N. Y. 69 [*affirming* 19 Hun (N. Y.) 314].

55. One of them (Cal. Const. art. 12, § 7) prohibits the extension of the franchise of any corporation or the remission of any forfeiture of corporate franchises. It was held that this provision did not prevent the legislature from passing a statute waiving a forfeiture of the franchise of a street railway company because of its unauthorized use of electricity as a motive power. People *v.* Los Angeles Electric R. Co., 91 Cal. 338, 27 Pac. 673.

56. See *supra*, XXI, A, 2.

charitable corporation, or indeed in any species of corporation which is capable of sustaining a loss of all its members.[57] Yet this mode of dissolution cannot take place in respect of pecuniary or business corporations which have a transferable joint stock, for the reason that their shares, being personal property, pass by assignment, bequest, or descent, and must always remain the property of some person or persons, who must of necessity be a member or members of the corporation as long as it exists.[58] As already pointed out,[59] the legal title to its property remains in the ideal body or corporation, no matter how much its individual members may change. If every member of a joint-stock corporation should die at the same moment, its shares would be distributed under the statute of distributions, or according to the testaments of the deceased shareholders, and the legal representatives of the deceased members would have authority by law to manage the corporation; and no dissolution would in such a case take place.[60] It is a very common thing to change, in one transaction, the entire personnel of a corporation, by the concurrent act of all its members, in selling all their shares to third persons, who may thereupon elect a new board of directors. The assignees of the shares, thus proceeding to reorganize the corporation, perpetuate its legal existence, and the title of the ideal body to its real and personal property remains as before.[61]

b. No Dissolution Because All Shares Pass Into Ownership of One Person. The judicial decisions seemed to be unanimous to the effect that the mere fact that all the shares of a corporation pass into the ownership of one person does not of itself dissolve the corporation. They rest upon the principle that a corporation is not dissolved by the destruction of an integral portion of its membership, so long as the remaining portion has the power to restore or renew the defective part.[62] Thus in the case of a charitable corporation no loss of members destroys the corporation, so long as a sufficient number remain to continue the succession and fill up the vacancies.[63] Contrary to early opinion[64] it is now generally held that the fact that all the shares in a joint-stock corporation have passed into the hands of two members,[65] or even into the hands of a single person,[66] does not *ipso facto* work a dissolution of the corporation; since such sole owner may so dispose of the shares as, by the election of the necessary directors and officers, to continue the corporate existence. If therefore such a sole owner continues the business under the corporate name, without giving notice to the public of a dissolution or of his individual ownership, he is still liable to be sued as a corporation.[67] Such

57. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; Russell *v.* McLellan, 14 Pick. (Mass.) 63.

58. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

59. See *supra*, VI, F, 1, a; VI, F, 2, b.

60. Russell *v.* McLellan, 14 Pick. (Mass.) 63.

61. Wilde *v.* Jenkins, 4 Paige (N. Y.) 481. That a charter will not be judicially approved, in Pennsylvania, for a beneficial society, which provides that the corporation shall not be dissolved while nine members remain, such provision not being authorized by law, see *In re* United Daughters of Cornish, 35 Pa. St. 80.

62. *Indiana.*— State *v.* Vincennes University, 5 Ind. 77. This decision was not reversed by the decision of the supreme court of the United States in 14 Howard, but the latter decision preceded the former. See 5 Ind. 80.

Louisiana.— Matter of Belton, 47 La. Ann. 1614, 18 So. 642, 30 L. R. A. 648.

Pennsylvania.— Monongahela Bridge Co. *v.* Pittsburgh, etc., Traction Co., 196 Pa. St. 25, 46 Atl. 99, 79 Am. St. Rep. 685, where all the shares of a bridge company passed into the ownership of a city except thirteen, which were distributed to the officers and directors — corporation not dissolved — title to property not vested in city — city no right to manage or control bridge.

South Carolina.— Smith *v.* Smith, 3 Desauss. 557.

Texas.— Wagner *v.* Marple, 10 Tex. Civ. App. 505, 31 S. W. 691.

63. State *v.* Vincennes University, 5 Ind. 77.

64. Bellona Co.'s Case, 3 Bland (Md.) 442.

65. Russell *v.* McLellan, 14 Pick. (Mass.) 63.

66. Newton Mfg. Co. *v.* White, 42 Ga. 148; Bohannon *v.* Binns, 31 Miss. 355; Geo. T. Stagg Co. *v.* Taylor, 68 S. W. 862, 24 Ky. L. Rep. 495.

67. Newton Mfg. Co. *v.* White, 42 Ga. 148.

sole owner does not become the legal owner of the property of the corporation, but he owns merely the shares,[68] although he would probably be regarded as the equitable owner.[69] And in general the dissolution of a corporation, which is made the ground of an action, is not shown by evidence that the discharge of the corporate functions under the charter has become impossible by reason of the diminution of the number of corporators, where a forfeiture of the franchise has not been declared by a court in a proper proceeding.[70]

c. Private Agreements Among Sole Shareholders Do Not Work Dissolution. A corporation is not dissolved in consequence of any private agreement among its sole shareholders, unless the necessary effect of such agreement is a surrender of its charter. Thus where a corporation came lawfully into existence with but two shareholders, there being an agreement between them that each was to contribute half of the expense in carrying on the work for which the corporation was organized, that the profits of the venture were to be divided equally between them, but that no debts to strangers were to be contracted without the consent of both of them, the subsequent refusal of one of the corporators to be any longer bound by the agreement did not, upon any conceivable theory, work a dissolution of the corporation.[71]

B. Doctrine That Forfeitures of Corporate Franchises Can Be Effected Only by State — 1. Scope of This Doctrine. This doctrine, already considered in another relation,[72] subject to exceptions elsewhere stated,[73] is that a corporation cannot be deprived of its franchises for misuser or non-user of them, or for any other cause, and its dissolution decreed, except in a direct judicial proceeding instituted by the state for that purpose; nor can its right to exercise its franchises be litigated in a collateral proceeding instituted by a private person or corporation.[74]

2. But Private Persons May Proceed to Forfeit Charters Under Statutory Authority. The legislature of a state has of course the power to prescribe in what manner the power of a corporation to do a prescribed act, for example the power of a banking corporation to issue notes intended to circulate as money, may be called in question.[75] And it has been held that authority for private

68. Button *v.* Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.

69. *Compare supra*, VI, F, 2, b; XII, D, 2, h.

70. Bohannon *v.* Binns, 31 Miss. 355.

71. McKay *v.* Beard, 20 S. C. 156.

72. See *supra*, XVI, A, 5, a, (I).

73. See *supra*, XVI, A, 5, a, (II).

74. *Alabama.*— Bloch *v.* O'Conner Min., etc., Co., 129 Ala. 528, 29 So. 925.

New Jersey.—West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333; Elizabethtown Gas Light Co. *v.* Green, 49 N. J. Eq. 329, 24 Atl. 560.

New York.— People *v.* Ulster, etc., R. Co., 128 N. Y. 240, 28 N. E. 635, 40 N. Y. St. 280, holding that the existence of a corporation is not terminated by the mere fact of a forfeiture which the state may waive, either by neglecting to sue under a statute authorizing the state by its attorney-general to bring an action to annul such existence for forfeiture of the corporate franchises or by discontinuing such an action.

Pennsylvania.— Philadelphia, etc., R. Co.'s Petition, 187 Pa. St. 123, 40 Atl. 967, 42 Wkly. Notes Cas. 419 (holding that the forfeiture of a corporate franchise granted by the commonwealth, by non-exercise or otherwise, is a question between the commonwealth and her grantee only, and cannot be raised by a private litigant, for example the owner of property over which the corporation seeks the right of way); *In re* South Side Water Co., 4 Pa. Dist. 158, 15 Pa. Co. Ct. 603, 36 Wkly. Notes Cas. 55 (question whether a corporation duly chartered with exclusive privileges has forfeited or lost them cannot be determined on the application of a rival corporation for a charter); Chestnut Hill, etc., R. Co. *v.* Conshohocken R. Co., 4 Pa. Dist. 12, 15 Pa. Co. Ct. 441 (holding that the forfeiture of a corporate charter for non-user cannot be asserted by another corporation); Union St. R. Co. *v.* Hazelton, etc., Electric R. Co., 7 Kulp 313.

Tennessee.— Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706, non-user of the franchise of a corporation, and the sole proprietorship of all its capital, will not constitute a dissolution of the corporation without a judicial adjudication thereof.

Texas.— Pickett *v.* Abney, 84 Tex. 645, 19 S. W. 859 (judgment forfeiting the charter of a corporation, where the state is not party to the suit, is a nullity); Galveston, etc., R. Co. *v.* State, 81 Tex. 572, 17 S. W. 67.

United States.— Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879.

75. Williams *v.* State, 23 Tex. 264.

parties to institute a proceeding by scire facias against a corporation for a forfeiture of its charter may properly be conferred by a general law.[76]

C. Grounds of Forfeiting Charters and Dissolving Corporations — 1. General Principles and Doctrines — a. Disinclination of Courts to Forfeit Charters. It may be collected not only from what the courts have judged but from what the judges have said, that the courts are disinclined to forfeit the charters of corporations, especially those created for purposes of public utility, which it is the policy of the state to encourage and foster. The reasons for declaring such a forfeiture must be solid, weighty, and cogent; there must have been a violation of a positive prohibitory statute; or a plain abuse of power, by which the corporation fails to fulfil the design and purpose of its creation; some act of misuser or non-user touching matters which are of the essentials of the contract between the sovereign and the corporation, and the act or neglect must be wilful and repeated;[77] and the information must state with precision every fact which constitutes the abuse of the franchises on which the demand for a forfeiture is predicated.[78]

b. How Far Question of Forfeiture Rests in Judicial Discretion. It may be collected from a comparison of a number of decisions speaking upon the question that, although grounds of forfeiture have been clearly made out, yet the question of imposing the severe penalty of the law is committed to judicial discretion so far as mitigation is concerned, unless a judgment of ouster is commanded by a statute in such terms as leaves the court no discretion.[79]

c. Effect of Subsequent Good Behavior of Corporation. Where a corporation has done acts which as mere matter of law operate as a forfeiture of its franchises, and entitle the state to demand a judgment of ouster, its mere subsequent good behavior will not disable the state from demanding such judgment. Nothing but a waiver by the state will release the corporation from the consequences of its acts.[80] In such a case, it has been reasoned that the corporation, after the doing or suffering of the guilty act which incurs the penalty of forfeiture, holds its franchises as a mere tenant at will of the state.[81]

d. Public Must Have Interest in Act Done or Omitted. In respect to those acts which will constitute a just ground for adjudging a forfeiture of the franchises of a corporation, a distinction is taken between those provisions of the charter which are intended to apply merely to the internal government of the corporation, and those which impose positive conditions, restrictions, and duties, in which the public right or interest is involved. For a violation of the latter, a forfeiture will be adjudged, but not so with regard to the former.[82] "It is not every excess of power, nor every omission of duty, that produces that effect.

76. State *v.* Consolidation Coal Co., 46 Md. 1, referring to Md. Code, art. 12. A statute of Pennsylvania (Pa. Act June 19, 1871) authorizes any private citizen by a bill in equity to compel a corporation to show its authority to do a particular act; but it is held that a private citizen cannot, by virtue of this statute, show the mere non-user of a franchise, in order to establish a forfeiture of the charter of the corporation. Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399. That the Revised Statutes of Louisiana of 1870, § 2593 *et seq.*, do not provide for the forfeiture of the charters of corporations at the instance of private persons, even when they are parties interested, see State *v.* Atty.-Gen., 30 La. Ann. 954.

77. State *v.* St. Paul, etc., Turnpike Co., 92 Ind. 42; Moore *v.* State, 71 Ind. 478. See also People *v.* Broadway R. Co., 126 N. Y. 29, 26 N. E. 961, 36 N. Y. St. 376 [*reversing* 56 Hun (N. Y.) 45, 9 N. Y. Suppl. 6, 29 N. Y. St. 343]; State *v.* Commercial Bank, 10 Ohio 535; Com. *v.* Commercial Bank, 28 Pa. St. 383; State *v.* Pawtuxet Turnpike Corp., 8 R. I. 182.

78. Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602.

79. Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497; State *v.* People's Mut. Ben. Assoc., 42 Ohio St. 579; State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121, 13 Am. Rep. 233; State *v.* Essex Bank, 8 Vt. 489.

80. People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445.

81. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287. *Compare In re* Franklin Tel. Co., 119 Mass. 447.

82. Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602; Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599; State *v.* Wood, 13 Mo. App. 139.

The public must have an interest in the act done, or omitted to be done. If it is confined exclusively to the corporation, and in nowise affects the community, it should not be considered as of those conditions upon which the grant is made."[83]

e. Annulment of Charters Which Conflict With Previous Grants. The state may maintain a proceeding to annul a charter which it has previously granted, on the ground that it was improvidently granted and is void by reason of the fact that it conflicts with the prior rights of another chartered corporation.[84]

f. Supposed Distinction Between Public and Private Corporations With Respect to Power of Courts to Dissolve Them. Under the principles of the common law, there is no distinction between public and private corporations with respect to the power of the state to demand the annulment of their charters in judicial proceedings for misuser or non-user of their corporate powers, or for the usurpation of powers which have not been granted.[85] Such a distinction must be founded in statute if it exists at all.[86]

2. Usurpation of Ungranted Franchises — a. In General. The grounds on which the franchises of corporations may be seized by the state, as usually described, consist of a wilful nonfeasance or malfeasance; in other words of a wilful non-user or misuser of their franchises, in matters affecting the interest or right of the public generally.[87] A very little reflection will show that these two grounds do not exhaust the list, but that we must add to them a third cause of forfeiture; namely, the exercise by a corporation of powers which have never been granted to it.[88]

b. Usurpation of Ungranted Powers Does Not Necessarily Forfeit Entire Franchises. The usurpation by a corporation of powers which have not been granted to it is not necessarily redressed by the forfeiture of all its franchises; but public justice is frequently satisfied by merely ousting it of the powers which it has usurped.[89]

c. But May Result in Such Forfeiture. But pursuing the official syllabus of an Ohio case, "in quo warranto against a corporation, where it has assumed fran-

83. Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602, 605. Therefore in a proceeding by information in the nature of quo warranto to forfeit the franchise of a private manufacturing corporation, it was held that the court might consider evidence tending to show that one of the corporators procured the institution of the proceeding in bad faith and for his private purposes. State *v.* Wood, 13 Mo. App. 139.

84. Com. *v.* Lance, 8 Del. Co. Rep. 9, 3 Dauph. Co. Rep. 181, 7 Northam. Co. Rep. 242.

85. State *v.* Bradford, 32 Vt. 50, a case of usurpation.

86. In California, where questions of this kind are governed by a civil code, it is held that in the absence of statute the judicial courts have no power to dissolve a public corporation for misuser or non-user of its corporate powers, and that an irrigation district is such a corporation. People *v.* Selma Irr. Dist., 98 Cal. 206, 32 Pac. 1047.

87. *Alabama.*— Paschall *v.* Whitsett, 11 Ala. 472.

Maryland.— Washington, etc., Turnpike Road *v.* State, 19 Md. 239.

Massachusetts.— Com. *v.* Blue Hill Turnpike Corp., 5 Mass. 420; Com. *v.* Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50.

Nebraska.— State *v.* Council Bluffs, etc., Ferry Co., 11 Nebr. 354, 9 N. W. 563.

New York.— People *v.* North River Sugar Refining Co., 54 Hun 354, 7 N. Y. Suppl. 406, 5 L. R. A. 386 [*affirmed* in 121 N. Y. 582, 21 N. E. 834, 31 N. Y. St. 781, 18 Am. St. Rep. 843, 9 L. R. A. 33].

Pennsylvania.— Com. *v.* U. S. Bank, 2 Ashm. 349.

United States.— Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. ed. 945; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629; Terret *v.* Taylor, 9 Cranch 43, 3 L. ed. 650.

There is a learned note on this subject in 22 Abb. N. Cas. (N. Y.) 210.

88. As where a corporation has power to employ its funds in the purchase of so much real estate as may be necessary for the transaction of its business, but employs them in purchasing real estate for investment. Bixler *v.* Summerfield, 195 Ill. 147, 62 N. E. 849.

89. Meurer *v.* Detroit Musicians' Benev., etc., Assoc., 95 Mich. 451, 54 N. W. 954. The provisions of a statute (Can. Civ. Proc. art. 997) authorizing the attorney-general to bring actions to forfeit the charters of corporations do not relate to every illegal act which a corporation may do, but only to such as are professedly or manifestly done in the assertion of a special power, franchise, or privilege not conferred upon the corporation by law. Casgrain *v.* Atlantic, etc., R. Co., [1895] A. C. 282, 64 L. J. P. C. 88, 72 L. T. Rep. N. S. 369, 11 Reports 449.

chises not granted, and it appears that the certificate of incorporation does not comply with the requirements of the statute under which it is organized, the court, in the exercise of its discretion, will oust it of the franchise to be a corporation." [90]

3. Forfeiture by Reason of Non-User of Its Franchises — a. In General. While the abandonment and non-user by a corporation of its franchises will or will not work an *ipso facto* dissolution, according to the nature of the rights involved in the question, and the manner in which it arises,[91] yet it is well settled that, whenever a corporation voluntarily and totally abandons the exercise of its franchises, and does or suffers to be done acts which destroy the end and objects for which it was incorporated, this will authorize a judgment ousting it of its franchises at the suit of the state,[92] or the appointment of a receiver by a court of equity to wind up its affairs, under a statutory jurisdiction, on the ground that it has suffered *de facto* dissolution.[93] But where a corporation possesses several powers or privileges, the non-user of one of them, it not being essential to the purposes of its creation, will not afford a ground of terminating its existence.[94]

b. Must Have Done or Suffered Something Which Destroys End and Object of Its Creation. Some of the cases proceed upon the proposition, announced in a leading case,[95] that the suffering an act to be done which destroys the nature and object for which the corporation was instituted must be regarded as equivalent to a direct surrender of its franchises.[96] Where this is the theory, an action in the nature of quo warranto, prosecuted by the state, does not, except in form, oust the corporation of its franchises; for it has already abandoned or surrendered them. It does no more than judicially ascertain the fact of the abandonment and surrender, and put it beyond all future question.[97]

90. State *v.* Central Ohio Mut. Relief Assoc., 29 Ohio St. 399.

91. See *supra*, VIII, P, 1, e, (I) *et seq.*; *infra*, XXI, C, 3, e *et seq.*

92. *Connecticut.*— Hart *v.* Boston, etc., R. Co., 40 Conn. 524, under a statute.

Illinois.— Henderson Loan, etc., Assoc. *v.* People, 163 Ill. 196, 45 N. E. 141 (loan association having banking powers discontinuing business without excuse for fifteen years); St. Louis, etc., Co. *v.* Sandoval, etc., Co., 116 Ill. 170, 5 N. E. 370.

New York.— People *v.* Northern R. Co., 53 Barb. 98 (under a statute); People *v.* Hudson Bank, 6 Cow. 217.

Ohio.— State *v.* Seneca County Bank, 5 Ohio St. 171.

Texas.—City Water Co. *v.* State, (Civ. App. 1895) 33 S. W. 259, where there was a failure of a water company to elect directors or officers, hold meetings, or perform corporate acts, for nearly eight years, and an attempted sale and surrender of all its property to another corporation.

93. Ward *v.* Sea Ins. Co., 7 Paige (N. Y.) 294; Matter of Jackson Mar. Ins. Co., 4 Sandf. Ch. (N. Y.) 559.

94. Wadesboro Cotton Mills Co. *v.* Burns, 114 N. C. 353, 19 S. E. 238.

95. Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273. See also *supra*, VIII, P, 1, e, (I) *et seq.*

96. People *v.* Hudson Bank, 6 Cow. (N. Y.) 217; State *v.* Seneca County Bank, 5 Ohio St. 171.

97. When therefore in a proceeding in the nature of quo warranto, the corporation showed that it had been duly incorporated, and traversed the allegations of usurpation in the information; and the state replied, setting up in substance among other things, that on a day named the corporation had become wholly insolvent and unable to redeem its bills; that it had discontinued its banking operations, either by the way of discounts or otherwise, and had assigned or transferred so much of its property to trustees, in trust for the payment of its debts, as to render itself incapable of continuing its banking operations according to the intent of the statute of incorporation, it was held that this constituted a good ground for a judgment of ouster. People *v.* Hudson Bank, 6 Cow. (N. Y.) 217. Closely similar to this on its facts and conclusions was State *v.* Seneca County Bank, 5 Ohio St. 171. On the other hand a railway company does not subject itself to a judicial sentence of forfeiture, when it discontinues its business, in consequence of having conveyed its property to another such company, under the authorization of a special statute, which by a just construction of its terms contemplates that the granting company shall continue its corporate existence. State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245. Again it has been adjudged that the assignment by a banking corporation of all its assets for the liquidation of its debts does not of itself authorize a judgment ousting it of its franchises, although it is conceded that circumstances may exist under which such an assignment will be tantamount to such a non-user of its franchises as will warrant an ouster. State *v.* Commercial Bank, 13 Sm. & M. (Miss.) 569, 53 Am. Dec. 106. *Compare* State *v.* Commercial Bank, 33 Miss. 474. An

c. No Forfeiture For Non-User of Some of Its Granted Powers. No corporation is required to exercise all the powers granted to it as a condition of the exercise of any of them, unless such a requirement is expressly made in some statute or ordinance under which it obtains some of its powers, or unless its powers are inseparably connected with each other.[98]

d. No Forfeiture by Reason of Unauthorized Lease of Properties and Franchises. It has been held that the charter of a domestic railway and bridge corporation will not be forfeited because of an unauthorized lease of all its rights and privileges for ninety-nine years to a foreign corporation composed of and officered by the same men, which fails to comply with charter conditions as to the streets.[99]

e. Suspending Ordinary Business For Year Under Statute. Under the Revised Statutes of New York,[1] a corporation which for one whole year had remained insolvent, or which had suspended its ordinary business, was deemed to have surrendered its franchises and was subject to be adjudged dissolved. This statute was the subject of numerous adjudications, but as it has been repealed it will not be further noticed here.

f. Failing to Build Branch Railroad. The principle already referred to,[2] that the courts proceed with extreme reluctance in adjudging forfeitures of the franchises of corporations, finds an apt illustration in a case where it was held that, where a corporation fails to carry out the public duties assumed by it in consideration of the grant of its franchises, by building a branch railroad, its franchises are forfeited only as to that particular branch.[3]

g. Forfeiture of Charter of Railroad Company For Discontinuing Part of Its Route — (i) *In General.* It has been reasoned that a railroad company which has completed its road between the termini named in its charter or articles of association forfeits its franchise by abandoning or ceasing to operate a part of the route. It was held that it could not be compelled by a court of equity, even where the action was brought by the state, to continue to maintain and operate it. The remedy was by mandamus, or indictment, or by a proceeding in the nature of quo warranto, at the election of the state, to forfeit the franchises of the corporation.[4]

(ii) *Will Work Forfeiture of Franchise of Building Unfinished Portion.* It may perhaps be collected, as the result of a few cases, that the failure of a railroad or plank-road company to build a part of its route will not work a forfeiture of all its franchises, but will at most work a forfeiture of the franchise which it possesses of building the unfinished portion, so that the state will be warranted in conferring that franchise upon another company.[5]

insurance company does not forfeit its charter because of non-user, by refusing to insure against extra-hazardous risks. State *v.* Urbana, etc., Mut. Ins. Co., 14 Ohio 6.

98. Illinois Trust, etc., Bank *v.* Ottumwa Electric R. Co., 89 Fed. 235 [*affirmed* in 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481].

99. State *v.* Omaha, etc., R., etc., Co., 91 Iowa 517, 60 N. W. 121.

1. 2 N. Y. Rev. Stat. p. 463, § 38.

2. See *supra*, XXI, C, 1, a.

3. State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245. See also State *v.* Brownstown, etc., Gravel Road Co., 120 Ind. 337; Com. *v.* Fitchburg R. Co., 12 Gray (Mass.) 180. It may be remarked that where a corporation fails to carry out the public object for which it was incorporated, such as the construction of a particular line of railroad, and the statutory duty is clear, a mandamus will lie to compel it to perform such duty. State *v.* Southern Minnesota R. Co., 18 Minn. 40; People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

4. People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295. *Compare* State *v.* Western North Carolina R. Co., 95 N. C. 602.

5. State *v.* Brownstown, etc., Gravel Road Co., 120 Ind. 337, 22 N. E. 316; State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245. In the former case the court so concluded in obedience to the language of a statute, but the reasoning of the court indicates that its conclusion would have been the same without the statute. In a case in Michigan, where the four judges of the court delivered separate opinions, and one of them dissented, leave to file an information in the nature of quo warranto against a railroad company for the purpose of forfeiting its charter was denied where it was apparent that the forfeiture of the charter would not redress the grievance complained of, which was that the lessee of the railroad company had discontinued a part

h. Failing to Keep Works in Repair — (I) *In General.* In the case of corporations organized to build toll-roads, canals, or other works of public utility, to be used by members of the public distributively on the payment of tolls, there is a reasonable implication, arising from the acceptance of the franchise, that the corporation will keep the works in a reasonable state of repair for the benefit of the public; and moreover the charters or other governing statutes generally prescribe this in express terms. In either case a substantial failure to comply with this duty will be ground upon which the state may demand a judgment ousting the corporation of its franchises.[6]

(II) *Rigid State of Repairs Not Insisted Upon.* But here, as elsewhere seen,[7] in proceedings to forfeit the franchises of corporations, the law does not require the performance of conditions subsequent with extreme strictness, nor does it insist upon extreme care, or upon the attainment by the corporation of impracticable results.[8]

i. Omission to Elect Directors. As elsewhere seen[9] the mere omission to elect trustees, directors, or other officers of a corporation does not *ipso facto* work a dissolution, provided the means remain, under the charter or governing statute, of perpetuating its existence; and similarly it has been held that the omission to elect trustees for a number of years is not a statutory ground of dissolution,[10] since the old board hold over, and their acts are valid until their successors are elected.[11]

4. Forfeiture For Misuser of Franchises or Powers — a. In General. The doctrine under this head has been well stated by saying that where a private corporation, created by a state law, misuses its franchise with respect to matters which are of the essence of the contract between such corporation and the state, and the acts or omissions are wilful and repeated, and inflict injury upon the public generally, they constitute ground for the forfeiture of the franchises and the dissolution of a corporation.[12]

of its route, and had side-tracked a village, which complained of the consequent loss of facilities for transportation. Atty.-Gen. *v.* Erie, etc., R. Co., 55 Mich. 15, 20 N. W. 696. The decision of another court is to the effect that a railroad corporation which has built a branch railroad under authority from the legislature, which maintains it in good condition for use, uses it regularly and sufficiently for the transportation of freight, and is ready at all times to transport passengers and draw passenger-cars over it whenever any shall be offered to be transported or drawn, for a reasonable toll or compensation, does not forfeit its franchise by discontinuing, after public notice, the running of regular passenger trains over the branch railroad, when there is not sufficient passenger business, at any rate of toll or fare, to pay the expenses of running them, by reason of the establishment, under authority of the legislature, of a competing line for the transportation of passengers over a horse railroad. Com. *v.* Fitchburg R. Co., 12 Gray (Mass.) 180.

6. State *v.* Moore, 19 Ala. 514; People *v.* Plainfield Ave. Gravel-Road Co., 105 Mich. 9, 62 N. W. 998 (financial inability of corporation immaterial); People *v.* Plymouth Plank Road Co., 32 Mich. 248; People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445; People *v.* Hillsdale, etc., Turnpike Co., 23 Wend. (N. Y.) 254; People *v.* Royalton, etc., Turnpike Co., 11 Vt. 431; State *v.* Pasumpsic Turnpike Co., 3 Vt. 178.

7. See *infra*, XXI, C, 4, c, (I) *et seq.*

8. When therefore a charter had been granted for the navigation of a bayou, and the company was required to keep ordinarily, at low tide, a certain depth of water, the simple fact that less water was occasionally found, in consequence of extremely low stages of the lake into which the bayou emptied, was not sufficient ground for the state to demand a judgment of forfeiture. State *v.* New Orleans Nav. Co., 7 La. Ann. 679. Nor was a turnpike company required after fifty years to continue its road in the same condition as required by the statute in its original construction, but the law was satisfied with its continuance in a good state of general repair; so that, to warrant a forfeiture for an omission to keep it in repair, it was necessary for the state to allege and prove that the want of repair was such as to render the road dangerous and inconvenient to travelers. People *v.* Williamsburgh Turnpike, etc., Co., 47 N. Y. 586. *Compare* People *v.* Waterford, etc., Turnpike Co., 3 Abb. Dec. (N. Y.) 580, 2 Keyes (N. Y.) 327.

9. See *infra*, XXI, D, 2, b.

10. Under N. Y. Laws (1848), c. 40, § 4.

11. Kelsey *v.* Pfaudler Process Fermentation Co., 45 Hun (N. Y.) 10.

12. State *v.* New Orleans Water Works Co., 107 La. 1, 31 So. 395 [writ of error *dismissed* in 185 U. S. 336, 22 S. Ct. 691, 44 L. ed. 936].

b. Wilfully Violating Charter Provisions Intended For Protection of Public. The principle is sometimes announced by the statement that where there has been a misuser or non-user in regard to matters which are of the essence of the contract between the corporation and the state, and the acts or omissions have been repeated and wilful, they constitute a just ground on which the state may claim a forfeiture.[13]

c. Misuser in Non-Performance of Conditions Subsequent — (I) *In General.* When it is determined, as the true interpretation of the charter or governing statute, that a condition annexed to a grant of corporate franchises is not a condition precedent, which must be performed before the grant takes effect, but is a condition subsequent, then, in conformity with a doctrine already considered,[14] the non-performance of the condition does not operate *ipso facto* to determine the grant, until the state or the municipal corporation, where that is the granting power, takes the appropriate affirmative action to put an end to the grant for that reason, and this by analogy to the principle, applicable to conditions subsequent in private grants, that such a condition does not defeat the grant until there is an entry by the grantor.[15] But where conditions subsequent in a grant of corporate franchises are of such a nature as to affect the public right and interest, in such a manner and to such an extent that it may be reasonably presumed that without the insertion of the conditions the grant would not have been made, then if the conditions are not performed it is good ground for adjudging a forfeiture of the franchises at the suit of the state.[16] And this is true, not only of express conditions in charters and governing statutes, but also of those conditions which the law implies as necessarily inhering in the grant. Thus it was said in a case in the English king's bench, that all franchises are granted upon condition that they shall be duly executed according to the charter, and that a corporation cannot be allowed to take a grant and repudiate the conditions on which it is made, but that a breach of the conditions is punished by withdrawing the grant.[17] This doctrine has been affirmed by American courts, and with the additional statement that it is a fundamental doctrine that corporations shall perform the conditions and duties enjoined by the fundamental law of their creation, and that a non-performance of the conditions is *per se* such a misuser as will forfeit the grant at common law.[18] The general doctrine therefore is that the non-performance of the substantial conditions named in the charter, upon which the grant was made, or of those named in the governing statute under which the corporation was permitted to organize, operates *per se* as such a misuser as will warrant a judicial forfeiture of the grant.[19]

(II) *Non-Performance Need Not Be Result of Bad or Corrupt Motive.* While it is often said that to warrant a judgment of forfeiture there must be something wrong arising from wilful abuse or improper neglect, something more than mere accidental negligence, excess of power, or mistake in the

13. State *v.* New Orleans Gas Light, etc., Co., 2 Rob. (La.) 529; State *v.* Commercial Bank, 33 Miss. 474; Com. *v.* Commercial Bank, 28 Pa. St. 383.

The erection of a building by a bank was said to be a violation of its charter, such as would entitle the state to forfeit its franchises, in New Haven *v.* City Bank, 31 Conn. 106. But there is no propriety in such a conclusion, since the building would be of public benefit and utility, and only the shareholders would have the right to complain.

14. See *supra*, XXI, A, 6, c, (I) *et seq.*

15. See to this effect People *v.* Hillsdale, etc., Turnpike Road Co., 23 Wend. (N. Y.) 254; Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879.

16. People *v.* National Sav. Bank, 129 Ill. 618, 22 N. E. 288.

17. London *v.* Vanacker, 1 Ld. Raym. 496.

18. People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551.

19. *Illinois.*—People *v.* National Sav. Bank, 129 Ill. 618, 22 N. E. 288.

Massachusetts.— Lumbard *v.* Stearns, 4 Cush. 60; Quincy Canal *v.* Newcomb, 7 Metc. 276, 39 Am. Dec. 778.

New York.—People *v.* Waterford, etc., Turnpike Corp., 3 Abb. Dec. 580, 2 Keyes 327; People *v.* Bristol, etc., Turnpike Road Co., 23 Wend. 222; People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. 193, 35 Am. Dec. 551.

North Carolina.—Atty.-Gen. *v.* Petersburg, etc., R. Co., 28 N. C. 456.

mode of exercising an acknowledged power, yet it is also held that it is enough to work a forfeiture, that the performance of the condition is neglected, or designedly omitted, and that the ingredient of a bad or corrupt motive is not necessary.[20]

(III) *Strained or Technical Compliance With Condition Not Required.* It must also be concluded from what has preceded[21] that the law does not insist upon a strained, literal, or technical compliance with the conditions of such a grant, but that a reasonable and substantial performance of the conditions is all that is necessary to defeat a claim to a forfeiture.[22]

(IV) *Misprisions of Directors and Officers* — (A) *In General.* Here as elsewhere the rule obtains that the acts of the directors are the acts of the corporation, and that the misprisions of the directors in the exercise of their offices are the misprisions of the corporation.[23] Hence, where the directors of a corporation do any act which may work a forfeiture of its charter, this will afford ground for a proceeding in equity on the part of a minority of the shareholders, under a statute, to wind up the corporation by the appointment of a receiver.[24]

Rhode Island.—State *v.* Pawtuxet Turnpike Corp., 8 R. I. 182.

Vermont.— People *v.* Royalton, etc., Turnpike Co., 11 Vt. 431.

20. People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551.

21. See *supra*, XXI, C, 1, a.

22. Thompson *v.* People, 23 Wend. (N. Y.) 537; People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551. And see Com. *v.* Allegheny Bridge Co., 20 Pa. St. 185. Cal. Civ. Code, § 502, does not declare that a failure to comply with the provision which requires work to be commenced within one year by a street railroad company shall work a forfeiture; but that a failure to comply with that, and also with the provision which requires the work to be completed within three years, shall have that effect. Omnibus R. Co. *v.* Baldwin, 57 Cal. 160. Where the charter of a railroad company defined the beginning point and terminus of the road, gave the general direction of the road, and required a survey of the route to be made, and a map of it to be filed in the office of the secretary of state within twelve months from the grant of the charter, these provisions were held not material conditions in the charter affecting the public interest, and the conclusion was that a failure to comply with them would not authorize a judicial declaration of the forfeiture of the franchise. Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602. But where the charter of a banking corporation contained the provision, "this act shall be void, unless said corporation shall organize and proceed to business within two years after the passage of this act," and another provision was, "the capital stock of said corporation shall be $50,000.00, with power to increase the same to $150,000.00, and shall be divided into shares," etc., and only ten thousand dollars of the capital stock was subscribed and paid in within the two years thus limited, it was held that the corporation had no authority to proceed to business, and that the state was entitled to a judgment of ouster. People *v.* National Sav. Bank, 129 Ill. 618, 22 N. E. 288. For a statute providing for the dissolution of railway corporations which do not begin the construction of their roads within five years see Colo. Laws (1889), p. 95.

23. Vincennes Bank *v.* State Bank, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 31; Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497.

24. Ward *v.* Sea Ins. Co., 7 Paige (N. Y.) 294. Where one of the trustees of a corporation entered into an agreement with one A, to the effect that if A would obtain an appropriation from the legislature to the corporation he should receive whatever amount might be appropriated in excess of a certain sum; and the board of trustees, with knowledge of the agreement, appropriated, by resolution, the excess over the sum named, to the payment of A, after he had obtained the legislative appropriation; and the money was paid to A in pursuance of their resolution, these acts were held to be such an abuse of the powers of the corporation as constituted sufficient ground for a sentence of dissolution. Nor did the fact that in making the payment to A the trustees acted upon the advice of counsel; or the fact that, since the passage of the resolution, the board of trustees had been changed by the election of new members, and that the new members were competent to manage the affairs of the corporation, constitute any defense to the action to dissolve it for the misconduct above stated. People *v.* Dispensary, etc., Soc., 7 Lans. (N. Y.) 304. So where it was found by a jury in a quo warranto proceeding that a banking corporation had embezzled large sums of money deposited with it for safe-keeping by the United States, this was held a violation of the first principles of their charter; and it was no argument that the embezzlement was the act of the directors, and was not to be charged against the shareholders, since the statute evidently contemplated that the corporation should be responsible to the fullest extent for the acts of its governing body. Besides the whole corporation by their corporate name had been charged and found guilty by the verdict of the jury. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234. It

(B) *But Not Unauthorized Misprisions and Breaches of Trust.* But it must not be concluded from the foregoing that the unauthorized misprisions of the ministerial officers of corporations will constitute grounds of a judicial sentence forfeiting the franchises of the corporation, and thereby working wrong to the innocent shareholders. Thus it has been held that the cashier of a banking corporation cannot produce a forfeiture of the charter, by a direct and palpable violation of the authority or instructions given him by the directors. It is conceded that if they give him no instructions against doing the illegal act upon which the right of forfeiture is predicated by the state, and he commits it in the course of his ordinary duties, it becomes their act; but it is held that if his act is a direct violation of express instructions from them, as well as a violation of the charter, the corporation is not bound by it, in such a sense that its charter is to be thereby forfeited.[25] Nor must it be concluded that every illegal act or breach of trust on the part of the directors even of a corporation will warrant a sentence of forfeiture.[26]

d. What Acts of Misuser Will Not Warrant Forfeiture — (I) *In General.* No decree forfeiting the franchises of a corporation will be granted for anything less than the violation of an express provision of law under which the corporation derives its powers, or for such a misuse or non-use of them as results in a substantial failure to fulfil the purpose of its organization.[27]

(II) *Unlawful Acts For Which Forfeitures Will Not Be Granted.* A forfeiture of the charter of a corporation will not be granted for wrongs to creditors or shareholders in the administration of its affairs, which have resulted from the assumption of questionable rights, the parties aggrieved having other adequate remedies; but there must have been *ultra vires* acts, wilful and continued, and relating to some franchise granted.[28] Such a forfeiture will not for example be granted because of the illegal levy of assessments upon the shares of shareholders.[29] Such a forfeiture will not be granted in the case of a water company because of violation of law at the time of its organization, more than eight years before, in issuing bonds in excess of the cost of constructing the waterworks, where none of the present shareholders were guilty of such violation.[30]

(III) *Making or Procuring Fundamental Changes in Corporation* — (A) *In General.* This in general is not a ground of forfeiting the franchises of a corporation. It has even been held that, if a domestic corporation procures a charter from a foreign state, under which its members attempt to reorganize, this is not such a violation of its allegiance to the state granting its charter, or *crimen læsæ majestatis*, as will warrant a judicial sentence forfeiting its charter in the domestic state.[31] Nor does the further fact that the corporation, under cover of its foreign charter, has instituted a proceeding in the circuit court of the United States within the domestic state, against another corporation created by the domestic state, and also against other persons, praying that an act of the legislature

has been held that a mutual benefit society will not be wound up because of the adoption of by-laws by its incorporators giving themselves the power to fill all vacancies in office and fix their own salaries, where such action has been rescinded, and the organization as perfected is entirely legal. Com. *v.* United Brethren Mut. Aid Soc., 16 Pa. Co. Ct. 145.

25. State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218, 45 Am. Dec. 280.

26. Thus the fact that the trustees of a mutual benefit association illegally voted to themselves back pay and issued unauthorized certificates of membership was held not a sufficient ground for ousting the corporation of its franchises. The court justly concluded that "to visit the perversion of its objects by a few, upon the heads of the entire membership must result in irremediable hardship." State *v.* People's Mut. Ben. Assoc., 42 Ohio St. 579, 584.

27. Illinois Trust, etc., Bank *v.* Ottumwa Electric R. Co., 89 Fed. 235 [*affirmed* in 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481].

28. State *v.* Southern Bldg., etc., Assoc., 132 Ala. 50, 31 So. 375.

29. People *v.* Rosenstein-Cohn Cigar Co., 131 Cal. 153, 63 Pac. 163.

30. State *v.* Janesville Water Co., 92 Wis. 496, 66 N. W. 512, 32 L. R. A. 391.

31. Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26. *Compare* Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450, which seems to have been a statutory proceeding by quo warranto

of the domestic state be declared null and void, warrant such a judicial sentence; for, although a corporation which undertakes to drag its sovereign *ad forinsecus examen* before the bar of the tribunal of another sovereign violates its first and paramount duty, and thereby subjects itself to the extreme consequences, yet a court of the United States within the domestic state is not a court of another sovereign, because the federal constitution is the constitution of the state, and the government of the United States forms a part of the government of the state.[32] So where an incorporated turnpike company attempted in good faith to consolidate with another such company, and twelve years afterward the consolidation was declared void, and the former company then resumed possession of its property, and for a year continued to exercise its franchises, it was held that it should not be deemed to have forfeited them by non-user, by reason of having failed to keep up its original organization during the period when the consolidation subsisted *de facto*. The court proceeded largely upon the ground of encouraging such enterprises as the company had been organized to promote, the maintaining of turnpike roads.[33]

(B) *Changing Corporate Name.* The attempt of a corporation to change its name, in a manner not authorized by its charter, does not *ipso facto* work an avoidance of its charter.[34] Nor does the use of an abbreviated name by the officers of a corporation, organized under a particular name, constitute such a usurpation as will support a proceeding by quo warranto to oust the corporation of its franchises.[35]

(IV) *Attempted Violations of Law.* No mere intention or purpose on the part of those who are in control of a corporation to violate the law will afford ground for forfeiting its franchises; since there is always a *locus pœnitentiæ*, and the carrying out of such an unlawful purpose may generally be thwarted by process of injunction.[36]

(V) *Failure to Make, File, or Publish Statements as Required by Statute.* There is a difference of opinion upon the question whether statutes requiring the filing by corporations of their condition at stated periods, and denouncing penalties for failing so to do, are cumulative or exclusive. If the penalty is exclusive, then such a failure is not ground of forfeiting the franchises of the corporation.[37] Whether such a statute is deemed to be cumulative or exclusive, a mere negligent or inadvertent failure to make the prescribed returns would not afford ground of forfeiture.[38]

to oust certain officers of a corporation, who had undertaken to accept certain fundamental charter amendments.

32. Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26.

33. State *v.* Crawfordsville, etc., Turnpike Co., 102 Ind. 283, 1 N. E. 395.

34. O'Donnell *v.* Johns, 76 Tex. 362, 13 S. W. 376.

35. People *v.* Bogart, 45 Cal. 73. *Compare* People *v.* Sierra Buttes Quartz Min. Co., 39 Cal. 511. And see as to names of corporations *supra*, I, C, 1 *et seq.*

36. Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26, 45. Upon the same line of thought, it has been held that the "reasonable cause" to decree a dissolution of a corporation, under a statute of Massachusetts (Mass. Gen. Stat. c. 68, § 35) providing for a dissolution upon a petition by a majority in number or interest of the members, is something more than a vague apprehension of some future mischief. It was accordingly held no ground for the dissolution of a telegraph company, upon such a petition, that it had leased its line to another company at a less rent than it might have obtained, fraudulently intending to give the benefit of the lease to the second company, in which the majority in interest of the shareholders of the first company were also interested, it appearing that after the filing of the petition for dissolution the lease had been canceled by a vote of the directors of both companies. *Re* Franklin Tel. Co., 119 Mass. 447.

37. State *v.* Brownstown R., etc., Gravel Road Co., 120 Ind. 337, 22 N. E. 316. See also Baker *v.* Backus, 32 Ill. 79. It may be collected from two cases in New Hampshire that the failure of a bridge company to make returns to the state of its tolls for the period of thirty years is not a ground upon which "in equity and good conscience a decree of forfeiture should be made," under the provisions of a statute, where the defendants pray to be permitted to make the returns. State *v.* Barron, 57 N. H. 498, 58 N. H. 370.

38. State *v.* Seneca County Bank, 5 Ohio St. 171. For a failure to make an annual report required by the New York Manufactur-

(VI) *Committing Frauds Upon Creditors and Shareholders.* The commission of frauds upon creditors or upon shareholders is not a general ground of dissolving a corporation, since such wrongs are remediable in equity. The dismemberment of a trading corporation and the appointment of a receiver is not in the opinion of one court justified upon the mere apprehension that certain frauds which have been committed by a majority of the directors may be repeated.[39] But it seems that an injunction is authorized on behalf of a particular creditor to prevent a failing corporation from preferring other creditors, by confessing judgments in their favor or otherwise;[40] and it seems that where the state is a creditor it may have an injunction and a receiver if the circumstances warrant it.[41]

(VII) *Acts for Which Legislature Has Provided Specific Penalty.* If the legislature has forbidden the doing of an act by a corporation and provided a specific penalty for doing it, the penalty is generally deemed to be exclusive, so as to prevent a forfeiture of the charter of the corporation after violating the legislative command;[42] although it is believed that this principle cannot be stated with confidence as applicable to all cases, but that it must depend upon the nature of the act and the true construction of the statute in each case.

(VIII) *Mere Insolvency.* Mere insolvency does not, as elsewhere stated,[43] work an *ipso facto* dissolution of a corporation; nor is it ordinarily a ground on which the state may demand a judgment of ouster.[44] But it may be and often is regarded as a *de facto* dissolution, for the purpose of letting in the remedies of its creditors against its shareholders.[45] Under statutes of New York authorizing proceedings in equity to wind up insolvent moneyed corporations the mere failure of a bank to pay a debt on demand would not support such a proceeding.[46]

(IX) *Officers and Directors Residing Out of State.* It is no ground for declaring a forfeiture of the franchises of a corporation organized under the general law of Illinois for the purpose of buying, leasing, selling, and operating railroad rolling-stock, that the officers and directors reside outside of the state; since the officers and directors of such corporations are not, like the officers and directors of railroad corporations, required to reside within the state.[47]

ing Law of 1848, § 12, a corporation incurs the liability of a forfeiture of its charter. People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140, 29 N. E. 947, 42 N. Y. St. 753, 15 L. R. A. 240.

39. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756, 26 Atl. 886.

40. Galwey *v.* U. S. Steam Sugar Refining Co., 36 Barb. (N. Y.) 256 [*affirming* 13 Abb. Pr. (N. Y.) 211, 21 How. Pr. (N. Y.) 313].

41. State *v.* Northern Cent. R. Co., 18 Md. 194.

42. Com. *v.* Breed, 4 Pick. (Mass.) 460; State *v.* Commercial Bank, 10 Ohio 535.

43. See *infra*, XXI, D, 2, h, (I) *et seq.*

44. State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405.

45. See *supra*, VIII, P, 1, e, (III), (A) *et seq.*

46. Livingston *v.* State Bank, 26 Barb. (N. Y.) 304, 5 Abb. Pr. (N. Y.) 338; *In re* Mechanics' Bank Case, 5 Abb. Pr. (N. Y.) 374. That the mere refusal to pay a note or other evidence of debt issued by a banking corporation, when the officers of the corporation had reasonable cause for believing that the debt was not due, would not work a forfeiture of its charter see Bank Com'rs *v.* Buffalo Bank, 9 Paige (N. Y.) 497. Again that neither discontinuance of business, reputed insolvency and inability to pay their debts, having large amounts of notes outstanding and unpaid, suffering their circulation notes to be returned to the comptroller for redemption, non-payment of rent for the premises occupied by the association, nor having on hand less than twelve and a half per cent of specie, nor the issue of post-notes, were grounds warranting a dissolution of a New York banking association to be ordered see Parmly *v.* Tenth Ward Bank, 3 Edw. (N. Y.) 395. That a creditor at large cannot maintain an action to have a corporation dissolved on the ground of its insolvency and to compel the officers to make good the losses from their mismanagement see Cole *v.* Knickerbocker L. Ins. Co., 23 Hun (N. Y.) 255. A mutual insurance corporation will not be dissolved for insolvency under N. Y. Code Civ. Proc. § 1785, where there are capital-stock notes available to meet any losses, and therefore the public interests are not in imminent danger, and the corporation has expressed its desire to make good any deficiency in the cash; but the dissolution will be denied upon the condition that the corporation shall make good such deficiency within a time to be specified. People *v.* Equitable Mut. F. Ins. Co., 12 Misc. (N. Y.) 556, 33 N. Y. Suppl. 708, 67 N. Y. St. 577.

47. North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462.

e. What Acts of Misuser Will Warrant Forfeiture — (I) *Making Excessive Loans to Directors.* It has been held that for a banking corporation to make loans to its own directors in excess of the limit prescribed by statute is a ground for forfeiting its franchises.[48]

(II) *Joining "Trust" to Stifle Competition.* For a corporation to combine with other corporations and form a "trust," the object of which is to limit production, maintain prices, and to stifle competition, is such a misuser of its franchises as will entitle the state to demand a judgment ousting it of them, where there is a statute prohibiting corporations from entering into such combinations.[49]

(III) *Making Usurious Loans, Shaving Notes, Etc.* The deliberate violation by a banking corporation of restrictive provisions in its charter relating to the rate of interest or of discounts upon loans is a ground upon which the state may demand a forfeiture of its franchises.[50] Thus where a banking corporation is prohibited by its charter from making loans at a greater rate of discount than one half of one per centum for thirty days, and from dealing in promissory notes, if it wilfully violates these restrictions by discounting at a higher rate or by dealing in promissory notes otherwise than by discounting them at a rate not greater than that prescribed, such acts constitute good ground of forfeiture.[51]

(IV) *For Public-Service Corporations to Serve Public Unequally.* It seems clear that corporations chartered for the performance of public duties, such as railway companies, turnpike companies, gaslight companies, water-supply companies, and the like, stand under the duty of serving all members of the public equally under equal conditions, and that a wilful violation of this duty is such an offense against the implied conditions under which they have received their charters as entitles the state to demand a forfeiture of them.[52]

(V) *Contracting Debts Beyond Prescribed Limit.* Where the charter of a banking corporation provided that the total amount of debts which the corporation should at any time owe should not exceed double the amount of moneys actually deposited in the bank for safe-keeping, a violation of this provision was held to be a ground on which the state might demand a judgment of ouster, although the statute provided for making the directors individually liable for the offense.[53]

(VI) *For Banking Corporation to Issue Paper With Intent to Defraud.* In a proceeding by quo warranto against a banking corporation, it was found by the jury that they, with intent to defraud, etc., had issued paper to a vast amount, which at the time of issuing they knew that they had not the means of redeeming, and which they did not intend to redeem. It was held that this finding, although it did not disclose a violation of any express provisions of the charter, disclosed what was evidently contrary to the intent and spirit of the grant; and that upon it the state was entitled to a judgment of ouster, upon the well-known principle of common law, that whenever the managers of a corporation pursue such a course as wholly to frustrate the design of the state in grant-

48. State *v.* Seneca County Bank, 5 Ohio St. 171.

49. People *v.* American Sugar Refining Co., 7 R. & Corp. L. J. 83; Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; People *v.* North River Sugar Refining Co., 3 N. Y. Suppl. 401, 19 N. Y. St. 853, 16 N. Y. Civ. Proc. 1, 22 Abb. N. Cas. (N. Y.) 164 [*affirmed* in 54 Hun (N. Y.) 354, 7 N. Y. Suppl. 406, 27 N. Y. St. 282, 5 L. R. A. 386 (*affirmed* but on another ground in 121 N. Y. 582, 24 N. E. 834, 31 N. Y. St. 781, 18 Am. St. Rep. 843, 9 L. R. A. 33)].

For constitutional provisions affirming this principle see Ida. Const. 11, § 18; Mont. Const. 1889, art. 15, § 20.

A forfeiture may be predicated on the violation of an anti-trust statute which is unconstitutional in some respects. State *v.* Shippers' Compress, etc., Co., 95 Tex. 603, 69 S. W. 58 [*affirming* (Tex. Civ. App. 1902) 67 S. W. 1049].

50. State *v.* Commercial Bank, 33 Miss. 474.

51. Com. *v.* Commercial Bank, 28 Pa. St. 383. See also Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

52. See the reasoning of Shaw, C. J., in Lumbard *v.* Stearns, 4 Cush. (Mass.) 60.

53. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

ing its franchise, the reason of its existence ceases, and the state has a right to resume the franchise granted.[54]

(VII) *For Banking Corporation to Make Dividends While Refusing Specie Payments.* It has been held that the verdict of a jury, finding that a banking corporation had made large dividends of profits, while they had refused to redeem their notes in specie or anything else, entitled the state to a judgment of ouster of its franchises. "If," said Holman, J., "they were, at the time of those dividends, able to redeem their notes and refused to do so, it manifests a fraudulent intention; if they were then unable to redeem them, their conduct shows a predetermination to continue so."[55]

(VIII) *For Banking Corporation to Embezzle Deposits of United States.* Where a jury in a quo warranto proceeding found that a banking corporation, created by a charter granted by the legislature of Indiana, had embezzled large sums of money deposited for safe-keeping by the United States, this was held "a violation of the first principles of their charter," such as showed that they could not be safely trusted with their franchises, and such as consequently entitled the state to a judgment of ouster.[56]

(IX) *For Banking Corporation to Suspend Specie Payments.* The general refusal of a bank to redeem, in gold and silver coin of the United States, its circulating notes, was frequently held, during the period of the existence of state banks of issue, to be such a failure to discharge the obligations imposed upon such a bank by its charter, defeating the essential ends for which it was instituted, as entitled the state to a judgment ousting it of its franchises.[57]

54. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234. The charter of a debenture company which had set forth a scheme for the sale of certificates redeemable at the expiration of six years, with fifty per cent in addition to the cash paid in, to come exclusively from the interest on twenty-five per cent of the payment, sixty-five per cent of the payment being used to liquidate other debentures maturing earlier, was annulled at the suit of the state because of the impossibility of the accomplishment of the scheme and the certainty of disastrous results to investors, in other words, because the scheme was fraudulent on its face. State *v.* New Orleans Debenture Redemption Co., 51 La. Ann. 1827, 26 So. 586; State *v.* Louisiana Debenture Co., 51 La. Ann. 1795, 26 So. 592.

55. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 276, 12 Am. Dec. 234.

56. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

57. Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Planters' Bank *v.* State, 7 Sm. & M. (Miss.) 163; Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599; State *v.* State Bank, 1 Speers (S. C.) 433; State *v.* Charleston Bank, 2 McMull. (S. C.) 439, 39 Am. Dec. 135; Townsends *v.* Racine Bank, 7 Wis. 185. See also Bank Com'rs *v.* James Bank, 9 Paige (N. Y.) 457 (construing a statute subjecting banking corporations to a forfeiture of their charters for allowing their circulating notes to remain unpaid for the period of twenty days, with the conclusion that they must be left with the agent of the bank until after the expiration of the twenty days, or presented for payment a second time after the expiration of that time); State *v.* Commercial Bank, 10 Ohio 535 (where it was held that the fact that the legislature had provided a separate penalty for this offense indicated a purpose that it should not be ground of a total forfeiture). For a case where two five-dollar bills of a bank were presented and redemption demanded in gold coin and the cashier refused to redeem in other coin than in quarter dollars of United States coinage see People *v.* Dubois, 18 Ill. 333.

Other violations of duty by banking corporations.— For an early and profligate decision to the effect that not the suspension of specie payments, nor the taking of usurious interest, nor expansions and contractions of circulation, nor disproportionate loans to its own officers, will entitle the state to a judgment of ouster against one of its incorporated banks, see State *v.* Commercial Bank, 10 Ohio 535. *Contrast* Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234. For a decision to the effect that for a banking corporation to receive from another such corporation the bills of the latter in exchange for its own bills, with the purpose of paying them out instead of specie, entitles the state to a perpetual injunction at the suit of the bank commissioners see Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497. For a decision to the effect that the bank commissioners of a state were not entitled to an injunction restraining a bank from exercising its franchises on the ground that it was so managing its concerns as to defraud and endanger the public, on the evidence of past mismanagement, where there had been a readjustment of its affairs with the approbation of such commissioners, see Bank Com'rs *v.* Rhode Island Cent. Bank, 5 R. I. 12.

(x) *For Water-Supply Company to Fail to Supply Wholesome, Pure, Deep-Well Water in Accordance With Charter and Contract.* The state may demand a judicial forfeiture of the charter of a water-supply company which supplies river water instead of pure, wholesome, deep-well water as required by its charter and its contract with the city, where such misconduct has continued during four dry spells in the space of two years, notwithstanding its promise after suit is begun that it will sink the additional wells necessary to afford an adequate water-supply.[58]

(xi) *Migrating From State of Its Creation.* It is sufficient ground for the dissolution of a corporation that it has removed its principal place of business and all of its agencies from the state of its creation, in contravention of the policy of the state as evinced by its general system of legislation.[59]

(xii) *Failing to Keep Its Place of Business, Books, Etc., Within State as Required by Statute.* Statutes exist in some of the states requiring corporations to keep their offices for the transaction of business and the office of their treasurer and their moneys within the state. A deliberate violation or evasion of such a statute by a corporation will afford ground on which the state may demand a forfeiture of its franchises.[60] For a failure for more than six months to comply with such a statute the charter of a corporation was annulled.[61] But where a corporation failed to comply with the provisions of a general statute requiring corporations to keep their books continually at their offices within the state, but kept them a portion of the time at another office across the state line, and produced them for inspection whenever required at its principal office within the state, it was held that its conduct exhibited no ground for a forfeiture of its charter.[62]

(xiii) *Unlawful Granting of College Degrees.* For an incorporated medical college to confer degrees for a price, without regard to the qualification of the applicant to practise medicine, is such an abuse and misuse of its franchises as entitles the state to demand a revocation of them.[63]

5. Failure to Organize in Mode Prescribed by Charter or Statute — a. Distinction Between Substantial and Directory Provisions of Statutes. It may be concluded, by analogy to what has preceded, that where the coadventurers enter upon the business of the corporation, and hold themselves out as possessing the faculties of a corporation, before they have complied, in the manner of effecting their organization, with the substantial requirements of the governing statute, this will be a just ground on which the state may demand a judgment of ouster against them; and on the other hand that the failure to comply with an unimportant, subsidiary, or directory provision, will not afford such a ground.[64]

58. Capital City Water Co. *v.* State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743, holding that the right of the state to declare the forfeiture of the charter of a waterworks company for infractions of duty imposed by its charter and contract is not taken away by a provision in the contract that the city may rescind it if the company's works fail to meet its requirements. That the failure to act as a corporation for eight years, and the attempted sale by a water-supply company of all its properties, the purchaser undertaking to fulfil its public duties, are wilful violations of corporate duties and afford ground of forfeiture of the vendor corporation see City Water Co. *v.* State, (Tex. Civ. App. 1895) 33 S. W. 259.

59. Simmons *v.* Norfolk, etc., Steamboat Co., 113 N. C. 147, 18 S. E. 117, 22 L. R. A. 677, 37 Am. St. Rep. 614. *Compare* North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462.

60. State *v.* Park, etc., Lumber Co., 58 Minn. 330, 59 N. W. 1048, 49 Am. St. Rep. 516.

61. State *v.* Topeka Water Co., 59 Kan. 151, 52 Pac. 422.

62. North, etc., Rolling-Stock Co. *v.* People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462.

63. Independent Medical College *v.* People, 182 Ill. 274, 55 N. E. 345; Illinois Health University *v.* People, 166 Ill. 171, 46 N. E. 737. But it has been held that the unlawful granting of a diploma by a school of osteopathy is not cause for forfeiting its charter, where the act was done in good faith, under legal advice, and in the belief that it had the right so to grant the diploma. State *v.* National Osteopathy School, 76 Mo. App. 439.

64. Com. *v.* Central Pass. R. Co., 52 Pa. St. 506, irregularities in reorganization where the franchises had passed under a judicial

b. Commencing Business Before Prescribed Amount of Capital Has Been Raised. For a corporation to commence business before the amount of capital has been raised which its charter or governing statute prescribes as a prerequisite to its commencing business is a ground on which the state may demand a forfeiture of its franchises.[65]

c. Failing to Fill Up Capital Before Expiration of Statutory Period. The statutory provision that a "corporation shall be dissolved" on failure to pay the capital stock within two years after incorporation makes it the imperative duty of the court to declare the forfeiture in case the attorney-general exercises his discretion to bring an action therefor, and leave to do so is given by the court.[66]

d. Failing to File Amended Articles of Incorporation With Secretary of State. Construing statutes, it has been concluded that a failure to file an amendment to articles of incorporation with the secretary of state is not vital, and will not be ground of forfeiting its franchises, if the amendment is not fundamental, such as an amendment increasing the number of directors.[67]

e. Failure to Compel Payment of Statutory Deposit. Again the failure to comply with such a provision as that at the time of the subscription to the capital stock each subscriber shall pay in cash five dollars on each share subscribed[68] is not sufficient ground for the state to demand a judgment of ouster.[69]

f. Neglect to Sell Shares of Delinquent Subscribers. Nor is a departure from the directions given in the statute to the agents of the state, in the proceeding to organize the corporation, or the neglect of the directors to sell the stock of a subscriber who has not paid the calls made against it, as they are directed to do by the charter, in itself, a ground of forfeiture.[70]

g. Corporators Failing to Perfect Legal Organization Proceeded Against Individually as Usurpers. The true doctrine, indicated by many decisions, is that the court does not in such a case bring its information against the corporation, for that would recognize that it had acquired a legal existence as such; but it brings it against the individuals who are usurping the franchises; and the judgment of the court ousts them of the franchises which they pretend to exercise.[71] In such

sale. When therefore a company incorporated to supply the city of San Francisco with water instituted a statutory proceeding to condemn land required for its purposes, and the owner of the land contested the application, on the ground that it was not a legal corporation because its articles of association did not show "where the principal place of business of the company is to be located," as required by the governing statute, it was held that this was not a proper ground for the dismissal of the petition, since it was a mere technical error and did not avoid the act of incorporation. *Re* Spring Valley Waterworks, 17 Cal. 132. *Compare* State *v.* Bradford, 32 Vt. 50, judgment of ouster against village corporation granted on proof that a majority of the electors voted against accepting the charter. There is a weak and untenable decision to the effect that the failure of the corporators named in the charter of a banking corporation to organize in compliance with the charter, and their act of holding themselves out as a corporation without so organizing, makes them a corporation, even as against the state; and that a judgment cannot be rendered in a proceeding by the state against such coadventurers to the effect that they never were a corporation, the court proceeding partly on the ground that a judgment of nullity would in some way work injury to innocent third persons. State *v.* Simonton, 78 N. C. 57. Under this doctrine a number of adventurers can meet together and call themselves a corporation and the state is powerless to interfere.

65. State *v.* Debenture Guarantee, etc., Co., 51 La. Ann. 1874, 26 So. 600; Reg. *v.* Eastern Archipelago Co., 1 E. & B. 310, 17 Jur. 491, 22 L. J. Q. B. 196, 18 Eng. L. & Eq. 167, 72 E. C. L. 310 [*affirmed* in 23 L. J. Q. B. 82, 22 Eng. L. & Eq. 328]. So where the governing statute prescribed that no corporation should continue to transact business beyond the period of one year from the date of its organization unless its entire capital should be fully paid up in cash. People *v.* Leadville City Bank, 7 Colo. 226, 3 Pac. 214, opinion by Stone, J.

66. People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140, 29 N. E. 947, 42 N. Y. St. 753, 15 L. R. A. 240.

67. Jackson *v.* Crown Point Min. Co., 21 Utah 1, 59 Pac. 238, 81 Am. St. Rep. 651.

68. As to which see *supra*, VI, H, 13, a *et seq.*

69. Com. *v.* West Chester R. Co., 3 Grant (Pa.) 200.

70. State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218, 45 Am. Dec. 280.

71. See for an illustration State *v.* Brown, 33 Miss. 500. See also State *v.* Barron, 57

a proceeding against individuals it is not sufficient for them to show an act establishing a corporation, and that they are members of it, in virtue of which they use the franchises mentioned in the information; but they must also show that the corporation is in such a state of organization as to authorize the use of the franchises and privileges which they are charged to have usurped, and that they are empowered by the corporation to do the acts complained of.[72]

h. Constitutional and Statutory Provisions Annulling Charters Where Organization Has Not Taken Place. Constitutional and statutory provisions have been enacted in some of the states declaring all existing charters *ipso facto* forfeited where a *bona fide* organization has not taken place thereunder,[73] and prohibiting the legislature from remitting the forfeiture of any corporate charter.[74]

i. Frauds Committed in Organizing. The fact that in the organization of a corporation a single subscriber and the appraisers committed a fraud upon the corporation, by allowing such subscriber stock on insufficient security, affords no ground for dissolving the company, unless the directors who accepted the security were privy to the fraud.[75]

6. Other Misprisions Not Sufficiently Serious to Demand Forfeiture of Corporate Franchises. It has been held that the franchises of a corporation will not be forfeited by reason of its failure to list its property within the state for taxation;[76] by reason of its failure to comply with a statute requiring a corporation to display a sign at its principal office advising the public of the location of such office, where the business of the corporation involves no dealing with the general public, but only with the railroad company to which the cars which it supplies are leased;[77] or by reason of its having loaned money upon the debentures of another corporation whose charter the state has set aside, or guaranteed such debentures, where the lending corporation had no legal connection with the debenture company.[78]

D. Ipso Facto Forfeitures of Charters and De Facto Dissolutions — 1. Acts and Neglects Which Operate Ipso Facto to Dissolve Corporations — a. Acts or Neglects Which Create Incapacity to Revive or Resuscitate Corporation. Generally stated any circumstance or collection of circumstances which creates an incapacity to revive or resuscitate the powers of a corporation operates in law *ipso facto* as a dissolution of it. In a learned opinion Chancellor Walworth classified the circumstances as follows: "1st. The absence of the necessary officers who are required to be present, when the deficiency is supplied, or their incapacity or neglect to do some act which is requisite to the validity of the appointment; 2d. The want of the necessary corporators who are required to unite in the appointment; 3d. The want of the proper persons from whom the appointment is to be made."[79]

N. H. 498; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33.

72. State *v.* Brown, 33 Miss. 500.

73. See for example Mo. Const. (1875), art. 12, § 1.

74. Mo. Const. (1875), art. 12, § 3. Evidence to support a finding that a corporation had organized and commenced business within one year after the date of its incorporation see People *v.* Rosenstein-Cohn Cigar Co., 131 Cal. 153, 63 Pac. 163.

75. King *v.* Sea Ins. Co., 26 Wend. (N. Y.) 62. A corporation formed for the general purpose of manufacturing lumber and operating a sawmill will not be ousted of its franchise because the corporation was not constituted as railroad corporations are required to be, although one purpose named in the articles is to buy, lease, sell, mortgage, and otherwise deal in railroads, tramways, and rights of way. People *v.* Mt. Shasta Mfg. Co., 107 Cal. 256, 40 Pac. 391.

76. North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462.

77. North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462.

78. State *v.* Debenture Guarantee, etc., Co., 51 La. Ann. 1874, 26 So. 600. That a clause in a charter prohibiting a dissolution of the corporation until its debts are paid does not prevent the state from proceeding to demand its dissolution for violations of its charter, but merely prevents the corporation from dissolving itself before the expiration of its charter without paying its debts, see Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

79. Philips *v.* Wickham, 1 Paige (N. Y.) 590, 597. In support of this text he added

b. Dissolution by Injunction Against Corporation Made Perpetual — (I) *In General.* Under statutory systems a corporation is deemed dissolved for all purposes when an injunction against the exercise of its franchises is made perpetual, in statutory proceedings to dissolve it and wind it up by means of a receiver,[80] and not until then.[81]

(II) *Judgments Valid in Suits Instituted Before Proceedings For Injunction.* On the other hand judgments and executions obtained against a corporation, and sales of corporate property thereunder, before any proceedings have been instituted to obtain a judgment or decree declaring a surrender of the corporate franchises and a dissolution of the corporation, are valid, and the purchasers at such sales acquire good titles.[82]

2. Acts and Neglects Which Do Not Ipso Facto Operate to Dissolve Corporations — a. Mere Non-User of Corporate Powers. A corporation is not *ipso facto* dissolved for all purposes by merely neglecting to exercise its corporate powers, so long as the possibility remains of resuming them.[83]

b. Omission to Elect Directors. The mere omission to elect directors, trustees, or other corporate officers does not of itself work a dissolution of the corporation, so long as the possibility of restoring the governing body by an election or otherwise remains in the members; and especially in view of the general rule of law that existing directors, trustees, and officers hold over until their successors

the following: "The case of The Corporation of Banbury, before referred to [10 Mod. 346], appears to be one of the first description. And the case cited from Rolle, and that put by Chief Baron Comyn, as well as Rex *v.* Pasmore, 3 T. R. 199, 1 Rev. Rep. 688, and The Corporation of Maidstone, and The Borough of Teverton, referred to in that case, all appear to belong to the two last classes of cases. The statute 11 Geo. I, c. 4 (15 Stat. at L. 178) has provided for the first class of cases; but the sixth section of the act expressly excludes the second class, and no provision is made for cases of the third class. The result of an examination of all the cases on this subject is the principle so ably and successfully contended for by Serjeant East, in The King *v.* Pasmore, that if the corporators have the power in themselves to supply the deficiency in their body, their rights are not extinguished, but only dormant. If however that power is gone, and they cannot act until the deficiency is supplied, the corporation is dissolved. In the language of Lord Mansfield, this is not a forfeiture for non-user, but is a consequence of law. 'The corporation is dead, and not barely asleep.'"

Illustration.— A savings-bank corporation which had paid its depositors, sold out its assets and good-will, and had done no business for sixteen years, but which subsequently changed its name and place of business, and exercised its corporate powers without objection on the part of the state, was not incapacitated from so doing by reason of the non-user of its franchises, but was at least a *de facto* corporation. Richards *v.* Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822.

80. Dane *v.* Young, 61 Me. 160; Wiswell *v.* Starr, 48 Me. 401.

81. Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103, per Walworth, Ch.

82. Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

83. *District of Columbia.*— Brown *v.* Delafield Cement Co., 1 App. Cas. 232, 21 Wash. L. Rep. 653, but may constitute a ground for forfeiting its charter in a proceeding brought by the state.

Maine.— St. Albans Baptist Meeting-House *v.* Webb, 66 Me. 398; Rollins *v.* Clay, 33 Me. 132.

Maryland.— State University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

Massachusetts.— Russell *v.* McLellan, 14 Pick. 63.

Montana.— Morrison *v.* Clark, 24 Mont. 515, 63 Pac. 98, failure of a mining company which has filed a certificate of incorporation, to hold meetings of shareholders and commence business does not invalidate a conveyance of mining claims to the corporation.

New Jersey.— A non-user even for twenty years has been held not *per se* evidence of an abandonment by a corporation of its franchises, although it is a relevant fact to be considered in determining the question. Raritan Water-Power Co. *v.* Veghte, 21 N. J. Eq. 463.

New York.— Atty.-Gen. *v.* Niagara Bank, Hopk. 354.

Texas.— Moseby *v.* Burrow, 52 Tex. 396.

Vermont.— Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

Wisconsin.—Atty.-Gen. *v.* Superior, etc., R. Co., 93 Wis. 604, 67 N. W. 1138, but a non-user merely furnishes a basis for judicial action in declaring its franchises forfeited.

On the other hand where a chapter of Free Masons disposed of all their property and held no meetings and elected no officers for twenty-three years this was held to dissolve it in such a sense as placed it beyond the power of the state chapter to restore it to life. Strickland *v.* Prichard, 37 Vt. 324.

are lawfully chosen.[84] The highest American court has declared this principle with regard to an eleemosynary corporation;[85] and the reasons are stronger for so holding in the case of a joint-stock corporation. In the latter case the board of directors or other managers or officers do not form an integral part of the corporation; and therefore the omission to elect them will operate merely to suspend the powers of the corporation for the time being, since it cannot act without them, but a subsequent election will restore its functions.[86] The conclusion is unavoidable, where the charter expressly provides that in case of the failure to elect directors at the prescribed time the old directors shall continue in the offices until their successors are elected;[87] but it is not at all necessary to the conclusion that there should be such a charter provision.[88]

c. **Failure to Reëlect Ministerial Officers.** It is scarcely necessary to add that a dissolution of a corporation does not arise from a failure to reëlect officers at the proper periods, when the corporate offices are in fact filled and their functions exercised by officers *de facto*; for in such a case it is clear that a new election may be had.[89] Where there is a statute providing that in case of a suit against a corporation which has failed to elect directors service may be had on the late proper officers, such a failure will not of course prevent the recovery of a judgment against the corporation.[90]

d. **Resignation of Corporate Officers.** For stronger reasons it must be apparent that the mere resignation of all the officers of a corporation does not work a dissolution of the corporation, so long as the possibility remains of again filling the offices by an election or otherwise.[91]

e. **Cessation of Business and Assignment For Creditors.** The mere fact that a corporation ceases its business and makes an assignment of all its property to a trustee for the payment of its debts,[92] and thereafter discontinues for several years to hold annual meetings and to choose directors,[93] does not work a dissolution so as to disable it from maintaining an action on an evidence of indebtedness due to

84. *Arkansas.*— Searcy *v.* Yarnell, 47 Ark. 269, 1 S. W. 319, where there is a by-law providing that those elected shall serve until their successors are elected and qualified according to law.

Connecticut.— Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447.

Illinois.— Baker *v.* Backus, 32 Ill. 79.

Massachusetts.— Knowlton *v.* Ackley, 8 Cush. 93; Boston Glass Manufactory *v.* Langdon, 24 Pick. 49, 35 Am. Dec. 292.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

Mississippi.— Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602; Smith *v.* Natchez Steamboat Co., 1 How. 479.

Missouri.— St. Louis Domicile, etc., Assoc. *v.* Augustin, 2 Mo. App. 123.

New Jersey.—Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427.

New York.—All Saints Church *v.* Lovett, 1 Hall 191; Allen *v.* New Jersey Southern R. Co., 49 How. Pr. 14; People *v.* Runkle, 9 Johns. 147.

Pennsylvania.— Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Rose *v.* Roseburg, etc., Turnpike Co., 3 Watts 46; Lehigh River Bridge *v.* Lehigh Coal, etc., Co., 4 Rawle 9, 26 Am. Dec. 111.

Tennessee.— Blake *v.* Hinkle, 10 Yerg. 218.

United States.— Vincennes University *v.* Indiana, 14 How. 268, 14 L. ed. 416.

Compare Ward *v.* Sea Ins. Co., 7 Paige (N. Y.) 294.

85. Vincennes University *v.* Indiana, 14 How. (U. S.) 268, 14 L. ed. 416.

86. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; Rose *v.* Roseburg, etc., Turnpike Co., 3 Watts (Pa.) 46. See Colchester *v.* Seaber, 3 Burr. 1866, 1 W. Bl. 591.

87. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 366.

88. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; People *v.* Runkle, 9 Johns. (N. Y.) 147.

89. Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; Philips *v.* Wickham, 1 Paige (N. Y.) 590; Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 366; Lehigh River Bridge *v.* Lehigh Coal, etc., Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111.

90. Blake *v.* Hinkle, 10 Yerg. (Tenn.) 218. That the omission of a corporation to elect a clerk during the year previous to incurring the debt sued on will not be a good defense by a shareholder in a proceeding to make him personally liable for a debt of the corporation see Knowlton *v.* Ackley, 8 Cush. (Mass.) 93.

91. Muscatine Turn Verein *v.* Funck, 18 Iowa 469.

92. De Camp *v.* Alward, 52 Ind. 468; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

93. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

it. This position is of course more clear where the deed of assignment contains clauses which contemplate the future existence of the corporation, as where it covenants that the corporation will make any further conveyance and assurance which may become necessary, and will do and perform any other and further act which may be required to enable the assignees fully to execute their trust.[94]

f. Sale or Disposal of All Its Property — (I) *In General.* The sale or disposal by a corporation of all its property does not of itself work such a dissolution of the corporation as disables it from thereafter exercising its corporate powers, although it may have the effect of substantially destroying the object for which the corporation was created;[95] but it may be regarded as a *de facto* dissolution for the purpose of letting in the rights of creditors against shareholders.[96] As the property of a corporation does not belong to the shareholders, but to the ideal body, a corporation does not lose its existence, so as to authorize forfeiture of its charter, merely because individual shareholders sell a majority of its stock to another corporation, even though the latter undertakes to exercise control over its property by mortgaging it.[97]

(II) *Judicial Sale of All Corporate Property.* For the same reason a judicial sale of all the property of a corporation does not *ipso facto* work a dissolution of the corporation,[98] since it does not pass its primary franchise, that of being a corporation; but merely passes its secondary franchise, that is to say, its right to carry on the business for which it was created;[99] although in case of the judicial sale of all the corporate property and franchises of a railroad company, the court may be justified in administering the assets of the corporation as if a legal dissolution had occurred.[1]

g. Mere Cessation of Active Business — (I) *In General.* The dissolution of a corporation is not necessarily implied from its mere cessation of active business.[2]

(II) *Suspending Business For One Year Under Statutes.* Statutes exist declaring in substance that a corporation which suspends its business for one whole year shall be deemed dissolved for the purpose of letting in the rights of its creditors. Such a suspension has been held not to create a dissolution of the corporation *ipso facto* and for all purposes, but merely to furnish a ground for a

94. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

95. *Illinois.*— Reichwald *v.* Commercial Hotel Co., 106 Ill. 439.

Kansas.— Attica State Bank *v.* Benson, 8 Kan. App. 566, 54 Pac. 1037 (bank transferring all its assets to another corporation); Eureka Light, etc., Co. *v.* Eureka, 5 Kan. App. 669, 48 Pac. 935 (sale by a street railway company of all its property, and the failure to elect new directors for about two years or to hold any meeting of the directors or officers within the same period of time, and the non-residence of all officers and directors but one).

Kentucky.— Smith *v.* Gower, 2 Duv. 17.

Maryland.—State *v.* State Bank, 6 Gill & J. 205, 26 Am. Dec. 561.

Massachusetts.— Russell *v.* McLellan, 14 Pick. 63.

Missouri.— Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279; Powell *v.* North Missouri R. Co., 42 Mo. 63; Hill *v.* Fogg, 41 Mo. 563.

New Jersey.— New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322.

New York.— Bradt *v.* Benedict, 17 N. Y. 93; Brinckerhoff *v.* Brown, 7 Johns. Ch. 217; Barclay *v.* Talman, 4 Edw. 123.

96. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120; Kehlor *v.* Lademann, 11 Mo. App. 550; Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273. See also *supra*, VIII, P, 1, e, (I) *et seq.*; *infra*, XXI, D, 3, b, (I) *et seq.*

97. Com. *v.* Punxsutawney Water Co., 197 Pa. St. 569, 47 Atl. 843.

98. Smith *v.* Gower, 2 Duv. (Ky.) 17.

99. See *supra*, XVI, C, 1. It has, however, been held that the sale of a railroad in a proceeding to enforce a lien reserved to the state operates a dissolution of the corporation because it totally destroys the end and object for which it was created. Moore *v.* Whitcomb, 48 Mo. 543; Opinion of Judges, 37 Mo. 129. See also Reynolds *v.* Cridge, 11 Pa. Co. Ct. 306, holding that a sale upon execution of all the property and franchises of a corporation extinguishes the corporation and prevents the obtaining of a valid judgment against it.

1. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155 [*rehearing denied* in 96 Fed. 784, 37 C. C. A. 587, *modifying* 82 Fed. 642, and 86 Fed. 929].

2. Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279; State Nat. Bank *v.* Robidoux, 57 Mo. 446; Butchers', etc., Bank *v.* Pulitzer, 11 Mo. App. 594; Law *v.* Rich, 47 W. Va. 634, 35 S. E. 858 (unless by resolution of the shareholders to discontinue business).

judgment of dissolution in a proper proceeding prescribed for that purpose.[3] Such a suspension of business operates as a dissolution for the purpose of enabling creditors to proceed against shareholders, but for all other purposes the corporation continues in existence, and may be sued and may defend actions as before, and service of process may be had upon, or may be accepted by, the same officers as before.[4] The suspension of business contemplated by such a statute is a suspension of the ordinary business for which the corporation was organized. If this business has been suspended for the period of one year the corporation is dissolved for the purpose of letting in suits by creditors against its shareholders, although it may have during that time transacted such business as was necessary or incidental to the winding-up of its affairs.[5]

h. Insolvency and Its Incidents — (i) *In General.* Neither the insolvency of a corporation nor the circumstances which usually attend an insolvency, such as the appointment of a receiver, work a dissolution of the corporation, so as to disable it from exercising its corporate powers and using its corporate name for the purpose of protecting the rights of those beneficially interested in its assets and business,[6] since the possession of property is not essential to the existence of a corporation.[7]

(ii) *Appointment of Receiver.* A corporation is not therefore dissolved because a receiver of its assets has been appointed by reason of its insolvency, unless the court appointing the receiver has, under the authority of a statute, issued an injunction against the exercise of its franchises, which injunction is made tantamount to a dissolution.[8]

i. Consolidation With Another Corporation. The union or consolidation of two corporations does not work such a dissolution of either of them as abates a pending action,[9] although it may require an amendment of the pleadings for the purpose of keeping the records straight.[10]

j. Resolution of Directors to Wind Up as Trustees. It has been held that the fact that the directors of a corporation resolved to notify the shareholders that the affairs of the corporation should be at once wound up by the directors acting as trustees under the statute, and that a meeting should be called to ratify the action of the directors, is not evidence that the corporation was dissolved, nor did it show that a subsequent call upon stock by the directors was invalid.[11]

k. Breach of Conditions Subsequent Named in Charter. The breach of a condition subsequent named in a corporate charter will not operate as an *ispo facto*

3. Atty.-Gen. *v.* Superior, etc., R. Co., 93 Wis. 604, 67 N. W. 1138.

4. Whitman *v.* Citizens' Bank, 110 Fed. 503, 49 C. C. A. 122.

5. Brigham *v.* Nathan, 62 Kan. 243, 62 Pac. 319.

6. Pondville Co. *v.* Clark, 25 Conn. 97; Catlin *v.* Eagle Bank, 6 Conn. 233; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; Nimmons *v.* Tappan, 2 Sweeny (N. Y.) 652; Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267.

7. Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

8. *Colorado.*— Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

Massachusetts.—Boston Glass Manufactory *v.* Langdon, 24 Pick. 49, 35 Am. Dec. 292.

Montana.— State *v.* Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219 [*citing* Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 36 N. Y. St. 267, 11 L. R. A. 480], holding that the appointment of a receiver of a corporation *pendente lite* does not necessarily mean dissolution of the corporation or its destruction.

New Jersey.— Kirkpatrick *v.* State Bd. Assessors, 57 N. J. L. 53, 29 Atl. 442, does not work its dissolution so as to affect its liability to taxation.

New York.— Denike *v.* New York, etc., Lime, etc., Co., 80 N. Y. 599; Moran *v.* Lydecker, 27 Hun 582; Davenport *v.* Buffalo, etc., City Bank, 9 Paige 12.

Texas.— Moseby *v.* Burrow, 52 Tex. 396.

Vermont.— Dewey *v.* St. Albans Trust Co., 56 Vt. 476, 48 Am. Rep. 803.

Evidence that a corporation has become insolvent and has ceased to do business does not support an allegation that it has become dissolved. Butchers', etc., Bank *v.* Pulitzer, 11 Mo. App. 594.

9. Baltimore, etc., R. Co. *v.* Musselman, 2 Grant (Pa.) 348. See also *supra*, III, D, 1, b *et seq.*

10. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 574.

11. Lucas Market Sav. Bank *v.* Goldsoll, 8 Mo. App. 596.

dissolution of the corporation, although it may afford ground on which the state may maintain a judicial proceeding for that purpose.[12]

l. Operation of Constitutional Provisions Affecting Charters Where Organization Has Not Taken Place. Provisions have been inserted in several modern state constitutions affecting all existing charters or grants of special or exclusive privileges where the grantees have not organized and commenced business in good faith at the time of the adoption of the constitution.[13] Such a provision has been held not to annul the existence of a corporation created under general laws, although it had omitted to commence business prior to the adoption of the constitution.[14] Such a provision did not extend to the case of a railway or turnpike corporation fully organized and doing business at the time of the adoption of the constitution, although it had subsequently an added privilege not theretofore exercised, so as to prevent it from exercising such a privilege.[15]

m. Failure to Keep Alphabetical List of Shareholders. A corporation is not *ipso facto* dissolved by any species of misprision, which consists in a violation of the statute governing its existence, until the state supervenes and demands and receives a judgment of dissolution. Therefore the mere failure of a corporation to keep in its office an alphabetical list of its shareholders, showing their residences, the number of their respective shares, and the amounts which each has paid in, does not of itself work a dissolution of the corporation.[16]

3. Dissolution For Certain Purposes but Not For Others — a. In General. It has not escaped the observation of capable judges that the dissolution of a corporation sometimes means an annulment of its franchises or a termination of its existence, and sometimes a mere judicial act which alienates its property and suspends its business without terminating its existence; so that the corporation may for certain purposes be considered as dissolved so far as to be incapable of doing injury to the public, while it yet retains vitality so far as essential for the protection of the rights of others.[17]

b. De Facto Dissolution For Purpose of Effectuating Rights of Creditors — (I) *In General.* For the purpose of effectuating the rights of creditors in administering statutes which provide that for all debts of corporations of certain descriptions, due and owing at the time of their dissolution, the persons then composing the corporation shall be liable to the extent of their respective shares of stock held therein to its creditors, it has often been held that a corporation may do or suffer acts to be done which amount in contemplation of law to a surrender of its franchises; and that if it suffers acts to be done which have the effect of destroying the end and object for which it was created this will be equivalent to a surrender of its rights and will work its dissolution.[18]

(II) *Where Corporation Asserts Its Own Existence.* This doctrine has no just application, in a litigation by or against a corporation, where the corporation itself asserts the fact of its own existence.[19]

12. See *supra*, XXI, A, 6, b, (I) *et seq.* *Compare* XXI, C, 4, c, (I) *et seq.*

Of this nature is a failure to comply with a provision in the charter of a bridge company that the company should give a bond for the completion of the bridge within a limited time, where this was not in terms prescribed as a condition precedent. Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28.

13. See for example Mont. Const. (1889), art. 15, § 1; Pa. Const. (1874), art. 16, § 1.

14. Morrison *v.* Clark, 24 Mont. 515, 63 Pac. 98.

15. Philadelphia, etc., R. Co.'s Appeal, 187 Pa. St. 123, 40 Atl. 967, 42 Wkly. Notes Cas. (Pa.) 419.

16. Baker *v.* Backus, 32 Ill. 79.

17. *In re* Independent Ins. Co., 13 Fed. Cas. No. 7,017, 1 Holmes 103.

18. Perry *v.* Turner, 55 Mo. 418; State Sav. Assoc. *v.* Kellogg, 52 Mo. 583; Moore *v.* Whitcomb, 48 Mo. 543; Dryden *v.* Kellogg, 2 Mo. App. 87; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454 [*affirming* 1 Hopk. (N. Y.) 300]; Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273. *Compare* La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420.

19. La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420. Chancellor Kent, in his Commentaries, has carefully pointed out what he deems to be a just limitation of the doctrine of the celebrated case of Slee *v.* Bloom,

(III) *When Corporate Election Will Not Prevent Dissolution.* On the other hand where it is necessary in order to give effect to the rights of creditors against shareholders, to treat the corporation as dissolved, under a principle already stated,[20] it is held that the mere election of trustees for the purpose of keeping the corporation in existence will not be deemed to have prevented such a dissolution.[21]

c. Dissolution For Purpose of Taxation. A corporation may cease to exist *de facto* for the purpose of taxation, although it has not been dissolved in a judicial proceeding.[22]

4. Judicial Proceedings With Respect to De Facto Corporations. By analogy to the general rule of pleading in civil actions against corporations, it has been held that where an information in the nature of a writ of quo warranto proceeds against a corporation by its corporate name, this fact admits its existence as a corporation.[23] But where a corporation exists *de facto*, the state is at liberty to treat it as such and to bring it into court as a party defendant in its corporate character, without making its members parties, for the purpose of obtaining a decree against it annulling its charter on the ground that the corporation was illegal because made for an illegal purpose.[24]

E. Voluntary Surrender of Franchises and Voluntary Dissolutions — 1. Dissolution by Voluntary Surrender of Franchises — a. In General. As already seen[25] one of the recognized modes by which a corporation may be dissolved is a voluntary surrender of its franchises.[26]

b. Acceptance by State — (I) *In General.* The dissolution of a corporation may be effected by the concurrent act of the state and the corporation, the corporation surrendering and the state accepting the surrender of its franchises, without the intervention of any judicial proceedings for that purpose.[27] Even in the case of a corporation chartered for the performance of public duties, the legislature may at pleasure release it from the performance of those duties and allow the transfer of them to another corporation.[28]

(II) *Whether Acceptance by State Necessary* — (A) *In General.* The doctrine is frequently announced in judicial decisions that a corporation cannot dissolve itself by a mere corporate act, or by the vote of a majority of its members, so as to escape its responsibilities or liabilities,[29] but that a surrender of its franchises by a corporation must in order to be effective be followed by an acceptance on the part of the state.[30] It is added that, to make the surrender, by the

19 Johns. (N. Y.) 456, 10 Am. Dec. 273, which is that it is merely a doctrine devised to save the rights of creditors and that it does not apply in other cases. 2 Kent Comm. 311.

20. See *supra*, VIII, P, 1, e, (I) *et seq.*

21. Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454 [*affirming* Hopk. (N. Y.) 300].

22. Thus it has been held under taxing laws of New York that a bank is not taxable during the period of six years allowed by the statute (N. Y. Laws (1859), c. 236), after the redemption of ninety per cent of its circulation, for closing its business, if it has permanently ceased to transact any banking business. By ceasing to act as a bank it loses its character as such, and is no longer deemed to exist as a bank for purposes of taxation. Metcalf *v.* Messenger, 46 Barb. (N. Y.) 325.

23. State *v.* Hannibal, etc., Gravel Road Co., 37 Mo. App. 496; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33.

24. New Orleans Debenture Redemption Co. *v.* Louisiana, 180 U. S. 320, 21 S. Ct. 378, 45 L. ed. 550.

25. See *supra*, XXI, A, 2.

26. McMahan *v.* Morrison, 16 Ind. 172, 79 Am. Dec. 418; Washington, etc., Turnpike Road *v.* State, 19 Md. 239; People *v.* Olmstead, 45 Barb. (N. Y.) 644; Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945.

27. Savage *v.* Walshe, 26 Ala. 619.

28. Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685, holding that a single shareholder cannot object, although he cannot be compelled to take stock in the new company.

29. Portland Drp Dock, etc., Co. *v.* Portland, 12 B. Mon. (Ky.) 77; Polar Star Lodge No. 1 *v.* Polar Star Lodge No. 1, 16 La. Ann. 53; Curien *v.* Santini, 16 La. Ann. 27; Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 351; Town *v.* River Raisin Bank, 2 Dougl. (Mich.) 530. *Contra*, McCurdy *v.* Myers, 44 Pa. St. 535.

30. *Georgia.*— Mechanics' Bank *v.* Heard, 37 Ga. 401.

corporators, of their charter of incorporation effectual, a record of the acceptance must be made.[31]

(B) *Doctrine Not Applicable to Corporations Created For Strictly Private Purposes.* It must be obvious that an acceptance by the state of the surrender of corporate franchises is not necessary in the case of corporations created for strictly private purposes and which have not assumed the performance of any public duties, but which do not differ, except in form of organization, from unincorporated joint-stock companies or business partnerships, in the continuation of which the state has no interest; but such a corporation may dissolve itself by the voluntary action of its members without the consent of the state.[32]

(C) *State Without Means to Compel Private Corporation to Remain in Existence.* This may be the conclusion when it is considered that the law affords no means by which the state can compel a private corporation to remain in existence for the purpose of discharging those duties in consideration of which its corporate franchises have been granted. The state may indeed compel the performance of minor or incidental duties by a corporation, which it has assumed under its charter, such as the operating by a railroad company of a branch railroad,[33] or the establishing and maintaining of a station at a particular place;[34] it may compel it by mandamus to restore a part of its railroad which it has dismantled;[35] and it may demand in a judicial proceeding a forfeiture of its franchises in whole or in part for refusing so to do.[36]

(D) *Corporations Dissolved by Mere Abandonment and Non-User of Their Franchises.* This must also be the conclusion when it is further considered that a corporation may be dissolved by a voluntary surrender of its franchises, evidenced by its mere abandonment and non-user of them, without any formal tender of them to the state or acceptance of them by the state, for the purpose of effectuating the remedy of its creditors against its shareholders, as has been adjudged in numerous decisions, which have been already much considered.[37] And while the facts showing such a surrender are not available for the purpose of proving a dissolution of a corporation, in order to defeat an action brought in its name,[38] yet without special reference to the rights of creditors it is clear upon principle and authority that a corporation may become defunct for all purposes by its own voluntary act, or rather by the voluntary act or neglect of its members, and that it does become defunct for all purposes, whenever there has been an abandonment

Indiana.— Harris *v.* Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372.

Massachusetts.—Boston Glass Manufactory *v.* Langdon, 24 Pick. 49, 35 Am. Dec. 292.

New York.— New York Marbled Iron Works *v.* Smith, 4 Duer 362.

Wisconsin.—Atty.-Gen. *v.* Superior, etc., R. Co., 93 Wis. 604, 67 N. W. 1138, holding that consent of the state to the surrender in some form is necessary before the surrender can work a dissolution of the corporation.

31. Norris *v.* Smithville, 1 Swan (Tenn.) 164.

32. Merchants', etc., Line *v.* Waganer, 71 Ala. 581; Savage *v.* Walshe, 26 Ala. 619.

33. People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

34. See the reasoning in Martindale *v.* Kansas City, etc., R. Co., 60 Mo. 508.

35. Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

36. Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466. It has even been held that a corporation which is a defendant in a suit in equity and liable to respond pecuniarily to the plaintiff in the suit, and which has made one attempt to procure its own dissolution, may be enjoined from taking any proceeding to that end, or for the appointment of a receiver of its effects, or for the distribution of such effects among its shareholders or any other persons, or from making any distribution or transfer of any of its effects. Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,830, 10 Blatchf. 518.

37. McMahan *v.* Morrison, 16 Ind. 172, 79 Am. Dec. 418; Washington, etc., Turnpike Road *v.* State, 19 Md. 239; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Slee *v.* Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420. See *supra*, VIII, P, 1, e, (I) *et seq.*; XXI, D, 3, b, (I) *et seq.*

38. *Louisiana.*— Atchafalaya Bank *v.* Dawson, 13 La. 497.

Maryland.— State University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

New York.— Niagara Bank *v.* Johnson, 8 Wend. 645.

of its franchises, committed under such circumstances, or continued for such a length of time, as renders it morally or legally impossible for it to resume them.[39] In the same line of thought it has been held that where an act authorizes a certain proceeding to be had upon the surrender by a corporation of its franchises, the same may be had without waiting for the acceptance of the surrender by the state.[40]

c. Power of Directors to Surrender Franchises. The directors of a corporation, being merely its business managers and possessing no power to do any constituent act unless thereto specially authorized,[41] have not, in the absence of some enabling statute, or of the authorization of the constituent body, any power to surrender the franchises of the corporation or to declare it dissolved.[42] Statutes have been enacted changing this rule. Thus the General Corporation Act of New Jersey provides that any corporation may be dissolved whenever deemed advisable by the board of directors, provided that two thirds in interest of all the shareholders shall consent thereto at a meeting called for the purpose. Construing this statute, it has been held that a court of equity has no power to review the decision of the board of directors of such a corporation as to the advisability of a dissolution or to enjoin such dissolution at the suit of a minority shareholder.[43]

d. Surrender by Failure to Accept and Act Upon Charter. The failure to accept and exercise the franchises granted by the state in a charter, within a reasonable time after the making of the grant, is evidence of a surrender, so that the franchises cannot be renewed without a new expression of the will of the legislature, but the state is entitled to demand a judgment of ouster in a proceeding by quo warranto.[44]

e. Other Evidence of Surrender. A surrender may be made by acts or neglects *in pais* as well as by a formal proceeding for that purpose; and it may be concluded, upon abundant authority,[45] that a surrender by a corporation of its charter may be presumed from a neglect for a long period of time to choose directors and to exercise the corporate franchises,[46] although this presumption is a disputable one and may be rebutted by other circumstances.[47]

f. Position of Creditors Immaterial. The position of creditors to a voluntary surrender by a corporation of its franchise is immaterial, since its assets are still available to the satisfaction of their claims, and hence no right of others is impaired by the fact of the corporation voluntarily going out of existence.[48]

Vermont.— Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

39. Bradt *v.* Benedict, 17 N. Y. 93.

40. Wilson *v.* Central Bridge, 9 R. I. 590. The real reason was that the statute did not contemplate any further action on the part of the state.

41. See *supra*, IX, C, 7.

42. Smith *v.* Smith, 3 Desauss. (S. C.) 557. It follows that a resolution, passed by the directors of a banking corporation that the bank be closed, that its business cease, that it go into liquidation, and that its franchises be surrendered, does not operate to dissolve it, in such a sense as to preclude the maintaining of actions against it to enforce its liabilities. Lake Ontario Nat. Bank *v.* Onondaga County Bank, 7 Hun (N. Y.) 549. To the contrary (and untenable), that the act of dissolution must proceed from the directors who alone can exercise the corporate powers see Wallamet Falls, etc., Co. *v.* Kittridge, 29 Fed. Cas. No. 17,105, 5 Sawy. 44, per Deady, J.

43. Windmuller *v.* Standard Distilling, etc., Co., 114 Fed. 491.

44. State *v.* Bull, 16 Conn. 179.

45. See *supra*, XXI, D, 2, a *et seq.*

46. State *v.* Vincennes University, 5 Ind. 77.

47. State *v.* Vincennes University, 5 Ind. 77. For a collection of facts under which it was held that an incorporated agricultural society had surrendered its franchises and ceased to exist for all purposes see Union Agricultural Soc. *v.* Gamble, 52 Iowa 524, 3 N. W. 531. On an issue as to whether there had been a surrender of a corporate franchise effected by the action or non-action of the shareholders intending to surrender the franchise, evidence as to the intention of another corporation holding a majority of its stock was admissible. Manchester St. R. Co. *v.* Williams, 71 N. H. 312, 52 Atl. 461.

48. The fact that parties hold property of a corporation under a lease extending for a term into the future presents no obstacle to the winding-up of the affairs of the corporation within the period provided by statute in the case of voluntary dissolution. Musgrove *v.* Gray, 123 Ala. 376, 26 So. 643, 82 Am. St. Rep. 124.

2. Number and Value of Shareholders That Can Surrender Franchises and Wind Up — a. Organizations in Which Unanimous Consent Necessary. It seems that in unincorporated joint-stock companies unanimous consent is necessary to a dissolution and winding-up; because these are merely numerous partnerships, and the rights of the members rest strictly on the footing of private contract among themselves, so that one or more of them cannot put an end to the contract without the consent of the others.[49] The same is true of incorporated societies created for ideal purposes, and not for the carrying on of business, such as a religious society; here, so long as there are dissenting members enough to hold and to exercise the franchises, a dissolution cannot be effected by the majority. The majority may sever their connection with the organization, but cannot put an end to the right of the minority to have it continued.[50] And this rule has been applied in the case of corporations organized for business purposes.[51]

b. In Business Corporations Unanimous Consent Not Necessary — (I) *Rule Stated.* But in the absence of some controlling statute the unanimous vote or consent of the shareholders or members of a corporation organized for business purposes is not necessary to a valid surrender of its franchises and to a dissolution and winding-up, but the dissent of a single member or of a minority will not be allowed to prevent a surrender desired by all the others.[52]

(II) *But Majority May Dissolve and Wind Up or May Sell Out* — (A) *In General.* But in corporations organized for business purposes and for the private gain of their members, the principle of the rule of the majority obtains to the extent that if the majority conclude that the business cannot be carried on with profit or advantage to all they may against the will of the minority elect to wind it up.[53] So if in the exercise of a sound discretion the majority of the shareholders deem it expedient to do so, they may sell out the whole property of the corporation to a new corporation, taking payment in its shares, to be distributed among such of the old shareholders as may be willing to take them.[54] But a corporation cannot, where the rights of a creditor have intervened, even with the consent of its shareholders, sell its plant and retire from business, taking the stock of the purchasing corporation in payment therefor, such stock being issued to an individual shareholder, without any agreement on his part to pay the corporate debts.[55]

(B) *Courts Will Not Inquire Whether Resolution Is Expedient.* If it is conceded that such action on the part of the majority is lawful, then the principle follows that the judicial courts will not examine into the affairs of the corporation for the purpose of determining whether the action is expedient, or for the purpose of scanning the motives which have led to it.[56]

A simple contract creditor of a corporation cannot restrain it from taking steps to wind up its affairs in the statutory manner, upon the mere ground that the corporation is insolvent. North Fairmount Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185.

49. Von Schmidt *v.* Huntington, 1 Cal. 55.

50. Polar Star Lodge No. 1 *v.* Polar Star Lodge No. 1, 16 La. Ann. 53.

51. Curien *v.* Santini, 16 La. Ann. 27; Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 351; Campbell *v.* Mississippi Union Bank, 6 How. (Miss.) 625.

52. Union Agricultural Soc. *v.* Gamble, 52 Iowa 524, 3 N. W. 531; Wilson *v.* Central Bridge, 9 R. I. 590.

53. Price *v.* Holcomb, 89 Iowa 123, 56 N. W. 407 (such sale is not in violation of Iowa Code, § 1066, providing that "no corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles," although such sale may have the effect of terminating the business for which the corporation was organized); Pringle *v.* Eltringham Constr. Co., 49 La. Ann. 301, 21 So. 515 (provided it is done in good faith, and not for the purpose of speculation and subsequently starting the business anew); Trisconi *v.* Winship, 43 La. Ann. 45, 9 So. 29, 26 Am. St. Rep. 175; Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Berry *v.* Broach, 65 Miss. 450, 4 So. 117.

54. Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490.

55. Hurd *v.* New York, etc., Steam Laundry Co., 167 N. Y. 89, 60 N. E. 327 [*reversing* 52 N. Y. App. Div. 467, 65 N. Y. Suppl. 125].

56. Oglesby *v.* Attrill, 105 U. S. 605, 26 L. ed. 1186; Bailey *v.* Birkenhead, etc., R.

3. Necessity of Pursuing Steps Pointed Out by Statute. Where the statute prescribes the steps to be taken by the members of a corporation for the surrender of its charter, those steps must of course be followed, in order to terminate the existence of the corporation. But it is necessary to discriminate between those steps which are made by the statute essential to effect the surrender, and other collateral steps which are merely directory.[57]

4. Voluntary Dissolution and Winding-Up Under Various Statutes. Adjudicated points which do not refer themselves to any principle, but rather to the varying expressions in the statute law, are noted in the margin.[58]

Co., 12 Beav. 433, 14 Jur. 119, 19 L. J. Ch. 377, 6 R. & Can. Cas. 256. *Compare* Hurst *v.* Coe, 30 W. Va. 158, 3 S. E. 564, holding that a statutory proceeding for a dissolution cannot be had at the instance of a majority without showing good cause therefor, although it is competent for a majority in interest to discontinue business.

57. See for illustration American Bank *v.* Cooper, 54 Me. 438, holding that where the steps for the surrender were taken in compliance with the statute, except the publication of the notice, the surrender was effectual.

58. *California.*—Voluntary dissolution and winding-up under California statute. Code Civ. Proc. §§ 1227, 1228, 1229, 1230, 1231, 1232, and 1233, as amended April 16, 1880. That these provisions are exclusive see Kohl *v.* Lilienthal, 81 Cal. 378, 387, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520, per Fox, J., a seemingly unsound conclusion. That they do not apply to corporations formed for ideal purposes having no shareholders see People *v.* State College, 38 Cal. 166.

Connecticut.— Under Gen. Stat. § 1942. Hammond *v.* National L. Assoc., 58 N. Y. App. Div. 453, 69 N. Y. Suppl. 585 [*affirming* 31 Misc. (N. Y.) 182, 65 N. Y. Suppl. 407], superior court of Connecticut has no jurisdiction to decree dissolution of corporation where there has been no vote of shareholders to wind up its affairs, nor any abandonment of its business, and neglect thereafter within a reasonable time to wind up its affairs. Further as to dissolving and winding-up under statute of Connecticut see Hart *v.* Boston, etc., R. Co., 40 Conn. 524.

Kentucky.— The required publication of four weeks is a condition precedent to a voluntary dissolution of a corporation organized under Gen. Stat. c. 56, § 8. An affidavit stating that a majority of the shareholders, in a meeting held for that purpose, voted in favor of closing up its affairs, does not show the "consent in writing" required by Stat. § 561, of the owners of a majority of the shares, necessary in order to a voluntary dissolution. The fact that plaintiff participated in the meeting of shareholders at which the resolution to wind up was passed does not discharge the corporation from liability to him, there being in fact no dissolution. Economy Bldg., etc., Assoc. *v.* Paris Ice Mfg. Co., 68 S. W. 21, 24 Ky. L. Rep. 107.

Montana.— Under Comp. Stats. (1887), §§ 492*a*–494. Want of power in the directors and the majority of the shareholders of a mining corporation, against the dissent of any shareholder, while the corporation is a going and prosperous concern, to transfer all its property, etc. Forrester *v.* Butte, etc., Consol. Copper, etc., Min. Co., 21 Mont. 544, 55 Pac. 229 [*rehearing denied* in 21 Mont. 565, 55 Pac. 353].

New York.— Under Rev. Stat. § 463; Laws (1889), c. 314, p. 384, § 38. Medbury *v.* Rochester Frear Stone Co., 19 Hun 498. Under Code Civ. Proc. § 2419 *et seq.* *In re* Murray Hill Bank, 153 N. Y. 199, 47 N. E. 298 [*affirming* 14 N. Y. App. Div. 318, 43 N. Y. Suppl. 836, directors cannot apply for voluntary dissolution, after superintendent of banking has taken possession of assets with intention to have attorney-general bring action to dissolve under Banking Law (Laws (1892), c. 689)]; Hitch *v.* Hawley, 132 N. Y. 212, 30 N. E. 401, 43 N. Y. St. 625 [*affirming* 15 Daly 413, 8 N. Y. Suppl. 319, 28 N. Y. St. 416 (*reversing* 2 N. Y. Suppl. 257, 18 N. Y. St. 175)] (circumstances under which a dissolution and distribution of the assets of a business exchange, a large majority of whose shareholders desired to wind it up, will be "beneficial to the interests of the shareholders," within Code Civ. Proc. § 2429); *In re* Lenox Corp., 57 N. Y. App. Div. 515, 68 N. Y. Suppl. 103 [*affirmed* in 167 N. Y. 623, 60 N. E. 1115] (condition of facts held to show insolvency so as to authorize a petition for a voluntary dissolution under the statute); Jameson *v.* Hartford F. Ins. Co., 14 N. Y. App. Div. 380, 44 N. Y. Suppl. 15 (directors of a corporation may bring an action for a voluntary dissolution, although the corporation is not insolvent, where for ten years it has been losing money every year, during which time the dividends have been paid from the surplus on hand; schedule of assets and liabilities annexed to the petition showing a surplus of assets cannot be amended after the appointment of a receiver so as to show a deficiency); *In re* Murray Hill Bank, 9 N. Y. App. Div. 554, 41 N. Y. Suppl. 920, 75 N. Y. St. 1290 (where the superintendent of banking has delivered assets and books to a receiver appointed in a proceeding by the attorney-general to forfeit the charter of a bank, the court will not order him to deliver the books and assets to a receiver appointed in a proceeding by the directors for a voluntary dissolution); *In re* Hitchcock Mfg. Co., 1 N. Y. App. Div. 164, 37 N. Y. Suppl. 834, 73 N. Y. St. 46 (particularity in the statement

F. Dissolution at Suit of Shareholders — 1. Constitutionality of Statutes Providing For Compulsory Dissolution of Corporations. Statutes of this kind

of reasons which induce the petitioners to desire a dissolution); *In re* Pyrolusite Manganese Co., 29 Hun 429 (judgment of dissolution reversed because petition failed to state facts showing that a dissolution would be beneficial to the shareholders); Chamberlain *v.* Rochester Seamless Paper Vessel Co., 7 Hun 557; Lake Ontario Nat. Bank *v.* Onondaga County Bank, 7 Hun 549; *In re* Santa Eulalia Min. Co., 4 N. Y. Suppl. 174, 21 N. Y. St. 89. Under Laws (1876), c. 442. Court may direct sale of assets which remain after payment of expenses of receivership. *In re* Woven Tape Skirt Co., 8 Hun 508. Circumstances and state of pleadings under which an injunction seeking to restrain the dissolution of a corporation by the majority shareholders will not be granted at the instance of the minority. *In re* Lenox Corp., 57 N. Y. App. Div. 515, 68 N. Y. Suppl. 103 [*affirmed* in 167 N. Y. 623, 60 N. E. 1115] (under Code Civ. Proc. § 2419, having acquired jurisdicttion may make a *nunc pro tunc* order correcting formal defects in its order reciting that insolvency has been satisfactorily shown); Elbogen *v.* Gerbereux-Flynn Co., 50 N. Y. App. Div. 623, 64 N. Y. Suppl. 1 [*reversing* 30 Misc. 264, 62 N. Y. Suppl. 287]. Under Code Civ. Proc. §§ 1783, 1784. *In re* Hoagland, 36 Misc. 28, 72 N. Y. Suppl. 435, a proceeding for a voluntary dissolution under section 1784 does not take precedence over an action by a judgment creditor for a sequestration under section 1793.

Ohio.— Under Rev. Stat. § 5654. Particularity in setting forth the amount of corporate indebtedness with an inventory of all its assets in order to give the court jurisdiction. Fitch *v.* Sprague Carriage Co., 19 Ohio Cir. Ct. 296, 10 Ohio Cir. Dec. 520. Any of the petitioners may withdraw if the court finds that the petitioners do not own the requisite amount of shares, but upon such withdrawal the court cannot allow another to be substituted. Herancourt Brewing Co. *v.* Armstrong, 6 Ohio Cir. Ct. 468.

Oregon.—Voluntary winding-up under statute of Oregon. Wallamet Falls, etc., Co. *v.* Kittridge, 29 Fed. Cas. No. 17,105, 5 Sawy. 44, untenable in so far as it holds that the act of dissolution must proceed from the directors.

Pennsylvania.— Mode of conducting shareholders' meeting and balloting on the question of dissolution, under supervision of court. *Re* Titusville Oil Exch., 8 Pa. Super. Ct. 304; Titusville Oil Exch. *v.* Witherop, 2 Pa. Super. Ct. 508, 39 Wkly. Notes Cas. 185.

West Virginia.— Dissolution and winding-up under Code, c. 53, § 57, with the conclusion that the shareholders may proceed *in pais* or by a bill in equity, and that if they proceed in equity the corporation is a necessary party defendant. Hurst *v.* Coe, 30 W. Va. 158, 3 S. E. 564.

United States.— Power of the trustees, in case of a transfer of the assets to another company, to pledge the shares received from the purchasing company to the holders of the dissolving company's mortgage bonds, in order to free the assets of the latter company. Wing *v.* Charleroi Plate Glass Co., 112 Fed. 817.

England.— Voluntary winding-up under English Companies Acts. Lindley Comp. L. (5th ed.) 875 *et seq.*; *In re* London India Rubber Co., L. R. 1 Ch. 329, 12 Jur. N. S. 402, 35 L. J. Ch. 592, 14 L. T. Rep. N. S. 316, 14 Wkly. Rep. 527 [*citing In re* Sunderland 32nd Universal Bldg. Soc., 21 Q. B. D. 349, 37 Wkly. Rep. 95]; *Re* Torquay Bath Co., 32 Beav. 581, 9 Jur. N. S. 633, 8 L. T. Rep. N. S. 527, 11 Wkly. Rep. 653. As to what will be a good notice of a meeting to pass a resolution to wind up see Lindley Comp. L. (5th ed.) 877; *In re* Bridport Old Brewery Co., L. R. 2 Ch. 191, 15 L. T. Rep. N. S. 643, 15 Wkly. Rep. 291; *In re* National Sav. Bank Assoc., L. R. 1 Ch. 547, 12 Jur. N. S. 697, 35 L. J. Ch. 808, 15 L. T. Rep. N. S. 127, 14 Wkly. Rep. 1005; *In re* Silkstone Fall Colliery Co., 1 Ch. D. 38, 34 L. T. Rep. N. S. 46. That such a notice may be good in part although bad in part, good so far as it relates to the passing of a resolution to wind up, although bad as to matters which are *ultra vires*, see Cleve *v.* Financial Corp., L. R. 16 Eq. 363, 43 L. J. Ch. 54, 29 L. T. Rep. N. S. 89, 26 Wkly. Rep. 839; Stone *v.* City, etc., Bank, 3 C. P. D. 282, 47 L. J. C. P. 681, 38 L. T. Rep. N. S. 9. Impeaching resolutions for a voluntary winding-up and amalgamation for want of a sufficient notice of the meeting. *In re* Imperial Bank, L. R. 1 Ch. 339. See *In re* Gibraltar, etc., Bank, L. R. 1 Ch. 69, 11 Jur. N. S. 916, 35 L. J. Ch. 49, 13 L. T. Rep. N. S. 386, 14 Wkly. Rep. 69. What claim does not constitute a party a creditor so as to entitle him to obtain an order continuing the voluntary winding-up under the supervision of the court. *In re* Pen-Y-Van Colliery Co., 6 Ch. D. 477, 46 L. J. Ch. 390. Circumstances under which an order will be made continuing the voluntary winding-up under supervision. *In re* United Service Co., L. R. 7 Eq. 76. Sufficient that creditor is such at the date of proving his claim, although not such at the date of the order for continuing the voluntary winding-up. *In re* Oriental Commercial Bank, L. R. 6 Eq. 582, 18 L. T. Rep. N. S. 450, 16 Wkly. Rep. 784. State of pleadings under which a creditor could not claim a winding-up order on the ground that the company was insolvent. *In re* Spence's Patent Non-Conducting Composition, etc., Co., L. R. 9 Eq. 9, 39 L. J. Ch. 79, 21 L. T. Rep. N. S. 413, 18 Wkly. Rep. 82. Costs of the liquidator incurred previously to an order made on the petition of a creditor to continue the voluntary winding-up under supervision. *In re* New York Exch. Co., [1893] 1 Ch. 371. The court will not,

which provide for a compulsory dissolution of corporations at the suit of shareholders are not unconstitutional.[59]

2. Power of Courts of Equity in Dissolving and Winding Up Corporations — a. In General. In the absence of enabling statutes, courts of chancery have no jurisdiction to decree the dissolution of a corporation;[60] nor as a general rule can such a court, during the life of the corporation, wind up its business and sequestrate its property and effects, on the application of a shareholder as such;[61] but when a corporation dies by reason of the expiration of its charter, or becomes substantially dead by reason of the non-user of its franchises, a court of equity has jurisdiction, under principles already elaborated,[62] to lay hold of its assets by its receiver and distribute them among its creditors.

b. Such Jurisdiction Frequently Conferred by Statute — (I) *In General.* Jurisdiction to dissolve a corporation may of course be conferred upon a court of equity by a statute;[63] and, considering the constitution of these courts and their modes of procedure, statutes conferring such a jurisdiction are very appropriately enacted, and exist in many of the states.

(II) *Such as Statutes Providing For Adjudication of Insolvency and Appointment of Receiver* — (A) *In General.* In some cases the statutes go no further than to provide for an adjudication of insolvency, and for the appoint-

at the instance of contributories, interfere with a voluntary winding-up, by ordering a winding-up by or under the supervision of the court, except where the resolution for winding-up voluntarily has been obtained by fraud, or by an inequitable overbearing of the rights of a dissentient minority by improper influence. *In re* Beaujolais Wine Co., L. R. 3 Ch. 15, 16 Wkly. Rep. 177; *In re* London, etc., Discount Co., L. R. 1 Eq. 277, 35 L. J. Ch. 229, 13 L. T. Rep. N. S. 665, 14 Wkly. Rep. 219. If the resolution disables the company from performing its contracts it of course remains liable in an action for damages for the breach of them. Inchbald *v.* Western Neilgherry Coffee, etc., Plantation Co., 17 C. B. N. S. 733, 10 Jur. N. S. 1129, 34 L. J. C. P. 15, 11 L. T. Rep. N. S. 345, 13 Wkly. Rep. 95, 112 E. C. L. 733. But it is added by Sir Nathaniel Lindley that "generally speaking, a winding-up order is not equivalent to a breach of contract." Lindley Comp. L. (5th ed.) 883. See also China Bank *v.* Morse, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139 [*affirming* 44 N. Y. App. Div. 435, 61 N. Y. Suppl. 268, holding that a proceeding for the voluntary winding-up of a company under section 161 of the Companies Act of 1862 does not cease to be a case within that section merely because presented to the court for its approval]; *In re* Gutta Percha Corp., [1900] 2 Ch. 665, 69 L. J. Ch. 769, 83 L. T. Rep. N. S. 401, 8 Manson 67 (rule that a voluntary winding-up is *prima facie* a bar to a shareholder obtaining a compulsory order does not apply where there are circumstances which require an investigation by a court); *In re* Haycraft Gold Reduction, etc., Co., [1900] 2 Ch. 230, 69 L. J. Ch. 497, 83 L. T. Rep. N. S. 166, 7 Manson 243 (resolution for voluntary winding-up is not valid, if passed at an extraordinary general meeting of the company, convened by the secretary without the authority, previously or subsequently given, of the board of directors); *In re* Varieties, [1893] 2 Ch. 235, 62 L. J. Ch. 526, 68 L. T. Rep. N. S. 214, 3 Reports 324, 41 Wkly. Rep. 296; Southern Counties Deposit Bank *v.* Rider, 73 L. T. Rep. N. S. 374 (court will not declare a special resolution for the voluntary winding-up of a corporation invalid because the notices convening the meeting at which such resolution was passed issued under a resolution passed at a meeting of the directors at which a quorum was not present).

59. Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; Ward *v.* Farwell, 97 Ill. 593; Brown *v.* Mesnard Min. Co., 105 Mich. 653, 63 N. W. 1000 (not unconstitutional because of its failure to make all shareholders necessary parties to the winding-up bill).

60. Wheeler *v.* Pullman Iron, etc., Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818. See *supra*, XI, D, 1, a *et seq.* *Compare* Edelin *v.* Pascoe, 22 Gratt. (Va.) 826, jurisdiction to call the redeemed shareholders of a building association to account at the suit of the unredeemed shareholders.

61. Cronin *v.* Potters' Co-Operative Co., 11 Ohio Dec. (Reprint) 749, 29 Cinc. L. Bul. 52. It has been held that a bill by majority shareholders of a private corporation praying its dissolution on the ground of insolvency and that its business is being carried on at a loss, but which does not allege any act which is illegal, fraudulent, or *ultra vires*, or show any action on the part of plaintiffs to induce a change of management either by the officers or shareholders, does not present a case for equitable relief, or authorize a circuit court of the United States in the absence of statute to take the property of the corporation from its possession and management. Worth Mfg. Co. *v.* Bingham, 116 Fed. 785, 54 C. C. A. 119.

62. See *supra*, VIII, B, 1 *et seq.*

63. Chicago Mut. L. Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

ment of a receiver, and the winding-up of the affairs of the corporation by collecting its debts and converting its assets into money and distributing the money ratably among its creditors first and thereafter among its shareholders.[64]

(B) *What Deemed Insolvency For Such Purpose*—(1) In General. It seems that a court of equity has power, on a bill filed by some of the shareholders of the corporation, to decree its dissolution, where it has been found "impracticable to keep the company together"; where a successful prosecution of the business for which the corporation has been organized is "impracticable and a delusion"; and where it appears that the desire of the petitioning shareholders, "being in accordance with the interests of all concerned, ought not to be thwarted."[65]

(2) Filing Petition in Bankruptcy. It has been held that the rule that the filing of a petition in bankruptcy is *per se* an act of insolvency which renders the actual solvency or insolvency of the petitioner immaterial, applies as well to proceedings by corporations as by individuals.[66]

(3) Under Statute Relating to Insolvency For One Year. Under the provisions of a statute[67] that a corporation shall be dissolved when it shall have remained insolvent, or neglected or refused to pay its notes or evidences of debt, or suspended its business for one year, a corporation is not regarded as having committed an act of insolvency or as having neglected or refused to pay its obligations because its demand notes have remained outstanding until the payment has been demanded.[68] Insolvency in the ordinary sense, which is simply an inability to pay and discharge one's obligations as they accrue[69] in the ordinary course

64. Such a statute exists in Minnesota. Minn. Gen. Stat. (1878), c. 76. See Hospes *v.* Northwestern Mfg., etc., Co., 41 Minn. 256, 43 N. W. 180; Merchants' Nat. Bank *v.* Bailey Mfg. Co., 34 Minn. 323, 25 N. W. 639. Equitable jurisdiction existing in Pennsylvania, under the act of June 16, 1836, § 13, as to corporations, is said to be general and unlimited, and includes a bill to remove the assignee of an insolvent corporation. Failey *v.* Stockwell, 2 Pa. Dist. 197, 12 Pa. Co. Ct. 403. The power of a court of equity, on good cause shown, to dissolve or close up the business of any corporation, which is conferred by section 25 of the Illinois statute for the incorporation of companies for pecuniary profit, exists only as a portion of the relief provided for by that section and does not authorize the exercise of such power, except for causes for which the state might procure a judgment of forfeiture at law. Wheeler *v.* Pullman Iron, etc., Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818. That banking associations established under the general banking law of New York were corporations within the provisions of the Revised Statutes relative to proceedings against insolvent corporations, etc., and that such association, failing to make an annual return, as required by the statute of 1841, was liable to be proceeded against as insolvent see Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Robinson *v.* Attica Bank, 21 N. Y. 406; Gillet *v.* Moody, 5 Barb. (N. Y.) 185; Leavitt *v.* Blatchford, 5 Barb. (N. Y.) 9; Mabey *v.* Adams, 3 Bosw. (N. Y.) 346; Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. (N. Y.) 23. That the provisions of the statutes of New York relating to "moneyed corporations" had no application to banking associations organized under the general act of 1838 see Leavitt *v.* Blatchford, 17 N. Y. 521. To the same effect see Tracy *v.* Talmage, 18 Barb. (N. Y.) 456. To the *contrary* Mabey *v.* Adams, 3 Bosw. (N. Y.) 346; *In re* Dansville Bank, 6 Hill (N. Y.) 370; Leavitt *v.* Yates, 4 Edw. (N. Y.) 134; Leavitt *v.* Tylee, 1 Sandf. Ch. (N. Y.) 207.

65. Von Schmidt *v.* Huntington, 1 Cal. 55. It should be noted that the corporation was organized by articles of association under the laws of New York, presumably the celebrated statute of that state authorizing the formation of manufacturing and mining corporations. It is also to be noted that the court dealt with it as it would have dealt with a partnership. It should be added that the bill did not pray for a decree of dissolution, the lawyer who drew it had too much sense for that; but what the court really did was to direct a decree to be entered dissolving the company as of the date of the judgment appealed from, directing the receiver to sell its property to pay the costs of suit, including counsel fees, and to make a *pro rata* distribution of the balance of the assets among all the shareholders, excluding two of them, etc.

66. *In re* Atlantic Mut. L. Ins. Co., 2 Fed. Cas. No. 628, 9 Ben. 270.

67. 1 N. Y. Rev. Stat. 604, § 4; 2 N. Y. Rev. Stat. 463, § 38.

68. Denike *v.* New York, etc., Co., 80 N. Y. 599.

69. Hazelton *v.* Allen, 3 Allen (Mass.) 114; Brouwer *v.* Harbeck, 9 N. Y. 589; Ferry *v.* Central New York Bank, 15 How. Pr. (N. Y.) 445.

of business, is not sufficient to warrant a decree of dissolution under the foregoing statute.[70]

3. NUMBER AND VALUE OF SHAREHOLDERS WHOSE CONCURRENCE IS NECESSARY TO SUPPORT PROCEEDING — a. When Not Dissolved at Suit of Single Shareholder. It has been held that a corporation will not be dissolved on the petition of a single shareholder, on the ground that its officers have refused to allow the petitioner to inspect its books and accounts, that it is carrying on a losing business, and that the directors have levied an assessment for the purpose of compelling the petitioner to dispose of his shares.[71] Nor according to a decision of a court of common pleas in Ohio will a corporation in that state be dissolved at the suit of a shareholder, because a by-law provides that it shall continue only for a certain period, and that period has expired, since the by-law imposes on those assenting to it no enforceable obligation.[72] Nor will a corporation be dissolved on such a petition, on the ground that it was actually formed for a longer period than that designated in the preliminary subscription agreement, either on the ground that such agreement of itself terminates the corporate life or that it should be specifically performed.[73]

b. When Not Dissolved on Petition of Minority in Value. What has just been said with respect to dissolving a corporation on the petition of a single shareholder will of course apply under the same conditions where a suit is brought by a minority of the shareholders to effect the same object. In the absence of statutory authorization a court cannot, in virtue of its equity powers merely, entertain a petition of a minority in value of the shareholders to dissolve and wind up the corporation, or to produce under any form of language that substantial result.[74]

70. Denike *v.* New York, etc., Co., 80 N. Y. 599. When therefore a referee found that a company was insolvent at the date of the commencement of the action, but also that it had not been insolvent for one year prior thereto; that it had not for one year neglected or refused to pay and discharge its obligations or suspended its ordinary and lawful business, it was held that a judgment entering a decree of dissolution was rightly reversed. Denike *v.* New York, etc., Co., 80 N. Y. 599. Ordering an election of directors to act as trustees for the shareholders in the winding-up see Lehigh Coal, etc., Co. *v.* Central R. Co., 35 N. J. Eq. 349. Enjoining the prosecution of suits in other courts against the corporation see Smith *v.* St. Louis Mut. L. Ins. Co., 6 Lea (Tenn.) 564. Insolvent building associations wound up according to principles of equity see City Loan, etc., Assoc. *v.* Goodrich, 48 Ga. 445. As to the liability of the officers carrying out the scheme enjoined see Goodrich *v.* City Loan, etc., Assoc., 54 Ga. 98.

71. Burham *v.* San Francisco Fuse Mfg. Co., 76 Cal. 24, 17 Pac. 940.

72. Cronin *v.* Potters' Co-Operative Co., 11 Ohio Dec. (Reprint) 748, 29 Cinc. L. Bul. 52.

73. Cronin *v.* Potters' Co-Operative Co., 11 Ohio Dec. (Reprint) 748, 29 Cinc. L. Bul. 52. Under English Company Law a debenture shareholder of a company to whom nothing is due for principal or interest has no *locus standi* to present a petition to wind up the company. *In re* Melbourne Brewery, etc., [1901] 1 Ch. 453, 70 L. J. Ch. 198, 84 L. T. Rep. N. S. 228, 8 Manson 403, 49 Wkly. Rep. 250. Under the same law a petition by a shareholder in arrears in the payment of calls upon his shares for the winding-up of the company will not be dismissed absolutely, but will not be heard until the calls are at least paid into court, or an undertaking given to submit to any order as to their payment. *In re* Crystal Reef Gold Min. Co., [1892] 1 Ch. 408, 61 L. J. Ch. 208, 66 L. T. Rep. N. S. 111, 40 Wkly. Rep. 235. Nor according to a recent decision can a shareholder or a minority of the shareholders maintain a suit for a dissolution of the corporation because the law has been changed so as to make them liable for its debts. Williams *v.* Nall, 108 Ky. 21, 55 S. W. 706, 21 Ky. L. Rep. 1526. But under English Company Law a single shareholder may maintain a proceeding to have a company wound up when it has embarked its funds in a wholly *ultra vires* business, as where, organized to do a banking business, it has undertaken to carry on speculations in land, the formation of a foreign company, and the business of investing in shares and securities. *In re* Crown Bank, 44 Ch. D. 634, 59 L. J. Ch. 739, 62 L. T. Rep. N. S. 823, 38 Wkly. Rep. 666. *Compare supra*, XI, D, 1, a *et seq.*

74. Stewart *v.* Pierce, 116 Iowa 733, 89 N. W. 234. But another such court has held that diversity of interest among the members of a corporation, and differences of opinion as to the advisability of continuing the existence of the concern, such as make it certain that no benefit can result to any party interested in perpetuating its existence, furnish sufficient grounds for its dissolution, in a judicial proceeding under a statute, at the suit of some of its shareholders. Matter of Importers', etc., Exch., 15 Daly 413, 8 N. Y. Suppl. 319, 322, 28 N. Y. St. 416. It has been held not a sufficient ground for dissolving a manufacturing corporation, on the

The reason goes back to a principle elsewhere discussed and often misapplied, that a corporation owes its life to the sovereign power, and that the circumstances under which it shall forfeit or be deprived of that life depend on the same power. "A corporation," it is said, "may be dissolved by forfeiture through abuse or neglect of its franchises; but such forfeiture, unless there be special provisions by statute, can only be enforced by the sovereign in some proceeding instituted in its behalf."[75] The conclusion is especially obvious that a corporation cannot be dissolved and a receiver appointed at the suit of a shareholder, where the state of the statute law requires every action to dissolve a corporation to be brought by the attorney for the state and in the name of the state.[76]

c. Construction of Statutes Prescribing Number and Value That Can Petition For Dissolution. Several of the statutes providing for voluntary proceedings for the winding-up of corporations prescribe the number and value of shareholders who must concur in the proceeding, in order to authorize the court to act. Under one statute, requiring the concurrence of three fourths in value of the shares at the time of the institution of the proceeding, and of the final decree, it was held that it was not necessary to the validity of the decree that it should appear that the petitioners for dissolution continued to desire the dissolution, from the filing of the petition up to the final decree, where they were prosecuting the case to the very last.[77] Any of the petitioners for the dissolution of a corporation may, before the court has found that they own the necessary amount of stock to entitle them to maintain the proceeding, withdraw therefrom, and if there is not left a number of petitioners owning a sufficient amount, the court cannot proceed on the petition and dissolve the corporation.[78]

d. Dissolution by Unanimous Consent of Shareholders. This may take place by any act or acts *in pais* which destroy the end and object for which the corpo-

petition of a majority in number of the shareholders owning a minority of the stock, that one owner of a majority of the stock has for many years controlled the election of the officers, and elected himself agent and clerk; that he has for a long time managed the business "according to his own will and choice, regardless of the wishes and interests of the petitioners"; that according to his statement the corporation had been doing a losing business for many years; that he has refused to make any change in the business or to purchase the shares of the petitioners; and that if the business were skilfully and properly managed it might be made a source of profit to all concerned. In such a case there must at least be a showing of illegal and fraudulent acts upon the part of the governing shareholder to the prejudice of those holding a minority of the shares. Pratt *v.* Jewett, 9 Gray (Mass.) 34.

75. Denike *v.* New York, etc., Co., 80 N. Y. 599, 605. It has been held by a subordinate court in New York that a life-insurance corporation organized under the laws of that state may be dissolved and wound up at the suit of a single shareholder. Masters *v.* Electric L. Ins. Co., 6 Daly (N. Y.) 455.

76. Dudley *v.* Dakota Hot Springs Co., 11 S. D. 559, 79 N. W. 839, where the complaint alleged that its officers and shareholders were fraudulently sacrificing property whose value was in excess of its liabilities.

77. Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234. As to a voluntary winding-up under the Alahama statute see also Wolfe *v.* Underwood, 91 Ala. 523, 8 So. 774; Merchants', etc., Line *v.* Waganer, 71 Ala. 581.

78. Herancourt Brewing Co. *v.* Armstrong, 6 Ohio Cir. Ct. 468 [*reversed* on jurisdictional grounds in 53 Ohio St. 467, 42 N. E. 425], points of evidence under statutes limiting number and value of shareholders necessary in such a petition.

Where some of the shares are owned by a deceased person, his executor or administrator is a shareholder for the purpose of making up the requisite number; and his appointment as executor is sufficiently proved by a certified copy of the will and the proceedings of the court probating the will and directing his qualification. Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234.

Upon the question of the mode of proving the amount of capital stock, it has been held that it is sufficiently proved by a certified copy of the charter proceedings. Upon the question of the amount of shares held by the petitioners their oral testimony is admissible, and the stock-book of the corporation need not be produced; and the failure to produce it will not be reversible error, at least without evidence that there was such a book. In reviewing such a proceeding, if it appears that all the material averments of the petition were established by uncontradicted legal evidence, the judgment will not be reversed no matter how much immaterial, illegal, incompetent, or irrelevant evidence may have been admitted. Wolfe *v.* Armstrong, 97 Ala. 375, 12 So. 234.

ration was created and which hence work what has been called a *de facto* dissolution of it;[79] such as resolutions adopted by all the shareholders authorizing a sale of all the corporate property, although not adopted by the directors sitting as a board.[80]

4. Questions of Procedure — a. Notice of Application For Dissolution — (I) *In General.* It has been held that where a corporation had become dissolved and its assets had become, under an existing statute, vested in its trustees then in office, in trust for its creditors and shareholders, a subsequent proceeding, under a subsequent statute, instituted by the attorney-general, such trustees not being made parties, resulting in a decree appointing a receiver and divesting the property out of the hands of such trustees and vesting it in the receiver for the purposes of a winding-up was a violation of a constitutional inhibition against the taking of property without due process of law.[81] The theory of the decision is that the right to have the property administered under the existing statute by the existing trustees was a right accruing to the creditors and shareholders which it was not competent for the legislature by a subsequent act to release or discharge.[82] It is obvious that if notice had been given to the trustees in possession it would not have cured the defect.

(II) *Notice to Attorney-General Under Statute of New York.* The statute of New York[83] requiring notice to be given to the attorney-general in case of any application for the dissolution of a corporation has been held to apply to proceedings for a voluntary dissolution.[84]

b. Order to Show Cause Against Application. Where the statute provides for an order to show cause against the application, and for service or publication in a certain way, unless the order is so made and served or published, the whole proceeding will be void. The reason is that the order to show cause is in the nature of original process, bringing in parties in interest, who have the right to oppose the winding-up;[85] and of course such a proceeding will be dismissed, at the instance of any party in interest at any stage of it, upon it being made to appear

79. See *supra*, VIII, P, 1, e, (I) *et seq.*; XXI, D, 3, b, (I) *et seq.*

80. Webster *v.* Turner, 12 Hun (N. Y.) 264.

81. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255 [*reversing* 45 Hun (N. Y.) 519]. *Compare* People *v.* O'Brien, 103 N. Y. 657.

82. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255 [*reversing* 45 Hun (N. Y.) 519, and *citing* and *following* Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291]. The court also cited Wynehamer *v.* People, 13 N. Y. 378; Westervelt *v.* Gregg, 12 N. Y. 202, 62 Am. Dec. 160; Taylor *v.* Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; Parker *v.* Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. ed. 377. Under a statute of Pennsylvania (Pa. Act April 4, 1872, Pamph. L. 40) notice of an application for the dissolution of a corporation should be published once a week for three weeks. *In re* Philadelphia Straw Braid Sewing Mach. Co., 6 Pa. Co. Ct. 65; *In re* Ashton Hand Mfg. Co., 5 Pa. Co. Ct. 400. And where a place of meeting is maintained in a county other than that in which the principal office is located, such advertisement should be in both counties. *In re* Ashton Hand Mfg. Co., 5 Pa. Co. Ct. 400. It has been held that the action of the English directors of a corporation chartered in England, but having its property, business, and four fifths of its shareholders in America, in attempting to wind up the company by voluntary procedure under the English statute, upon notice to the American shareholders given so late that it would be impossible for them to be represented, will not be sustained by an American court upon principles of international comity, since it is the voluntary act of the English shareholders, and not of the British courts. Brown *v.* Republican Mountain Silver Mines, 55 Fed. 7.

83. N. Y. Laws (1883), c. 378, § 8.

84. People *v.* Seneca Lake Grape, etc., Co., 52 Hun (N. Y.) 174, 5 N. Y. Suppl. 136, 23 N. Y. St. 346, 17 N. Y. Civ. Proc. 130. Vacating such an order on motion of the attorney-general, when made on petition of shareholders and creditors. Matter of Mart, 5 N. Y. Suppl. 82, 22 Abb. N. Cas. (N. Y.) 227. When application for appointment of a new trustee of an insolvent insurance company need not be given to the attorney-general see Matter of Gay, 4 N. Y. Suppl. 602, 21 N. Y. St. 346.

85. People *v.* Seneca Lake Grape, etc., Co., 52 Hun (N. Y.) 174, 5 N. Y. Suppl. 136, 23 N. Y. St. 346, 17 N. Y. Civ. Proc. 130; Freeman's Nat. Bank *v.* Smith, 9 Fed. Cas. No. 5,089, 13 Blatchf. 220; *In re* Pensacola Lumber Co., 19 Fed. Cas. No. 10,959, 8 Ben. 171.

that no order to show cause has been made, served, or published, in conformity with the statute.[86]

c. Allegations of Bill. In a proceeding to wind up an insolvent corporation under the statutes of New Jersey the bill need not allege that the corporation is doing business in the state at the time when the bill is filed, since the court has, under the statute, jurisdiction in the case of a foreign corporation which has previously done business in the state and still has property there.[87]

d. Consolidation of All Suits Pending Against Corporation by Creditors. A shareholder who is also a creditor may file a bill in equity in Tennessee to wind up an insolvent corporation, and may have all suits pending against it by creditors consolidated and proper accounts taken for the settlement of its affairs; and other shareholders may show that the claim of the one filing the bill is not valid, although the bill has been taken for confessed against the corporation.[88]

e. Intervention of Creditors. A final settlement, made between a corporation and its members, on the winding-up of its affairs, is not of course valid as against its creditors, unless they have been parties to the proceeding.[89] On general principles of equity, where such a proceeding takes place in a court possessing equity powers, it would be within the discretion of the court to allow a creditor to intervene, even after the expiration of the time previously limited for that purpose, at least it has been so held where the proceeding was instituted by creditors,[90] and no reason is perceived why the rule should be different where it is instituted by shareholders.

G. Effect of Dissolution — 1. At Common Law — a. In General. Under the operation of the principles of the ancient common law, excluding in this statement the principles of equity jurisprudence and the effect of general saving statutes, the effect of the dissolution of a corporation is to put an end to its existence for all purposes whatsoever and to destroy every one of the faculties possessed by it; so that thereafter it can neither make nor take contracts,[91] nor sue,[92] nor be sued;[93] and so that all debts to or from it become extinguished,[94]

86. *In re* Pyrolusite Manganese Co., 29 Hun (N. Y.) 429. When therefore the governing statute (N. Y. Code Civ. Proc. § 2423) prescribed that on presentation of the petition the court might make an order requiring all persons interested in the corporation to show cause why it should not be dissolved, and the order that was in fact made and served was an order to show cause "why the prayer of the petition should not be granted," and there was no statutory provision for the service of a copy of the petition with the order to show cause, it was held that subsequent proceedings were void. People *v.* Seneca Lake Grape, etc., Co., 52 Hun (N. Y.) 174, 5 N. Y. Suppl. 136, 23 N. Y. St. 346, 17 N. Y. Civ. Proc. 130.

87. Albert *v.* Clarendon Land, etc., Co., 53 N. J. Eq. 623, 23 Atl. 8.

88. Crutchfield *v.* Mutual Gas-Light Co., (Tenn. Sup. 1886) 2 S. W. 658.

89. Heggie *v.* People's Bldg., etc., Assoc., 107 N. C. 581, 12 S. E. 275.

90. Spooner *v.* St. Louis Bay Syndicate, 48 Minn. 313, 51 N. W. 377.

91. Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668; Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152; Green *v.* Seymour, 3 Sandf. Ch. (N. Y.) 285; White *v.* Campbell, 5 Humphr. (Tenn.) 38.

92. State Bank *v.* Wilson, 19 La. Ann. 1; Whitman *v.* Cox, 26 Me. 335.

93. Carey *v.* Giles, 10 Ga. 9; Bonaffe *v.* Fowler, 7 Paige (N. Y.) 576.

94. *Delaware.*— Commercial Bank *v.* Lockwood, 2 Harr. 8.

Georgia.— Robinson *v.* Lane, 19 Ga. 337; Thornton *v.* Lane, 11 Ga. 459; Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Louisiana.— In Louisiana the property and property rights of a corporation are not destroyed by the expiration of its charter. Fleitas *v.* New Orleans, 51 La. Ann. 1, 24 So. 623.

Massachusetts.— Thornton *v.* Marginal Freight Co., 123 Mass. 32.

Mississippi.— State Bank *v.* Duncan, 56 Miss. 166; Port Gibson *v.* Moore, 13 Sm. & M. 157; Commercial Bank *v.* Chambers, 8 Sm. & M. 9.

New York.—Assuming that this rule was introduced in New York by the constitution of 1777, adopting such parts of the common law as was then the law of the colony, yet the changed conditions surrounding the creation and dissolution of corporations and the distribution of their assets after dissolution have abrogated the rule. Shayne *v.* Evening Post Pub. Co., 168 N. Y. 70, 61 N. E. 115, 10 N. Y. Annot. Cas. 237, 85 Am. St. Rep. 654, 55 L. R. A. 777 [*reversing* 56 N. Y. App. Div. 426, 67 N. Y. Suppl. 937].

North Carolina.— Von Glahn *v.* De Rosset, 81 N. C. 467; Malloy *v.* Mallett, 59 N. C. 345; Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48.

Tennessee.— Hopkins *v.* Whitesides, 1 Head 31; White *v.* Campbell, 5 Humphr. 38.

and all actions by[95] or against[96] it abate; and so that its real property reverts to the grantors or donors thereof or their heirs;[97] and its personal property escheats to the crown or to the state.[98]

b. Extinguished Liability of Shareholders — (i) *Rule Stated.* The general rule of the ancient common law that debts owing by or to a corporation become extinguished upon the event of its dissolution had the necessary consequence of exonerating the shareholders from their liability to pay calls to the corporation in respect of the shares for which they had subscribed.[99] Therefore a shareholder was not liable to garnishment, under a statute, by a creditor of a defunct corporation; because a garnishing creditor claims in right of his debtor, and whatever will disable his debtor from claiming will operate as a disability against him.[1] So where, under the charter or governing statute, a judgment recovered against a corporation may be levied upon the property of any of its shareholders, a shareholder is privy to the judgment, in such a sense that he may maintain in his own name a writ of error and reverse it where it has been recovered against the corporation after its dissolution.[2]

(ii) *But Individuals May Incur Liabilities Which Will Survive.* But although the debts owing to or from the corporation are at common law extinguished by its dissolution, yet this does not exclude the conclusion that the individuals composing the corporation may during its existence incur liabilities, under the operation of statutes or otherwise, which will survive.[3]

United States.— Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. ed. 945.

95. Eagle Chair Co. *v.* Kelsey, 23 Kan. 632; State Bank *v.* Wrenn, 3 Sm. & M. (Miss.) 791.

96. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375; Selma First Nat. Bank *v.* Colby, 21 Wall. (U. S.) 609, 21 L. ed. 687.

97. *Massachusetts.*— Folger *v.* Chase, 18 Pick. 63.

New York.— Bingham *v.* Weiderwax, 1 N. Y. 509; Hooker *v.* Utica, etc., Turnpike Co., 12 Wend. 371.

North Carolina.— Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48; State *v.* Rives, 27 N. C. 297.

Tennessee.— White *v.* Campbell, 5 Humphr. 38.

Texas.—Acklin *v.* Paschal, 48 Tex. 147.

England.— Winsor *v.* Webb, Godb. 211; Edmunds *v.* Brown, 1 Lev. 237; Atty.-Gen. *v.* Gower, 9 Mod. 224; Coke Litt. 136.

98. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168; Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48.

99. Paschall *v.* Whitsett, 11 Ala. 472; Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412; Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Malloy *v.* Mallett, 59 N. C. 345, 346. The court which rendered the last of these decisions seems to have been animated by sheer love of injustice, and in another case, while professing to proceed according to the principles of equity, refused relief against the shareholders of a bank, notwithstanding the following clause in its charter: "The private property of the individual stockholders shall be liable for all the debts, contracts and liabilities of the corporation in proportion to the stock subscribed by each individual." Notwithstanding this provision it was held that a court of equity had no power, after the dissolution of a corporation, at the suit of a creditor of the same, to aid him in collecting his debt from the shareholders; and this is the way the court reasoned in reaching the conclusion: "The responsibility thus imposed upon the individual stockholders is, we think, manifestly a secondary one; because it makes them liable for the debts of another person, to wit: the corporation. Such a liability was amply sufficient for the security of the creditors of the company, should they be diligent in enforcing it, during the existence of the corporation; while, to have made it greater, would, in a considerable degree, have tended to defeat the purpose for which the company was created. The liability of the individual stockholders being thus a secondary one for the debts of the company, it follows that when the corporation expired and its debts became thereby extinct, their liability became extinct also. As long as there were debts of the company to be paid, the stockholders were bound to pay them, if necessary, out of their private means; but when the debts of the corporation ceased to exist, as such, there remained nothing upon which to attach a responsibility on those who had been members of the defunct company." The court also found an analogy in the case of a creditor's bill founded upon a judgment which is not in force. Wintz *v.* Webb, 14 N. C. 27. The doctrine announced in Von Glahn *v.* De Rosset, 81 N. C. 467, although an *obiter dictum*, expresses the unquestioned rule of the American law, and necessarily involves a repudiation of the doctrine in this case.

1. Paschall *v.* Whitsett, 11 Ala. 472.

2. Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

3. Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

2. Effect of Dissolution With Respect to Contracts — a. Destroys Power of Corporation to Make Contracts. After a corporation has been dissolved *de jure*,[4] it can make no contract which will have the effect of binding its assets.[5]

b. To What Extent Liable For Money Thereafter Borrowed. There is a decision to the effect that a corporation whose charter has expired is liable for money thereafter borrowed, only where such money is necessary to preserve its property or pay its just and legal liabilities.[6]

c. Effect of Dissolution Upon Unexpired or Executory Contracts — (i) *In General.* The executory contracts of a corporation become nugatory after it is forced into an involuntary liquidation and dissolution.[7]

(ii) *Puts End to Continuing Duty of Corporation and Entitles Obligee to Just Compensation.* In respect of contracts of such a nature as to involve a continuing duty or liability on the part of the corporation, the necessary effect of its dissolution is to put an end to the continuing duty or liability, and to entitle the other party to just compensation.[8]

(iii) *Entitles Obligee to Damages For Breach of Contract.* In ordinary cases the obligee will be entitled to be paid, out of the assets of the dissolved corporation, compensation by way of damages for the breach of its contract.[9]

(iv) *Renders Debentures of Corporation Immediately Payable.* In England the winding-up of a corporation renders immediately payable a deben-

4. The expression *de jure* is used to exclude from conception those *de facto* and shadowy dissolutions which are frequently held to have taken place through insolvency or the non-user of the corporate franchises, for the purpose of letting in the rights of creditors against their shareholders, and for some other purposes. See *supra*, VIII, P, 1, e, (I) *et seq.*

5. Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152; Green *v.* Seymour, 3 Sandf. Ch. (N. Y.) 285; White *v.* Campbell, 5 Humphr. (Tenn.) 38.

Illustrations.— Such an effect has been ascribed to an order enjoining a corporation from exercising its franchises, in a statutory proceeding to dissolve it. Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152. So where a note secured by a deed of trust was executed to a defunct corporation, it was held that the note was void for want of a payee, and that the deed of trust was void for want of a beneficiary. White *v.* Campbell, 5 Humphr. (Tenn.) 38. So where the directors of a corporation, after they had been, by a vote of the shareholders, which took place in pursuance of the charter, divested of all authority except to close its concerns, issued new obligations in the name of the company and took a mortgage therefor, it was held that the mortgage thus taken was void. Green *v.* Seymour, 3 Sandf. Ch. (N. Y.) 285. So where a corporation's charter is declared void for non-payment of taxes, and a receiver is appointed, a claim by its manager for services rendered and money loaned after the date of the forfeiture cannot be allowed as against the receiver. Louchheim *v.* Clawson Printing, etc., Co., 12 Pa. Super. Ct. 55.

6. Mason *v.* Pewabic Min. Co., 66 Fed. 391, 13 C. C. A. 532. The decision is obviously unsound. A corporation whose charter has expired, unless there is a statute continuing its corporate life for the purpose of winding-up, cannot borrow money, because it is non-existent, and it cannot be liable for anything for the same reason. Another holding announces the doctrine that the acts of a minority party of a corporation organized for ideal purposes, done after the corporation has ceased to exist, are void. Com. *v.* Order of Solon, 166 Pa. St. 33, 30 Atl. 930. This decision must be read with reference to the principle that so long as a corporation not having a joint stock retains a sufficient number of members to keep the corporation alive, their acts are binding; but of course not after it has ceased to exist. Another decision announces the principle that an attempt on the part of the managers of a corporation to exercise corporate powers after the expiration of its charter without renewal is *ultra vires*. *In re* McKinley-Lanning L., etc., Co., 1 Pa. Dist. 551. Naturally, because there is no corporation, and the case simply presents the attempt of a number of private persons to exercise the powers of a corporation which does not exist.

7. People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174; Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 33 S. E. 125.

8. This may be best illustrated in respect of contracts of fire insurance where, if the insurance company becomes dissolved while the contract is in force, the contract is determined as a contract of insurance, and the insured is entitled to the unearned premium at the date of the dissolution. Carr *v.* Union Mut. F. Ins. Co., 28 Mo. App. 215.

9. *In re* Wiltshire Iron Co., L. R. 3 Ch. 443, 37 L. J. Ch. 554, 18 L. T. Rep. N. S. 38, 16 Wkly. Rep. 682. That the dissolution of a corporation, while preventing specific performance of its contracts, perfects a cause of action for their breach see Schleider *v.* Dielman, 44 La. Ann. 462, 10 So. 934.

ture issued by it covenanting for the payment of the money on a specified day, which is subsequent to such winding-up, although there is no special provision for such immediate payment.[10]

(v) *When Court May Order Execution of Contract After Winding-Up Order.* In England the principle has been recognized that where a corporation has entered into an obligation and commenced its performance after the presentation of a petition for a winding-up, and the contract remains but partly performed when the winding-up order is made, it is within the power of the court to order the performanee of it to be completed.[11]

(vi) *Effect Upon Unexpired Contracts to Render Services to Corporation.* The effect of the dissolution of a corporation upon an unexpired contract for the rendition of services to it does not bar a recovery of damages for the breach of the contract for the unexpired portion of the term.[12]

(vii) *Effect Upon Unexpired Leases Made to Corporation*—(a) *In General.* Neither the receiver of a dissolved corporation appointed to wind up its affairs nor its assignee in bankruptcy[13] is bound to accept onerous property, because this would be in violation of the rights of creditors. He is not therefore bound, if to do so will be prejudicial to the interests of the creditors, to comply with the covenants of a lease made to the corporation by paying rent in full; but he may allow the lease to be forfeited, and allow the lessor to intervene *pro interesse suo* to recover his distributive share of any rents accruing prior to the date of the forfeiture.[14]

(b) *Receiver May Take Possession of Leased Property and Pay Rent.* If on the other hand it becomes clear that it will be profitable and advantageous to the insolvent estate in his hands to hold on to the lease, even for the purpose of selling it, where it is assignable, he may undoubtedly do this; and where he makes such an eleetion, the estate in his hands will become liable to pay to the lessor the full amount of the rents already accrued and thereafter accruing. In general the same result will follow where the court orders him to take possession of the leased property, by an order, the terms of which leave him no eleetion. But it seems that if he is appointed receiver of an estate where part of the estate consists of leased property, he has an election whether he will take possession of the leased property and assume the liability to pay rent according to the covenants of the lease; and the mere fact of his appointment does not render him liable so to pay rent, until he makes his election or does some act which in law would be equivalent to an election.[15]

10. Wallace *v.* Universal Automatic Mach. Co., [1894] 2 Ch. 547, 63 L. J. Ch. 598, 70 L. T. Rep. N. S. 852, 1 Manson 315, 7 Reports 316.

11. When therefore a customer of a trading company had *bona fide* ordered and paid for an invoice of goods, and the company had loaded the goods on a railway carriage marked to his address, and sent him the invoices after the presentation of a petition to wind up its affairs, but before the winding-up order had been made, it was held that the disposition of the property was complete before the winding-up order, and the goods were ordered to be delivered to the customer. *In re* Wiltshire Iron Co., L. R. 3 Ch. 443, 37 L. J. Ch. 554, 18 L. T. Rep. N. S. 38, 16 Wkly. Rep. 682.

12. Rosenbaum *v.* U. S. Credit System Co., 61 N. J. L. 543, 40 Atl. 591 [*reversing* 60 N. J. L. 294, 37 Atl. 595, and *disapproving* People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174].

13. *In re* Merrifield, 17 Fed. Cas. No. 8,465. See also *supra*, VIII, J, 8.

14. This seems to the writer to be the result of the best adjudications on the subject. People *v.* National Trust Co., 82 N. Y. 283. *Compare* Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Hoyt *v.* Stoddard, 2 Allen (Mass.) 442.

15. Com. *v.* Franklin Ins. Co., 115 Mass. 278; Woodruff *v.* Erie R. Co., 93 N. Y. 609 [*reversing* 25 Hun (N. Y.) 246]; Moore *v.* Higgins, 2 Silv. Supreme (N. Y.) 298, 5 N. Y. Suppl. 895, 24 N. Y. St. 378, 20 N. Y. Wkly. Dig. 123 [*affirmed* in 132 N. Y. 456, 30 N. E. 861, 44 N. Y. St. 608]; People *v.* Universal L. Ins. Co., 30 Hun (N. Y.) 142; *In re* Lundy Granite Co., L. R. 6 Ch. 462, 40 L. J. Ch. 588, 24 L. T. Rep. N. S. 922, 19 Wkly. Rep. 609; *In re* Oak Pits Colliery Co., 21 Ch. D. 322, 51 L. J. Ch. 768, 47 L. T. Rep. N. S. 7, 30 Wkly. Rep. 759; *In re* Brown, 18 Ch. D. 649; Turner *v.* Richardson, 7 East 335, 3 Smith K. B. 330. *Compare* Miltenber-

3. Effect of Dissolution Upon Actions — a. Destroys Its Power to Sue — (I) *In General.* By the principles of the common law, after a corporation has become effectually dissolved in any mode known to the law, its power to sue in its corporate name is effectually extinguished.[16] Thereafter it can maintain no action to enforce rights acquired during the life of its charter, unless its capacity in this respect has been continued by the provisions of its charter or otherwise by statute.[17]

(II) *Abates All Actions Commenced in Its Name.* By the principles of the common law, in the absence of any saving statute, the dissolution of a corpo-

ger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; *In re* Bridgewater Engineering Co., 12 Ch. D. 181, 48 L. J. Ch. 389. The English doctrine is thus expressed by Lord Justice Lindley, in giving the judgment of the English court of appeal: "When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full, like any other debt or expense properly incurred by the liquidator for the same purpose; and in such a case it appears to us that the rent for the whole period, during which the property is so retained or used, ought to be paid in full, without reference to the amount which could be realized by a distress." *In re* Oak Pits Colliery Co., 21 Ch. D. 322, 51 L. J. Ch. 768, 47 L. T. Rep. N. S. 7, 30 Wkly. Rep. 759. On the same principle where a receiver is appointed to take charge of a leasehold estate, which is sublet to various tenants, for the purpose of collecting the rents and profits, such a receiver being usually called "a receiver of rents and profits," his primary duty is to pay the head rent, or rent which is due from the debtor whose custody he has displaced, to the principal landlord; and he is bound to do this without any order of court to that effect, and without compelling the landlord to resort to any proceedings for the purpose of enforcing such payment. Balfe *v.* Blake, 1 Ir. Ch. 365; Walsh *v.* Walsh, 1 Ir. Eq. 209. This is obvious when it is considered that the very fact of his appointment, and of his taking possession of property which is thus liable to a head rent, is an affirmation of the covenant in the lease under which such head rent is due. For a clause in a lease which justifies the lessor in making a reëntry upon the lessee corporation going into liquidation see Horsey *v.* Steiger, [1898] 2 Q. B. 259, 67 L. J. Q. B. 747, 79 L. T. Rep. N. S. 116. As to the remedies of the landlord after the lessee corporation has gone into liquidation, his remedy by distress, his relief by filing an intervening petition, his right to priority in the distribution, etc. see 5 Thompson Corp. § 6999.

16. *Alabama.*— Saltmarsh *v.* Planters', etc., Bank, 17 Ala. 761.

Louisiana.— State Bank *v.* Wilson, 19 La. Ann. 1.

Maine.— Whitman *v.* Cox, 26 Me. 335; Read *v.* Frankfort Bank, 23 Me. 318.

North Carolina.— Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48, collection of a judgment recovered by bank cashier suing in behalf of the bank after its dissolution enjoined in equity. *Compare* Von Glahn *v.* De Rosset, 81 N. C. 467 [*overruling* in effect Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48].

Ohio.— Miami Exporting Co. *v.* Gano, 13 Ohio 269.

Texas.— In Texas a corporation which has been dissolved is without power to bring trespass to try title to land owned by it. Baldwin *v.* Johnson, 95 Tex. 85, 65 S. W. 171.

United States.— Greeley *v.* Smith, 10 Fed. Cas. No. 5,748, 3 Story 657.

17. *Alabama.*—Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668, 17 Ala. 761.

Connecticut.— Wilcox *v.* Continental L. Ins. Co., 56 Conn. 468, 16 Atl. 244; National Pahquioque Bank *v.* Bethel First Nat. Bank, 36 Conn. 325, 4 Am. Rep. 80.

Kansas.—Krutz *v.* Paola Town Co., 20 Kan. 397.

Louisiana.—Planters Consol. Assoc. *v.* Claiborne, 7 La. Ann. 318.

Mississippi.— State Bank *v.* Wrenn, 3 Sm. & M. 791; Campbell *v.* Mississippi Union Bank, 6 How. 625.

New Hampshire.— Blake *v.* Portsmouth, etc., R. Co., 39 N. H. 435.

New York.—Sturges *v.* Vanderbilt, 73 N. Y. 384 [*affirming* 11 Hun 136].

Ohio.—Renick *v.* West Union Bank, 13 Ohio 298, 42 Am. Dec. 203; Miami Exporting Co. *v.* Gano, 13 Ohio 269.

Tennessee.—Ingraham *v.* Terry, 11 Humphr. 572.

Virginia.— Rider *v.* Nelson, etc., Union Factory, 7 Leigh 154, 30 Am. Dec. 495.

United States.— Pendleton *v.* Russell, 144 U. S. 640, 12 S. Ct. 743, 36 L. ed. 574; U. S. Bank *v.* McLaughlin, 2 Fed. Cas. No. 928, 2 Cranch C. C. 20; Smith *v.* Frye, 22 Fed. Cas. No. 13,049, 5 Cranch C. C. 515.

Statute construed.— That the common-law rule that an unqualified dissolution of a corporation extinguishes all rights of action in favor of or against it is not changed by Conn. Gen. Stat. § 1322, specifying the power of receivers, see Wilcox *v.* Continental L. Ins. Co., 56 Conn. 468, 16 Atl. 244. That in an action on a note by a corporation it is no defense that the charter fails to define the period of its duration see East Tennessee Iron Mfg. Co. *v.* Gaskell, 2 Lea (Tenn.) 742.

ration has the effect of abating all actions pending against the corporation at the date when the dissolution takes effect.[18]

(III) *This Doctrine Not Applicable to De Facto Dissolutions.* This doctrine is not applicable to those *de facto* dissolutions which have been frequently declared by the courts to exist, for the purpose of letting in the rights of creditors against shareholders. Thus the non-user by a corporation of its franchises, such as is evidenced by its cessation of active business, does not impair its capacity to prosecute suits.[19]

(IV) *What Actions Abate and What Survive Under Statutes*— (A) *Follows Rule With Respect to Death of Natural Persons* — (1) In General. Assuming that a statute exists preventing the dissolution of a corporation from putting an end to rights of action against it, the question arises whether those rights of action which, under the principles of the common law, abate on the death of a natural person, will abate on the dissolution of a corporation. It seems that this question must be answered in the affirmative.

(2) Action by Corporation For Libel. For instance it has been held that an action by a corporation for a libel, being for a mere personal tort, does not survive the dissolution of the corporation; and that such a right of action does not continue in its receiver, and this is so, although the libel may have resulted in pecuniary injury to the corporation, and may have diminished the amount of its estate which has passed into the hands of the receiver.[20]

(3) Action For Tort Continued Against Directors Under Statute. But an action brought against a corporation for a tort may be continued against its directors and trustees under a statute[21] providing that upon the dissolution of a

18. Eagle Chair Co. *v.* Kelsey, 23 Kan. 632; State Bank *v.* Wrenn, 3 Sm. & M. (Miss.) 791; May *v.* North Carolina State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726.

Effects of this principle.— If for instance a corporation becomes extinct by the expiration of its charter, or by a decree of forfeiture, pending a suit at law by it for a corporate demand, and the fact be brought regularly to the notice of the court, the action must terminate, and any attachment made in aid of it must be dissolved; and if after judgment in favor of the corporation it becomes extinct no execution can regularly issue thereon in the corporate name; and if one be sued out it may be quashed on showing that the corporation had become extinct before it was sued out. May *v.* North Carolina State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726. The effect of this principle was such that where, in an action by a corporation, plaintiff introduced in evidence its articles of incorporation, although no issue as to its corporate existence had been raised, and these articles showed that its charter had expired during the pendency of the action, it was held that the court could not render a judgment in favor of the corporation upon the verdict which had been returned by the jury. Eagle Chair Co. *v.* Kelsey, 23 Kan. 632. The doctrine of this section must be absolutely clear, so far as it relates to proceedings in courts which have no equity powers. In order to place it beyond the possibility of doubt, it is only necessary to consider that if, after the dissolution of the corporate plaintiff, the action should proceed to judgment, there would be no person capable in law of receiving the fruits of it. Decisions exist which have sometimes been quoted in opposition to this principle, but on examination it will be found that they are capable of being reconciled with it. Examine with reference to this statement the cases of Louisville *v.* U. S. Bank, 3 B. Mon. (Ky.) 138; Alexandria Bank *v.* Patton, 1 Rob. (Va.) 499. See also 5 Thompson Corp. p. 5308, note 2, where these cases are explained. In New York an action commenced by a corporation is not abated by a subsequent dissolution. New York Marbled Iron Works *v.* Smith, 4 Duer (N. Y.) 362, but this is in conformity with a saving statute. But in that state as everywhere else after a corporation has been dissolved no cause of action can arise in favor of it, because it is non-existent — "all is void," etc. Kinney *v.* Reid Ice Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Suppl. 325. It has been held that where a court has decreed the dissolution of a corporation and the appointment of a receiver; and the corporation has appealed from the portion of the decree appointing a receiver, but not from that ordering dissolution, its acquiescence in the decree of dissolution terminates its existence, so that it has no capacity to prosecute an appeal from the other provision of the decree, and such appeal will be dismissed. State *v.* Fidelity L. & T. Co., 113 Iowa 439, 85 N. W. 638.

19. State Nat. Bank *v.* Robidoux, 57 Mo. 446.

20. Milwaukee Mut. F. Ins. Co. *v.* Sentinel Co., 81 Wis. 207, 51 N. W. 440, 15 L. R. A. 627.

21. 1 N. Y. Rev. Stat. p. 600, §§ 8, 9.

corporation its directors shall be trustees for its creditors and shareholders, with power to settle up its affairs and distribute its assets among its creditors first and its shareholders next.[22]

(4) Action For Specific Performance Abates. Necessarily the dissolution of a corporation puts an end to an action to compel the specific performance of its contract; but it is said that it has at the same time the effect of perfecting a right of action for its breach.[23]

b. Destroys Its Capacity to Be Sued — (I) *In General.* The complete dissolution of a corporation destroys its capacity to be sued at law because a judgment can no more be rendered against a dead corporation than against a dead man.[24]

(II) *Cannot Thereafter Be Made Party Defendant.* It cannot thereafter be made a party defendant in an action brought by a receiver to set aside a fraudulent conveyance of its assets.[25]

(III) *Abates All Actions Pending Against It* — (A) *In General.* The necessary effect of the dissolution of a corporation is to abate all actions pending against it at the time of its dissolution, in the absence of a saving statute providing for the continuation of such actions.[26]

22. Hepworth *v.* Union Ferry Co., 62 Hun (N. Y.) 257, 16 N. Y. Suppl. 692, 41 N. Y. St. 783. A private business corporation duly chartered and organized under the laws of West Virginia, which failed to wind up its business when the time fixed by its charter for its duration expired, but continued thereafter in its charter name to carry on its corporate business, may be sued in a court of law in its corporate name for a tort committed by it after its charter had expired. Miller *v.* Newburg Orrel Coal Co., 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903.

23. Schleider *v.* Dielman, 44 La. Ann. 462, 10 So. 934.

24. *Georgia.*— Carey *v.* Giles, 10 Ga. 9.

New York.— Bonaffe *v.* Fowler, 7 Paige 576.

West Virginia.— Styles *v.* Laurel Fork Oil, etc., Co., 45 W. Va. 374, 32 S. E. 227, 47 W. Va. 838, 35 S. E. 986, holding that there can be no suit against an expired domestic corporation except a suit in equity under a statute to wind up its affairs for the benefit of its creditors and shareholders.

Wisconsin.— Combes *v.* Keyes, 89 Wis. 297, 62 N. W. 89, 46 Am. St. Rep. 839, 27 L. R. A. 369, holding that a railroad company divested of all its property and franchises by foreclosure of mortgages is without capacity to be sued after a new corporation under legislative authority has acquired its property and franchises and operated its road for many years.

United States.— Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. ed. 945.

25. Carey *v.* Giles, 10 Ga. 9.

26. *Alabama.*— Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375.

Illinois.— Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

Louisiana.— Munson *v.* Richardson, 11 Rob. 37.

Maine.— Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Whitman *v.* Cox, 26 Me. 335; Read *v.* Frankfort Bank, 23 Me. 318.

Massachusetts.— Thornton *v.* Marginal Freight R. Co., 123 Mass. 32.

New York.— McCulloch *v.* Norwood, 58 N. Y. 562; Bonaffe *v.* Fowler, 7 Paige 576.

North Carolina.— Dobson *v.* Simonton, 86 N. C. 492.

Pennsylvania.— Farmers', etc., Bank *v.* Little, 8 Watts & S. 207, 42 Am. Dec. 293.

Texas.— Life Assoc. of America *v.* Goode, 71 Tex. 90, 8 S. W. 639.

United States.— Selma First Nat. Bank *v.* Colby, 21 Wall. 609, 22 L. ed. 687; Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. ed. 945; Greeley *v.* Smith, 10 Fed. Cas. No. 5,748, 3 Story 657.

Illustrations.— Therefore a suit against a national bank to enforce the collection of a demand was abated by a decree of a district court of the United States, dissolving the corporation and forfeiting its franchises, rendered upon an information against the bank filed by the comptroller of the currency, there being no saving statute continuing rights of action. Selma First Nat. Bank *v.* Colby, 21 Wall. (U. S.) 609, 22 L. ed. 687. Under the statutory system existing in New York the court, on an application for a final order dissolving a corporation, must make a final order of dissolution if it appears that the corporation is insolvent, although upon such dissolution a pending action for personal injuries will abate. *Re* New York Oxygen Co., 33 N. Y. Suppl. 726, 67 N. Y. St. 549, 24 N. Y. Civ. Proc. 398. But under the system prevailing in New Jersey it seems that unless the terms of the order made by the court are tantamount to a dissolution of the corporation, a pending action against it may regularly proceed, notwithstanding the adjudication of insolvency and the appointment of a receiver to wind up its affairs, and notwithstanding the action is in the courts of another state than that of the home jurisdiction. Taylor *v.* Gray, 59 N. J. Eq. 621, 44 Atl. 668 [*modifying* (N. J. Ch. 1897) 38 Atl. 951]. In Texas a judgment for personal injuries against a railway company is not void because

(B) *Contrary Decisions That Such Actions Do Not Abate.* Decisions are sometimes met with which hold in general terms a doctrine opposed to that just stated. Thus according to an early decision in Missouri the expiration of the charter of a corporation does not affect legal proceedings already commenced against it.[27] It is enough to say of such decisions that unless they can be justified by some local statute they were badly decided.[28]

(C) *Judgment Rendered Against Corporation After Dissolution Erroneous* — (1) IN GENERAL. It follows that a judgment rendered against a corporation after it has been dissolved is voidable, in the sense that it will be reversed on error,[29] or that the execution of it will be perpetually enjoined.[30]

(2) DOCTRINE THAT SUCH JUDGMENTS ARE VOID — (a) STATEMENT OF DOCTRINE. Other authoritative courts have gone to the length of holding that a judgment rendered against the corporation after its dissolution, although in an action previously commenced, is not merely erroneous, but absolutely void.[31]

(b) MAY BE IMPEACHED COLLATERALLY BY CREDITORS. It follows that under this doctrine such a judgment may be impeached by any one entitled to participate in the distribution of the assets of the corporation. It has been held that it may be impeached by a creditor; for every creditor claiming payment out of the funds of an insolvent corporation occupies an adversary position toward every other claimant, and has a right to contest the validity of the claim preferred by any other, and to see that another claimant does not get a preference under the operation of a void judgment.[32]

it is rendered after a judgment dissolving the company in a suit by the state, where an appeal is pending from such judgment of dissolution. Giles *v.* Stanton, 86 Tex. 620, 26 S. W. 615 [*reversing* (Tex. Civ. App. 1893) 24 S. W. 556]. In Connecticut, where the receivers of a corporation rely upon its dissolution as a defense to an action against it, it has been held proper to allow them to appear and plead specially to the action. Morgan *v.* New York Nat. Bldg., etc., Assoc., 73 Conn. 151, 46 Atl. 877.

27. Lindell *v.* Benton, 6 Mo. 361.

28. In Com. *v.* Huntingdon Bank, 2 Penr. & W. (Pa.) 438, it was held that a statute of the state exacting a duty of eight per cent upon the amount of dividends declared by the bank, and providing that upon the failure of the bank to pay the same to the state treasurer within a given period he should proclaim the charter of the bank forfeited, did not preclude the state from recovering the duty in an action, although the state treasurer had by proclamation forfeited the charter. But as there was no opinion the ground of the decision does not appear.

29. Musson *v.* Richardson, 11 Rob. (La.) 37; Rankin *v.* Sherwood, 33 Me. 509; Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649 (reversed on error at the suit of a member whose property has been levied upon under an execution to enforce the judgment).

30. Rankin *v.* Sherwood, 33 Me. 509; Merrill *v.* Suffolk Bank, 31 Me. 57. But see Whitman *v.* Cox, 26 Me. 335.

31. *Massachusetts.*— Thornton *v.* Marginal Freight R. Co., 123 Mass. 32.

New York.—Sturges *v.* Vanderbilt, 73 N. Y. 384; McCulloch *v.* Norwood, 58 N. Y. 562 [*reversing* 36 N. Y. Super. Ct. 180]; *Re* Norwood, 32 Hun 196. In New York a judgment rendered against a corporation whose charter has expired is void, unless the action be continued by order of the court under the New York Law of 1832, c. 295, to prevent abatement, etc. Sturges *v.* Vanderbilt, 73 N. Y. 384. Therefore after the dissolution of a corporation its attorneys are without power to enter into a stipulation affecting any pending action. *In re* Norwood, 32 Hun (N. Y.) 196. A judgment recovered in a suit commenced against a corporation two months after its dissolution was held to be not even *prima facie* evidence of a debt due from the corporation at the time of its dissolution. Bonaffe *v.* Fowler, 7 Paige (N. Y.) 576.

North Carolina.— Dobson *v.* Simonton, 86 N. C. 492.

Pennsylvania.— McAnulty *v.* National L. Assoc., 6 Lack. Leg. N. 128.

Rhode Island.— Insurance Commissioner *v.* United F. Ins. Co., 22 R. I. 377, 48 Atl. 202, holding that an agreement by counsel of corporation, subsequent to its dissolution, that a judgment in a pending action may be rendered against it, is absolutely void.

Tennessee.— Grace *v.* Noel Mill Co., (Ch. App. 1901) 63 S. W. 246, holding that there can be no decree against dissolved corporation in a subsequent suit by shareholders against the purchasers of the corporate property, most of whom were shareholders in the dissolved corporation, to recover assessments fraudulently appropriated.

United States.— Pendleton *v.* Russell, 144 U. S. 640, 12 S. Ct. 743, 36 L. ed. 574.

32. Dobson *v.* Simonton, 86 N. C. 492. That such is the right of a creditor in the administration of an insolvent estate of a deceased person see Long *v.* Yanceyville Bank, 85 N. C. 354; Wordsworth *v.* Davis, 75 N. C. 159; Overman *v.* Grier, 70 N. C. 693. In Her-

(c) Other Consequences of This Doctrine. Relief cannot be given to a corporation against a decree in equity on the ground that it had no existence at the time when the decree was rendered, where it is not shown that its existence had not been so prolonged or revived that it would have a standing in court.[33] So, although a corporation may have been in the possession of its charter and franchises at the time of the rendition of a judgment against it, yet a scire facias cannot be maintained upon the judgment if, before the issue of the writ, its charter has been surrendered or forfeited.[34]

(d) Creditors May Nevertheless Enforce Their Claims Against Corporate Assets. Creditors may, however, enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company or for its shareholders, at the time of its dissolution, in any mode permitted by the local laws.[35]

(e) Shareholders May Sue to Wind Up. Under statutory systems shareholders also have a standing to sue in equity to wind up the affairs of the corporation.[36]

(f) And Corporation May Prevent Consequences of Dissolution by Making Assignment For Creditors. It must also be kept in mind that it is within the power of every business corporation to prevent the results which the rules of the common law attach to a dissolution, by making an assignment of all its property, prior to its dissolution in trust for the benefit of its creditors.[37]

(iv) *Dissolves All Attachments Levied on Its Property.* The necessary effect of the *de jure* dissolution of a corporation is that it dissolves all attachments levied on its property,[38] and destroys the attachment lien.[39]

(v) *De Facto Dissolutions Do Not Destroy Capacity to Be Sued.* It must be kept in mind that this rule is not applicable to those *de facto* dissolutions which are frequently declared for the purpose of letting in the rights of creditors against shareholders; but the mere insolvency of a corporation, rendering it incapable of carrying on the business for which it was created, never operated to prevent the prosecution of suits against it.[40]

c. Dissolution Has No Effect Upon Proceedings to Enforce Liens Upon Corporate Property — (i) *Does Not Operate to Divest Vested Rights.* The dissolution of a corporation does not operate to divest rights which have become vested before the dissolution. It does not for example affect a valid conveyance made prior to the dissolution; but with respect to the property thus conveyed no title will pass in the event of dissolution to the person who otherwise might have been entitled to take in that event.[41]

(ii) *Does Not Oust Court of Bankruptcy of Jurisdiction.* So the dissolution of a corporation does not oust the court of bankruptcy of a jurisdiction previously obtained over its property, a proceeding in bankruptcy being a proceeding *in rem*.[42]

vey *v.* Edmunds, 68 N. C. 243, an outside creditor of defendant's intestate was permitted to assail the integrity of a judgment, for the reason that he was interested in the administration of the assets and in preventing the priority attempted to be given to plaintiff therein.

33. Muscatine Turn Verein *v.* Funck, 18 Iowa 469.

34. Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945.

35. Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348; Thornton *v.* Marginal Freight R. Co., 123 Mass. 32; Lindell *v.* Benton, 6 Mo. 361; Habich *v.* Folger, 20 Wall. (U. S.) 1, 22 L. ed. 307; Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 286, 8 L. ed. 945 (per Story, J.).

36. Krutz *v.* Paola Town Co., 20 Kan. 397. See *supra*, XI, D, 1, a *et seq.*; XXI, F, 2, b, (I) *et seq.*

37. Sturges *v.* Vanderbilt, 73 N. Y. 384 [*affirming* 11 Hun (N. Y.) 136]. See *supra*, XX, A, 1. a.

38. Morgan *v.* New York Nat. Bldg., etc., Assoc., 73 Conn. 151, 46 Atl. 877; Farmers', etc., Bank *v.* Little, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293; Walters *v.* Western, etc., R. Co., 69 Fed. 679.

39. Wilcox *v.* Continental L. Ins. Co., 56 Conn. 468, 16 Atl. 244.

40. Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

41. Methodist Protestant Church *v.* Johnson, 22 Nebr. 163, 34 N. W. 221.

42. Platt *v.* Archer, 19 Fed. Cas. No. 11,213, 9 Blatchf. 559, 6 Nat. Bankr. Rep. 465, per Blatchford, District Judge.

(III) *Does Not Oust Trustees in Mortgage of Right to Take Possession and Carry On Business.* So the right of trustees in a mortgage of its property, executed by a corporation, to take possession and control of the property, and carry on the business for which the property was used, is such a right or interest in the property as survives a voluntary dissolution of the corporation. But where a proceeding has been instituted, under a statute, by shareholders, to secure a voluntary dissolution of the corporation, this will exclude an independent proceeding to foreclose such a mortgage, and will remit the mortgagees to the remedy of filing their claim in the dissolution proceeding.[43] Especially is it true that the voluntary action of the shareholders in effecting a dissolution of the corporation, under the provisions of a statute, cannot be allowed to have such an effect; since this would impair the obligation of an existing contract. The court will in such a case direct the execution of the power contained in the mortgage.[44]

4. Effect of De Facto Dissolutions — a. Dissolution by Reason of Non-User Not Pleadable. The dissolution which alone is pleadable under the foregoing principles is an absolute, unqualified dissolution, such as has been announced by a competent judicial sentence, or such as needs no judicial sentence to announce the fact. The foregoing principles have no application to a dissolution by the mere non-user of the franchises of the plaintiff corporation; for although such non-user might be a ground upon which the state could vacate the franchises of the corporation, yet this result cannot be accomplished by private individuals in a collateral way, by way of defense to an action brought by the corporation.[45] The very fact of bringing the action is a revival of the corporation if dormant, and a user of its franchises if they have fallen into a state of non-user. Accordingly where trustees of a religious corporation bring an action *colore officii* an objection that they were not regularly elected as such trustees cannot be sustained, unless it be shown that proceedings have been instituted against them by the government and carried to judgment of ouster.[46]

b. Nor Is Mere Insolvency. From the foregoing principles it follows that, in an action by a corporation against an individual, evidence that the corporation has become insolvent is inadmissible; for although such insolvency might be a ground for adjudging the corporate rights forfeited in proceedings against the corporation for that express purpose, yet it cannot be inquired into collaterally in an action brought by the corporation.[47] If therefore an action has been brought against a corporation to enforce an obligation entered into by it, plaintiff has the right to have the corporation retained as defendant, notwithstanding it may have become insolvent or may have disposed of its property in such a manner as to render the recovery of the judgment futile, and a motion to substitute an assignee for the corporation will be properly denied unless assented to by plaintiff.[48]

43. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375.

44. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375; Muscatine Turn Verein *v.* Funck, 18 Iowa 469.

45. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457. See also Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370.

46. Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429. See also the same principle in Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Banks *v.* Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706. Upon the same principle it is held that the failure of a railroad company to commence the construction of its road within the time limited by its charter does not *per se* work a forfeiture of its franchises without judicial determination, unless it is apparent from the language of the statute that the legislature intended that the statute should be self-executing without the aid of any judicial sentence. See *supra*, XXI, A, 6, a; *In re* Brooklyn El. R. Co., 11 N. Y. Suppl. 161, 32 N. Y. St. 1065. And even where there has been an absolute dissolution, such franchises as exist in perpetuity and as have been assigned by mortgage with the assent, express or implied, of the legislature, if in the nature of real property, survive according to one view and exist in perpetuity. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255.

47. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457, opinion by Finch, J.

48. Hood *v.* California Wine Co., 4 Wash. 88, 29 Pac. 768.

5. Effect of Dissolution After Judgment — a. No Execution Can Issue in Corporate Name — (I) *In General.* If a corporation becomes dissolved after the recovery of a judgment by it, no execution can issue thereon in its name, because there is no existent person entitled to receive the proceeds; but if an execution is sued out on such a judgment, it may be quashed on showing that the corporation had become extinct before it was sued out.[49]

(II) *Collection of Such Judgment Enjoined.* In the same semibarbarous era it was held that where a judgment has been recovered upon a promissory note by the legal payee thereof, if the note really belongs to a corporation, which has become defunct by the expiration of its charter, equity will enjoin the collection of the judgment.[50]

b. Contra, That Property of Corporation May Be Sold on Execution Under Judgment Obtained Against It Before Forfeiture. Opposed to this is the doctrine that the forfeiture of the charter of a corporation will not prevent the sale of its property under execution upon a judgment which had been obtained against it before the forfeiture.[51] In New York the annulment of the charter of a corporation for the non-payment of taxes will not abate an action properly commenced in the name of the corporation, and prosecuted to judgment before a referee previously to the annulment.[52]

6. Modern Doctrine That Obligations of Corporations Survive Against Their Assets — a. Doctrine Stated. The doctrine of the ancient common law that the debts of a corporation, and the remedies furnished by that law for the collection of the same, die and abate with the corporation, has been repudiated by modern American courts as odious to justice;[53] and the sound and just doctrine now is that the death of a corporation no more impairs the obligation of its contracts than does the death of a natural person, but that its assets remain a trust fund or pledge for the payment of its creditors and shareholders, and that a court of equity will lay hold of those assets by its receiver or otherwise and see that they are duly collected and justly applied.[54] The obligation of such contracts survives, except such as in the nature of the case are incapable of specific performance; and the creditor may still enforce his demands against any property belonging to the corporation, which has not passed into the hands of a *bona fide* purchaser.[55]

b. Obligations Survive Against Shareholders to Extent of What Is Due Upon Their Shares. Under the operation of the modern doctrine as already seen[56] if the shareholders of the corporation have not paid their subscriptions according to the terms of their contract, or if the capital stock and property of the corporation have been divided among them, leaving its debts unpaid, every shareholder

49. May *v.* North Carolina Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726.

50. Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48. See *supra*, XXI, G, 3, a, (I).

51. Boyd *v.* Hankinson, 92 Fed. 49, 34 C. C. A. 197 [*reversing* 83 Fed. 876].

52. Pyro-Gravure Co. *v.* Staber, 30 Misc. (N. Y.) 658, 64 N. Y. Suppl. 520.

53. Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513, 520 (opinion by ex-Chancellor Kent as counsel); Hightower *v.* Thornton, 8 Ga. 486, 493, 52 Am. Dec. 412 (quoting with approval the opinion of ex-Chancellor Kent just referred to).

54. 2 Kent Comm. 307 note.

55. *Connecticut.*—National Pahquioque Bank *v.* Bethel First Nat. Bank, 36 Conn. 325, 4 Am. Rep. 80.

Florida.— Howe *v.* Robinson, 20 Fla. 352.

Georgia.— Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Illinois.— Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348; Tarbell *v.* Page, 24 Ill. 46.

Iowa.— Muscatine Turn Verein *v.* Funck, 18 Iowa 469.

Mississippi.— Nevitt *v.* Port Gibson Bank, 6 Sm. & M. 513.

Missouri.— McCoy *v.* Farmer, 65 Mo. 244; Powell *v.* North Missouri R. Co., 42 Mo. 63.

New York.— Tinkham *v.* Borst, 31 Barb. 407; Hastings *v.* Drew, 50 How. Pr. 254.

North Carolina.— Von Glahn *v.* De Rosset, 81 N. C. 467.

Pennsylvania.— Shamokin Valley, etc., R. Co. *v.* Malone, 85 Pa. St. 25.

United States.— Bacon *v.* Robertson, 18 How. 480, 15 L. ed. 499; Curran *v.* Arkansas, 15 How. 304, 14 L. ed. 705; Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. ed. 945; Boyd *v.* Hankinson, 92 Fed. 49, 34 C. C. A. 197 [*reversing* 83 Fed. 876] (forfeiture of charter of a corporation does not prevent suits of its creditors and shareholders to preserve its assets for their benefit); Platt *v.* Archer, 19 Fed. Cas. No. 11,213, 9 Blatchf. 559.

56. See *supra*, VIII, B, 1 *et seq.*

is deemed to hold a portion of the assets of the corporation; and equity will compel him to contribute to discharge its debts *pro rata* out of the funds of the corporation which in theory of equity are in his hands.[57]

c. Effect of Doctrine That Obligations of Corporation Survive Against Its Assets Upon Constitutionality of Statutes. From this doctrine it follows that a legislative act dissolving a corporation and transferring its franchises to another is not unconstitutional, since it does not impair the obligation of its contracts.[58] So it is a sound view that a man has no constitutional right not to pay his debts;[59] that an act of the legislature compelling him so to do does not impair the obligation of his contracts with his creditors, but gives validity to them; and hence that a statute providing that when a judgment is entered against an incorporated bank, ousting it of its franchises, its debtors shall not thereby be released from their debts and liabilities, and prescribing a mode for collecting such debts and enforcing such liabilities, is a valid exercise of legislative power.[60] A statute providing for a distribution among creditors of the property of corporations whose charters had become forfeited was likewise valid.[61] On the other hand a law distributing the property of an insolvent trading or banking corporation among its shareholders, or giving it to strangers, or seizing it to the use of the state, would as clearly impair the obligation of its contracts as a law giving to the heirs the personal effects of a deceased natural person would impair the obligation of his contracts.[62]

d. Operation of This Doctrine Where Corporation Abandons Its Franchises. It follows that a corporation cannot by dissolving itself defeat the rights of its creditors; but if its officers die, resign, or refuse to act, and its shareholders neglect or refuse to appoint others in their place, a court of equity, which never allows a trust to fail for want of a trustee, will interfere and appoint a receiver or manager *ad interim* for the purpose of winding up and putting an end to the concern.[63] On the other hand, in conformity with a principle already stated,[64] the mere non-user by a corporation of its franchises does not of itself disable it from resuming them so as to bring actions to enforce its obligations; but so long as its organization remains it may collect its dues and pay its debts, although the undertaking for which it was created has been abandoned.[65] The modern doctrine may perhaps be summed up in the language of the supreme court of errors of Connecticut: "For the protection of creditors it is also a well-settled rule that a dissolution of a corporation by winding up, or other act of its stockholders,

57. Hastings *v.* Drew, 50 How. Pr. (N. Y.) 254. The extent of the jurisdiction of the court winding up the affairs of a corporation is said to be to ascertain the amount of corporate assets and liabilities and to declare the necessity for making an assessment upon the shareholders. It has no authority to render a personal judgment against one of the shareholders, who is not a party to the winding-up proceeding by service of process or voluntary appearance; nor any authority to adjudicate the fact of membership in the corporation. Commonwealth Mut. F. Ins. Co. *v.* Hayden, 61 Nebr. 454, 85 N. W. 443 [*setting aside* on rehearing decision in 60 Nebr. 636, 83 N. W. 922, 83 Am. St. Rep. 545]. This proposition may well be challenged.

58. Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945; Platt *v.* Archer, 19 Fed. Cas. No. 11,213, 9 Blatchf. 559.

59. Harris *v.* Glenn, 56 Ga. 94; Sparger *v.* Cumpton, 54 Ga. 355.

60. Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

61. Mudge *v.* Commissioners of Exch., etc., Co., 10 Rob. (La.) 460.

62. Curran *v.* Arkansas, 15 How. (U. S.) 304, 312, 4 L. ed. 705, per Curtis, J.

63. Curry *v.* Woodward, 53 Ala. 371; Brown *v.* Union Ins. Co., 3 La. Ann. 177, 182. In Carlen *v.* Drury, 1 Ves. & B. 154, 158, 12 Rev. Rep. 203, which involved the question of the neglect of the managers of the association of the Bankside Brewery to act, the lord chancellor said: "This court is not to be required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom: but, if the Case justified the Interference of the Court it may appoint a Manager in the Interim, for the Purpose of winding up, and putting an End to, the Concern . . . But there must be a positive Necessity for the Interference of the Court, arising from the Refusal or Neglect of the Committee to act." See also Knowlton *v.* Ackley, 8 Cush. (Mass.) 93.

64. See *supra*, XXI, D, 2, a.

65. Hardy *v.* Merriweather, 14 Ind. 203.

or by limitation, or in any mode except legislative repeal or judicial decree, does not affect the rights of creditors; and that as to them, and their right to enforce their claims, or determine their validity, by suit or otherwise, the corporation will be deemed to continue in existence."[66]

7. Statutes Abrogating Common-Law Rule That Debts Due by or to Corporation Die With It — a. In General. The bald injustice of the rule of the ancient common law that the obligations of a corporation die with it led to the enactment of statutes abolishing the rule, and providing for the survival of such debts, and for the continuation of the right of action to enforce them.

b. Constitutionality of These Statutes. On the one hand it was held that such a statute would be unconstitutional, in so far as it attempted to revive debts which had become extinguished, under the principles of the common law, before the enactment of the statute;[67] although it was not denied that the legislature might preserve the debts from extinction by an appropriate statute enacted before they became extinct.[68] On the other hand it was held that where a statute had been passed saving the rights of creditors of dissolved corporations and appointing trustees to collect the assets of such corporations and administer them in the payment of their debts, a subsequent statute cutting down the powers of the trustees to the substantial prejudice of the creditors of the bank by requiring them to sell the assets for cash was unconstitutional.[69]

c. These Statutes Liberally Construed. These statutes, being plainly remedial, have been liberally construed.[70]

d. Whether Construed as Prescribing an Exclusive Remedy — (i) *In General.* Whether such a statute will be construed as prescribing the remedy which is to be exclusive of all others, and which ousts the ordinary jurisdiction of courts of equity, is a more difficult question. If such a statute prescribes a complete system of procedure for the winding-up of insolvent corporations, it may reasonably be concluded that the purpose of the legislature was to establish a course of procedure which should be exclusive, just as the statutory system enacted in some of the states for administering the estates of deceased persons is held to be exclusive of the jurisdiction formerly exercised by courts of equity upon that subject. In North Carolina it has been held that the provisions of the code of that state[71] continuing the existence of defunct corporations for three years after the expiration of their charters, for the purpose of bringing and defending suits and closing their general business, have the effect of ousting the former jurisdiction of courts of equity to accomplish the same result by the appointment of a receiver upon a creditors' bill. The conclusion was that a failure to proceed within the period of three years pointed out by the statute would be a complete defense,

66. National Pahquioque Bank *v.* Bethel First Nat. Bank, 36 Conn. 325, 334, 4 Am. Rep. 80.

67. Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8.

68. Robinson *v.* Lane, 19 Ga. 337.

69. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168; Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9. That the Mississippi act of 1843, saving the rights of creditors after dissolution, did not apply to banks dissolved by limitation of their charters was held in State Bank *v.* Duncan, 56 Miss. 166. That a statute providing that suits against corporations shall not abate by expiration of their charters, but that the provision shall not apply "to any corporation the affairs of which are being wound up by order of any court," etc. (Ill. Sess. Laws (1869), p. 1, § 4), excepts only corporations which were being wound up at the time when the act took effect, and not all those in course of being wound up when a question of abatement might arise, see Ramsey *v.* Peoria M. & F. Ins. Co., 55 Ill. 311. A statute of West Virginia providing that "when a corporation shall expire or be dissolved, . . . suits may be brought, continued or defended . . . in the corporate name, in like manner . . . as before such dissolution or expiration" (W. Va. Code, c. 53, § 59), applies to a dissolution by forfeiture or charter as well as to voluntary dissolutions and those decreed by equity. Greenbrier Lumber Co. *v.* Ward, 30 W. Va. 43, 3 S. E. 227.

70. Franklin Bank *v.* Cooper, 36 Me. 179; Michigan State Bank *v.* Gardner, 15 Gray (Mass.) 362; Folger *v.* Chase, 18 Pick. (Mass.) 63.

71. N. C. Rev. Code, c. 26, §§ 5, 6.

not only to the corporation, but to its shareholders, who by its charter were individually liable in the event of its insolvency.[72] Such a statute does not create a new right and give a remedy for that right, but merely gives a remedy to effectuate a right already existing under the general principles of law. It is not a sound view that it creates a remedy which is exclusive and which puts an end to the ordinary remedy in equity, unless it says so in express terms, or by necessary implication; and it is scarcely necessary to add that if it does not furnish an adequate remedy it does not oust the ordinary remedy in equity.[73]

(II) *When Court of Equity Will Assist Statute.* It the statute does not afford an adequate remedy to the creditor, a court of equity will assist him, in furtherance of the purpose and policy of the statute. It was so held under the provisions of the Mississippi act of 1843, which provided that after a judgment of forfeiture the debts due the bank should not be extinguished, but that a trustee should be appointed to collect them and apply the proceeds to the payment of the debts of the bank.[74]

e. Whether Apply in Case of Voluntary Dissolutions. Some of these statutes have been held not to apply in the case of proceedings for the voluntary dissolution of corporations.[75]

8. Statutes Continuing Existence of Corporation For Purpose of Suing and Being Sued — a. Description of These Statutes. A class of statutes of the kind under consideration merely enacts, that, for the purpose of winding up the concerns of a corporation after the expiration of its charter, or after it has otherwise been dissolved, its corporate powers shall continue, to the extent of prosecuting and defending actions, for a stated period, in some cases three years[76] and in some cases five years.[77]

b. Their Construction — (I) *When Word "May" to Read "Must" or "Shall."* It has been held that the rule which obtains in the construction of statutes that the word "may" in a statute is to be made to read "must" or "shall," where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power permitted by the statute shall be exercised, applies to a statute of the kind under consideration.[78]

(II) *Judgment Rendered After Expiration of Statutory Period Void* — (A) *In General.* A judgment rendered against the corporation after the period of limitation created by the statute has expired is void.[79]

(B) *Except Where Period of Limitation Is Referred to Commencement of Action, and Not to Judgment.* But in many cases the period of limitation fixed

72. Von Glahn *v.* De Rosset, 81 N. C. 467.

73. Shamokin Valley, etc., R. Co. *v.* Malone, 85 Pa. St. 25.

74. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168; Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9.

75. Thus the continuation of the existence of corporations "dissolved by forfeiture or any other cause," provided for by Ala. Code, § 1690, does not apply to corporations dissolved by the voluntary act of the owners of three fourths of the stock, under sections 1683–1689, which supply a complete scheme or system of procedure for winding up its affairs. Nelson *v.* Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375. So the North Carolina statute (N. C. Rev. Code, § 667 *et seq.*), providing that corporations whose charters shall have expired or been annulled shall continue as bodies corporate for three years for the purpose of winding up their business, and that receivers shall be appointed to settle their affairs, etc., relates only to cases where the charters of corporations expire by limitation or are annulled by forfeiture or otherwise, and does not apply to the case where a building and loan association has been wound up by the voluntary action of its members, so as to render a judgment void which has been recovered against the corporation after the lapse of three years. Heggie *v.* People's Bldg., etc., Assoc., 107 N. C. 581, 12 S. E. 275. *Compare* Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48.

76. Such as Mass. Gen. Stat. c. 68, §§ 36, 37. Thornton *v.* Marginal Freight R. Co., 123 Mass. 32. See further as to the construction of such statutes Wright *v.* Rogers, 26 Ind. 218; Cunningham *v.* Clark, 24 Ind. 7; Herron *v.* Vance, 17 Ind. 595; Blake *v.* Portsmouth, etc., R. Co., 39 N. H. 435; Ferguson *v.* Miners', etc., Bank, 3 Sneed (Tenn.) 609.

77. Such as Ala. Rev. Code, § 1775. Tuskaloosa Scientific Assoc. *v.* Green, 48 Ala. 346.

78. Blake *v.* Portsmouth, etc., R. Co., 39 N. H. 435.

79. Thornton *v.* Marginal Freight R. Co., 123 Mass. 32.

by such statutes has been construed as referring to the time of the commencement of the action against the corporation and not to the date of the judgment rendered against it in such action.[80]

(III) *When Receiver to Be Made Party.* Where a statute provides that upon the dissolution of a corporation suits against it shall not abate, the suit can be continued only upon the terms prescribed in the statute. The proper practice clearly is for plaintiff to satisfy the court that in the suit as continued the proper parties will be represented. A suit prosecuted against the defunct corporation by name will not be binding upon the receiver or other person having charge of the assets of the corporation, unless he is substituted for the corporation as defendant.[81]

c. What Powers May Be Exercised During Period of Continuance — (I) *In General.* Unless the statute is so expressed as to leave no room for construction upon this point, the implication necessarily is that during the period to which the existence of the corporation is thus extended no powers can be exercised by it or in its name, except such as may be necessary for the winding-up of its affairs.

(II) *When Notes May Be Renewed.* Where the statute continued the corporate capacity of a bank for three years from its date, with all the powers necessary for collecting the debts then due to the corporation, for selling and conveying its property and finally closing its concerns, it was held that the corporation had authority within that period to take a new note in part payment or renewal

80. Thus where a statute applicable to a banking corporation extended the existence of the corporation during the period of two years and authorized the trustees to institute actions in its name at any time within that period, and to prosecute them to final judgment, it was held that such action, commenced within the prescribed period, might be prosecuted after the period had expired. Franklin Bank *v.* Cooper, 36 Me. 179. Where the charter of a bank provided that the bank should continue in existence until Jan. 1, 1859, but contained a proviso that all banking powers should cease after Jan. 1, 1857, "except those incidental and necessary to collect and close up its business," and an action of ejectment was brought against the bank during the period of its existence, and such proceedings were had therein that the action was, in the year 1862, pending in the supreme court of the United States on a writ of error, a motion to dismiss the writ was refused, on the ground that its prosecution belonged to those "necessary and incidental powers to collect and close up its business" which were saved by the statute. Pomeroy *v.* Indiana Bank, 1 Wall. (U. S.) 23, 17 L. ed. 500. So where a statute of Michigan provided that all corporations whose charters expired by their own limitation should continue to be bodies corporate for three years, for the purpose of prosecuting and defending suits by or against them, and that any suit pending in favor of a corporation at the time of its dissolution should not be thereby abated, but might be prosecuted by the trustees on whom its estate should have devolved, in its or their name, under the direction of the court in which the suit might be pending; and shortly before the end of the three years next after the expiration of its charter a corporation, established by the laws of Michigan, sold and assigned to an individual all its property and claims, upon his giving bond to pay its debts and do certain other things, it was held that an action commenced in Massachusetts prior to the expiration of the charter, by the assignee, in the name of the corporation, might be prosecuted to judgment after the expiration of the three years. Michigan State Bank *v.* Gardner, 15 Gray (Mass.) 362. This is in accordance with the construction put by the supreme court of Michigan upon the statute, which was that the purpose of the statute was not to limit but to enlarge the corporate privileges so that the corporation might continue business throughout the whole charter period; for which reason it was held that it might begin legal proceedings in its own name at any time within three years after the expiration of its franchises and continue such proceedings to a close, unless its powers should be superseded by the appointment of trustees or receivers. Bewick *v.* Alpena Imp. Harbor Co., 39 Mich. 700. Under the statute of Illinois a corporation against which suit has been brought within the two years granted by the statute may sue out a writ of error in such cause after the two years have expired. Singer, etc., Stone Co. *v.* Hutchinson, 176 Ill. 48, 51 N. E. 622 [*reversing* 72 Ill. App. 366]. Application of statutes of Ohio, with the conclusion that an incorporated lodge of Odd Fellows whose charter has expired by limitation may be sued as a corporation, where it still continues to exercise corporate powers as if its charter had not expired. Meyers *v.* Lucas, 16 Ohio Cir. Ct. 545, 8 Ohio Cir. Dec. 431.

81. McCulloch *v.* Norwood, 58 N. Y. 562.

of an old one, although the indorsers on the new note were not the same as those upon the old note.[82]

(III) *Assign and Indorse Notes to Trustees Appointed by It to Wind Up Its Affairs.* Again, where the statute provided that corporations should be continued bodies corporate for the term of three years after the expiration of their charters, for the purpose of settling their business, but not for the purpose of continuing it, it was held that a banking corporation was authorized, immediately before the expiration of the term of extension so limited, to indorse notes held by it to trustees appointed by it to wind up its affairs, on whom it had purported to confer, in the instrument of appointment, all of its powers. The reasoning of the court was that the notes not having been collected before the expiration of the statutory period of extension, the bank had a clear right to sell them or to dispose of them in any other reasonable and proper manner so as to wind up its concerns. As it had a right to dispose of the notes to the trustees, it was no concern of the obligors therein how the money thus collected was to be disposed of.[83] This, it will be perceived, is merely an extension — or rather an application — of the settled rule of law, already considered,[84] that a corporation has the power to assign or otherwise dispose of its assets for the payment of its debts.

d. Effect of Such Statutes Upon Remedies of Creditors Against Shareholders. Where another applicatory statute prescribes that those who are shareholders when the charter of a corporation expires shall be liable to its creditors, the charter is deemed to expire, in the case of a legislative repeal, when the repealing act takes effect, and not at the expiration of the three years permitted by such statute for the winding-up of its concerns. The reason is that the effect of the statute prolonging the existence of the corporation is merely to prolong its existence for the purpose of an administration of its estate; and that all rights in respect of its property become fixed at the date of its dissolution, although it is endowed by the statute with a nominal existence for the purpose of closing its concerns in the most convenient manner, and especially of compelling it to execute its contracts and discharge its obligations and liabilities.[85]

e. Such Statutes Applicable to Foreign Corporations. It has been held that such a statute applies to suits brought in the state enacting it, in the name of a corporation organized and dissolved in another state, by its assignees in insolvency appointed in such other state.[86] But another court has held that such a provision of the statute law of the state creating the corporation is not operative outside of that state, but that the mode of continuing an action against a foreign corporation after its dissolution is a matter of practice governed by the law of the state of the forum.[87]

9. Statutes Continuing Directors and Managers as Trustees to Wind Up — a. Description of These Statutes. Other states have enacted statutes which in substance provide that on the dissolution of a corporation the directors or managers of its affairs at that time shall be trustees of its creditors and shareholders, for the purpose of winding up its affairs.[88]

b. General Statement of Effect of Such Statutes. Such statutes have the necessary effect of abrogating the rule of the common law that all debts due the corporation are extinguished; but they merely transfer the right of action to recover them from the corporation to the statutory trustees.[89]

82. Mariners' Bank *v.* Sewall, 50 Me. 220.
83. Folger *v.* Chase, 18 Pick. (Mass.) 63.
84. See *supra*, XX, A, 1, a.
85. Crease *v.* Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61 [*citing* Foster *v.* Essex Bank, 16 Mass. 245, 8 Am. Dec. 135].
86. Stetson *v.* New Orleans City Bank, 2 Ohio St. 167 [*reaffirmed* in 12 Ohio St. 577].
87. Sturges *v.* Vanderbilt, 73 N. Y. 384.
88. 1 Wagner Stat. Mo. p. 293, § 21; 1 Mo. Rev. Stat. (1879), § 744; 1 Mo. Rev. Stat. (1889), § 2513; N. Y. Rev. Stat. 600, § 9.
89. McCoy *v.* Farmer, 65 Mo. 244. That the statute of jeofails cures the fault of bringing an action in the corporate name after the statutory period of limitation instead of bringing it in the name of the directors as

c. To What Extent Arrest Dissolution of Corporation. But the corporation itself may be none the less dissolved. Such a statute, unless it expresses something more than above indicated, does not have the effect of continuing the existence of the corporation, as *cestui que trust* or otherwise, so as to render it capable of defending actions in its corporate name after its charter has expired.[90]

d. Do Not Arrest Running of Statute of Limitations. The effect of a statute of this kind does not arrest the running of the statute of limitations against any demand accruing to the corporation, upon which the directors as trustees acquire a right of action. A trust which has devolved upon them by the operation of the statute is not such a trust as arrests the running of the statute of limitations, such as those trusts which are within the exclusive jurisdiction of equity, arising in cases of partnership, agency, and the like.[91]

e. Do Not Prevent Assignments For Creditors. A statute providing that a corporation whose charter has been declared forfeited or annulled may have three years within which to settle its affairs does not prevent a corporation whose charter has been declared forfeited from transferring thereafter, and before the expiration of three years, for the benefit of its creditors, its property.[92]

f. Do Not Abate Actions Against Directors For Malfeasance. Where a statute gives an action against the directors of a corporation for malfeasance in office, as for instance where it makes them personally liable for debts contracted beyond a certain prescribed limit,[93] the expiration of the charter by its own limitation while such an action is pending does not have the effect of abating it.[94] But a dissolution of the corporation will have the effect of exonerating the directors as to any future liability.[95]

10. When Dissolution of Corporation Takes Effect — a. When Charter Is Repealed. If the charter of a corporation is repealed by a valid act of the legislature, its dissolution takes effect at the time when the repealing act takes effect, and is not postponed by a statute continuing the corporate faculties for three years for the purpose of winding up its affairs.[96]

b. In Case of Statutory Winding-Up by Means of Receiver — (i) *In General.* Where a statute provides for the winding-up of a business corporation by means of a receiver, it has been held that suits may be continued against it and prosecuted to judgment until a decree of dissolution has been entered, unless such actions are restrained by injunction.[97]

(ii) *Invalidity of Confession of Judgment After Issuing of Order to Show Cause.* But this is not inconsistent with the conclusion that a judgment confessed by a corporation, after the issuing of an order requiring all persons interested to show cause why it should not be dissolved, is void, whether confessed on a bond and warrant of attorney or after the regular commencement of a suit.[98]

(iii) *Judgment Recovered After Filing of Petition For Dissolution Ineffectual.* It has been held that a creditor who recovers judgment against an insolvent corporation, after the filing of a petition for a dissolution of the corporation, although before the appointment of a receiver, acquires no lien thereby.[99]

trustees was held in Kansas City Hotel Co *v.* Sauer, 65 Mo. 279.

90. Sturges *v.* Vanderbilt, 73 N. Y. 384.

91. Landis *v.* Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403.

92. Sage *v.* Crowley, 83 Minn. 314, 86 N. W. 409, where land had been granted to a railroad by congress.

93. See *supra*, IX, P, 7, a *et seq.*

94. Moultrie *v.* Smiley, 16 Ga. 289.

95. Thus in New York, if a receiver of a manufacturing company is appointed before the expiration of the time allowed the trustees for making their report, the corporation is so far dissolved that the trustees will not be liable to the penalty of the General Manufacturing Act (see *supra*, IX, P, 5, g *et seq.*) for failing to make such a report. Huguenot Nat. Bank *v.* Studwell, 74 N. Y. 621. *Compare* People *v.* Cohocton Stone Road, 25 Hun (N. Y.) 13.

96. Crease *v.* Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61.

97. Kincaid *v.* Dwinelle, 59 N. Y. 548.

98. Matter of Waterbury, 8 Paige (N. Y.) 380.

99. Matter of Eagle Iron Works, 3 Edw. (N. Y.) 385.

c. Doctrine That Forfeiture Takes Effect From Commission of Act but Becomes Effectual Only From Date of Sentence. It has also been reasoned that the forfeiture of the franchises of a corporation, declared by judicial sentence, is incurred from the date of the commission of the act for which the judgment of forfeiture is rendered; but it is said in the next breath that notwithstanding this the corporation continues a corporation *de facto*, so as to render its transactions valid, until the judgment of forfeiture is actually pronounced.[1]

11. Effect of Dissolution Upon Property of Corporation — a. In General. By the principles of the ancient common law the effect of a dissolution of the corporation upon the devolution of its property was as follows: (1) Real property reverted to the grantor and his heirs; (2) personal property, being analogous to the *bona vacantia* of the civil law, that is to say, to goods having no owner, vested in the sovereign; (3) choses in action, consisting of debts due to the corporation, became extinct; that is to say, the debtor became released from the performance of his obligation because there was no creditor who could accept payment.[2]

b. Upon Real Property — (I) *In General.* The modern doctrine is that the real property of a business or joint-stock corporation does not revert to the grantor and his heirs upon the dissolution of the corporation. And while cases may be found dealing with this question with respect to eleemosynary corporations which seem to preserve a semblance of the ancient rule, yet on examination they will be found conformable to the modern doctrine.[3]

(II) *Property Which Reverted Must Have Been Held by Corporation at Date of Its Decease.* Again it is to be observed that the rule of the ancient common law was never applied except as to real property, the title to which was lawfully held by the corporation at the time of its decease. Property which had become divested out of it by its own act or by the act of the law prior to its dissolution did not so revert.[4]

c. Personal Property Does Not Escheat. The modern rule also is that upon dissolution the personal property does not escheat to the state, but that both species of property vest in a receiver or other trustee; and that all the property, real and personal, of the corporation, is to be administered by him for the benefit of creditors and shareholders.[5]

d. Secondary Franchises Do Not Revert, but Pass to Receiver or Trustee — (I) *In General.* The secondary franchises of a corporation, that is to say, the peculiar privileges or rights which it may have received from the legislature under its charter or incorporating act, or from a municipal corporation under an ordinance by way of a license, are in the nature of property, and do not revert to the state upon the death of the corporation, but being vendible[6] pass to a receiver or other representative of the corporation among its other assets, to be administered for the benefit of its creditors; and the corporation may make a valid sale thereof, in like manner with its other property,[7] before it is dissolved.[8]

1. State *v.* Charleston Bank, 2 McMull. (S. C.) 439, 39 Am. Dec. 135.

2. Fox *v.* Horah, 36 N. C. 358, 6 Am. Dec. 48.

3. As late as the year 1877 the doctrine was applied in Texas, in regard to real estate which had been donated to an educational institution which had become subsequently dissolved, but with the qualification that the heirs of the grantor would hold the property subject to the burden of any debts owing by the institution. Acklin *v.* Paschal, 48 Tex. 147. In this way the effect of the decease of the corporation was made precisely analogous to the effect of that of a natural person. His land descends to his heirs, but subject to the right of his creditors to have it sold to pay his debts.

4. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140; State *v.* Rives, 27 N. C. 297.

5. Towar *v.* Hale, 46 Barb. (N. Y.) 361; Owen *v.* Smith, 31 Barb. (N. Y.) 641.

6. See *supra*, XVI, C, 1.

7. 4 Thompson Corp. § 5415.

8. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140; Pollard *v.* Maddox, 28 Ala. 321; Bailey *v.* Platte, etc., Canal, etc., Co., 12 Colo. 230, 21 Pac. 35; People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255.

Doctrine illustrated by the right of way of a railroad.—This may be illustrated by con-

(11) *Except Where Ousted of Such Franchises by State.* But a corporation which has been forever ousted, barred, and excluded on quo warranto from the further exercise of the rights and privileges conferred by its charter has no power afterward to sell and transfer them.[9]

e. Effect of Dissolution Upon Commercial Paper Transferred by Delivery Merely. It was adjudged in 1849 in Mississippi, in a case exciting great interest, upon the decision of which a number of other like cases depended, that, where a banking corporation assigns a promissory note by mere delivery and without indorsement, and afterward its charter is forfeited in a judicial proceeding, the assignee cannot sue at law, but must bring a bill in equity, because an assignment without indorsement passes an equitable title merely; and it was consequently held that the trustees appointed under a statute to wind up the bank could not bring the action to the use of the beneficial owner of the note, because the statute only vested in them the legal title coextensive with the beneficial rights which the bank itself possessed.[10]

f. When Property Vests in Shareholders as Tenants in Common. Where, on the dissolution of a private foreign corporation, all debts are satisfied, and no receiver has been appointed to wind up its affairs, the title to its property vests in its shareholders as tenants in common, so that they may bring an action of trespass to try title as to such property.[11]

12. Effect of Repeal of Charter — a. Does Not Impair Obligation of Contracts, but They Survive Against Property of Corporation. A statute authorizing a corporation to surrender its charter and be dissolved is not invalid as infringing the obligation of the contracts subsisting between the corporation and third persons. The obligation of its contracts survives. The theory is that by the nature of its political existence a corporation is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and non-

sidering the subject of the right of way of a railroad company which has been acquired by the condemnation of land of private owners and the payment of damages to them, under the right of eminent domain, which the state has delegated to the corporation, in view of the public use which the corporation has been created to subserve. While it has been said that the right thus acquired is coextensive with the life of the corporation (Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140), yet the reasoning in the same case and in other cases plainly shows that the right is property, which is vendible in execution, and which passes under a sale foreclosing a mortgage covering the properties and franchises of the corporation. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140; Pollard *v.* Maddox, 28 Ala. 321; Allen *v.* Montgomery R. Co., 11 Ala. 437. *Compare* People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255; 4 Thompson Corp. § 5415. The rule that the real property of a corporation reverts to the donor or grantor or his heirs does not therefore extend to the right of way of a railroad company which has been transferred to another person or corporation under a sale foreclosing a mortgage. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 637, 6 So. 140. It has been aptly said, with reference to such a case, that "it is the public use for which the land is taken, and so long as it is used for railroad purposes it is immaterial what company or what individuals operate it." Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140 [*citing* 2 Wood Railw. L. § 242]. Such property does not revert to the donor or his heirs upon any theoretical dissolution of the corporation which may take place in consequence of the mere non-user of its franchises, although according to the reasoning of one case the period of non-user had reached the term of forty years. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140. But the state may, in the case of a non-user, by a second exercise of the right of eminent domain, vest the right of way in another corporation, which will carry out the purposes of the condemnation, upon paying compensation to the preceding corporation, which has failed to carry out such purposes. Noll *v.* Dubuque, etc., R. Co., 32 Iowa 66. This case involved the application of a statute providing for the transfer to another company of a right of way condemned by a railroad company, upon the failure of the earlier company to construct its road within the period of ten years, upon the later company making compensation to the earlier company.

9. Wilmington Water-Power Co. *v.* Evans, 166 Ill. 548, 46 N. E. 1083.

10. Bacon *v.* Cohea, 12 Sm. & M. (Miss.) 516. This would not be the rule under the modern codes of procedure, which require all actions to be brought in the name of the real party in interest.

11. Baldwin *v.* Johnson, 95 Tex. 85, 65 S. W. 171.

user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. The existence of the private contracts of the corporation does not force upon it a perpetuity of existence.[12]

b. Does Not Extinguish Its Property Rights, but They Survive in Its Creditors and Shareholders. Upon the same principle a statute annulling a corporation and repealing its franchises does not extinguish its property rights acquired during its corporate existence, or affect the rights of shareholders and creditors to use and enjoy such property.[13] Such an act cannot take away or impair the remedy of a creditor against it for previously incurred liability or affect a pending suit against it.[14]

c. But Nevertheless Extinguishes Corporation. But outside of the operation of this principle, where the power to repeal a charter has been reserved to the legislature, the act of repeal has precisely the same effect upon the corporation that a judicial dissolution has. The corporation is thereby extinguished, and is consequently incapacitated from suing or being sued in a court of law, except so far as the capacity may be continued by the repealing act or by some other operative statute.[15]

13. Extent of Title of Trustees Appointed to Wind Up — a. In General. Trustees appointed under a statute to wind up an insolvent corporation have no greater powers than the statute gives them. Unless thereto empowered by the statute they cannot therefore allow a suit to be brought in their names to the use of an assignee of commercial paper of the bank, where the assignment has been made without an indorsement, so as not to pass the legal title, but only to pass an equitable title.[16] Trustees, under the same statutes, had no rights whatever as to debts or notes assigned by the bank before the forfeiture of its charter.[17] While such trustees could sue to recover debts due to the bank,[18] they were not so far substituted in the place of the bank as to be clothed with every naked, legal title which was in the bank, but they possessed no power except where the bank had a beneficial interest.[19] It was said in another case that the trustees appointed under that statute did not differ materially from a trustee appointed by contract.[20]

b. Whether Sue in Name of Corporation. The fact that the charter of a corporation has expired by limitation does not necessarily disable the trustees, to whom it has previously made a general assignment of its assets, from prosecuting actions to recover its debts in its corporate name for their use, where the common-law rule of pleading is in force.[21]

14. Effect of Dissolution in Foreign Jurisdiction — a. Dissolved in State of Its Creation, Dissolved Everywhere. It necessarily follows that when a corporation becomes dissolved in the state or country of its creation, in any mode known to

12. Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945.

13. People *v.* O'Brien, 45 Hun (N. Y.) 519 [*affirmed* in 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255].

14. Blake *v.* Portsmouth, etc., R. Co., 39 N. H. 435.

15. Whitman *v.* Cox, 26 Me. 335; Read *v.* Frankfort Bank, 23 Me. 318.

16. Bacon *v.* Cohea, 12 Sm. & M. (Miss.) 516.

17. Grand Gulf R., etc., Co. *v.* State, 10 Sm. & M. (Miss.) 428.

18. Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

19. Bacon *v.* Cohea, 12 Sm. & M. (Miss.) 516.

20. Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9.

21. State *v.* Washington Bank, 18 Ark. 554. *Compare* Alexandria Bank *v.* Patton, 1 Rob. (Va.) 499. Where the charter of a bank had been judicially forfeited, and a judgment which the bank had recovered against a third person had been revived in the name of P, its trustee appointed under a statute to wind up its affairs, and the judgment was filed as a claim against the estate of the judgment debtor, who had died insolvent, it was held to be immaterial that it was filed in the name of the bank which had become defunct; since regularity of pleading is not required in such cases, and the vouchers showed that the claim was preferred by a party capable in law of assert-

the laws of such state or country, it is dissolved everywhere else; so that any action depending against it in a judicial tribunal in another state or country will abate, upon the fact of its dissolution in the state or country of its domicile being brought to the attention of the court.[22]

b. Effect of Expiration of Charter of Foreign Corporation Upon Domestic Actions — Revival of Such Actions. On the other hand if a corporation is maintaining an action in the courts of a state other than the state of its creation, the action will abate upon the expiration of its charter, in like manner as though the action were depending in the state of its creation. And in such case it has been held that the action will not be revived, by virtue of a subsequent statute of the state of its creation, authorizing the trustees of its property to maintain actions to enforce its rights.[23]

c. Effect of Foreign Statutes Appointing Trustees to Wind Up Foreign Corporations. It has been held that a statute of the state of the domicile of a corporation, making its directors and managers trustees for the purpose of winding up its affairs, is not operative outside of the state creating the corporation, for the purpose of continuing actions against it; but that the mode of continuing actions against foreign corporations is a matter of practice governed by the law of the forum.[24]

15. Effect of Dissolution on Criminal Offenses Denounced by Charter. If the charter of a corporation makes criminal the doing of a certain act relating to the corporation or to its funds, as for instance the embezzlement of its funds by its officers, there can be no punishment for the offense after the charter has expired by its own limitation.[25]

16. Effect of Expiration of Charter on Torts Afterward Committed. While it is a general principle that after the charter of a corporation has expired it is not even a corporation *de facto*,[26] yet it has been held that where a private business corporation continues to do business after the expiration of its corporate existence, as fixed by its charter, it will be liable to be sued in a court of law for a tort committed after that time.[27]

17. Effect of Voluntary Dissolution — a. No Greater Effect Than Expiration of Charter or Decree of Forfeiture. The dissolution of a corporation by the voluntary act of its shareholders does not have any greater effect in putting an end to the powers of the corporation than would be produced by an expiration of its charter or a decree of forfeiture. It does not destroy the power to wind up its affairs or displace the rights of creditors.[28]

b. Effect Upon Contracts. Contracts under which third parties hold the property of a corporation are not necessarily annulled and avoided by the voluntary dissolution of the corporation under a statute;[29] although as already seen the

ing it, and that for all substantial purposes it ought to be regarded as the claim of the trustee. Robertson *v.* Agricultural Bank, 28 Miss. 237.

22. Farmers', etc., Bank *v.* Little, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293.

23. Galliopolis Bank *v.* Trimble, 6 B. Mon. (Ky.) 599.

24. Sturges *v.* Vanderbilt, 73 N. Y. 384. That a judgment recovered in Ohio against an insurance corporation organized under the laws of New York, which had voluntarily submitted itself to the jurisdiction of the Ohio court, was valid, although the corporation had been dissolved and a receiver of its effects had been appointed in New York pending the action in Ohio, was held in McCullough *v.* Norwood, 36 N. Y. Super. Ct. 180.

25. Com. *v.* Cain, 14 Bush (Ky.) 525.

26. See *supra*, I, N, 3; XXI, A, 3, a *et seq.*

27. Miller *v.* Newburg Orrel Coal Co., 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903.

28. Muscatine Turn Verein *v.* Funck, 18 Iowa 469. In Kentucky it is held that a corporation created by special act of the legislature prior to the present constitution, as to which no method of dissolution is expressly provided, cannot be dissolved by the act of the shareholders, so as to exempt it from suit for existing liabilities; and the court thought it doubtful whether, in the absence of statutory authority permitting it, the resolution of a mere majority in interest of shareholders may terminate its existence for any purpose before the date fixed by its charter. Economy Bldg., etc., Assoc. *v.* Paris Ice Mfg. Co., 68 S. W. 21, 24 Ky. L. Rep. 107.

29. Musgrove *v.* Gray, 123 Ala. 376, 26 So. 643, 82 Am. St. Rep. 124.

executory contracts of a corporation are incapable of a specific performance after its dissolution.[30]

18. Reviving Dissolved Corporations Will Not Displace Rights Accrued Since Dissolution. Corporations may be revived by the legislature after they have become dissolved *de jure*;[31] but the act of revival will not operate to displace any rights which have been acquired in consequence of the dissolution. Thus it has been held that where, under principles of the common law, the debts of the corporation become extinguished in consequence of its dissolution, the obligation to pay those debts cannot be restored, under the principles of American constitutions, by an act reviving the corporation.[32]

19. Dissolution Does Not Invalidate Acts of Corporation De Facto. Where a judgment of dissolution is rendered in consequence of informalities and irregularities in the attempt of the corporators to organize themselves into a corporation, transactions had in good faith between the pretended corporation and others, before the institution of the quo warranto proceedings, will be valid, upon the principle which upholds, for the protection of third persons, the acts of corporations *de facto*.[33]

20. When Dissolution Does Not Devolve Obligations Upon Successor Corporation. This subject has been considered when treating of the reorganization of corporations.[34] The mere purchase by a successor corporation of the property and franchises of a dissolved corporation does not make the successor corporation liable for the personal wrongs of the predecessor.[35]

21. Winding-Up Order Not Judgment In Rem. A statutory proceeding for the winding-up of a corporation is not a proceeding *in rem*, and the judgment therein rendered is not binding upon strangers to the proceeding.[36]

XXII. ACTIONS BY AND AGAINST CORPORATIONS.

A. Power to Sue and Be Sued — 1. At Common Law — a. In General. In general it may be said that the power to sue and be sued is, by the principles of the common law, an incident of every corporation.[37]

30. See *supra*, XXI, G, 3, a, (IV), (A), (4).

31. It has been held that a decree by which an act of incorporation is annulled and the corporation dissolved, "except for certain purposes," declaring that the corporation shall only continue in existence for the purposes specified, and appointing receivers of its assets and business, does not operate to extinguish the corporation in such sense that it cannot be revived by repeal of the decree or by other governmental acts recognizing the corporation as existent. Lea *v.* American Atlantic, etc., Canal Co., 3 Abb. Pr. N. S. (N. Y.) 1.

32. Robinson *v.* Lane, 19 Ga. 337.

33. Society Perun *v.* Cleveland, 43 Ohio St. 481, 3 N. E. 357. A provision of the charter of a new benevolent association, binding the new association to pay all liabilities of the old association, which has been dissolved by the expiration of the period of limitation fixed by its charter, does not of itself revive the old corporation, or give any life to by-laws attempted to be adopted by it after its legal dissolution. Supreme Lodge K. of P. *v.* Walter, 93 Va. 605, 25 S. E. 891.

34. See *supra*, II, B, 3, a *et seq.*

35. For example a telephone company which upon its organization succeeded to the property of a former company which was dissolved should not be substituted as a defendant in place of the old corporation in an action brought against it by a subscriber, to restrain it from removing a telephone from his office, imposing unreasonable restrictions, or charging exorbitant rates; since the cause of action is based solely on the personal act of the defendant, for which a company acquiring its property is not liable. Sterne *v.* Metropolitan Telephone, etc., Co., 33 N. Y. App. Div. 164, 53 N. Y. Suppl. 467 [*distinguishing* Prouty *v.* Lake Shore, etc., R. Co., 85 N. Y. 272].

36. *In re* Bowling, etc., Contract, [1895] 1 Ch. 663, 64 L. J. Ch. 427, 72 L. T. Rep. N. S. 411, 2 Manson 257, 12 Reports 218, 43 Wkly. Rep. 417.

37. See *supra*, I, B, 1 *et seq.*; Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Breene *v.* Merchants', etc., Bank, 11 Colo. 97, 17 Pac. 280; Libbey *v.* Hodgdon, 9 N. H. 394, 396 (opinion by Wilcox, J.); Grant County *v.* Lake County, 17 Oreg. 453, 21 Pac. 447. See also Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. Suppl. 836, 21 N. Y. St. 439. It is scarcely necessary to cite precedents of cases where this power has been ascribed to railroad companies (Bal-

b. Power to Sue Coextensive With Power to Make Contracts. Where the power is conferred upon any collective body of men to make and take contracts in their aggregate capacity, they have the right to sue, and are liable to be sued, in respect to such contracts in such aggregate capacity. The conferring of such a power places them in the category of what are termed quasi-corporations, and it is not necessary, in order to support a right of action against them in respect of a contract which they have made when acting within their statutory powers, that such a right of action should be given by any statute in express terms.[38]

c. Suable Although State Is Member or Sole Proprietor. Although an action cannot be brought against a sovereign state without its own consent, yet if it chooses so far to cast off its sovereignty as to become a member of a private corporation, in that character it may be sued.[39] It follows that the fact that the state is a member of a corporation, otherwise liable to suit,[40] or even that it is the sole proprietor,[41] does not prevent the corporation from being sued; and such a corporation may be sued in a court of the United States, where the requisite jurisdictional grounds exist.[42]

d. States May Sue as Corporations. A state of the American Union being a corporation may sue to enforce a contract in the courts of another state of the American Union.[43] A foreign government may sue in the courts of one of the American states.[44]

2. Under Statutes and Constitutional Provisions — a. This Power Expressly Conferred by Statutes — (I) *In General.* The power to "sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever," if not an incident to a corporation, is conferred in every incorporating act,[45] as for instance by the act of congress incorporating the Union Pacific Railroad Company.[46]

(II) *By What Statutes* — (A) *In General.* Under a grant of "all such rights, privileges and immunities as by law are incident or necessary to corporations, and what may be necessary to the corporations herein constituted," it is held that the right to sue exists.[47]

(B) *By Statutes Using Word "Person."* The word "person" in a statute is interpreted as including corporations aggregate, when the circumstances in

timore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254), to turnpike companies (Dunningtons *v.* Northwestern Turnpike Road, 6 Gratt. (Va.) 160), or indeed to any particular kind of corporation; because we shall see, from an examination of each case, that the question was whether the party suing or being sued as a corporation was indeed a body corporate. This for instance was the question where an action had been brought against the State Sinking Fund of Kentucky, and where the court held that it was liable to be sued, because it was a body corporate, although in its interests and functions closely connected with the state, against which no action could be brought. Sinking Fund Com'rs *v.* Northern Bank, 1 Metc. (Ky.) 174. Such also was the question where the right to bring an action for an injury resulting from negligence against the Metropolitan Fire Department of New York was challenged, the court holding it liable to be sued as a corporation. Clarissy *v.* Metropolitan Fire Dept., 7 Abb. Pr. N. S. (N. Y.) 352.

38. Ward *v.* Hartford County, 12 Conn. 404; McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689.

39. U. S. Bank *v.* Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

40. Moore *v.* Wabash, etc., Canal, 7 Ind. 462.

41. Hutchinson *v.* Western, etc., R. Co., 6 Heisk. (Tenn.) 634; Western, etc., R. Co. *v.* Taylor, 6 Heisk. (Tenn.) 408.

42. U. S. Bank *v.* Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

43. Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

44. Mexico *v.* Arrangois, 11 How. Pr. (N. Y.) 1.

45. U. S. Bank *v.* Deveaux, 5 Cranch (U. S.) 61, 85, 3 L. ed. 38.

46. Smith *v.* Union Pac. R. Co., 22 Fed. Cas. No. 13,121, 2 Dill. 278. See also Lathrop *v.* Union Pac. R. Co., 1 MacArthur (D. C.) 234; Land *v.* Coffman, 50 Mo. 243.

47. Marsh *v.* Astoria Lodge No. 112, I. O. O. F., 27 Ill. 421, 425.

A resolve of the legislature, authorizing a part of a society to hold meetings, choose officers, levy taxes, and repair their meeting-house, has been held to give a right to sue for the destruction of such meeting-house after it is repaired. Tilden *v.* Metcalf, 2 Day (Conn.) 259.

which such corporations are placed are identical with those of natural persons who are expressly included in the statute,[48] unless there is something in the statute showing a legislative intention to restrict its application to natural persons.[49]

(III) *By What Statutes Not Conferred.* A statute incorporating the members of a voluntary association, to whom moneys were due, and conferring upon the corporation the power to receive all those moneys to its use, and to give receipts to the debtors which would be evidence in any action to recover such moneys, was held not to empower the corporation to maintain an action at law in its own name to collect the same, although it might give effectual discharges to the debtors on receiving payment.[50]

b. This Power Expressly Conferred by Constitutional Provisions. Constitutional provisions exist in many states providing in distinct terms that all corporations may sue or be sued in all courts in like manner as natural persons.[51]

3. Power to Sue How Affected by Want of Organization — a. In General. In strictness a body of adventurers, not having a valid charter, or not duly organized as a corporation, cannot maintain an action in that character;[52] although as elsewhere seen[53] the defendants may be estopped by their conduct from setting up that they are not a corporation. On the other hand if a body of adventurers assuming to act as a corporation, but who have not been legally organized as such, threaten an injury to a third person, he may, it has been held, maintain a preventive action against them in their assumed corporate name.[54]

48. Gaskell *v.* Beard, 11 N. Y. Suppl. 399, 33 N. Y. St. 852.

49. Crafford *v.* Warwick County, 87 Va. 110, 12 S. E. 147, 10 L. R. A. 129. See also Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239. Therefore by statute in Massachusetts (Mass. Pub. Stat. c. 3, cl. 16) a corporation may in that state maintain a petition to quiet title to lands. Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239. Lord Coke in commenting upon the statute of 31 Eliz. c. 7, respecting the erection of cottages, where the language is "No person shall," etc., says: "This extends as well to persons, politicke and incorporate, as to naturall persons whatsoever." 2 Coke Inst. 736. See also U. S. Bank *v.* Merchants' Bank, 1 Rob. (Va.) 573.

A corporation has been held to be an "inhabitant" under a statute providing for the reparation of bridges (2 Coke Inst. 703), and an "inhabitant and occupier," and therefore liable as such to pay poor rates (Rex *v.* Gardner, Cowp. 79).

50. Scots Charitable Soc. *v.* Shaw, 8 Mass. 532.

A statute providing for an appeal from an award of arbitrators, upon defendants entering into a recognizance with one or more sureties in the nature of special bail to make certain payments, or in default thereof to surrender the defendant or defendants to the jail of the proper county, has no application to corporations; since these bodies, being political, can neither be surrendered nor imprisoned. A corporation therefore might have its appeal without entering into a recognizance. Carpentier *v.* Delaware Ins. Co., 2 Binn. (Pa.) 264.

51. With some variation of language, this provision is found in the following constitutions, and doubtless in many others:

Alabama.— Const. (1875), art. 13, § 12.
California.— Const. (1879), art. 12, § 4.
Kansas.— Const. (1859), art. 12, § 6.
Michigan.— Const. (1850), art. 15, § 11.
Minnesota.— Const. (1857), art. 10, § 1.
Nebraska.— Const. (1875), art. 11, § 3.
Nevada.— Const. (1864), art. 8, § 5.
North Carolina.— Const. Amendm. (1876), art. 8, § 3.

52. Workingmen's Accommodation Bank *v.* Converse, 29 La. Ann. 369; Doboy, etc., Tel. Co. *v.* De Magathias, 25 Fed. 697.

53. See *supra*, VI, P, 6, a, (I), (D), (1) *et seq.*; *infra*, XXII, D, 1, b, (II), (A).

54. Newton County Draining Co. *v.* Nofsinger, 43 Ind. 566. This case presents the incongruity of an injunction being procured against a threatened trespass by a defendant, impleaded as a corporation, on the ground that it had never been legally organized as such; and because of this absurdity, Pettit, J., dissented.

Statutes exist imposing limitations on the power of corporations to sue, until they have complied with certain formalities. For instance, section 299 of the civil code of California provides that every corporation must file in the office of the clerk of every county in the state in which it holds any property, except in the county where its original articles of incorporation are filed, a certified copy of such articles, and prohibits a corporation failing to comply with this provision from maintaining or defending any action or proceeding in relation to such property, its rents, issues, or profits, until it does so comply. This, it has been held, does not prevent it from defending an action brought against it to recover for work and labor alleged to have been performed upon its property. Weeks *v.* Garibaldi South Gold Min. Co., 73 Cal. 599, 15 Pac. 302.

b. Enough That Corporation Exists De Facto. If under principles already considered[55] the corporation exists *de facto*, it may exercise the power to sue, and the question of its having the right to exercise it will be deemed one which can be raised only by the state,[56] except in those cases where it is proceeding to assert rights which from their nature can only exist in a corporation; e. g., to condemn land for the purposes of a railroad, under a statute granting such a power to corporations.[57] A body which might have been properly organized as a corporation under an enabling statute, and which has attempted, although possibly without complying with the requisite formalities, so to organize itself, and which has acted as a corporation, executing deeds and releases in its corporate name, and which in that name has recovered judgment in a former action against the defendant now impleaded, will, on the principle of being a corporation *de facto*, if not *de jure*, be allowed to sustain an action for damages for a nuisance.[58] As to what will be evidence of the existence of a corporation we may recur to what has preceded and refer to what will follow, with the statement, for our present purposes, that general reputation that plaintiffs have been conducting business as a corporation, coupled with the fact that the obligation sued on was payable to them in their corporate name, will be sufficient to prevent a dismissal of their complaint on the ground that formal proof of their organization as a corporation has not been made.[59]

4. Power to Sue and Be Sued How Affected by Dissolution — a. Dissolution Ends Power to Sue or Be Sued. Unless the power of a corporation to sue or to be sued after its dissolution has been prolonged by statute, then such power is determined by the fact of its dissolution, and its dissolution may be pleaded in abatement of any pending action by or against it. After a corporation becomes dissolved, it can neither sue nor be sued, unless the faculty of suing or being sued is prolonged by statute for the purpose of winding up its affairs.[60]

b. Mere Insolvency Does Not Have This Effect. But the mere insolvency of a corporation does not of itself determine this power or cut off any remedy which its creditors might otherwise have against it.[61]

c. Common-Law Disability Avoided by Assignment For Creditors. The deplorable consequences of a corporate dissolution at common law, when not provided against by a provision of the charter or by some general statute,[62] might be

55. See *supra*, I, O, 1, a *et seq.* For the purpose of establishing the existence of a body as a corporation *de facto*, oral testimony, not purporting to give the contents of corporate records or documents, tending to show that after the execution of articles of incorporation, the supposed corporation held meetings, adopted by-laws, elected officers, issued stock, and did business as a corporation, is admissible without producing the corporate records or accounting for their loss. Johnson *v.* Okerstrom, 70 Minn. 303, 73 N. W. 147. A corporation does not exist *de facto* where there has been an entire failure to execute and file articles of incorporation as required by the governing statute. McLennan *v.* Hopkins, 2 Kan. App. 260, 41 Pac. 1061.

56. See *infra*, XXII, D, 2, f, (v), (B).

57. See *infra*, XXII, D, 2, b, (v).

58. Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 29 L. ed. 739. Corporations formed by the legislatures of certain states, while in armed rebellion against the United States, had power, after the suppression of the rebellion, to sue in the federal courts, if their acts of incorporation had no relation to anything else than the domestic concerns of the state, and were, neither in their apparent purpose nor in their operation, hostile to the Union, nor in conflict with the constitution, but were mere ordinary legislation, such as might have been had if there had been no war or no attempted secession, and such as is of yearly occurrence in all the states. U. S. *v.* Home Ins. Co., 22 Wall. (U. S.) 99, 22 L. ed. 816, opinion by Strong, J.

59. Holmes *v.* Gilliland, 41 Barb. (N. Y.) 568. Thus it has been held that the fact that the clerk of a corporation has not been sworn and has not filed, in the office of the register of deeds, the certificate of his appointment required by law (South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547), or the fact that the amount of the capital stock of the corporation has not been fixed pursuant to the governing statute (Worcester City Hotel *v.* Dickinson, 6 Gray (Mass.) 586), does not disable it from maintaining actions in its corporate name.

60. Building Assoc. *v.* Anderson, 7 Phila. (Pa.) 106. See also *supra*, XXI, G, 3, a, (I) *et seq.*

61. Van Pelt *v.* U. S. Metallic Spring, etc., Co., 13 Abb. Pr. N. S. (N. Y.) 325.

62. See *supra*, XXI, G, 1, a *et seq.*

avoided by making an assignment in trust of all assets of the corporation to trustees for the purpose of winding up its affairs. This was the course pursued previous to the expiration of the charter of the bank of the United States.[63]

d. Or by Failing to Notice on Record Fact of Dissolution. In one case where this course was pursued, and pending an appeal the charter of the corporation expired, it was held that the court might inquire as to the fact of the assignment, and upon being satisfied of the fact might permit the case to proceed without noticing on the record the dissolution of the corporation.[64]

5. Power to Sue Exercised by or Through Board of Directors — a. In General. Where the governing statute provides that the corporate powers shall be exercised by a board of directors, the corporation can obtain redress of injuries done to it only through the action of its board of directors, and if they are unable or unwilling to act, the artificial entity is incapable of obtaining a remedy;[65] although on principles elsewhere considered[66] the refusal of the corporate officers to proceed to obtain redress of a corporate grievance, by the appropriate action, may of itself open a remedy to the shareholders in equity.

b. Resolution Authorizing Bringing of Action Not Necessary. But it is not necessary, in order to make it appear that an action is rightfully brought by the corporation, that a formal resolution of the board of directors authorizing or directing the bringing of the action should be produced; although it has been said that it would be otherwise if the suit were brought in the name of the corporation solely for the use of somebody else. In that case it might be necessary, if such an action could be maintained at all, to show that there was authority for permitting the third party to use the name of the corporation.[67]

c. Resolution Authorizing Dismissal of Action Not Necessary. On the other hand it is not necessary to produce a resolution of the board of directors in order to prove that the withdrawal of a suit, brought by a corporation, has been made by the proper authority; but if the act be done by its agent or attorney no other proof of authority will be required.[68]

6. Suable in What Manner. A private corporation is a creature of the state, and must be sued in such manner as the legislature provides;[69] but if there is no statute prescribing the mode, the ordinary legal remedies applicable in the case of natural persons will be equally applicable in the case of corporations, except in so far as the differences which exist between artificial and natural bodies prevent them from being applied.

7. Corporations May Maintain Action Against Their Own Members. As already seen[70] a corporation may contract with and sue one of its own shareholders, officers, or corporators, in his individual capacity.[71]

63. U. S. Bank *v.* McLaughlin, 2 Fed. Cas. No. 928, 2 Cranch C. C. 20.

64. Alexandria Bank *v.* Patton, 1 Rob. (Va.) 499. See also May *v.* North Carolina Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726.

65. Arkansas River Land, etc., Co. *v.* Farmers' L. & T. Co., 13 Colo. 587, 22 Pac. 954.

66. See *supra*, XI, B, 7 *et seq.*

67. Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737, per Swing, D. J. But this is doubtful. If for instance a corporation has made an assignment of a non-negotiable instrument, it would be necessary, under the common-law system of pleading, for the assignee to bring an action upon it in the name of the corporation to his use. The corporation would not be responsible for costs, and hence could not refuse the use of its name. The fact of the assignment would of itself be a consent to that use. Nor could it prevent the use of its name by a receiver, or by its assignee for creditors. The power of the board of directors to authorize the institution of an action, the very nature of which is to destroy the corporation itself, as for instance to direct the filing of a petition to have the corporation adjudged a bankrupt, has been denied. *In re* Lady Bryan Min. Co., 14 Fed. Cas. No. 7,978, 2 Abb. 527, 1 Sawy. 349. But as the directors clearly have the power to direct the making of an assignment of all the assets of a corporation for the benefit of its creditors (see *supra*, XX, A, 4, a), it is difficult to see how this holding can be maintained.

68. Union Mfg. Co. *v.* Pitkin, 14 Conn. 174.

69. Holgate *v.* Oregon Pac. R. Co., 16 Oreg. 123, 17 Pac. 859.

70. See *supra*, VI, F, 3, a *et seq.*

71. Wausau Boom Co. *v.* Plumer, 35 Wis. 274.

B. Actions by Corporations — 1. Corporations Entitled to What Remedies — a. Entitled to Same Remedies as Individuals. Generally speaking corporations have the same remedies at common law, in equity, and under statutes, which are accorded to individuals under like circumstances. This is seen by what follows in this article.[72]

b. May Sue in Assumpsit. The old idea was that a corporation could not maintain an action of assumpsit, because it could only contract by its common seal, and hence could sue only in covenant. But this idea is exploded, and the settled law is that a corporation can sue in assumpsit whenever an individual can.[73] Thus an incorporated bridge company may maintain assumpsit for the use and occupation of premises held by its tenant.[74] As already seen [75] assumpsit may be maintained by a corporation against a shareholder upon his express promise to pay his proportion of the legal assessments upon stock issued to him.[76]

c. May Sue in Trespass. Although the old conception was that a corporation could act only by its seal, still it did not follow that it could not be acted upon except by its seal. It could own property, and if a trespass were committed thereon, it could maintain an action of trespass to recover damages therefor.[77]

d. May Maintain Actions Sounding in Damages — (I) *In General.* Corporations like individuals constantly maintain actions, the object of which is the recovery of damages for wrongs done to them, as for instance where a shareholder and officer of a corporation and a third person conspire to cripple the corporation by a manipulation of its shares and the conspiracy is successful.[78]

(II) *Such as Actions For Libel or Slander.* For example a corporation may maintain an action for libel, upon averment and proof of special damages.[79] This would clearly be true in respect of a slander of its goods or property.

e. May Have Summary Remedies. It has been held not unconstitutional for the legislature to give a summary remedy for the collection of its debts to a corporation created for the public benefit.[80]

f. May Have Special Remedies Under Statutes. When it was the fashion to create corporations by special acts of the legislature, special remedies were often accorded to them; but the decisions relating to such remedies may for the most part be regarded as obsolete,[81] and under modern constitutions abolishing special legislation their validity would be doubtful.

The trustees of schools and school lands, in Mississippi, are corporate bodies, and as such may maintain an action against a member of their own bodies. Connell *v.* Woodward, 5 How. (Miss.) 665, 37 Am. Dec. 173.

72. That a corporation cannot have equitable relief in behalf of its shareholders when they are without equity see Arkansas River Land, etc., Co. *v.* Farmers' L. & T. Co., 13 Colo. 587, 22 Pac. 954. That a corporation may follow its property as a trust fund when an individual might see Erie R. Co. *v.* Vanderbilt, 5 Hun (N. Y.) 123.

73. London Gas-Light, etc., Co. *v.* Nicholls, 2 C. & P. 365, 12 E. C. L. 620.

74. Southwark Bridge Co. *v.* Sills, 2 C. & P. 371, 12 E. C. L. 623.

75. See *supra*, VI, P, 2, a.

76. Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Gilmore *v.* Pope, 5 Mass. 491; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273. Under the common-law system of pleading, a corporation may maintain assumpsit upon a contract to take its stock at a specific price, or it may declare on a contract to take stock agreeably to the provisions of its charter; and to such a declaration the common counts may be added. Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

77. Second Cong. Soc. *v.* Waring, 24 Pick. (Mass.) 304; Greenville, etc., R. Co. *v.* Partlow, 14 Rich. (S. C.) 237.

78. Ilion Bank *v.* Carver, 31 Barb. (N. Y.) 230.

79. Knickerbocker L. Ins. Co. *v.* Ecclesine, 11 Abb. Pr. N. S. (N. Y.) 385, 42 How. Pr. (N. Y.) 201.

80. Newbern Bank *v.* Taylor, 6 N. C. 266.

81. That the Ohio statute of 1844, regulating practice in the courts, did not apply to suits of incorporated banks see Clinton Bank *v.* Hart, 19 Ohio 372. That the statute of the same state, authorizing a joint action by a bank against a drawer and indorser, applied to banks of other states, see Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469. Construction of Ohio statute of 1824 relating to suits where banks are parties see Goodenow *v.* Duffield, Wright (Ohio) 455. That a bank could not ask the aid of a court of equity

g. May Have What Remedies With Respect to Commercial Paper. Some of the cases take this distinction, that where a corporation has no power to acquire commercial paper, yet if it does acquire it it cannot maintain an action thereon, but may maintain an action for money had and received to recover what it gave for the paper.[82] That is to say, while it cannot maintain an action on the instrument which it had no power to take, it can maintain an action to recover its money which it had no power to pay out and which it ought not to have parted with.[83]

h. May Maintain Action on Promise Made to Its Officer. Elsewhere we have seen that a deed conveying land to the trustees of a corporation is a deed to the corporation itself.[84] An analogous rule is that a promise made to the officers of a corporation for its benefit, and upon a consideration proceeding from it, is enforceable in the form of an action by the corporation, as for instance an agreement to pay to the directors of a corporation money due to the corporation itself.[85]

i. May Maintain Action Against Corporation Having Same Officers as Itself. In theory of law a corporation is an ideal body or person, distinct from the individuals who compose it, and, subject to exceptions where the trustees are the corporation, distinct from its officers and directors. It may therefore maintain actions against corporations having the same officers or directors as itself.[86]

2. Corporation Cannot Sue as Common Informer Under Statute Giving Such Action to "Any Person or Persons." It has been held under a statute[87] giving an action for a penalty to any person or persons that a corporation cannot sue as a common informer.[88]

3. Demand in Actions by Corporations. A corporation must make demand where an individual must, and need not make demand where an individual need not, prior to bringing and maintaining an action.[89]

C. What Actions Will and Will Not Lie Against Corporations — 1. Any Appropriate Actions — a. In General. Without going into the ancient history of this subject, it may be said here that it is settled that where the law imposes an obligation upon a corporation, which it fails or refuses to discharge, it may be held civilly liable therefor, at law or in equity, in any appropriate form of action where the system of common-law pleading prevails, and on appropriate allegations and proofs, under the system of equity, in admiralty, and under the codes.[90]

b. When Assumpsit Will Lie — (i) *In General.* Thus, although there are some ancient and untenable holdings to the contrary,[91] a corporation may now be

against a party to a joint and several contract before exhausting legal remedies see Chillicothe Bank *v.* Yoe, 4 Ohio 125.

82. See *supra*, XVII, B, 2, f; XVII, C, 7; XVII, C, 10, a *et seq.*

83. Waddill *v.* Alabama, etc., R. Co., 35 Ala. 323. *Compare* Phelps *v.* Masterton, etc., Stone Dressing Co., 3 Rob. (N. Y.) 517.

84. See *supra*, XII, D, 5, b.

85. Thompson *v.* Marion, etc., Gravel Road Co., 98 Ind. 449.

86. Salina Nat. Bank *v.* Prescott, 60 Kan. 490, 57 Pac. 121 [*reversing* 53 Pac. 769]. See also San Diego, etc., R. Co. *v.* Pacific Beach Co., 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788; Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865; Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 26 N. E. 145, 34 N. Y. St. 743.

87. 7 Geo. II, c. 7.

88. Weavers Co. *v.* Forrest, 2 Str. 1241.

89. Thus if the treasurer of a corporation receives money belonging to it, and asserts rights thereto inconsistent with the right of the corporation to demand the same, and makes charges in the corporate books in extinguishment of his obligation to pay over the money to the corporation, a demand is not necessary before suit brought by the corporation to recover the money. East New York, etc., R. Co. *v.* Elmore, 5 Hun (N. Y.) 214.

90. For a general statement of the doctrine of the liability of a corporation to an action by one sustaining damage in consequence of its failure to discharge a duty imposed by law see Seagraves *v.* Alton, 13 Ill. 366.

91. Frankfort Bank *v.* Anderson, 3 A. K. Marsh. (Ky.) 1; Breckbill *v.* Turnpike Co., 3 Dall. (Pa.) 496, 1 L. ed. 694.

An exception to this rule was admitted where a local act authorized a corporation to make promissory notes. Slark *v.* Highgate Archway Co., 5 Taunt. 792, 1 E. C. L. 405. But all American corporations have this power, unless it is prohibited to them. See *supra*, XVII, C, 1, a.

sued in assumpsit on express or implied promises, in the same manner as an individual.[92] This action will lie against it for refusing to permit a transfer of its shares upon its books, at the suit of a person lawfully entitled to demand the same;[93] or upon a refusal of the corporation to permit a shareholder to subscribe for additional stock to which he is entitled.[94] If a railroad corporation occupies land after its agent has been notified by the owner that rent will be charged it is liable in assumpsit for use and occupation.[95]

(II) *When Not Assumpsit but Covenant.* Covenant, and not assumpsit, being the form of action at common law upon a sealed instrument, assumpsit cannot be maintained against a corporation upon a written agreement to which the agent of the corporation has put a seal, although not the common seal of the corporation. Such an instrument is nevertheless the deed of the corporation.[96]

e. Trespass. It being settled in the modern law, contrary to earlier opinion,[97] that a corporation can commit tresspass,[98] both upon person and property, through its agents acting in its behalf, it follows that where the common-law system of pleading prevails, an action of trespass will lie against a corporation for a direct injury done within the general scope of its corporate powers.[99]

d. Trespass on the Case. An action of trespass on the case for malfeasance will lie against a corporation aggregate.[1] This form of action may for instance be

92. *California.*— Hunt *v.* San Francisco, 11 Cal. 250.

Illinois.— Seagraves *v.* Alton, 13 Ill. 366.

Maryland.— *In re* Cape Sable Co.'s Case, 3 Bland 606.

Massachusetts.— Sargent *v.* Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143; Worcester Turnpike Corp. *v.* Willard, 5 Mass. 80, 4 Am. Dec. 39; Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

New Jersey.—Antipoeda Baptist Church *v.* Mulford, 8 N. J. L. 182.

New York.— Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 [*affirmed* in 22 Wend. 348, 34 Am. Dec. 317]; Dunn *v.* St. Andrew's Church, 14 Johns. 118; Danforth *v.* Schoharie, etc., Turnpike Road, 12 Johns. 227.

Pennsylvania.— Chesnut Hill, etc., Turnpike Co. *v.* Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675; North Whitehall *v.* South Whitehall, 3 Serg. & R. 117.

South Carolina.— Waring *v.* Catawba Co., 2 Bay 109.

Vermont.— Gassett *v.* Andover, 21 Vt. 342; Stone *v.* East Berkshire Cong. Soc., 14 Vt. 86; Poultney *v.* Wells, 1 Aik. 180; Proctor *v.* Webber, 1 D. Chipm. 371, 456 note.

United States.— Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. 541, 9 L. ed. 222; Mechanics' Bank *v.* Columbia Bank, 5 Wheat. 326, 5 L. ed. 100; Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351; Davis *v.* Georgetown Bridge Co., 7 Fed. Cas. No. 3,637, 1 Cranch C. C. 147.

England.—Rex *v.* Bank of England, Dougl. (3d ed.) 524.

93. Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Kortright *v.* Buffalo Commercial Bank, 20 Wend. (N. Y.) 91 [*affirmed* in 22 Wend. (N. Y.) 348, 34 Am. Dec. 317]; Rex *v.* Bank of England, Dougl. (3d ed.) 524. See *supra*, VII, D, 9, e.

94. Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

95. Illinois Cent. R. Co. *v.* Thompson, 116 Ill. 159, 5 N. E. 117.

That a corporation must first be put in default before it will be liable upon an implied contract see Seagraves *v.* Alton, 13 Ill. 366.

96. Porter *v.* Androscoggin, etc., R. Co., 37 Me. 349. But the scroll or private seal of the chief engineer of a railroad corporation affixed to a contract is not the seal of the company and will not make the contract a specialty so as to prevent assumpsit against the company for its breach. Saxton *v.* Texas, etc., R. Co., 4 N. M. 378, 16 Pac. 851. *Compare supra*, XII, D, 1, h.

97. See *supra*, XIX, B, 2, a.

98. See *supra*, XIX, B, 2, a *et seq.*

99. *Delaware.*— Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. 514, 33 Am. Dec. 411.

Illinois.— That an action of trespass for assault and battery will lie against a railroad company see St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353. See also *supra*, XIX, B, 2, c, (II), (A) *et seq.*

Indiana.— Crawfordsville, etc., R. Co. *v.* Wright, 5 Ind. 252.

Kentucky.—Underwood *v.* Newport Lyceum, 5 B. Mon. 129, 41 Am. Dec. 260.

New Hampshire.— Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287.

Pennsylvania.— McCready *v.* Guardians of Poor, 9 Serg. & R. 94, 11 Am. Dec. 667.

Vermont.— Lyman *v.* White River Bridge Co., 2 Aik. 255, 16 Am. Dec. 705.

Application of this doctrine to municipal corporations.— Chicago *v.* Turner, 80 Ill. 419; Chicago *v.* McGraw, 75 Ill. 566; Wolf *v.* Boettcher, 64 Ill. 316; Allen *v.* Decatur, 23 Ill. 332, 76 Am. Dec. 692; Sheldon *v.* Kalamazoo, 24 Mich. 383.

1. Harlem *v.* Emmert, 41 Ill. 319; New York *v.* Bailey, 2 Den. (N. Y.) 433.

maintained by a purchaser of the shares of stock of an incorporated bank against the corporation for its refusal to transfer the shares to him on its books.[2]

e. Trover. As a corporation may through its agents have the custody of personal property, and as it may sometimes have that custody wrongfully, it follows that it is liable in the common-law action of trover, where the common-law system of pleading prevails, or in an action of a similar nature under the modern codes of procedure, by the owner of goods and chattels, for the conversion of them to its own use.[3]

f. Replevin. For the same reason an action of replevin will lie against a corporation, the object of this action being to recover if possible the specific goods or chattels and damages for their detention, and if it is not possible to recover them then to recover their value and also damages for their detention.[4]

g. Ejectment. The ancient notion that trespass could not be maintained against a corporation prevented of course corporations being made defendants in suits of ejectment. But this principle was early abandoned, and it has long been regarded as the established law that the method of trying the title of land by ejectment extends to corporations of every kind, whether in the character of plaintiffs or defendants.[5]

h. Forcible Entry and Detainer. The same principle will support the statutory action of forcible entry and detainer against a corporation aggregate.[6]

i. Slander of Goods or Business. One corporation may be liable to another in an action for damages for slandering its business and representing its product to be of an inferior quality.[7]

j. Book-Account. An action of "book-account" may be maintained either by or against a corporation.[8]

k. Account Stated. An action may be maintained against a corporation to recover upon an account stated, in like manner as against an individual, the same presumption existing that if the account, when rendered, is not correct, the alleged debtor will make objection to it within a reasonable time. The presumption would no doubt have the same force in the case of a commercial corporation as in that of a commercial partnership; but in the case of other corporations, which act more slowly, it is conceived that it might be somewhat relaxed.[9]

2. Presbyterian Congregation *v.* Carlisle Bank, 5 Pa. St. 345. See also *supra*, VII, D, 9, f.

3. Sherman *v.* Commercial Printing Co., 29 Mo. App. 31; Yarborough *v.* Bank of England, 16 East 6, 14 Rev. Rep. 272. That trover lies by a shareholder against the corporation for the conversion of his shares see *supra*, VII, D, 9, c, (I) *et seq.*

4. It has been held that a stock subscription list, like a promissory note or other written obligation, may be the subject of an action of replevin or other possessory action; and an instance of such an action is found in Louisiana, where it was held that an alternative judgment for forty thousand dollars, in case of default in obeying the order of the court to deliver the list, was invalid, the subscriptions being on credit and the judgment not recognizing or reserving defendant's right to receive a corresponding amount of stock. People's Brewing Co. *v.* Boebinger, 40 La. Ann. 277, 4 So. 82.

5. 1 Kyd Corp. 187. See also Den *v.* Fen, 10 N. J. L. 237.

6. It has been held that a statute declaring any person who shall "enter into or upon any lands, tenements, or other possessions, and detain or hold the same with force and strong hand, or with weapons," etc., guilty of a forcible entry and detainer (Mansfield Dig. Ark. § 3347) is applicable to the possession by a railroad company of a railroad or part of a railroad, there being no reason in the nature of a possession of a section of a railroad line which takes it out of the language of such a statute, or out of the general principle which lies at the foundation of all actions of forcible entry and detainer. Iron Mountain, etc., R. Co. *v.* Johnson, 119 U. S. 608, 7 S. Ct. 339, 30 L. ed. 504.

7. Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 42 Hun (N. Y.) 153.

8. Hunneman *v.* Jamaica Fire Dist. No. 1, 37 Vt. 40; Vermont Mut. F. Ins. Co. *v.* Cummings, 11 Vt. 503.

9. Where resolutions were adopted by the trustees of a religious society, acknowledging the justness of a claim made by plaintiff against the corporation, fixing the amount thereof, and agreeing to pay the same in a specified time, and were duly certified by the secretary of the board of trustees, and transmitted to plaintiff, who thereupon assented to the proposition contained in the resolutions, and agreed to accept the sum offered by the trustees, it was held that an action would lie against the corporation, notwith-

l. Use and Occupation. While an action of assumpsit will lie against a corporation for the use and occupation of land, plaintiff waiving the tort and suing upon an implied contract,[10] yet it has been held that a statutory "action of contract" for the use of a railroad cannot be maintained by the owner against persons who did not recognize his title, but used the railroad adversely to him, under a *bona fide* claim of right, by virtue of a lease from another person.[11]

m. Actions on Clauses of Charter. Where a clause in the charter of a corporation provides that any trustee or manager shall have a claim and lien upon the proceeds of the sales of the company's property, for expenses or debts incurred by him for its benefit, this gives a remedy at law against the company to recover such expenses and debts.[12]

n. Actions on By-Laws. Where a right arises under the provisions of a by-law, an action, generally an action of debt at common law, will lie to enforce that right, a subject already considered.[13]

o. Actions For Violations of Public Duties. When a private person brings an action against a corporation in respect of the violation of some general public duty, it is sometimes loosely said that the liability of the corporation for the violation of such a duty cannot be raised in this collateral way, and that the only exception to the rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation is where express legislative permission is granted therefor.[14] This language does not lead the mind to a clear understanding of any principle, although the result of the decisions is that where the duty is undertaken by the corporation toward the members of the public distributively, as where a railroad company undertakes to carry a passenger safely, where a telegraph company undertakes to transmit a message properly, where a canal company undertakes to keep its canal in a navigable condition for the use of its patrons, or where a municipal corporation undertakes to open a highway and keep it in repair, the corporation is liable in an action to any individual damaged by its failure to perform the particular duty assumed.[15] But where the duty is one that is assumed toward the public generally, or toward a considerable portion of the public in the aggregate, as where a railway company fails to complete its road according to its charter, establishes it on a route not permitted by its charter, establishes a depot at a place not permitted or prohibited by law, or abandons some portion of its route and leaves the inhabitants of that vicinity without adequate service, the injury is of that public nature which, unless the legislature has expressly given a private action to an individual, can be redressed only by a proceeding on the part of the state.[16] The principle here laid down is somewhat analogous to the right of action for a nuisance. If the injury flowing therefrom is one sustained by the public, or by a neighborhood generally, and is not special or peculiar to plaintiff, he has no right of action; the injury is to the public, and it must be redressed by a public prosecution by indictment[17] or

standing it had omitted to make a record of the vote of its board of trustees upon the resolutions, and that the plaintiff could recover upon the promise contained in the resolutions, under a count upon an account stated. St. Mary's Church *v.* Cagger, 6 Barb. (N. Y.) 576.

10. See *supra*, XXII, C, 1, b, (I).

11. Kittredge *v.* Peaslee, 3 Allen (Mass.) 235.

12. Stephens *v.* Green Hill Cemetery Co., 1 Houst. (Del.) 26.

13. See *supra*, V. A, 10. See also Watson *v.* Clarke, Carth. 75, Comb. 138.

14. Martindale *v.* Kansas City, etc., R. Co., 60 Mo. 508.

15. Shewalter *v.* Pirner, 55 Mo. 218; Land *v.* Coffman, 50 Mo. 243; North Missouri R. Co. *v.* Winkler, 33 Mo. 354; Chambers *v.* St. Louis, 29 Mo. 543; Christian University *v.* Jordan, 29 Mo. 68.

16. Kinealy *v.* St. Louis, etc., R. Co., 69 Mo. 658; Martindale *v.* Kansas City, etc., R. Co., 60 Mo. 508; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Brainard *v.* Missisquoi R. Co., 48 Vt. 107.

17. Stone *v.* Fairbury, etc., R. Co., 68 Ill. 394, 18 Am. Rep. 556; Proprietors Locks, etc., *v.* Nashua, etc., R. Co., 10 Cush. (Mass.) 385; Smith *v.* Boston, 7 Cush. (Mass.) 254; Holman *v.* Townsend, 13 Metc. (Mass.) 297; Quincy Canal *v.* Newcomb, 7 Metc. (Mass.)

information, or sometimes by an information in equity brought by the attorney-general.[18]

p. Specific Performance. Courts with equity powers will compel the specific performance of their contracts by corporations, where they would exert the same power against individuals.[19]

q. Bills in Equity For Discovery — (I) *In General.* A bill in equity for a discovery may be maintained against a corporation in like manner as against an individual, although with a difference of procedure about to be stated;[20] nor will the corporation be relieved from the duty of answering such a bill by the fact that its officers and agents have been by statute made competent witnesses for either party to the suit.[21]

(II) *Practice of Joining Officers of Corporation as Co-Defendants* — (A) *In General.* In order to prevent a failure of justice arising from the circumstances that a corporation cannot take an oath and cannot be indicted for perjury for making an answer wilfully false, the practice has long been settled to join the officers of the corporation, such as its secretary, bookkeeper, a director or other officer or agent, and even its members, as defendants in bills in chancery for the purpose of compelling them to make discovery for it.[22] When discovery

276, 39 Am. Dec. 778; Stetson *v.* Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; Kinealy *v.* St. Louis, etc., R. Co., 69 Mo. 658. *Compare* Baltimore, etc., R. Co. *v.* Compton, 2 Gill (Md.) 20; Jackson *v.* Jackson, 16 Ohio St. 163; Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466.

18. *Missouri.*— State *v.* Saline County Ct., 51 Mo. 350, 11 Am. Rep. 454.

New York.— People *v.* Third Ave. R. Co., 45 Barb. 63; People *v.* New York, 32 Barb. 102; People *v.* New York, 10 Abb. Pr. 144; People *v.* Lowber, 7 Abb. Pr. 158.

Pennsylvania.— Buck Mountain Coal Co. *v.* Lehigh Coal, etc., Co., 50 Pa. St. 91, 88 Am. Dec. 534, where the doctrine was recognized.

Wisconsin.— Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

England.— Auckland *v.* Westminster Local Bd., L. R. 7 Ch. 597, 41 L. J. Ch. 723, 26 L. T. Rep. N. S. 961, 20 Wkly. Rep. 845; Atty.-Gen. *v.* Mid-Kent, etc., R. Co., L. R. 3 Ch. 100; Atty.-Gen. *v.* West Hartlepool Imp. Com'rs, L. R. 10 Eq. 152, 39 L. J. Ch. 624, 22 L. T. Rep. N. S. 510, 18 Wkly. Rep. 685; Atty.-Gen. *v.* Dublin, 1 Bligh N. S. 312, 4 Eng. Reprint 888; Atty.-Gen. *v.* Great Northern R. Co., 4 De G. & Sm. 75, 14 Jur. 684, 15 Jur. 387; Atty.-Gen. *v.* Great Northern R. Co., 1 Dr. & Sm. 154; Atty.-Gen. *v.* Poole, 2 Jur. 934, 8 L. J. Ch. 27, 4 Myl. & C. 17, 18 Eng. Ch. 17; Atty.-Gen. *v.* Aspinwall, 1 Jur. 812, 7 L. J. Ch. 51, 2 Myl. & C. 613, 14 Eng. Ch. 613; Stockport Dist. Waterworks Co. *v.* Manchester, 9 Jur. N. S. 266, 7 L. T. Rep. N. S. 545, 11 Wkly. Rep. 156; Frewin *v.* Lewis, 4 Myl. & C. 249, 18 Eng. Ch. 249; Atty.-Gen. *v.* Liverpool, 7 L. J. Ch. 51, 1 Myl. & C. 171, 13 Eng. Ch. 171; Campbell *v.* Norwich, 2 Myl. & C. 406, 14 Eng. Ch. 406; Atty.-Gen. *v.* Lichfield, 13 Sim. 547, 36 Eng. Ch. 547.

19. Montclair Tp. *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 18 Atl. 242. The question of the power of a court of chancery, by exerting its process *in personam* against parties before it, to compel them to perform acts relating to real property in another jurisdiction, is a disputable one. It has been held that a court of chancery in one state has no jurisdiction to compel a domestic corporation to go into another state and specifically execute a contract to make improvements on lands, and on its default to enforce the decree by attachment and sequestration of its property in the home state. Port Royal R. Co. *v.* Hammond, 58 Ga. 523.

Mode of compelling specific performance of an agreement entered into by a corporation to arbitrate. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69 [*citing* People *v.* Manhattan Gas Light Co., 45 Barb. (N. Y.) 136; Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428; U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,600, 3 Dill. 524].

20. Morse *v.* Bay State Gas Co., 91 Fed. 938, bill for a discovery and accounting on behalf of holders of corporate bonds which provide that interest shall be paid out of net earnings.

21. Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196. A corporation may be compelled to answer a bill against it for discovery and accounting, which is filed by holders of bonds which are to receive interest from net profits, but no interest in the absence of net profits, where it alleges fraudulent misappropriation of the corporate assets in violation of the rights of bondholders. Edwards *v.* Bay State Gas Co., 91 Fed. 946.

22. Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188; Fulton Bank *v.* New York, etc., Canal Co., 1 Paige (N. Y.) 311 (per Walworth, Ch.); Brumly *v.* Westchester County Mfg. Soc., 1 Johns. Ch. (N. Y.) 366; Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283, 303, 17 L. ed. 725 (per Nelson, J.); Moodalay *v.* Morton, 1 Bro. Ch. 469, Dick. 652, 28 Eng. Reprint 1245; Glascott *v.* England Copper Miners Co., 5 Jur. 264, 10 L. J. Ch. 30, 11 Sim. 305, 34 Eng. Ch. 305; Gibbons *v.*

is sought of an officer of a corporation impleaded as a defendant in equity, the officer must be made a party for that purpose, although no substantial relief is sought against him.[23] On the other hand, if no substantial relief is sought against him, and if no discovery is demanded from him in the bill, he is not properly joined as a party, especially where the bill waives answer under oath.[24]

(B) *Further Explanations of This Practice.* The officers of a corporation

Waterloo Bridge Co., 5 Price 491; Wych *v.* Meal, 3 P. Wms. 310, 24 Eng. Reprint 1078; Anonymous, Vern. 117; Le Texier *v.* Anspach, 15 Ves. Jr. 159; Dummer *v.* Chippenham, 14 Ves. Jr. 245. "It seems to be settled that a bill will lie against a corporation and its officers, to compel a discovery from the officers, to aid a plaintiff or a defendant in maintaining or defending a suit brought against or by the corporation alone." Field, J., in Post *v.* Toledo, etc., R. Co., 144 Mass. 341, 347, 11 N. E. 540, 59 Am. Rep. 86 [*citing* McComb *v.* Chicago, etc., R. Co., 7 Fed. 426, 19 Blatchf. 69; Moodalay *v.* Morton, 1 Bro. Ch. 469, Dick. 652, 28 Eng. Reprint 1245; Costa Rica *v.* Erlanger, 1 Ch. D. 171, 45 L. J. Ch. 145, 33 L. T. Rep. N. S. 632, 24 Wkly. Rep. 151; Glascott *v.* England Copper Miners Co., 5 Jur. 264, 10 L. J. Ch. 30, 11 Sim. 305, 34 Eng. Ch. 305]. See on the subject of discovery Colgate *v.* Compagnie Francaise, etc., 23 Fed. 82, 23 Blatchf. 86; Bolton *v.* Liverpool, Coop. t. Brough. 19, 1 L. J. Ch. 166, 1 Myl. & K. 88, 7 Eng. Ch. 88; MacGregor *v.* East India Co., 2 Sim. 452, 2 Eng. Ch. 452. It is said that in suits against a corporation, as it answered under its common seal and not under oath, the practice was early established in Massachusetts of making one or more of its officers or members co-defendants, and of compelling them to make disclosure of such facts within their knowledge as the corporation, if a natural person, could have been compelled to disclose, although their answers could not be used as evidence against the corporation. Their answers enabled plaintiff to ascertain, in advance of a trial, what the facts within their knowledge were, and to propound proper interrogatories to them or to other persons as witnesses. Field, J., in Post *v.* Toledo, etc., R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86 [*citing* Wright *v.* Dame, 1 Metc. (Mass.) 237]. The practice of joining an officer of the corporation in a bill against it for a discovery, where plaintiff is entitled to a discovery, is explained in McComb *v.* Chicago, etc., R. Co., 7 Fed. 426, 19 Blatchf. 69. The reason of the rule is stated by Lord Chancellor Talbot in the leading case of Wych *v.* Meal, 3 P. Wms. 310, 24 Eng. Reprint 1078, which seems to have finally established the practice to be that the plaintiff ought to have discovery, and although the corporation might answer under its common seal, it would not be responsible for perjury. It is an exception to the general rule that a witness cannot be joined for purposes of discovery. A limitation of the rule is that the officer cannot be joined as a party for the discovery of what he did not learn as an officer, or of the facts which he knew before he became an officer. It has also been held that the plaintiff may join a member of the corporation for the purposes of discovery, although the latter is not an officer or agent of the corporation. Wright *v.* Dame, 1 Metc. (Mass.) 237. And it has been held in the English court of chancery that members of the corporation may be joined with an officer in such a bill. Glascott *v.* England Copper Miners Co., 5 Jur. 264, 10 L. J. Ch. 30, 11 Sim. 305, 34 Eng. Ch. 305. But outside of the rule above stated a bill for a discovery, in aid of a defense to an action, cannot be maintained against one who is not a party to the record at law, although he may be interested in the subject of the action, Lord Cottenham saying: "The cases of officers of corporations stand on principles entirely peculiar to themselves, and have obviously no application to the present case." Reg. *v.* Glyn, 7 Cl. & F. 466, 488, 7 Eng. Reprint 466, 45 L. J. Ch. 145, 33 L. T. Rep. N. S. 682, 24 Wkly. Rep. 151. In the case of Costa Rica *v.* Erlanger, 1 Ch. D. 171, there was a cross bill for a discovery against the plaintiff and the president of the plaintiff republic. The only questions were as to staying the original action till answer, and as to the right to choose the officer of the plaintiff republic who should make the discovery. One of the leading cases on this subject was that of a "Bill against a Corporation to discover Writings. The Defendants answer under their Common Seal; and so being not sworn, will answer nothing in their own prejudice. Ordered that the Clerk of the Company, and such principal Members as the Plaintiff shall think fit, answer on Oath, and that the Master settle the Oath." Anonymous, Vern. 117 (Anno 1682). So in a case against the East India Company, an officer of the company was made defendant in a bill for discovery of orders and entries in the books of the company, and a demurrer to the bill was overruled. Wych *v.* East India Co., 3 P. Wms. 309, 24 Eng. Reprint 1078 (Anno 1734). In like manner a demurrer to a bill against the East India Company and their secretary, praying for a general examination of witnesses in India, and that the defendants might discover by what authority plaintiff was dispossessed of a lease for supplying Madras with tobacco (the plaintiffs intending to bring an action), was overruled. Moodalay *v.* Morton, 1 Bro. Ch. 469, Dick. 652, 28 Eng. Reprint 1245 (Anno 1785).

23. Virginia, etc., Min., etc., Co. *v.* Hale, 93 Ala. 542, 9 So. 256, Clopton, J., delivering the opinion of the court.

24. Colonial, etc., Mortg. Co. *v.* Hutchinson Mortg. Co., 44 Fed. 219.

will in many cases be made parties for the mere purpose of compelling them to make discovery of doings of the corporation, where no relief is sought against them as individuals.[25] Although no relief is sought against the officers or agents, but merely a discovery, yet this discovery cannot be had from them unless they be joined with the corporation as defendants in the action; but the answer in such a case will be under the seal of the corporation, according to the knowledge and information and belief of its officers, ascertained from all proper sources of information.[26]

(III) *Mere Witness Cannot Be Joined For Discovery.* Moreover it is a principle that mere witnesses, who are shown to be cognizant of the alleged facts, cannot be joined for a discovery.[27]

(IV) *When Bill Does Not Require Answer Under Oath.* It is of the essence of a discovery that it should be under oath, and a party is impleaded as defendant for the purposes of discovery in order to compel him to answer under oath. When therefore the bill does not require an answer under oath the officers of the corporation are improperly joined for discovery.[28]

(V) *Former Officers May Be Joined For Discovery.* The former as well as the present officers of a corporation can be made parties to a suit against it for the purpose of compelling them to make discovery of facts within their official knowledge.[29]

(VI) *Plaintiff May Waive Right to Have Corporate Officer Joined For Discovery.* Plaintiff may of course waive his right to have an officer of the corporation joined, who can answer under oath and be responsible for the penalties of perjury for the purpose of making discovery. He may therefore maintain a bill for a discovery against the corporation alone in aid of an action at law, although it does not answer under oath.[30]

(VII) *Discovery Limited to Matters Coming to Their Knowledge as Officers.* Where the officers of a corporation are thus joined for the purpose of discovery, the discovery is limited to matters coming to their knowledge in the course of their service as officers and cannot be extended to other matters.[31]

25. Dummer *v.* Chippenham, 14 Ves. Jr. 245.

26. Brumley *v.* Westchester County Mfg. Soc., 1 Johns. Ch. (N. Y.) 366; French *v.* New York City First Nat. Bank, 9 Fed. Cas. No. 5,099, 7 Ben. 488. Also it has been said that a bill for a discovery will lie against the members of a corporation without joining the corporation where the members are personally liable for its debts. Middletown Bank *v.* Russ, 3 Conn. 135, 8 Am. Dec. 164. Where the officers or members of the corporation are joined with the corporation for purposes of discovery only, and the complainant by mistake inserts a prayer for relief against such officers as well as against the company, the officers cannot demur to the discovery and relief generally. They should make the discovery sought and demur to the relief, or should answer the bill generally, and then object at the hearing that they have been improperly made parties to the suit for relief as well as for discovery. Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188.

27. Norwood *v.* Memphis, etc., R. Co., 72 Ala. 563; Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188; How *v.* Best, 5 Madd. 19; Gibbons *v.* Waterloo Bridge Co., 5 Price 491; Le Texier *v.* Anspach, 15 Ves. Jr. 159; Story Eq. Pl. §§ 234, 235, note 2. Upon this principle it is held that where a bill in equity is filed by a creditor against a corporation, and also against its directors and officers, but no relief is prayed except as against the corporation, and no fraud, conspiracy, or breach of trust is charged against the directors and officers, they cannot be joined as defendants for the sole purpose of discovery. Tutweiler *v.* Tuskaloosa Coal, etc., Co., 89 Ala. 391, 7 So. 398; Norwood *v.* Memphis, etc., R. Co., 72 Ala. 563.

28. Tutweiler *v.* Tuskaloosa, etc., Coal Co., 89 Ala. 391, 7 So. 398. *Compare* Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; Zelnicker *v.* Brigham, etc., Co., 74 Ala. 598.

For a bill not alleging facts entitling plaintiff to a discovery from the directors see Camp *v.* Taylor, (N. J. Ch. 1890) 19 Atl. 968.

Even though the answers of the corporation to the demand of the bill for a discovery cannot be read as evidence against the corporation, yet they may be of use in directing plaintiff how to draw his interrogatories for the purpose of obtaining a better discovery. Wych *v.* Meal, 3 P. Wms. 310, 24 Eng. Reprint 1078.

29. Fulton Bank *v.* Sharon Canal Co., 1 Paige (N. Y.) 219.

30. Colgate *v.* Compagnie Francaise, etc., 23 Fed. 82, 23 Blatchf. 86.

31. "No case has gone so far as to join an officer of a corporation for the purpose of a discovery of matters which were not within

(VIII) *OBJECTION THAT DISCOVERY MAY SUBJECT CORPORATION TO FORFEITURE OF ITS CHARTER.* The objection that a discovery may subject the company to a forfeiture of its charter is not sufficient to support a general demurrer to a bill for discovery and relief, even if it would have authorized a demurrer to the discovery of particular facts.[32]

r. Statutory Substitutes For Bills For Discovery. Statutory substitutes for the bill for discovery have been enacted both in England[33] and America,[34] under the operation of which the subject of discovery in equity has lost much of its importance. A statutory provision to the effect that any party to an action may be examined as a witness at the instance of any adverse party or parties, after issue joined in said action and before trial thereof, is a statutory substitute for the bill of discovery in equity.[35]

s. Bill of Interpleader by Agent of Corporation. For the circumstances under which an agent of a corporation may bring a bill of interpleader to compel the corporation and a third person to litigate with each other to determine the title to a fund or to a thing in the possession of the agent, and the practice under such a bill, see the authorities cited in the margin.[36]

t. Actions to Recover Payments Voluntarily Made. The rule that a payment voluntarily made under a mistake of law, but with a full knowledge of the facts, cannot be recovered back, rests upon general principles of public convenience, and applies to a corporation as well as to a natural person.[37]

2. DEMAND IN ACTIONS AGAINST CORPORATIONS. It is conceived that no demand is necessary in order to maintain an action against a corporation, except where it would be necessary in the case of an individual. But before a shareholder can bring an action to prevent or redress breaches of trust committed by the officers of the corporation in the management of its affairs, he must make a demand on the directors to sue in the name of the corporation, absurd as this in some cases may be;[38] although some courts have held that no such demand is necessary where it must be made upon the persons who themselves are guilty of the

his knowledge as such officer, or learned by him while in the service, or as a member of the corporation, nor, as in this case, matters which took place before the corporation was formed, or in which it had no part, though it appears that by and through other sources of information the officer happens to have obtained such knowledge." Per Choate, J., in McComb *v.* Chicago, etc., R. Co., 7 Fed. 426, 428, 19 Blatchf. 69.

32. Robinson *v.* Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212.

When production of corporate books compelled.— Where a corporation, being a party to a suit, is directed by an order of court to do a specific thing to effectuate certain relief to which the other party is entitled, an officer of the corporation may in aid of such relief be compelled, by a *subpœna duces tecum* on the order of a master, to produce certain specified books and documents of the corporation. Erie R. Co. *v.* Heath, 8 Fed. Cas. No. 4,513, 8 Blatchf. 413.

33. In England it is no longer the practice, or even proper, to make an officer or member of a corporation a party to a bill against it for purposes of discovery. In accordance with the fifty-first section of the Common Law Procedure Act of 1854, it has been provided, by the rules of court, that "if any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in his own name or in the name of any officer or other person, any opposite party may apply at Chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly." Rules of Court 1875, Order XXXI, Rule 4. See Wilson *v.* Church, 9 Ch. D. 552, 555, 39 L. T. Rep. N. S. 413, 26 Wkly. Rep. 735. Doubtless the more recent court rules deal with the subject in a similar way.

34. These statutes and their interpretation are considered at length in 1 Thompson Trials, § 731 *et seq.* For the construction of the New York statute see 1 Thompson Trials, § 743 *et seq.*

35. Wilson *v.* Webber, 2 Gray (Mass.) 558; Apperson *v.* Mutual Ben. L. Ins. Co., 38 N. J. L. 272.

36. Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Atkinson *v.* Manks, 1 Cow. (N. Y.) 691; Morley *v.* Thompson, 3 Madd. 564 note; Lowe *v.* ———, 3 Madd. 277; Bowyer *v.* Pritchard, 11 Price 103; 6 Thompson Corp. § 7413.

37. Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412.

38. See *supra*, XI, B, 19, a *et seq.*; XI, C, 4, c.

wrong.[39] A demand against a corporation must of course be made upon an agent authorized to represent it in respect of the matter of the demand.[40]

D. Questions Relating to Corporate Existence — 1. In General[41] — a. Corporations De Facto Suable as if De Jure. The contracts of corporations which do not rightfully exist, but which nevertheless do exist and carry on their business as corporations with the consent or through the neglect of the state, may be enforced against them the same as though they were corporations *de jure*,[42] under the operation of the principle that the question of the rightfulness of the claim to exist as a corporation will not be litigated collaterally between the corporation and private parties, but will be litigated only between it and the state.[43]

b. Estoppel to Deny Corporate Existence — (i) *In General.* Another principle which constantly comes into operation in actions by and against corporations or in actions by or against the receiver or other representative of corporations in their insolvency is that a party by entering into a contract with a corporation in its artificial name and character, and under such circumstances as necessarily admit its artificial character, becomes thereafter estopped to deny that it is a corporation.[44]

39. Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788.

40. Commercial Bank *v.* Bonner, 13 Sm. & M. (Miss.) 649; Langworthy *v.* New York, etc., R. Co., 2 E. D. Smith (N. Y.) 195. Thus a demand made by a passenger or by his assignee for his baggage where his check has been lost is a good demand if made upon the baggage-master of the railroad company. Cass *v.* New York, etc., R. Co., 1 E. D. Smith (N. Y.) 522. How demand made upon the corporation to lay a foundation for an action to enforce a shareholder's individual liability see Harvey *v.* Chase, 38 N. H. 272; Haynes *v.* Brown, 36 N. H. 545.

41. **Most of the questions which might properly be considered in this subdivision** have been fully dealt with already. See *supra*, I.

42. Doty *v.* Patterson, 155 Ind. 60, 56 N. E. 668 [*citing* Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365; Williamson *v.* Kokomo Bldg., etc., Assoc., 89 Ind. 389, 391, 392; Mullen *v.* Beech Grove Driving Park, 64 Ind. 202; Indianapolis Furnace, etc., Co. *v.* Herkimer, 46 Ind. 142; Ft. Wayne, etc., Turnpike Co. *v.* Deam, 10 Ind. 563; Ensey *v.* Cleveland, etc., R. Co., 10 Ind. 178; Stoops *v.* Greensburgh, etc., Plank-Road Co., 10 Ind. 47].

43. Jones *v.* Aspero Hardware Co., 21 Colo. 263, 40 Pac. 457, 52 Am. St. Rep. 220, 29 L. R. A. 143; Indiana Bond Co. *v.* Ogle, 22 Ind. App. 593, 54 N. E. 407, 72 Am. St. Rep. 326; McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044; Davis *v.* Stevens, 104 Fed. 235. For example there having been no law of the territory of Dakota under which a corporation could be formed for banking purposes, an attempted incorporation for that purpose under the laws of the territory did not create even a corporation *de facto* under the operation of a statute declaring the common-law principle above stated, but the incorporators were liable as partners on contracts made in the name of the pretended corporation. Davis *v.* Stevens, 104 Fed. 235.

44. *Connecticut.*— Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161, one sued by the receiver of a corporation as a shareholder for an unpaid balance on his shares is estopped from asserting that the organization never became a corporation.

Illinois.— Crystal White Soap Co. *v.* Roseboom, 91 Ill. App. 551, concern holding itself out as a corporation not permitted to deny its legal identity as such as against those with whom it has assumed to be and to act as a corporation.

Louisiana.— Anderson *v.* Thompson, 51 La. Ann. 727, 25 So. 399, promoter and organizer of an assumed corporation estopped from denying its existence as such, as against one who has acted upon the assumption of its corporate existence.

Michigan.— Kalamazoo *v.* Kalamazoo Heat, etc., Co., 122 Mich. 489, 81 N. W. 426, 124 Mich. 74, 82 N. W. 811, parties dealing with a corporation as such, estopped from raising objections to the irregularity of its organization.

Nebraska.— Equitable Bldg., etc., Assoc. *v.* Baird, 60 Nebr. 173, 82 N. W. 385 (party contracting with an assumed corporation estopped to question its capacity to contract or to sue); Equitable Bldg., etc., Assoc. *v.* Bidwell, 60 Nebr. 169, 82 N. W. 384; Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85 (legal existence of a corporation cannot be questioned collaterally, where it is authorized by law and there has been an attempt in good faith to organize).

New York.— Muehlenbeck *v.* Babylon, etc., R. Co., 26 Misc. 136, 55 N. Y. Suppl. 1023.

Ohio.— Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Dec. 238, principle applied in an action to determine the priority of liens on a railroad.

Oregon.— Washington Nat. Bldg., etc., Assoc. *v.* Stanley, 38 Oreg. 319, 63 Pac. 489, 84 Am. St. Rep. 793, 58 L. R. A. 816, principle applied so as to estop one who has borrowed from a building association from questioning its corporate existence in an action to foreclose the mortgage.

(II) *This Estoppel Extends to Promoters, Directors, Officers, and Shareholders*—(A) *In General.* This estoppel operates in favor of persons who have given credit to the assumed corporation, or otherwise changed possession to their loss, upon the faith of its being what it purports to be, as against those who by their active conduct have held it out to the world as a corporation.[45] It therefore estops promoters, directors, officers, and shareholders, from denying the fact of the existence of the corporation, when proceeded against to charge them upon the assumption of its existence, and of their connection with it as such.

(B) *How as to Promoters.* In an action to recover from promoters the profits which they have made in buying property for one price and selling it to the corporation for a greater price, defendants, by reason of their active participation in the formation of the corporation, are estopped from denying that it has been regularly organized.[46]

(C) *Extends to Cases Where Parties Contract Among Themselves to Be Liable Only as Members of Supposed Corporation Are Liable.* Yet while it is a rule of law that persons who have assumed to make a contract as agents of a corporation which has no existence bind themselves personally, on the principle of breach of warranty of agency,[47] nevertheless this doctrine, in the absence of fraud, has no application where the other contracting party is himself a member of the supposed or pretended corporation. The reason is that where several persons have agreed among themselves to be liable only as the members of a corporation are liable, each one of them is estopped by his own agreement from charging the others with a greater liability.[48]

c. Estoppel to Deny Corporate Powers. Another principle sometimes applied is that a party entering into a contract with a corporation impliedly admits not only the corporate existence of the other contracting party, but its power, under its charter or governing statute, to enter into the particular contract, so as to estop such party from raising the question of such power when sued to enforce the contract.[49]

d. Suing Corporation as Such Admits Its Corporate Existence. Where a plaintiff brings an action against a corporation the direct object of which is to operate upon it and to procure relief against it in its corporate character, he will be estopped at any subsequent stage of the case from denying that defendant is a corporation.[50]

United States.— American Cable R. Co. *v.* New York, 68 Fed. 227, question of corporate existence cannot be contested in the defense of an action for the infringement of a patent.

See also *supra*, I, N, 1, b *et seq.*

45. Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149. We have already considered at length how this estoppel operates against shareholders (see *supra*, I, N, 1, k; VI, P, 6, a, (I), (D), (1) *et seq.*; VIII, C, 8, a *et seq.*), and against directors (see *supra*, IX, P, 12, a, (I) *et seq.*).

46. Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149. So where, in an action in the name of an insurance company, suing as a corporation, upon a subscription executed to the company in liquidation of a subscription to its capital stock, it appeared that defendant was one of the original subscribers to such capital stock, and that he had been elected and had served as one of the directors of the company, it was held that these facts estopped him from objecting that plaintiff had failed to prove a legal corporate organization. Ramsey *v.* Peoria M. & F. Ins. Co., 55 Ill. 311. So where a certificate of incorporation has been signed by certain persons who accept the office of trustees they are estopped from denying the validity of the certificate. Parrott *v.* Byers, 40 Cal. 614.

47. See *supra*, I, Q, 7, c, (I) *et seq.*; VIII, C, 1, a *et seq.*

48. Foster *v.* Moulton, 35 Minn. 458, 29 N. W. 155.

49. Standard Sewing-Mach. Co. *v.* Frame, 2 Pennew. (Del.) 430, 48 Atl. 188. See further with respect to estoppel to set up the want of corporate power *supra*, XVII, F, 2, b, (I) *et seq.*

50. Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200 (proceeding against a defendant by its corporate name impliedly admits the regularity and legality of the corporate organization); Useful Manufactures Soc. *v.* Morris Canal, etc., Co., 1 N. J. Eq. 157, 21 Am. Dec. 41. Still less can a corporation be sued as such, and brought into court, and the action be maintained against it, on the ground that it is not

e. General Appearance by Corporation Admits Its Corporate Existence — (I) *Rule Stated.* A corporation, by appearing in a suit which has been brought against it, admits its corporate existence and estops itself from denying the same.[51]

(II) *Rule Extends to Case of Foreign Corporation Proceeded Against by Attachment.* So if a foreign corporation proceeded against by attachment voluntarily appears and gives bond in its corporate name it cannot afterward deny its corporate existence.[52]

f. Corporate Existence Admitted by Taking Appeal — (I) *In General.* So if a defendant is sued as a corporation and makes no appearance until judgment is rendered against it, but appeals from such judgment to a higher court, its appearance for the purpose of taking an appeal, and its appeal, will have the effect of admitting its existence as a corporation, so that it will not be a good point in the appellate court that plantiff failed to prove defendant's corporate existence.[53]

(II) *Or by Executing Appeal-Bond.* So an assumed corporation, against which a judgment has been rendered, becomes estopped to deny its existence by executing a bond for the purpose of appealing from such judgment.[54]

2. Questions of Pleading Relating to Corporate Existence — a. When Not Necessary to Allege Corporate Existence — (I) *In General.* There is a mass of authority, more or less definite, to the effect that in an action by[55] or

a corporation; and other defendants sued jointly with it cannot be charged in such an action with having jointly, with such corporation, usurped the rights of a corporation, etc., because by suing the corporation as such its existence is admitted. People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

51. *Alabama.*— Oxford Iron Co. *v.* Spradley, 46 Ala. 98.

Colorado.— Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041.

Illinois.— U. S. Express Co. *v.* Bedbury, 34 Ill. 459.

Kansas.— Missouri River, etc., R. Co. *v.* Shirley, 20 Kan. 660.

Missouri.— Seaton *v.* Chicago, etc., R. Co., 55 Mo. 416.

New York.— *Compare* Stoddard *v.* Onondaga Annual Conference, 12 Barb. 573.

52. Smith *v.* Burlington, etc., R. Co., 55 Mo. 526; Seaton *v.* Chicago, etc., R. Co., 55 Mo. 416; Hudson *v.* St. Louis, etc., R. Co., 53 Mo. 525.

53. Kansas City, etc., R. Co. *v.* Bolson, 36 Kan. 534, 14 Pac. 5.

54. East Tennessee, etc., R. Co. *v.* Evans, 6 Heisk. (Tenn.) 607.

55. *Alabama.*— Seymour *v.* Thomas Harrow Co., 81 Ala. 250, 1 So. 45.

Georgia.—Wilson *v.* Sprague Mowing Mach. Co., 55 Ga. 672.

Indiana.— Mackenzie *v.* Board School Trustees, 72 Ind. 189; Adams Express Co. *v.* Hill, 43 Ind. 157; Cicero Hygiene Draining Co. *v.* Craighead, 28 Ind. 274; Williams *v.* Franklin Tp. Academical Assoc., 26 Ind. 310; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460; Harris *v.* Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372.

Iowa.— Harris Mfg. Co. *v.* Marsh, 49 Iowa 11.

Kansas.— Ryan *v.* Farmers' Bank, 5 Kan. 658.

Kentucky.— Henderson, etc., R. Co. *v.* Leavell, 16 B. Mon. 358.

Missouri.— Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17.

Nebraska.— Exchange Nat. Bank *v.* Capps, 32 Nebr. 242, 49 N. W. 223, 29 Am. St. Rep. 433.

New Jersey.— Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 105, 35 Am. Dec. 528.

New York.— Phœnix Bank *v.* Donnell, 40 N. Y. 410 [*affirming* 41 Barb. 571]; La Fayette Ins. Co. *v.* Rogers, 30 Barb. 491; Kennedy *v.* Cotton, 28 Barb. 59; Stoddard *v.* Onondaga Annual Conference, 12 Barb. 573; Camden, etc., R., etc., Co. *v.* Remer, 4 Barb. 127; Georgia M. & F. Ins. Bank *v.* Jauncey, 1 Barb. 486; Lighte *v.* Everett F. Ins. Co., 5 Bosw. 716; Union Mut. Ins. Co. *v.* Osgood, 1 Duer 707; Shoe, etc., Bank *v.* Brown, 9 Abb. Pr. 218, 18 How. Pr. 308; Waterville Bank *v.* Beltser, 13 How. Pr. 270; Acome *v.* American Mineral Co., 11 How. Pr. 24; Michigan Bank *v.* Williams, 5 Wend. 478; Utica Bank *v.* Smalley, 2 Cow. 770, 14 Am. Dec. 526; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459; U. S. Bank *v.* Haskins, 1 Johns. Cas. 132.

Ohio.— Brady *v.* Palmer, 10 Ohio Cir. Dec. 27.

Oklahoma.— Leader Printing Co. *v.* Lowry, 9 Okla. 89, 59 Pac. 242.

Pennsylvania.— Zion Church *v.* St. Peter's Church, 5 Watts & S. 215.

South Carolina.— Cheraw, etc., R. Co. *v.* White, 14 S. C. 51.

Virginia.— Gillett *v.* American Stove, etc., Co., 29 Gratt. 565.

Wisconsin.— Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109; Farmers' L. & T. Co. *v.* Fisher, 17 Wis. 114; Chickerming Lodge No. 55, I. O. O. F. *v.* McDonald, 16 Wis. 112;

against[56] a corporation, whether *ex contractu* or *ex delicto*, it is not necessary to allege the fact that plaintiff or defendant is a corporation.

(II) *Not so Necessary Where Plaintiff or Defendant Is Described by Name Which Imports Corporation.* Most of these decisions proceed upon the ground that where the plaintiff or the defendant as the case may be is described in the declaration or complaint by a name which naturally imports that it is a corporation, that is a sufficient allegation that such is the fact, for the purpose of an action, until it is controverted.[57]

(III) *Not so Necessary Where Plaintiff or Defendant Is Described by Name in Which It Has Entered Into Contract Sued on*—(A) *In General.* Others proceed on the ground that in an action on a contract it will be sufficient for the declaration or complaint to describe plaintiff or defendant as the case may be by the artificial name by which such party is described in the contract, and that the defendant will be estopped by the contract to deny the capacity of such party to sue or be sued by that name.[58]

(B) *This Rule Under Statutes.* Still others rest upon statutes such as that of Iowa providing that "when an action is founded on a written instrument, suit

Rains *v.* Oshkosh, 14 Wis. 372; Central Bank *v.* Knowlton, 12 Wis. 624, 78 Am. Dec. 769.

United States.— Society for Propagation, etc. *v.* Pawlet, 4 Pet. 480, 7 L. ed. 927; Union Cement Co. *v.* Noble, 15 Fed. 502.

56. *Arkansas.*—Odd Fellows Bldg. Assoc. *v.* Hogan, 28 Ark. 261.

Georgia.— Cribb *v.* Waycross Lumber Co., 82 Ga. 597, 9 S. E. 426.

Illinois.— U. S. Express Co. *v.* Bedbury, 34 Ill. 459.

Indiana.—Adams Express Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214; Cincinnati, etc., R. Co. *v.* McDougall, 108 Ind. 179, 8 N. E. 571; Sayers *v.* Crawfordsville First Nat. Bank, 89 Ind. 230; Indianapolis Sun Co. *v.* Horrell, 53 Ind. 527; Adams Express Co. *v.* Hill, 43 Ind. 157.

Michigan.— Ladd *v.* East Saginaw M. E. Church, 1 Mich. N. P. 47.

New York.— Stoddard *v.* Onondaga Annual Conference, 12 Barb. 573.

North Carolina.— Stanly *v.* Richmond, etc., R. Co., 89 N. C. 331.

Wisconsin.— Brauser *v.* New England F. Ins. Co., 21 Wis. 506.

England.— Woolf *v.* City Steamboat Co., 7 C. B. 103, 13 Jur. 456, 18 L. J. C. P. 125, 62 E. C. L. 103.

57. *Alabama.*— Seymour *v.* Thomas Harrow Co., 81 Ala. 250, 1 So. 45, where plaintiff sued as the "Thomas Harrow Company."

Arkansas.— Odd Fellows Bldg. Assoc. *v.* Hogan, 28 Ark. 261, defendant being sued merely as the "Odd Fellows' Building Association."

Georgia.— Cribb *v.* Waycross Lumber Co., 82 Ga. 597, 9 S. E. 426.

Indiana.—Adams Express Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214 (the "Adams Express Company"); Cincinnati, etc., R. Co. *v.* McDougall, 108 Ind. 179, 8 N. E. 571 (where defendant was sued as the "Cincinnati, Hamilton & Indianapolis Railroad Company"); Mackenzie *v.* Board School Trustees, 72 Ind. 189 (where plaintiff sued as "The Board of School Trustees for the Town of," etc.); Indianapolis Sun Co. *v.* Horrell, 53 Ind. 527; Adams Express Co. *v.* Hill, 43 Ind. 157; Northwestern Universalists Conference *v.* Myers, 36 Ind. 375; Cicero Hygiene Draining Co. *v.* Craighead, 28 Ind. 274; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; O'Donald *v.* Evansville, etc., R. Co., 14 Ind. 259; Richardson *v.* St. Joseph's Iron Co., 5 Blackf. 146, 33 Am. Dec. 460; Harris *v.* Muskingum Mfg. Co., 4 Blackf. 267, 27 Am. Dec. 372.

New York.— Phœnix Bank *v.* Donnell, 40 N. Y. 410 (where plaintiff sued as the "Phœnix Bank"); Lighte *v.* Everett F. Ins. Co., 5 Bosw. 716; Union Mut. Ins. Co. *v.* Osgood, 1 Duer 707.

North Carolina.— Stanly *v.* Richmond, etc., R. Co., 89 N. C. 331.

Virginia.— Gillett *v.* American Stove, etc., Co., 29 Gratt. 565, where plaintiff sued as the "American Stove & Hollow-ware Company."

England.— Woolf *v.* City Steamboat Co., 7 C. B. 103, 13 Jur. 456, 18 L. J. C. P. 125, 62 E. C. L. 103, where the declaration commenced: "The plaintiff complaining of The City Steam Boat Company, who have been summoned to answer the plaintiff," etc., and it was held that this was a sufficient declaration without alleging defendant to be chartered, or incorporated, or registered.

58. National Ins. Co. *v.* Bowman, 60 Mo. 252; Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17; Exchange Nat. Bank *v.* Capps, 32 Nebr. 242, 49 N. W. 223, 29 Am. St. Rep. 433; Platte Valley Bank *v.* Harding, 1 Nebr. 461; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459. It has been held that where defendant has contracted in writing with plaintiffs as a corporation, they will not be required to prove their corporate existence, because he avers in his answer that he is informed and believes that they "are not a corporation." East River Bank *v.* Rogers, 7 Bosw. (N. Y.) 493. See also *supra*, I, N, 1, a *et seq.*; XXII, D, 1, b, (I).

may be brought by or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument."[59]

(iv) *Theory of Decisions Which Dispensed With Necessity of Alleging Corporate Existence.* Most of the cases, as already noted, rest upon the theory that it is sufficient to describe plaintiff or defendant by an artificial name which naturally imports that it is a corporation. Others rest upon the broader ground that plaintiff may, on the one hand, sue by whatever name or description he chooses to take, and that he may sue defendant, on the other hand, by whatever name or description he chooses to give; so that if in the former case there is no such plaintiff, defendant may appear and show that fact,[60] and that until he does appear and show that fact by an appropriate plea it is immaterial whether plaintiff is a corporation, a partnership, or an individual, but his petition is good on demurrer,[61] and it is not necessary for the plaintiff on the trial to introduce any evidence of its existence as a corporation;[62] and so that, on the other hand, if there is no such defendant, it is not necessary for any one to appear at all. Again, in cases where plaintiff is described by a name which is ordinarily given to a corporation, many of the decisions hold that the declaration or complaint is sufficient on demurrer, because it does not appear on the face of it that plaintiff is not a corporation;[63] and the same rule has been suggested as applicable to the case where defendant is so sued even in an action *ex delicto*;[64] and this conclusion is strengthened in those jurisdictions which practice under the modern codes of procedure, which allow the want of capacity of plaintiff to sue to be taken advantage of by demurrer, when it appears on the face of the complaint, but which expressly require all other objections to parties to be made by answer.[65] And finally many of the cases lay stress upon the failure of defendant to raise the objection by the proper plea, or until after verdict;[66] and it is the implication of all the cases that the objection must be made *in limine* and by plea in abatement, or otherwise in the mode pointed out by statute, as by affidavit in Virginia;[67] and it seems that this rule applies in equity as well as at law;[68] and this would be the conclusion in the code states, where there is one code of procedure applicable alike to cases at law and in equity. Under no system of pleading is it necessary for the corporate existence to be averred and where the suit is in the name of trustees who hold the legal title.[69]

b. Contrary Doctrine That It Is Necessary to Allege Corporate Existence — (i) *In General.* On the contrary there are some judicial holdings, mostly it seems, rendered in deference to statutory provisions, that in an action by[70] or

59. Iowa Code, § 2558; Harris Mfg. Co. *v.* Marsh, 49 Iowa 11, 13. *Compare* Gaines *v.* Mississippi Bank, 12 Ark. 769; Hoereth *v.* Franklin Mill Co., 30 Ill. 151.

60. "A party," says Nevius, J., "must come into court in his true and proper name. If he fails to do so, the defendant may interpose his plea in abatement; but if he pleads to the action, he admits the plaintiff's right to sue in the name assumed." Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 105, 107, 35 Am. Dec. 528.

61. Seymour *v.* Thomas Harrow Co., 81 Ala. 250, 1 So. 45. See also Mackenzie *v.* Edinburg School Trustees, 72 Ind. 189; Phœnix Bank *v.* Donnell, 40 N. Y. 410.

62. Adams Express Co. *v.* Hill, 43 Ind. 157; Gillett *v.* American Stove, etc., Co., 29 Gratt. (Va.) 565.

63. Union Mut. Ins. Co. *v.* Osgood, 1 Duer (N. Y.) 707.

64. Stanly *v.* Richmond, etc., R. Co., 89 N. C. 331.

65. See for instance N. C. Code Civ. Proc. § 95, as thus interpreted in Stanly *v.* Richmond, etc., R. Co., 89 N. C. 331.

66. Cribb *v.* Waycross Lumber Co., 82 Ga. 597, 9 S. E. 426; Kennedy *v.* Cotton, 28 Barb. (N. Y.) 59.

67. Gillett *v.* American Stove, etc., Co., 29 Gratt. (Va.) 565. See also *infra*, XXII, D, 2, f, (IX).

68. Thus in a bill in equity filed by a corporation an averment of the corporate existence of the complainants is unnecessary. Central Mfg. Co. *v.* Hartshorne, 3 Conn. 199; Frye *v.* State Bank, 10 Ill. 332; German Reformed Church *v.* Von Puechelstein, 27 N. J. Eq. 30.

69. Wolf *v.* Goddard, 9 Watts (Pa.) 544.

70. Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 354, 360 (per Rhodes, J.); Central Mfg. Co. *v.* Hartshorne, 3 Conn. 199; Connecticut Bank *v.* Smith, 17 How. Pr. (N. Y.) 487; Havana Bank *v.* Wickham, 16 How. Pr. (N. Y.) 97; Johnson *v.* Kemp, 11 How. Pr.

against a corporation, it is necessary for the declaration, complaint, or petition to allege that it is a corporation.[71]

(II) *Courts Proceed Upon Distinction Between Public Statutes and Private Charters* — (A) *In General.* Some of these decisions proceed upon a distinction between the case where a corporation is created by a public statute, which the courts will notice judicially, and the case where it is created by a private charter, which must be pleaded and proved, holding that in the latter case plaintiffs must aver and prove that they are a body corporate, duly constituted by competent authority,[72] while conceding that the rule is otherwise where the act of incorporation is a public statute of the state in which the action is brought, of which the court can take judicial notice.[73] This principle, it has been held, applies with equal force in a case where the action is brought by a foreign corporation,[74] and where it is brought by a domestic corporation created by a private statute;[75] since in the latter as well as in the former case, the act under which the plaintiff claims to exist as a corporation cannot be judicially known by the court.

(B) *Courts Which Repudiate This Distinction.* Other courts repudiate this distinction, and hold that it is not necessary to plead the charter of the corporation, although it is a private statute.[76]

(III) *Distinction Between Actions Ex Delicto and Actions Ex Contractu.* One case takes a further distinction between actions *ex delicto* and actions *ex contractu*, holding that in an action *ex delicto* against a defendant impleaded by an artificial name the petition should allege defendant to be either a corporation or a partnership, or capacitated to be sued in the action, while conceding that if the action were upon a contract, and defendant were impleaded by the artificial name used therein, that would be sufficient.[77]

(IV) *Jurisdictions in Which Rule Rests Upon Statute.* It should also be noted that some of the decisions holding that it is necessary to aver in a complaint that plaintiff is a corporation rest upon the language of positive statutes, such as decisions in New York.[78]

(V) *Necessary to Allege Corporate Existence Where Action Is to Enforce Right Which Can Inhere Only in a Corporation.* Even if the general rule of procedure stated in the preceding paragraphs,[79] which dispensed with the necessity of averring the fact of corporate existence in ordinary cases, obtained, yet on sound principles an exception to it must be admitted in the case where a

(N. Y.) 186; Alabama Bank *v.* Simonton, 2 Tex. 531. The last two cases are disapproved in Kennedy *v.* Cotton, 28 Barb. (N. Y.) 59. And see Phœnix Bank *v.* Donnell, 40 N. Y. 410.

71. People *v.* Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303; Middletown Bank *v.* Russ, 3 Conn. 135, 8 Am. Dec. 164; Byington *v.* Mississippi, etc., R. Co., 11 Iowa 502.

72. Central Mfg. Co. *v.* Hartshorne, 3 Conn. 199; Holloway *v.* Memphis, etc., R. Co., 23 Tex. 465, 76 Am. Dec. 68; Alabama Bank *v.* Simonton, 2 Tex. 531.

73. Holloway *v.* Memphis, etc., R. Co., 23 Tex. 465, 76 Am. Dec. 68.

74. Alabama Bank *v.* Simonton, 2 Tex. 531.

75. Holloway *v.* Memphis, etc., R. Co., 23 Tex. 465, 76 Am. Dec. 68.

76. U. S. Bank *v.* Haskins, 1 Johns. Cas. (N. Y.) 132. See also Taylor *v.* Alexandria Bank, 5 Leigh (Va.) 471; Grays *v.* Lynchburg, etc., Turnpike Co., 4 Rand. (Va.) 578.

77. Byington *v.* Mississippi, etc., R. Co., 11 Iowa 502. *Compare* Harris Mfg. Co. *v.* Marsh, 49 Iowa 11; Falconer *v.* Campbell, 9 Fed. Cas. No. 4,620, 2 McLean 195.

78. That the failure to allege either that plaintiff or defendant is a corporation is ground of demurrer under section 1775 of the New York Code of Civil Procedure see Schillinger Fireproof Cement, etc., Co. *v.* Arnot, 14 N. Y. Suppl. 326; Oesterreicher *v.* Sporting Times Pub. Co., 5 N. Y. Suppl. 2; National Temperance Soc. *v.* Anderson, 2 N. Y. Suppl. 49, 17 N. Y. St. 389.

In an action for a penalty given by a statute against "the several railroad companies in this State," for transporting slaves from place to place without the permission of their masters, it was held, in Missouri, that it is necessary for plaintiff to aver in his complaint that defendant is a railroad company in this state; that without this averment the petition showed no cause of action which would support a judgment; and that a judgment rendered upon such a petition would be reversed and the cause remanded with leave to plaintiff to amend. Welton *v.* Pacific R. Co., 34 Mo. 358.

79. See *supra*, XXII, D, 2, a, (I) *et seq.*

party is suing by an artificial name to enforce a right which from its nature can be possessed only by a corporation, in which case it must allege and prove that it is a corporation; because such allegation and proof are necessary — not to its right of action generally, but to its right or title to maintain the particular action.[80] It has been so held where it sues to recover property of a previously existing company, and its own charter requires it to purchase such property as a condition precedent to becoming organized as a body corporate. Here, as no recovery can be had without the fulfilment of the condition, that is to say, without organizing as a corporation, the fact of its having so organized must be alleged by it and proved.[81] So where there is a statute giving as a substitute to a discovery in equity the right to examine the officers of the opposite party to a suit where the opposite party is a corporation,[82] then, in order to entitle the other party to file interrogatories thereunder, he must prove that the opposite party is in fact a corporation.[83]

c. What Averments of Corporate Existence Sufficient — (I) *Enough to Allege That Plaintiff or Defendant Is Corporation, Etc.* In an action by[84] or against[85] a corporation, it is in general not necessary for plaintiff to do more than allege the fact that plaintiff or defendant as the case may be is a corporation created under laws of a state or country named.

(II) *What Plaintiff Need Not Aver.* Plaintiff need not go further and set forth the charter, whether it be a public or private statute;[86] state whether the corporation has been created by a public or private act of the legislature,[87] give the names of the individuals composing it,[88] how they came to be a corporation,[89] or the manner in which the corporation was organized;[90] or aver the performance

80. Frye *v.* State Bank, 10 Ill. 332, 335, per Trumbull, J.

81. Wheadon *v.* Peoria, etc., R. Co., 42 Ill. 494.

82. Mass. Gen. Stat. c. 129, § 50.

83. Gott *v.* Adams Express Co., 100 Mass. 320.

84. *California.*— South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222.

Georgia.—Wilson *v.* Sprague Mowing Mach. Co., 55 Ga. 672.

Illinois.— Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276.

Indiana.—Washer *v.* Allensville, etc., Turnpike Co., 81 Ind. 78; Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

Missouri.—Chillicothe Sav. Assoc. *v.* Ruegger, 60 Mo. 218.

Nevada.— Little *v.* Virginia, etc., Water Co., 9 Nev. 317.

New York.— Stoddard *v.* Onondaga Annual Conference, 12 Barb. 573; Camden, etc., R., etc., Co. *v.* Remer, 4 Barb. 127; Sun Mut. Ins. Co. *v.* Dwight, 1 Hilt. 50; U. S. Bank *v.* Haskins, 1 Johns. Cas. 132.

Ohio.— Smith *v.* Weed Sewing Mach. Co., 26 Ohio St. 562.

South Carolina.— Cheraw, etc., R. Co. *v.* Garland, 14 S. C. 63; Cheraw, etc., R. Co. *v.* White, 14 S. C. 51.

85. Dodge *v.* Minnesota Plastic Slate Roofing Co., 14 Minn. 49; Sun Mut. Ins. Co. *v.* Dwight, 1 Hilt. (N. Y.) 50; Minter *v.* Union Pac. R. Co., 3 Utah 500, 24 Pac. 911; Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

86. *Indiana.*— Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

Minnesota.— Dodge *v.* Minnesota Plastic Slate Roofing Co., 14 Minn. 49.

New York.— Sun Mut. Ins. Co. *v.* Dwight, 1 Hilt. 50; U. S. Bank *v.* Haskins, 1 Johns. Cas. 132.

Ohio.— Smith *v.* Weed Sewing Mach. Co., 26 Ohio St. 562, a foreign corporation.

Virginia.— Grays *v.* Lynchburg, etc., Turnpike Co., 4 Rand. 578.

Contra, that plaintiff must set forth such parts of its acts of incorporation as are necessary to show that it is a corporation and has power to sue see Central Mfg. Co. *v.* Hartshorne, 3 Conn. 199.

87. U. S. Bank *v.* Haskins, 1 Johns. Cas. (N. Y.) 132.

88. U. S. Bank *v.* Haskins, 1 Johns. Cas. (N. Y.) 132.

89. Stoddard *v.* Onondaga Annual Conference, 12 Barb. (N. Y.) 573; Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526; Grays *v.* Lynchburg, etc., Turnpike Co., 4 Rand. (Va.) 578.

90. *Alabama.*— Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Georgia.—Wilson *v.* Sprague Mowing Mach. Co., 55 Ga. 672.

Indiana.—Washer *v.* Allensville, etc., Turnpike Co., 81 Ind. 78.

Kentucky.— Instone *v.* Frankfort Bridge Co., 2 Bibb 576, 5 Am. Dec. 638.

West Virginia.— Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

The same rule has been applied under the common-law system of pleading in an action ex contractu against the directors of an alleged corporation, the court taking the view that the averment of the existence of the corporation need not be made in positive language, but may be made by way of recital; nor so formal as to set out how the corpora-

of statutory conditions precedent.[91] But everything beyond the general fact of incorporation alleged in the declaration necessary to maintain the action is matter of evidence upon the trial.[92]

(III) *THE USUAL WAY OF MAKING THE AVERMENT.* Under the foregoing principles, in an action by a corporation, an averment that plaintiff was a corporation "duly incorporated under and by virtue of an act of the General Assembly of the State of Missouri entitled," etc., is the usual way of making the averment of the corporate existence of plaintiff, and is sufficient.[93]

tion came into existence, reciting the various steps necessary to make it a corporation; but suggesting that the rule is otherwise, at least on special demurrer, where the action is founded on tort. Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195. This is in conformity with the doctrine of an old case to the effect that where the fact of incorporation is pleaded as an inducement to something else, for instance as a means of alleging seizin in the defendants, it is not necessary to set forth how they became incorporated. Manby *v.* Long, 3 Lev. 107. The rule is the same where the due organization of a corporation is the foundation of the plaintiff's action, as where two parties agree to organize a corporation, combining their business under a scheme by which one of them is to receive certain guaranteed dividends, and his action is to recover those dividends. Here it is enough for him to allege that the corporation was duly organized, without alleging the details of its organization. Lorillard *v.* Clyde, 86 N. Y. 384.

91. South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222; Cheraw, etc., R. Co. *v.* Garland, 14 S. C. 63; Cheraw, etc., R. Co. *v.* White, 14 S. C. 51. A statute of California provides that no corporation now in existence or hereafter formed shall maintain or defend any action in relation to its property until it has filed a certified copy of its articles of incorporation with the clerk of the county in which such property is situated. Cal. Civ. Code, § 299. The construction of this statute is that where the complaint contains no averment upon the subject, whether the plaintiff has complied with this provision or not, it is not for that reason demurrable; it is a defense to be specially pleaded in the answer. As a defense it is only matter in abatement of the action, and if not specially pleaded it is deemed to have been waived. South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222; Ontario State Bank *v.* Tibbits, 80 Cal. 68, 22 Pac. 66; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Phillips *v.* Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Sweeney *v.* Stanford, 67 Cal. 635, 8 Pac. 444. Moreover a plea in abatement setting up this matter is strictly construed. Ontario State Bank *v.* Tibbits, 80 Cal. 68, 22 Pac. 66. See Larco *v.* Clements, 36 Cal. 132; Thompson *v.* Lyon, 14 Cal. 39; Tooms *v.* Randall, 3 Cal. 438. An answer setting up "that plaintiff has not, and at the commencement of this action had not, legal capacity to sue; that plaintiff never was a corporation duly or otherwise organized under the laws of this state, nor a copartnership, nor an individual" states mere conclusion of law and does not properly plead this defense so as to admit evidence of it. Ontario State Bank *v.* Tibbits, 80 Cal. 68, 70, 22 Pac. 66. From the foregoing it follows that a complaint which does not show that plaintiff has complied with this law, nevertheless, if otherwise good, states a cause of action. Phillips *v.* Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451. It is also held that the expression in the above statute, "every corporation now in existence," was intended to embrace only corporations formed in the state of California, whether formed under the provisions of the civil code of that state or under the provisions of statutes existing in that state prior to the civil code; and that it has no application to foreign corporations. South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222. The theory has been put forward that where a corporation brings an action, if it has been created by an act of the legislature which requires certain acts to be done before it can be considered *in esse*, it must allege and prove that such acts have been done in order to establish its corporate existence; but that when a corporation is declared such by its act of incorporation, without the doing of any further act to make it such, the existence of the charter need not be alleged. St. Paul Div. No. 1 S. of T. *v.* Brown, 9 Minn. 157. But this is not the law. The true theory is that of the text, that it is not necessary to do more in any case than to allege that the plaintiff is a corporation.

92. Stoddard *v.* Onondaga Annual Conference, 12 Barb. (N. Y.) 573.

93. Dodge *v.* Minnesota Plastic Slate Roofing Co., 14 Minn. 49; Chillicothe Sav. Assoc. *v.* Ruegger, 60 Mo. 218. As to the averment of corporate existence under the code of New York prior to the statute of 1880 (N. Y. Code Civ. Proc. § 1775) see Canandarkua Academy *v.* McKechnie, 19 Hun (N. Y.) 62; Howe Mach. Co. *v.* Robinson, 7 Daly (N. Y.) 399; Roberts *v.* National Ice Co., 6 Daly (N. Y.) 426; Sonoma Valley Wine, etc., Co. *v.* Heyman, 11 N. Y. Wkly. Dig. 327. Among the more or less contradictory and confusing decisions construing this statute are: Adams *v.* Lamson Consol. Store Service Co., 59 Hun (N. Y.) 127, 13 N. Y. Suppl. 118, 35 N. Y. St. 518; American Baptist Home Mission Soc. *v.* Foote, 52 Hun (N. Y.) 307, 5 N. Y. Suppl. 236, 23 N. Y. St. 462; Northampton First Nat. Bank *v.* Doying, 13 Daly (N. Y.) 509, 11 N. Y. Civ. Proc. 61; Gilpin *v.* Baltimore, etc., R. Co., 17 N. Y. Suppl. 520, 44 N. Y. St. 298;

(iv) *Whether Necessary to Repeat Averment of Corporate Existence in Successive Counts.* Where the declaration, petition, or complaint contains several counts, each stating a separate cause of action, then, according to the rule in some jurisdictions, if proper averments be made in the first count of the petition, showing the corporate existence and powers of parties to the action, they need not be repeated in subsequent counts;[94] while in other jurisdictions the averment must be repeated in each count.[95]

(v) *Declaring Against Corporation Which Has Changed Its Name.* A change of name by a corporation does not change its character or abrogate its contracts;[96] and an action against a corporation by a former name cannot be defeated by showing that it has changed its name without any change of membership.[97] Where, since the making of the contract, or the happening of the event which gives the right of action, the corporation liable to the action has changed its name, plaintiff proceeds against it in its true name and simply declares that defendant by the name of — here inserting its old name — made the contract sued on or did the act complained of; and it is not necessary to explain how its name came to be changed, because the question can only arise on a defensive pleading.[98]

d. Question of Corporate Existence of Plaintiff Must Be Raised by Defendant — (i) *Under All Theories of Pleading.* Under all theories of pleading, whether the declaration or complaint sets out that plaintiff is a corporation or not, the question will never be noticed unless it is distinctly raised by defendant by some defensive pleading.[99]

(ii) *Corporate Character of Plaintiff Admitted by Default.* Therefore the capacity of plaintiff to sue, in the character assumed by it, is always admitted by a default.[1]

(iii) *When Corporate Existence of Plaintiff Presumed After Verdict.* It also follows that if it is not appropriately raised by defendant, the

Oesterreicher *v.* Sporting Times Pub. Co., 5 N. Y. Suppl. 2; Columbia Bank *v.* Jackson, 4 N. Y. Suppl. 433; National Temperance Soc. *v.* Anderson, 2 N. Y. Suppl. 49, 17 N. Y. St. 389; Farmers', etc., Nat. Bank *v.* Rogers, 1 N. Y. Suppl. 757, 17 N. Y. St. 381, 15 N. Y. Civ. Proc. 250; Irving Nat. Bank *v.* Corbett, 10 Abb. N. Cas. (N. Y.) 85; Utica Second Nat. Bank *v.* Wells, 53 How. Pr. (N. Y.) 242.

94. West *v.* Eureka Imp. Co., 40 Minn. 394, 42 N. W. 87; Aull Sav. Bank *v.* Lexington, 74 Mo. 104.

95. People *v.* Central Pac. Co., 83 Cal. 393, 23 Pac. 303.

96. See *supra*, I, C, 6, a.

97. Dean *v.* La Motte Lead Co., 59 Mo. 523; Welfley *v.* Shenandoah Iron, etc., Co., 83 Va. 768, 3 S. E. 376.

98. 6 Thompson Corp. § 7597.

Contrary to the text is an old case to the effect that where in an action it becomes necessary to plead an authority under a corporation, if the pleader describes the corporation by one name and recites that after a period named it was known by another name, it is incumbent upon him to show in what manner the name of the corporation became changed. Adney *v.* Vernon, 3 Lev. 243.

99. *California.*— South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222; Ontario State Bank *v.* Tibbits, 80 Cal. 68, 22 Pac. 66; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886.

Illinois.— Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695 [*affirming* 21 Ill. App. 642].

Missouri.— Kansas City Y. M. C. A. *v.* Dubach, 82 Mo. 475; Bulkley *v.* Big Muddy Iron Co., 77 Mo. 105.

Nebraska.— Exchange Nat. Bank *v.* Capps, 32 Nebr. 242, 49 N. W. 223, 29 Am. St. Rep. 433; Heron *v.* Cole, 25 Nebr. 692; National L. Ins. Co. *v.* Robinson, 8 Nebr. 452, 1 N. W. 124.

North Carolina.— Stanly *v.* Richmond, etc., R. Co., 89 N. C. 331.

South Carolina.— Rembert *v.* South Carolina R. Co., 31 S. C. 309, 9 S. E. 938; Palmetto Lumber Co. *v.* Risley, 25 S. C. 309.

Texas.— Willis *v.* Smith, 17 Tex. Civ. App. 543, 43 S. W. 325, holding that the existence of a corporation need not be proved in the absence of a plea denying its existence.

United States.— Imperial Refining Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503.

See also Bliss Code Pl. (2d ed.) § 408.

1. Phenix Bank *v.* Curtis, 14 Conn. 437, 36 Am. Dec. 492; McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Hubbard *v.* Chappel, 14 Ind. 601; Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372.

existence of plaintiff as a corporation will be presumed after verdict, whether plaintiff's affirmative pleading states that it is a corporation or not.[2]

e. Plea to Merits Admits Corporate Existence. Whether the corporation is the plaintiff or the defendant in the action, if its existence is alleged in the declaration, complaint, or petition, a plea to the merits of the action operates as an admission that it is a corporation. Thus, although there are some early and overruled decisions to the contrary,[3] if the action is brought by a plaintiff, alleging itself to be a corporation, a plea of the general issue at common law admits the corporate existence of plaintiff, and its right to sue in the character which it has assumed;[4] and the same effect is ascribed to the general denial under the codes

2. British American Land Co. *v.* Ames, 6 Metc. (Mass.) 391; Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344; Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539. *Compare* Wolf *v.* Goddard, 9 Watts (Pa.) 544.

3. *Alabama.*— Lucas *v.* Georgia Bank, 2 Stew. 147.

Illinois.— Jones *v.* State Bank, 1 Ill. 124; Hargrave *v.* State Bank, 1 Ill. 122.

Maryland.— Agnew *v.* Gettysburg Bank, 2 Harr. & G. 478.

Michigan.— Smith *v.* Adrian, 1 Mich. 495; Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. 457.

Mississippi.— Carmichael *v.* School Lands Trustees, 3 How. 84.

New Hampshire.— Society for Propagating, etc. *v.* Young, 2 N. H. 310.

New York.— U. S. Bank *v.* Stearns, 15 Wend. 314; New York Fire Dept. *v.* Kip, 10 Wend. 266; Welland Canal Co. *v.* Hathaway, 8 Wend. 480, 24 Am. Dec. 51; Michigan Bank *v.* Williams, 5 Wend. 478 [*affirmed* in 7 Wend. 539]; Wood *v.* Jefferson County Bank, 9 Cow. 194; Vernon Soc. *v.* Hills, 6 Cow. 23, 16 Am. Dec. 429; Utica Bank *v.* Smalley, 2 Cow. 770, 14 Am. Dec. 526; Auburn Bank *v.* Weed, 19 Johns. 300, 303; Bill *v.* Fourth Great Western Turnpike Co., 14 Johns. 416; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459; Jackson *v.* Plumbe, 8 Johns. 378.

North Carolina.— Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306; Tar River Nav. Co. *v.* Neal, 10 N. C. 520.

Ohio.— Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469.

Texas.— Holloway *v.* Memphis, etc., R. Co., 23 Tex. 465, 76 Am. Dec. 68.

Virginia.— Jackson *v.* Marietta Bank, 9 Leigh 240; Taylor *v.* Alexandria Bank, 5 Leigh 471; Rees *v.* Conococheague Bank, 5 Rand. 326, 16 Am. Dec. 755; Grays *v.* Lynchburg, etc., Turnpike Co., 4 Rand. 578.

The rule in England seems to be as held in these earlier American cases. Norris *v.* Staps, Hob. 293; Henriques *v.* West Indies Dutch Co., 2 Ld. Raym. 1532; 1 Kyd Corp. 292. This rule is hence frequently spoken of in the American law-books as the "rule of the common law." See for example Smith *v.* Adrian, 1 Mich. 495; Central Land Co. *v.* Calhoun, 16 W. Va. 361. *Compare* Ætna Ins. Co. *v.* Wires, 28 Vt. 93.

4. *Alabama.*— Prince *v.* Commercial Bank, 1 Ala. 241, 34 Am. Dec. 773.

Arkansas.—Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; Washington *v.* Finley, 10 Ark. 423, 52 Am. Dec. 244; McKiel *v.* Real Estate Bank, 4 Ark. 592.

Connecticut.— Phenix Bank *v.* Curtis, 14 Conn. 437, 36 Am. Dec. 492.

Illinois.— Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695.

Indiana.— Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137; Bartholomew County *v.* Bright, 18 Ind. 93; Carpenter *v.* Mercantile Bank, 17 Ind. 253; Harrison *v.* Martinsville, etc., R. Co., 16 Ind. 505, 79 Am. Dec. 447; Hubbard *v.* Chappel, 14 Ind. 601; Hardy *v.* Merriweather, 14 Ind. 203; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89; Railsback *v.* Liberty, etc., Turnpike Co., 2 Ind. 656.

Kentucky.—Taylor *v.* Illinois Bank, 7 T. B. Mon. 576.

Maine.— Orono *v.* Wedgewood, 44 Me. 49, 69 Am. Dec. 81; Roxbury *v.* Huston, 37 Me. 42; Putnam Free School *v.* Fisher, 30 Me. 523; Savage Mfg. Co. *v.* Armstrong, 17 Me. 34, 35 Am. Dec. 227; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656.

Maryland.— Metropolis Bank *v.* Orme, 3 Gill 443; Whittington *v.* Farmers' Bank, 5 Harr. & J. 548.

Massachusetts.— Monumoi Great Beach *v.* Rogers, 1 Mass. 159. *Compare* Plymouth Christian Soc. *v.* Macomber, 3 Metc. 235.

Michigan.— Lake Superior Bldg. Co. *v.* Thompson, 32 Mich. 293 (under a statute); Smith *v.* Adrian, 1 Mich. 495.

Mississippi.—*Compare* Carmichael *v.* School Lands Trustees, 3 How. 84.

Nebraska.— Swift *v.* Crawford, 34 Nebr. 450, 51 N. W. 1034.

New Hampshire.— Concord *v.* McIntire, 6 N. H. 527. *Compare* Orange School Dist. No. 1 *v.* Blaisdell, 6 N. H. 197.

New York.—Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; People *v.* Ravenswood, etc., Turnpike, etc., Co., 20 Barb. 518. *Compare* Southold *v.* Horton, 6 Hill 501.

Ohio.— Cincinnati M. E. Church *v.* Wood, 5 Ohio 283.

Pennsylvania.—Rheem *v.* Naugatuck Wheel Co., 33 Pa. St. 356; Zion Church *v.* St. Peter's Church, 5 Watts & S. 215. *Compare* Wolf *v.* Goddard, 9 Watts 544.

South Carolina.— Liberian Exodus Joint Stock Steamship Co. *v.* Rodgers, 21 S. C. 27; Commercial Ins., etc., Co. *v.* Turner, 8 S. C. 107.

and practice acts,[5] and to a special plea to the merits.[6] It is substantially another statement of this rule to say that, in an action by a plaintiff declaring itself to be a corporation, the question of its corporate existence can be raised only by a plea in abatement, a plea of *nul tiel corporation*, or other pleading designed to raise that question distinctly, and that a plea to the merits of the action in any form admits the capacity of plaintiff to sue in the name assumed.[7]

f. In What Manner Question of Corporate Existence Raised in Pleading — (1) *In General Not Raised by Demurrer.* It has been elsewhere said, in a state practising under a code, that the question must be raised by demurrer or answer or it will be deemed waived;[8] but as a demurrer has no larger office under the codes than a special demurrer had at common law, it is clear that it cannot be raised by demurrer, unless the declaration, complaint, or petition, affirmatively shows that the party described is not a corporation.[9] Where a body

West Virginia.— Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

United States.— Yeaton *v.* Lynn, 5 Pet. 224, 8 L. ed. 105; Union Cement Co. *v.* Noble, 15 Fed. 502; Dental Vulcanite Co. *v.* Wetherbee, 7 Fed. Cas. No. 3,810, 2 Cliff. 555. *Compare* Society for Propagation, etc., *v.* Pawlet, 4 Pet. 480, 7 L. ed. 927.

5. Herron *v.* Cole, 25 Nebr. 692, 41 N. W. 765; National L. Ins. Co. *v.* Robinson, 8 Nebr. 452, 1 N. W. 124; Rembert *v.* South Carolina R. Co., 31 S. C. 309, 9 S. E. 968; Palmetto Lumber Co. *v.* Risley, 25 S. C. 309; Imperial Refining Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503.

6. Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Central Land Co. *v.* Calhoun, 16 W. Va. 361.

7. *Alabama.*— Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Prince *v.* Commercial Bank, 1 Ala. 241, 34 Am. Dec. 773.

Connecticut.—Litchfield Bank *v.* Church, 29 Conn. 137; West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66; People's Sav. Bank, etc., Assoc. *v.* Collins, 27 Conn. 142; Phenix Bank *v.* Curtis, 14 Conn. 437, 36 Am. Dec. 492.

Illinois.— McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.

Indiana.— Adams Express Co. *v.* Hill, 43 Ind. 157; Cicero Hygiene Draining Co. *v.* Craighead, 28 Ind. 274; Bartholomew County *v.* Bright, 18 Ind. 93; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Hubbard *v.* Chappel, 14 Ind. 601; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89; Railsback *v.* Liberty, etc., Turnpike Co., 2 Ind. 656; Dunning *v.* New Albany, etc., R. Co., 2 Ind. 437; Guaga Iron Co. *v.* Dawson, 4 Blackf. 202.

Kentucky.— Taylor *v.* Illinois Bank, 7 T. B. Mon. 576.

Maine.— Orono *v.* Wedgewood, 44 Me. 49, 69 Am. Dec. 81; Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571; Freeman *v.* Machias Water Power, etc., Co., 38 Me. 343; Putnam Free School *v.* Fisher, 30 Me. 523; Savage Mfg. Co. *v.* Armstrong, 17 Me. 34, 35 Am. Dec. 227; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Dutton Ministerial, etc., Fund *v.* Kendrick, 12 Me. 381.

Maryland.— Whittington *v.* Farmers' Bank, 5 Harr. & J. 489.

Massachusetts.— Sutton First Parish *v.* Cole, 3 Pick. 232; Gilbert *v.* Nantucket Bank, 5 Mass. 97; Kennebeck Purchase *v.* Call, 1 Mass. 483; Monumoi Great Beach *v.* Rogers, 1 Mass. 159.

Mississippi.— Reed *v.* Benton, etc., R., etc., Co., 4 How. 257, under a statute.

Nebraska.— U. S. National L. Ins. Co. *v.* Robinson, 8 Nebr. 452, 1 N. W. 124.

New Hampshire.— Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507; Concord *v.* McIntire, 6 N. H. 527; Orange School Dist. *v.* Blaisdell, 6 N. H. 197.

New Jersey.— Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 105, 35 Am. Dec. 528.

New Mexico.— Butterfield's Overland Dispatch Co. *v.* Wedeles, 1 N. M. 528.

Ohio.— Cincinnati M. E. Church *v.* Wood, 5 Ohio 283.

Vermont.— Stone *v.* East Berkshire Cong. Soc., 14 Vt. 86; Manchester Bank *v.* Allen, 11 Vt. 302; Boston Type, etc., Foundry *v.* Spooner, 5 Vt. 93.

United States.— Society for Propagation, etc. *v.* Pawlet, 4 Pet. 480, 7 L. ed. 927; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. ed. 189; Kenton Furnace R., etc., Co. *v.* McAlpin, 5 Fed. 737; Dental Vulcanite Co. *v.* Wetherbee, 7 Fed. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87.

8. Kansas City Y. M. C. A. *v.* Dubach, 82 Mo. 475.

9. South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222; Exchange Nat. Bank *v.* Capps, 32 Nebr. 242, 49 N. W. 223, 29 Am. St. Rep. 433; Stanly *v.* Richmond, etc., R. Co., 89 N. C. 331; Crane Bros. Mfg. Co. *v.* Reed, 3 Utah 506, 24 Pac. 1056. *Contra*, in Massachusetts, prior to the statute of 1881, c. 113. Goodwin Invalid Bedstead Co. *v.* Darling, 133 Mass. 358 [*citing* Williamsburg City F. Ins. Co. *v.* Frothingham, 122 Mass. 391; Hebron Church Deacons *v.* Smith, 121 Mass. 90 note; Mosler *v.* Potter, 121 Mass. 89; Hungerford Nat. Bank *v.* Van Nostrand, 106 Mass. 559]. It has been held in Missouri that where the incorporation is not by public act, and where the action is not upon a contract made by the defendant with the plaintiff in the name by which it sues, so as to raise an

of persons affect to sue in chancery, in a corporate character, if they have no such title to this character, their want of title may, according to the English chancery practice, be set up by demurrer, provided the objection appear on the face of the bill;[10] for it is the exclusive power of the government to create corporations and invest them with the power of suing by their corporate name.[11] "It is the absolute duty of Courts of Justice," said Lord Eldon, "not to permit persons, not incorporated, to affect to treat themselves as a corporation upon the Record."[12] But at common law, the question of corporate existence cannot be raised by demurrer.[13]

(II) *By Plea in Abatement*—(A) *In General.* At common law, and under some of the modern codes, it is necessary, in order to raise the question, to plead in abatement that the party is not a corporation.[14]

(B) *That Is, by Plea of Nul Tiel Corporation at Common Law.* This plea in abatement is called, in the language of common-law pleading, a plea of *nul tiel corporation*; and this, where that system of pleading prevails, is generally the plea by which such an issue is raised;[15] but as to whether the common-law plea of *nul tiel corporation* is a plea in abatement or in bar, there is a division of opinion, as will be seen hereafter.[16]

(III) *By Verified Plea*—(A) *In General.* It is now provided by statute in several of the states that in actions by a corporation, proof of the corporate existence is put in issue by answer or plea verified by oath.[17]

estoppel, the fact of the incorporation of the plaintiff should be averred, and if a general denial is pleaded should be proved. Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344. So as elsewhere seen (see *supra*, XXII, D, 2, e) it was the early theory in several American jurisdictions, and notably in New York, that under a general denial plaintiff suing as a corporation was required to prove the facts of its incorporation. Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539; Auburn Bank *v.* Weed, 19 Johns. (N. Y.) 300.

10. Lloyd *v.* Loaring, 6 Ves. Jr. 773.

11. Story Eq. Pl. §§ 496, 497.

12. Lloyd *v.* Loaring, 6 Ves. Jr. 773.

13. Lighte *v.* Everett F. Ins. Co., 5 Bosw. (N. Y.) 716; Union Mut. Ins. Co. *v.* Osgood, 1 Duer (N. Y.) 707. But see Waterville Bank *v.* Beltser, 13 How. Pr. (N. Y.) 270.

14. Ontario State Bank *v.* Tibbits, 80 Cal. 68, 22 Pac. 66; Imperial Refining Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503. As to the statutory rule in New York requiring the question of the incorporation of a plaintiff to be raised by plea in abatement or in bar see Concordia Sav., etc., Assoc. *v.* Read, 93 N. Y. 474; Stone *v.* Western Transp. Co., 38 N. Y. 240; Union M. E. Church *v.* Pickett, 19 N. Y. 482; Eaton *v.* Aspinwall, 19 N. Y. 119; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Bengston *v.* Thingvalla Steamship Co., 31 Hun (N. Y.) 96; Stoddard *v.* Onondaga Annual Conference, 12 Barb. (N. Y.) 573; Union Mut. Ins. Co. *v.* Osgood, 1 Duer (N. Y.) 707; East River Electric Light Co. *v.* Clark, 18 N. Y. Suppl. 463, 45 N. Y. St. 645; Waterville Bank *v.* Beltser, 13 How. Pr. (N. Y.) 270; McFarlan *v.* Triton Ins. Co., 4 Den. (N. Y.) 392; Southbold *v.* Horton, 6 Hill (N. Y.) 501. See also Leader Printing Co. *v.* Lowry, 9 Okla. 89, 59 Pac. 242, should be raised by a special plea in the nature of a plea in abatement.

15. *Arkansas.*—Gaines *v.* Mississippi Bank, 12 Ark. 769.

Connecticut.—Phenix Bank *v.* Curtis, 14 Conn. 437, 36 Am. Dec. 492.

Illinois.—Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695 [*affirming* 21 Ill. App. 642]; Hoereth *v.* Franklin Mill Co., 30 Ill. 151; McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.

Indiana.—Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Hubbard *v.* Chappel, 14 Ind. 601; Morgan *v.* Lawrenceburgh Ins. Co., 3 Ind. 285; Harris *v.* Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372; Gauga Iron Co. *v.* Dawson, 4 Blackf. 202.

New York.—Auburn Bank *v.* Aikin, 18 Johns. 137.

England.—Stafford *v.* Bolton, 1 B. & P. 40; Mellor *v.* Spateman, 1 Saund. 339, note 2.

In one jurisdiction where practice is conducted under a code of procedure, if plaintiff, suing in a name which *prima facie* imports a corporation, is in fact not assuming to act as a corporation, but only as a partnership, this fact may be raised by answer alleging want of parties in interest to the suit. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430. See also Brown *v.* Killian, 11 Ind. 449.

16. See *infra*, XXII, D, 2, f, (V), (A).

17. The author does not assume to state the language of particular statutes, but merely their substance. See Ala. Acts (1888–1889), p. 57 (applied in Rosenberg *v.* H. B. Claflin Co., 95 Ala. 249, 10 So. 521); Mo. Act, March 15, 1883 (applied in White *v.* Bellefontaine Lodge I. O. O. F., 30 Mo. App. 682); N. Y. Code Civ. Proc. § 1776; Wis. Code, § 4199 (applied in Michigan Ins. Bank *v.* Eldred, 130 U. S. 693, 9 S. Ct. 690, 32 L. ed. 1080).

(B) *Denial on Information and Belief Not Sufficient.* Under such a statute a denial upon information and belief is not sufficient.[18]

(C) *Same Rule in Case of Actions by Foreign Corporations.* Such a statute applies in actions brought by foreign corporations.[19]

(IV) *By Special Demand For Proof of Incorporation.* Under other statutes the existence of plaintiff corporation stands admitted, unless defendant, within a specified time prior to the filing of his answer, makes a special demand for proof of the fact.[20]

(V) *By Plea of Nul Tiel Corporation at Common Law*—(A) *Whether This Is Plea in Abatement or in Bar.* In jurisdictions where the common-law system of pleading prevails, it has been a controverted question whether the plea of *nul tiel corporation* is to be treated as a plea in abatement or as a plea in bar of the action. The general opinion seems to be that it is a plea in bar,[21] although some of the courts take the view that a plea that there is no such corporation in existence is substantially matter of abatement only, and cannot be relied upon in bar of the action.[22] Moreover where such a plea is regarded as a plea in abatement it must, under most systems of pleading, precede the answer to the merits.[23]

(B) *Plea of Nul Tiel Corporation Raises Only Question of Existence De Facto of Corporation.* Upon the trial of the issue of fact raised by such an

18. Iowa Sav., etc., Assoc. *v.* Selby, 111 Iowa 402, 82 N. W. 968 (denial of want of information with reference to corporate capacity of plaintiff not sufficient to put plaintiff to its proof); Rock Island First Nat. Bank *v.* Loyhed, 28 Minn. 396, 10 N. W. 421 (under a statute); Concordia Sav., etc., Assoc. *v.* Read, 93 N. Y. 474; Taendstickfabriks Aktiebolaget Vulcan *v.* Meyers, 58 Hun (N. Y.) 161, 11 N. Y. Suppl. 663, 34 N. Y. St. 122; Bengston *v.* Thingvalla Steamship Co., 31 Hun (N. Y.) 96; East River Bank *v.* Rogers, 7 Bosw. (N. Y.) 493; Deutz Lithographing Co. *v.* International Registry Co., 32 Misc. (N. Y.) 687, 66 N. Y. Suppl. 540 (under N. Y. Code Civ. Proc. § 1776); East River Electric Light Co. *v.* Clark, 18 N. Y. Suppl. 463, 45 N. Y. St. 645; Law Guaranty, etc., Soc. *v.* Hogue, 37 Oreg. 544, 62 Pac. 380, 63 Pac. 690 (averment that defendant has no knowledge or information sufficient to form a belief whether the plaintiff is a corporation, not sufficient). Accordingly an answer stating that "the defendant has no information sufficient to form a belief," concerning plaintiff's allegation that it is a corporation, "and therefore denies the same," is insufficient under such a statute. Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

In Indiana there is this distinction, that whereas a general denial unverified by oath will not put plaintiff to the proof of its corporate existence (Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137), yet the contrary will be held where the general denial is verified by oath (Indianapolis Furnace, etc., Co. *v.* Herkimer, 46 Ind. 142; Chance *v.* Indianapolis, etc., Gravel Road Co., 32 Ind. 472).

19. Williams Mower, etc., Co. *v.* Smith, 33 Wis. 530.

20. Goodwin Invalid Bedstead Co. *v.* Darling, 133 Mass. 358; Mass. Stat. (1881), c. 113.

21. *Arkansas.*— Mahony *v.* State Bank, 4 Ark. 620.

Illinois.— Hoereth *v.* Franklin Mill Co., 30 Ill. 151; Marsh *v.* Astoria Lodge No. 12, I. O. O. F., 27 Ill. 421; Lewiston *v.* Proctor, 27 Ill. 414.

Massachusetts.— Plymouth Christian Soc. *v.* Macomber, 3 Metc. 235.

New Hampshire.— Sunapee *v.* Eastman, 32 N. H. 470; Lisbon School Dist. No. 3 *v.* Aldrich, 13 N. H. 139; Orange School Dist. No. 1 *v.* Blaisdell, 6 N. H. 197.

Oregon.—Law Guaranty, etc., Soc. *v.* Hogue, 37 Oreg. 544, 62 Pac. 380, 63 Pac. 690.

Pennsylvania.— Northumberland County Bank *v.* Eyer, 60 Pa. St. 436.

See also Bacon Abr. tit. Abatement.

22. Jones *v.* Tennessee Bank, 8 B. Mon. (Ky.) 122, 46 Am. Dec. 540; Woodson *v.* Gallipolis Bank, 4 B. Mon. (Ky.) 203.

23. New York City Phenix Bank *v.* Curtis, 14 Conn. 437, 36 Am. Dec. 492; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89. In Missouri, and no doubt under some other codes, all matters of defense, whether in abatement or in bar, are pleadable in one answer.

There was, under the principles of common-law pleading, another distinction, which was extremely technical. It was that whereas, under the general issue, plaintiff was bound to prove, in the first instance, that it was a corporation, therefore a special plea setting up negatively that it was not a corporation was bad on special demurrer as amounting to the general issue. Auburn Bank *v.* Weed, 19 Johns. (N. Y.) 300. See also Carmichael *v.* School Trustees, 3 How. (Miss.) 84; Farmers', etc., Bank *v.* Rayner, 2 Hall (N. Y.) 194; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194. But this principle would have no application, and a special plea of *nul tiel corporation* would be open to no such objection, in those jurisdictions where the modern doctrine obtains, that the question of the corporate existence of plaintiff cannot be raised upon the general issue. Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Prince *v.* Commercial Bank, 1 Ala. 241, 34 Am. Dec. 773; McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Wert *v.* Crawfordsville,

answer and a reply thereto, it is said that the evidence is limited to the question of the existence *de facto* of a corporation, under an authority sanctioning such a corporation *de jure*. In other words mere irregularities in organization cannot be shown collaterally, where there is no defect of power.[24] But this, on a principle already considered,[25] is restrained to cases where under the law such a corporation might exist.[26]

(c) *Nul Tiel Corporation How Pleaded.* In an action by a plaintiff, alleging itself to be a corporation, a plea that at the time the suit was commenced there was no such corporation in existence as plaintiff has been held substantially good.[27]

etc., Turnpike Co., 19 Ind. 242; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Hubbard *v.* Chappel, 14 Ind. 601; Jones *v.* Cincinnati Type Foundry, 14 Ind. 89; Morgan *v.* Lawrenceburgh Ins. Co., 3 Ind. 285; Guaga Iron Co. *v.* Dawson, 4 Blackf. (Ind.) 202; Manchester Bank *v.* Allen, 11 Vt. 302; Boston, etc., Foundry *v.* Spooner, 5 Vt. 93. If therefore in any case plaintiff would not be bound to prove its incorporation, the plea of *nul tiel corporation* would raise the issue. But if the nature of the action was such — as where plaintiff sued upon a promise made upon condition of its becoming a corporation — that it was bound, in order to state and prove a case for a recovery, to allege and prove that it was a corporation, then it was held that the plea of *nul tiel corporation* amounted to a general denial, and if pleaded with an answer of general denial might be stricken out on motion. Wert *v.* Crawfordsville, etc., Turnpike Co., 19 Ind. 242.

In Massachusetts the party who intends to avail himself of this circumstance must give notice of his intention to do so, in a specification of defense. Townsend *v.* Lowell First Freeville Baptist Church, 6 Cush. (Mass.) 279. Accordingly, in an action by a corporation, defendant may plead the general issue, giving notice at the same time that he shall deny that plaintiff is a corporation, in which case plaintiff is bound to prove its corporate existence. Newburyport First Universalist Soc. *v.* Currier, 3 Metc. (Mass.) 417; Plymouth Christian Soc. *v.* Macomber, 3 Metc. (Mass.) 235.

In Arkansas it was held in several early cases that in the case of a public corporation created under a public law, of which the courts take judicial notice, a plea of *nul tiel corporation* will be bad on demurrer; since the court will look to the statute, and from it determine the question of the existence of the corporation. Conway *v.* State Bank, 13 Ark. 48 (where the plea was stricken out for the same reason); Pickett *v.* Real Estate Bank, 8 Ark. 224; Murphey *v.* State Bank, 7 Ark. 57; Mahoney *v.* State Bank, 4 Ark. 620; McKiel *v.* Real Estate Bank, 4 Ark. 592. But these holdings were clearly unsound since in the case of private corporations it requires something more than an enabling act to create a corporation, but the charter must have been accepted. See *supra*, I, J, 7, a. And it is upon this principle that the ordinary mode of proving the existence of a corporation is to prove a charter and user thereunder. See *supra*, I, M, 3. These decisions were accordingly evasively overruled in a case where the court saw the true principle. Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204, 207. "If, however," said English, J., "the statute does not *ipso facto* create the corporation *eo instanti*, but prescribes something to be done after its passage, as a condition precedent to the legal existence of the corporation, we suppose the plea would be good, and the plaintiff would have to reply to it, and prove that the thing was done, which the statute required to be done as a condition precedent to the coming into existence of the corporation."

24. Williams *v.* Franklin Tp. Academical Assoc., 26 Ind. 310; Gillespie *v.* Ft. Wayne, etc., R. Co., 17 Ind. 243; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Harriman *v.* Southam, 16 Ind. 190; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Ewing *v.* Robeson, 15 Ind. 26; Brown *v.* Killian, 11 Ind. 449; Toledo Bank *v.* International Bank, 21 N. Y. 542.

25. See *supra*, I, O, 2, d.

26. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 279, 79 Am. Dec. 430. When therefore it was alleged in an answer in the nature of a plea of *nul tiel corporation* that the articles by which the corporation was organized were filed before the law authorizing its organization was in force, it was held that such allegations were properly stricken out, since they would be bad on demurrer, as the court judicially knew that the General Railroad Law was in force at the time when the corporation was formed. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430. In State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405, it was held that courts will take judicial notice of the time when the statute took effect and will decide the question as a question of law.

27. Morgan *v.* Lawrenceburgh Ins. Co., 3 Ind. 285. That an answer pleading *nul tiel corporation* may be stricken out as a sham on plaintiffs producing evidence of their incorporation and defendant showing nothing to the contrary see Philadelphia Commonwealth Bank *v.* Pryor, 11 Abb. Pr. N. S. (N. Y.) 227. Where the complaint described plaintiffs as the "St. Louis Bagging & Rope Company," and nothing more, it was held that a plea of *nul tiel corporation* might be stricken out as irrelevant, because it did not appear from the complaint that plaintiff sued as a corporation. Ware *v.* St. Louis Bagging, etc., Co., 47 Ala. 667.

A plea stating that plaintiff "is not a corporation duly authorized by law to maintain this suit" was held, although brief, to contain all that is of substance in the plea of *nul tiel corporation*.[28] Where a corporation, once legally existing, is alleged to have ceased so to exist, it is necessary that the pleading should show and set forth particularly the manner in which the corporate powers have ceased.[29]

(D) *Further as to Particularity of Averment in Raising Question of Corporate Existence* — (1) IN GENERAL. Where the alleged corporation is plaintiff in the action, the denial of its corporate existence must be made in positive terms or by a direct negative averment.[30]

(2) NOT A CORPORATION AUTHORIZED TO MAINTAIN THE ACTION. On the other hand, in an action by a corporation, a plea that plaintiff is not a corporation authorized to maintain the action is a defense to the whole action and devolves on plaintiff the burden of proving its corporate existence.[31]

(3) PARTICULARITY OF STATEMENT WHERE DEFENDANT PLEADS CORPORATE EXISTENCE. It seems that where a defendant pleads the existence of a corpora-

28. Johnson *v.* Hanover Nat. Bank, 88 Ala. 271, 6 So. 909.

29. Sutherland *v.* Lagro, etc., Co., 19 Ind. 192. *Compare* Underhill *v.* Bank, 6 Ark. 135. If we advert to the rule of pleading that it is not necessary for plaintiff, suing in a name which imports its corporate existence, formally to allege that it is a corporation (see *supra*, XXII, D, 2, a, (II)), then it would seem to be immaterial whether the issue is raised by such a formal allegation, and is traversed by a special plea, or whether it is raised by a special plea and replication, in the absence of such a formal allegation. Thus, under the Massachusetts practice, in an action against persons sued in a corporate name, if their incorporation is not alleged as a fact in the declaration, or if, being alleged, it is denied in the answer, plaintiff is bound to prove it affirmatively on the trial, if then controverted by defendants. Gott *v.* Adams Express Co., 100 Mass. 320.

30. Accordingly a verified plea which (omitting the formal parts) recites that "the defendant says the plaintiff is a corporation, not incorporated under the laws of the State of Indiana, but is incorporated and organized under the laws of the State of New York; and that, at the commencement of this action the plaintiff had not complied with the provisions of an act of the General Assembly of the State of Indiana, entitled 'An act respecting Foreign Corporations and their agents in this State,' approved June 15, 1852," is not a good plea in abatement, raising the question of the right of plaintiff to maintain a suit in the domestic jurisdiction; because it states merely a conclusion, and not a fact. Singer Mfg. Co. *v.* Effinger, 79 Ind. 264, 265. Similarly an information in the nature of quo warranto, against a corporation, alleging that it did not file a copy of its articles of association with the recorder of the county in which it was pretending to exercise the functions of a corporation is not a reasonably certain averment that the articles were not filed in the recorder's office. State *v.* Bethlehem, etc., Gravel Road Co., 32 Ind. 357; Stork *v.* Supreme Lodge K. of P., 113 Iowa 724, 84 N. W. 721 (statement insufficient to show that plaintiff was a fraternal society and not a life-insurance company as alleged — decision under a statute). A denial that plaintiff "is a corporation duly organized as a national bank under the act of Congress of June 3, 1864, or any other act" does not put in issue plaintiff's corporate existence. Plattsmouth First Nat. Bank *v.* Gibson, 60 Nebr. 767, 84 N. W. 259. A denial that plaintiff is a corporation organized and existing "under and by virtue of the laws of the State of Illinois" does not raise an issue, since it is pregnant with the admission that plaintiff is nevertheless a corporation. McCormick Harvesting Mach. Co. *v.* Hovey, 36 Oreg. 259, 59 Pac. 189.

31. Johnson *v.* Hanover Nat. Bank, 88 Ala. 271, 6 So. 909. Under a statute (Cal. Civ. Code, § 299), requiring corporations to file a copy of their articles of incorporation in the county where their property is situated, and providing that until this is done they "shall not maintain or defend any action or proceeding in relation to such property," the failure so to file a copy of the articles must be specifically set up in the answer, in order to state a defense under the statute, and is not well pleaded by an answer which merely denies the existence of the corporation. Ontario State Bank *v.* Tibbits, 80 Cal. 68, 22 Pac. 66; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886. That a want of compliance with the statute cannot be specially pleaded see further Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Phillips *v.* Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 45.

That an allegation of incorporation is "new matter" within the meaning of a stipulation of New York see Becht *v.* Harris, 4 Minn. 504.

That the abbreviation, "C. B. & Q. R. R. Co.," was not a sufficient description of a party in a petition to take depositions was held in Accola *v.* Chicago, etc., R. Co., 70 Iowa 185, 30 N. W. 503, although the most ignorant man in Iowa undoubtedly knows that the abbreviation, which is in constant use, means the Chicago, Burlington & Quincy Railroad Company.

tion by way of inducement or otherwise, it is not necessary for him to plead it more specifically than where a plaintiff pleads it, but that he may make the allegation in general language.[32]

(VI) *Particularity in Replication to Plea of Nul Tiel Corporation.* Under the old practice, where plaintiff replied to a plea of *nul tiel corporation*, it was necessary for him to plead with more accuracy than in stating the fact of corporate existence in his original declaration. For instance it has been held that a replication to a plea alleging that there is no such corporation as plaintiff must set forth specially how plaintiffs are a corporation, if their incorporating act requires certain things to be done before they can become such.[33] And where, under the Revised Statutes of New York,[34] he pleaded the title of the incorporating act, it was necessary to state it with entire accuracy, and a variance between the statement and the title of the act as it really was, was ground of demurrer if the act was a public statute[35] so that the court could notice it judicially. This will impress the modern practitioner as senseless technicality; since it is not necessary to plead a public statute at all, because the court will notice it judicially.

(VII) *Burden of Proof Under Plea of Nul Tiel Corporation Plaintiff.* Where the declaration or other affirmative pleading substantially alleges that plaintiff is a corporation, and a plea of *nul tiel corporation* is interposed by defendant, this plea operates as a special traverse of the averment that plaintiff is a corporation, and puts upon plaintiff the burden of proving that fact.[36]

(VIII) *Plea of Nul Tiel Corporation Defendant*—(A) *In General.* It has been held to be an insuperable inconsistency to allow a party sued as a corporation to appear by attorney, as a corporation must if it appear at all, and defend the action on the ground that it is not a corporation.[37] But it is believed that it

32. Manby *v.* Long, 3 Lev. 107. This is especially true where the rule of the forum does not require it to be pleaded at all, in a case where the name used imports that the party is a corporation. Johnson *v.* Gibson, 78 Ind. 282.

33. Auburn Bank *v.* Aikin, 18 Johns. (N. Y.) 137.

34. Permitting an act of incorporation to be pleaded by its title and date of passage. 2 N. Y. Rev. Stat. p. 459, § 13.

35. Union Bank *v.* Dewey, 1 Sandf. (N. Y.) 509.

36. Johnson *v.* Hanover Nat. Bank, 88 Ala. 271, 6 So. 909; Savage *v.* Russell, 84 Ala. 103, 4 So. 235; Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Ramsey *v.* Peoria Mar. Ins. Co., 55 Ill. 311; Stone *v.* Great Western Oil Co., 41 Ill. 85; Lewiston *v.* Proctor, 27 Ill. 414; Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276; Indianapolis Furnace, etc., Co. *v.* Herkimer, 46 Ind. 142; Saltsman *v.* Schultz, 14 Hun (N. Y.) 256; Hallett *v.* Harrower, 33 Barb. (N. Y.) 537. The rule is the same in the proceedings in the district courts of the United States in admiralty; so that a libellant suing as a corporation has the burden of proving its organization, where its corporate existence is put in issue by the answer. The Guy C. Goss, 53 Fed. 839. So where plaintiffs sue as a corporation, in Massachusetts, and defendant, on pleading the general issue, gives notice, conformably to a rule of court, that he will deny their corporate existence, they must prove it, or they cannot maintain their action. Newburyport First Universalist Soc. *v.* Currier, 3 Metc. (Mass.) 417. Circumstances under which the onus of disproving the articles of incorporation are upon those who signed them. Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36.

37. Thus in Oxford Iron Co. *v.* Spradley, 46 Ala. 98, 107, it is said, in the opinion of the court by Peck, C. J.: "The plea of *nul tiel corporation*, where a defendant is sued as a corporation aggregate, is an inappropriate plea, and an inconsistency in itself. We find no precedent for such a plea in such a case, nor any case in which it has been pleaded. The appointment of an attorney, and an appearance by him for the defendant, is an admission on the record that the defendant is a corporation." So in Colorado it is held that a defendant, impleaded as a corporation, cannot deny its existence, either in abatement or in bar; because if it is not a corporation it cannot as such appear and plead. Western Union Tel. Co. *v.* Eyser, 2 Colo. 141. Upon the same principle it has been held that an information against a body in its corporate name, charging that it has not been legally organized, and pointing out certain supposed defects in its organization, and praying for its dissolution, is bad, by reason of not having been brought against the persons claiming to be the corporation, the court reasoning that if a body is brought into court by a corporate name its corporate existence is thereby admitted. Mud Creek Draining Co. *v.* State, 43 Ind. 236. See also *supra*, XXII, D, 1, e, (I). *Compare* Stoddard *v.* Onondaga Annual Conference, 12 Barb. (N. Y.) 573; Curtis *v.* Central R. Co., 6 Fed. Cas. No. 3,501, 6 McLean 401.

will not do to say that where a defendant is impleaded as a corporation, which is not such, no one can appear for the real parties in interest and show the real fact.[38] Indeed the same court that put forth the proposition that a defendant sued as a corporation could not plead *nul tiel corporation* added in a subsequent case the following qualification: "The substance of such a plea seems necessary or permissible only in cases of misnomer or dissolution, and in the form and manner required in the case of a person."[39]

(B) *How Pleaded.* The plea of *nul tiel corporation* defendant should not only deny in positive terms that defendant is a corporation, but it should state what defendant is or who the defendants are. In other words in the technical language of common-law pleading it should "give the plaintiff a better writ."[40]

(IX) *Stage of Proceeding at Which Nul Tiel Corporation Pleadable.* The rule already stated[41] that the right to contest the existence of plaintiff as a corporation is waived by pleading to the merits yields to statutory rules of pleading in particular jurisdictions.[42]

38. See the strong reasoning upon this question of Hammond, J., in Kelley *v.* Mississippi Cent. R. Co., 1 Fed. 564, 569, 2 Flipp. 581.

39. McCullough *v.* Talladega Ins. Co., 46 Ala. 376, 377. In Massachusetts, in an action against a corporation, after the entry of a general appearance on the docket, and the filing by the corporation of an affidavit of merits, or, in the language of the statute (Mass. Laws (1852), c. 312), that the party "verily believes that the defendants have a substantial defense to the action on its merits," it is competent for defendants in their answer to deny that they are a legal corporation. Gott *v.* Adams Express Co., 100 Mass. 320; Greenwood *v.* Lake Shore R. Co., 10 Gray (Mass.) 373.

40. Freeman *v.* Machias Water Power, etc., Co., 38 Me. 343. When certain defendants, sued as a corporation, appear and plead in abatement that they "together with others" are doing business under a corporate name — that of defendant to the suit — but deny that the company is now or ever has been a corporation, this plea may be successfully attacked by a demurrer. It is defective in that it does not give plaintiff a better writ (1 Chitty Pl. (6th ed.) 481). The plea should be set forth who were the "others" with whom the persons answering are doing business in the corporate name of defendant, to the end that plaintiff may know against whom to bring his suit, if the plea should be sustained. American Express Co. *v.* Haggard, 37 Ill. 465, 87 Am. Dec. 257. Where a defendant was sued as a corporation, which was in fact a limited partnership, a denial in its answer "that defendant is or ever was a corporation, organized and existing under the laws of England" was held a negative pregnant, pregnant with the admission that defendant was a corporation, and it consequently raised no issue. Wright *v.* Fire Ins. Co., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211. Where a defendant, sued as a corporation, answered, denying that "it is or ever has been a corporation, either public or private, and duly organized, chartered, or existing under the laws of the State of Pennsylvania, or under the laws of any other State or government, for the purpose of carrying on the business of common carrier in goods and merchandise, or otherwise," it was held that this pleading was sufficiently specific under a statute (Iowa Code, § 2717) providing that where defendant is sued as a corporation, "it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated." Folsom *v.* Star Union Line Fast Freight Line, 54 Iowa 490, 6 N. W. 702.

41. See *supra*, XXII, D, 2, e.

42. Thus in Missouri defendant may set up in a single answer as many defenses as he may have, and matter in abatement may be pleaded with matter in bar in different paragraphs of the same answer. Cohn *v.* Lehman, 93 Mo. 574, 6 S. W. 267; McIntire *v.* Calhoun, 27 Mo. App. 513. So in Massachusetts even where defendants are sued in the character of a corporation they may deny that they are a corporation, after they have appeared generally and filed an affidavit of merits. The entry of a general appearance is regarded as a waiver of all objections grounded on the want of a proper service of the writ upon the defendants, but not as affecting the merits; and the question of the defendant being a corporation is consequently regarded as a question affecting the merits. Greenwood *v.* Lake Shore R. Co., 10 Gray (Mass.) 373. In Vermont, in an action of book-account against a corporation, if defendant would deny its corporate existence, the question must be raised by plea before judgment to account is rendered. Hunneman *v.* Fire Dist. No. 1, 37 Vt. 40. That the estoppel raised against a defendant to deny the existence of the corporation plaintiff, by reason of filing an answer admitting the contract sued on, but denying the corporate character of the plaintiff, is waived by the failure of plaintiff to demur to the answer, see Law Guarantee, etc., Soc. *v.* Hogue, 37 Oreg. 544, 62 Pac. 380, 63 Pac. 690. The execution and delivery of a lease to a corporation as such, being *prima facie* evidence of the existence, no proof in answer to plea of *nul tiel corporation* in an action for the rent is necessary until such evi-

(x) *Manner of Putting in Issue Corporate Existence in Actions Before Justices of the Peace.* In actions before justices of the peace, where formality of pleading is not required even on the part of plaintiff, and where defensive pleadings may be made *ore tenus*, the existence of a corporation may be put in issue by defendant, without a denial under oath, and even without a written denial of any kind;[43] and on an appeal to a higher jurisdiction, where the trial is *de novo*, each party proceeds without filing new or more formal pleadings. In some jurisdictions this rule is varied so that on an appeal to a higher court for the purpose of a trial *de novo*, in the absence of anything to the contrary, defendant is presumed to have pleaded the general issue.[44] This plea goes to the merits, and as already seen, where plaintiff sues as a corporation, it admits its corporate capacity and its ability to sue as an artificial body.[45] It is therefore deemed immaterial in such an action, whether plaintiff was in fact a corporation or a mere voluntary association acting under the name which it assumed; and so where a plaintiff calling itself The Farmers and Drovers' Bank sued upon a note which had been transferred to it by the payee, the suit having been commenced before a justice of the peace, it was held unnecessary, upon an appeal to the circuit court, to prove that plaintiff was a corporation.[46]

(xi) *Manner of Pleading Dissolution of Corporation.* That the corporation has ceased to exist or was not a corporation at the commencement of a suit upon a contract may be pleaded in abatement, but not in bar of a recovery.[47] Where an answer denies the existence, at the commencement of the action, of a corporation which is shown to have once existed, the answer should according to one theory particularly set forth the manner in which the corporate powers ceased.[48] It must according to this theory show that the corporation has expired by limitation, or that it has been terminated by a competent legal proceeding. Merely to allege facts which would warrant an adjudication of forfeiture is not enough, since the right of the corporation to exist cannot be tried collaterally.[49] But the prevailing theory seems to be that a general averment of dissolution is enough.[50]

g. Amendments in Case of Failure to Plead Corporate Existence. In an action by[51] or against[52] a party described by an artificial name, it is always proper, if deemed necessary, to allow the plaintiff to amend his writ, declaration, or complaint, so as to allege the fact of corporate existence. And the rule is of course the same where the corporation is not sufficiently described so as to identify it from some other corporation, but in such a case an amendment cannot be made

dence is rebutted. West Side Auction House Co. *v.* Connecticut Mut. L. Ins. Co., 186 Ill. 156, 57 N. E. 839 [*affirming* 85 Ill. App. 497].

43. Stanley *v.* Farmers' Bank, 17 Kan. 592.

44. Reed *v.* Snodgrass, 55 Mo. 180.

45. See *supra*, XXII, D, 2, e.

46. Kansas City Y. M. C. A. *v.* Dubach, 82 Mo. 475, 480; Farmers', etc., Bank *v.* Williamson, 61 Mo. 259. In New Jersey the rule is similar. Defendant must take an exception in the justice's court to the failure of plaintiff to prove its corporate existence, or the right to make an objection is waived, and it cannot be interposed for the first time on appeal. State *v.* New York, etc., Telephone Co., 49 N. J. L. 322, 8 Atl. 290. See also Johnston Harvester Co. *v.* Clark, 30 Minn. 308, 15 N. W. 252.

47. Meikel *v.* German Sav. Fund Soc., 16 Ind. 181; Dental Vulcanite Co. *v.* Wetherbee, 7 Fed. Cas. No. 3,810, 2 Cliff. 555.

48. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430, where the court say: "A faulty answer in this respect was erroneously held good in Morgan *v.* Lawrenceburgh Ins. Co., 3 Ind. 285."

49. Hartsville University *v.* Hamilton, 34 Ind. 506.

50. Perry *v.* Turner, 55 Mo. 418; Poughkeepsie Bank *v.* Ibbotson, 24 Wend. (N. Y.) 473. It has been ruled that where the receiver of a railroad corporation is served with process in an action proceeding on a right of action against the corporation, he may plead in abatement, in his own name, that the corporation is extinct, or he may make the defense by motion to dismiss the suit, or by a suggestion of his attorney on the record, supported by affidavits showing the facts. Kelley *v.* Mississippi, etc., R. Co., 1 Fed. 564, 2 Flipp. 581.

51. Wilson *v.* Sprague Mowing Mach. Co., 55 Ga. 672.

52. Alabama Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79.

substituting the other corporation, because this would amend an action against one party so as to make it an action against another party, which cannot be done; but a new action must be commenced against the right party, founded upon new process.[53]

h. Defense That Plaintiff Corporation Was Organized For Unlawful Purposes. It seems pretty clear that it will not be a good defense to an action brought by a corporation, although organized under the laws of another state, that the corporation was organized primarily for an unlawful purpose, that is to say, during the late Civil war, for the purpose of running the blockade in aid of the rebellion, unless the purpose of the action is in aid of the unlawful purpose for which the corporation was organized.[54]

CORPORATION SOLE. A corporation consisting of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which as an individual person he could not have.[1]

CORPORATOR. A member of a corporation;[2] a member of a corporation aggregate;[3] one of the stockholders or constituents of the body corporate;[4] an organizer or first stockholder of a corporation.[5] (See, generally, CORPORATIONS.)

CORPOREAL. Things which may be seen and touched;[6] material.[7] (Corporeal: Hereditaments, see ESTATES; PROPERTY.)

53. Little *v.* Virginia, etc., Water Co., 9 Nev. 317.

54. Importing, etc., Co. *v.* Locke, 50 Ala. 332.

1. 1 Bl. Comm. 469 [*quoted* in Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122, 125]; 2 Kent Comm. 273 [*quoted* in Havana Bank *v.* Wickham, 7 Abb. Pr. (N. Y.) 134, 138].

Instances of sole corporations.— The sovereign of England. Burrill L. Dict. A bishop, dean, parson, and vicar. Havana Bank *v.* Wickham, 7 Abb. Pr. (N. Y.) 134, 138 [*quoting* 2 Kent Comm. 273]. A minister of a town or parish, seised of lands in right of the town or parish, as parsonage lands, etc., is for that purpose a sole corporation, and holds the same to him and his successors. Brunswick First Parish *v.* Dunning, 7 Mass. 445, 447. And see Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122, 125, where it is said: "We are not aware, that there is any instance of a sole corporation, in this Commonwealth, except that of a person, who may be seised of parsonage lands, to hold to him and his successors, in the same office, in right of his parish."

The term will include an individual banker, conducting business under authority of a statute. Havana Bank *v.* Wickham, 7 Abb. Pr. (N. Y.) 134, 138.

Almost obsolete in law.—"There are very few points of corporation law applicable to a corporation sole." 2 Kent Comm. 273 [*quoted* in Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122, 125].

Distinguished from corporation aggregate. —"The distinction established by law, between a sole and an aggregate corporation, . . . is, that a corporation aggregate has a perpetual existence without change, so that an estate once vested in it, continues vested without interruption Whereas, when a bishop or parson, holding estate as a sole corporation, dies, or resigns his office, the fee is in abeyance, until a successor is appointed. From this flows one necessary, but obvious legal consequence, which is, that a grant to an aggregate corporation, carries a fee, without the word 'successors'; but a grant to a corporation sole, without including successors, carries a life estate only to the actual incumbent, who is the first taker." Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122, 126.

2. Gulliver *v.* Roelle, 100 Ill. 141, 147 (where it is said: "And all know that to be a member of a stock company a person must be a shareholder, or to be a member of a mutual company, a policyholder"); *In re* Atlantic Mut. L. Ins. Co., 2 Fed. Cas. No. 628, 9 Ben. 270; Bouvier L. Dict.; Webster Dict. [*quoted* in *In re* Lady Bryan Min. Co., 14 Fed. Cas. No. 7,978, 2 Abb. 527, 1 Sawy. 349].

3. Sweet L. Dict.

4. *In re* Atlantic Mut. L. Ins. Co., 2 Fed. Cas. No. 628, 9 Ben. 270.

5. English L. Dict.

6. Either movable or immovable. Sullivan *v.* Richardson, 33 Fla. 1, 116, 14 So. 692.

7. Burrill L. Dict. [*citing* Coke Litt. 9*a*].

Distinguished from "corporal."— "Corporeal" means "possessing a body," that is, tangible, physical, material; "corporal" means "relating to or affecting a body," that is, bodily external. "Corporeal" denotes the nature or physical existence of a body; "corporal" denotes its exterior or the coördination of it with some other body. Hence we speak of "corporeal hereditaments," but of "corporal punishment," "corporal touch," "corporal oath," etc. Black L. Dict.

Distinguished from incorporeal.—In Roman law, the distinction between things corporeal and incorporeal rested upon the sense of touch; tangible objects only were considered corporeal. In modern law, all things which

CORPSE. The dead body of a human being.[8] (Corpse: Possession and Disposition of, see DEAD BODIES. Right of Burial in Cemetery, see CEMETERIES.)

CORPUS. A body; a human body; an artificial body created by law, as a corporation; a body or collection of laws; a material substance; something visible and tangible, as the subject of a right;[9] something having local position, as distinguished from an incorporeal right;[10] physical substance, as distinguished from intellectual conception;[11] the body of an estate,[12] or the capital of an estate.[13] Also, a substantial or positive fact, as distinguished from what is equivocal and ambiguous;[14] a corporeal act of any kind, (as distinguished from *animus* or mere intention,) on the part of him who wishes to acquire a thing; whereby he obtains the physical ability to exercise his power over it whenever he pleases.[15] As applied to railroads, the term means a peculiar species of property, of a compound character, consisting of roadway, embankment, superstructure and equipment.[16]

CORPUS CHRISTI DAY. A feast instituted in 1264, in honor of the sacrament.[17]

CORPUS COMITATUS. The body of a county; the whole county, as distinguished from a part of it, or any particular place in it.[18]

CORPUS CORPORATUM EX UNO POTEST CONSISTERE. A maxim meaning "One person may constitute a corporation."[19]

CORPUS CORPORATUM NEQUE IN LITE SISTI; NEQUE UTLAGARI, NEQUE BONA FORISFACERE, NEQUE ATRINCTUM PATI, ATTORNATUM FACERE; NEQUE EXCOMMUNICARI POTEST. A maxim meaning "A corporation can neither be brought into court nor outlawed, nor can it forfeit goods, suffer attainder, take power of attorney nor is it liable to excommunication."[20]

CORPUS CORPORATUM NON HABET HÆREDES NEQUE EXECUTORES NEQUE MORI POTEST. A maxim meaning "A corporation has neither heirs nor executors nor can it die."[21]

CORPUS CUM CAUSA. An English writ which issued out of chancery, to remove both the body and the record, touching the cause of any man lying in execution upon a judgment for debt, into the king's bench there to remain until he satisfied the judgment.[22]

CORPUS DELICTI. The body of a crime.[23] (Corpus Delicti: Generally, see CRIMINAL LAW. In Particular Crimes, see ABORTION; ARSON; BURGLARY; HOMICIDE; LARCENY; RAPE.)

CORPUS HUMANUM NON RECIPIT ÆSTIMATIONEM. A maxim meaning "A human body is not susceptible of appraisement."[24]

may be perceived by any of the bodily senses are termed corporeal; although a common definition of the word includes merely that which can be touched and seen. Abbott L. Dict.

Corporeal investiture was a symbolical delivery of estates, under the feudal system. 2 Bouvier Inst. 154.

Corporeal possession of land is a residence on or occupation of or cultivation of the same. Dickson *v.* Marks, 10 La. Ann. 518, 519.

8. Black L. Dict.

Does not include decomposed remains.—Carter *v.* Zanesville, 59 Ohio St. 170, 52 N. E. 126, 127.

9. Burrill L. Dict.

10. Thus, the *corpus* of land is sometimes distinguished from the estate or interest in it. So in the Scotch law, a specific article of property is called *corpus*, as distinguished from its mere equivalent in money or other form. Burrill L. Dict.

11. Black L. Dict.

12. Sanderson *v.* Jones, 6 Fla. 430, 450, 63 Am. Dec. 217.

13. As distinguished from the income thereof. Weems *v.* Bryan, 21 Ala. 302, 307.

14. Burrill L. Dict. [*citing* Best Presumptions 269, 279].

15. Burrill L. Dict. [*citing* 1 Mackeldey Civ. L. 284, § 240].

16. Jackson *v.* Vicksburg, etc., R. Co., 99 U. S. 513, 25 L. ed. 460.

17. Black L. Dict.

18. Black L. Dict. And see Waring *v.* Clarke, 5 How. (U. S.) 441, 452, 453, 12 L. ed. 226; U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290, 298.

19. Lofft Max. 302.

20. Lofft Max. 303.

21. Lofft Max. 299.

22. Burrill L. Dict.

Applied also to a writ of habeas corpus for the removal of a cause. Burrill L. Dict. And see, generally, HABEAS CORPUS.

23. Black L. Dict.

24. Wharton L. Lex.

Applied in Snevily *v.* Read, 9 Watts (Pa.) 396, 401.

CORPUS JURIS. A body of law, a term used to signify a book comprehending several collections of law.[25]

CORPUS PRO CORPORE. In old records, body for body; a phrase expressing the liability of manucaptors.[26]

CORRAL.[27] As a noun, a pen or inclosure for horses or cattle.[28] As a verb, to surround or inclose, to coop up, to put into a close place.[29] (See, generally, ANIMALS.)

CORRECT.[30] As an adjective, in accordance or agreement with a certain standard, model, or original; conformable to truth, rectitude, or propriety; not faulty; free from error or misapprehension; accurate.[31] As a verb, to make straight or

25. Black L. Dict.

Corpus juris anglici signifies a body of English law. English L. Dict.

Corpus juris canonici signifies the body of canon law. Black L. Dict. See also 6 Cyc. 345, note 11.

Corpus juris civilis signifies the body of the civil law; the system of Roman jurisprudence compiled and codified under the direction of the emperor Justinian, in A. D. 528–534. Black L. Dict. And see Blackborough *v.* Davis, 1 P. Wms. 41, 52. See also CODE.

The three great compilations of Justinian, the Institutes, the Pandects, and the Code, together with the Novellæ, form one body of law, and were considered as such by the glossatores, who divided it into five volumina. The Pandects were distributed into five volumina, under the respective names of Digestum Vetus, Infortiatum, and Digestum Novum. The fourth volume contained the first nine books of the Codex Repetitæ Prælectionis. The fifth volume contained the Institutes, the Liber Authenticorum or Novellæ, and the three last books of the Codex. The division into five volumina appears in the oldest editions; but the usual arrangement now is the Institutes, Pandects, the Codex, and Novellæ. The name Corpus Juris Civilis was not given to this collection by Justinian, nor by any of the glossatores. Savigny asserts that the name was used in the twelfth century; at any rate, it became common from the date of the edition of D. Gothofredus of 1604. Wharton L. Lex. [*citing* Smith Dict. Antiq.].

26. Burrill L. Dict. [*citing* 3 How. St. Tr. 110].

27. The word comes from the Spanish language, and is to be construed according to its approved usage. People *v.* Borda, 105 Cal. 636, 639, 38 Pac. 1110.

28. Century Dict.

Compared with "pen."— Where a statute made it a misdemeanor to keep any sheep or other live stock "penned, corralled, or housed on, over, or on the borders of" any stream, etc., the court said: "This plainly implies that, within the meaning of the statute, the animals may be inclosed by means other than an ordinary pen or corral, as such structures are not usually built on or over a stream. And such use of the words 'pen' and 'corral' is authorized." People *v.* Borda, 105 Cal. 636, 640, 38 Pac. 1110 [*citing* Century Dict.].

29. People *v.* Borda, 105 Cal. 636, 640, 38 Pac. 1110, where it is said: "This need not necessarily be done by means of an artificial structure, but may also be done by means of, or through the agency of, men and dogs, either alone or in conjunction with natural or artificial barriers of an inanimate nature."

30. Not a technical word.— See Gordon *v.* South Fork Canal Co., 10 Fed. Cas. No. 5,621, 1 McAll. 513.

31. Century Dict.

Applied to executor's accounts.— See Wright *v.* New York City M. E. Church, Hoffm. (N. Y.) 202, 214. See also EXECUTORS AND ADMINISTRATORS.

"Correct and satisfactory."— Goods were supplied to an infant, and when he became of age, he certified, pursuant to statute, that the items of the account were "correct and satisfactory." The court declared "these words to mean that the items are properly set out and the sums charged in respect of those items satisfactory." Rowe *v.* Hopwood, L. R. 4 Q. B. 1, 3, 38 L. J. Q. B. 1, 19 L. T. Rep. N. S. 261, 17 Wkly. Rep. 28.

"Correct" and "true" as used in an insurance policy see Fowkes *v.* Manchester, etc., L. Assur., etc., Assoc., 3 B. & S. 917, 923, 32 L. J. Q. B. 153, 8 L. T. Rep. N. S. 309, 11 Wkly. Rep. 622, 113 E. C. L. 917.

"A correct description" is one which identifies the individual object intended to be designated. Springer *v.* Kroeschell, 161 Ill. 358, 369, 43 N. E. 1084 [*quoting* Phillips Mech. Liens, § 378]; Gordon *v.* South Fork Canal Co., 10 Fed. Cas. No. 5,621, 1 McAll. 513.

"Correct weight" as stated in a coal ticket, issued pursuant to a statute, see Knowles *v.* Sinclair, [1898] 1 Q. B. 170, 172, 18 Cox C. C. 681, 62 J. P. 102, 67 L. J. Q. B. 67, 77 L. T. Rep. N. S. 624, 46 Wkly. Rep. 188.

Distinguished from "complete."— See Adams *v.* Macfarlane, 65 Me. 143, as applied to an arbitration.

"True and correct" synonymous with "true and complete."— "The statement that a transcript contains 'a correct statement' of certain proceedings is the practical equivalent of a certificate that the transcript is 'a true and complete copy' of such proceedings." Yeager *v.* Wright, 112 Ind. 230, 235, 13 N. E. 707, construing Ind. Rev. Stat. (1881), § 459. "'A true and correct copy' is the equivalent of 'true and complete transcript.'" Collier *v.* Collier, 150 Ind. 276, 278, 49 N. E. 1063 [*quoting* Walker *v.* Hill, 111 Ind. 223, 225, 12 N. E. 387], construing Burns Rev. Stat. Ind. (1894), § 624. A "true and correct copy" instead of as a "true and complete

right; remove error from; bring into accordance with a standard or original; point out errors in.[32] (See CORRECTION.)

CORRECTION. The act of noting and pointing out for removal or amendment, as errors, defects, mistakes, or faults of any kind.[33] Also discipline;[34] CHASTISEMENT,[35] *q. v.*; the chastisement by one having authority, of a person under his lawful power who has committed some offense, for the purpose of bringing him to legal subjection.[36] (Correction: Of Account, see ACCOUNTS AND ACCOUNTING. Of Appeal Papers,[37] see APPEAL AND ERROR. Of Apprentice, see APPRENTICES. Of Award, see ARBITRATION AND AWARD.[38] Of Ballot, see ELECTIONS. Of Bill of Exceptions, see APPEAL AND ERROR. Of Instrument,[39] see REFORMATION OF INSTRUMENTS. Of Irregularities and Errors at Trial, see CRIMINAL LAW; TRIAL. Of Judgment,[40] see APPEAL AND ERROR; JUDGMENTS. Of Pupil, see ASSAULT AND BATTERY; SCHOOLS AND SCHOOL DISTRICTS. Of Seaman, see SEAMEN; SHIPPING. Of Specification for Patent, see PATENTS. Of Verdict, see CRIMINAL LAW; TRIAL.)

CORRELATIVE. Having a mutual or reciprocal relation.[41]

CORRESPOND. To harmonize with, or be suitable to.[42] Used in reference to written instruments, the word means adapted to each other.[43]

CORRESPONDENCE. A term meaning identity; adaptation;[44] making things

copy" is good. Bailey *v.* Martin, 119 Ind. 103, 108, 21 N. E. 346; Anderson *v.* Ackerman, 88 Ind. 481, 490 [*quoted* in Walker *v.* Hill, 111 Ind. 223, 225, 12 N. E. 387].

32. Century Dict.

Applied to review of tax assessment.—People *v.* Feitner, 30 Misc. (N. Y.) 641, 645, 64 N. Y. Suppl. 321, construing N. Y. Tax Law, §§ 250, 256. See also, generally, TAXATION.

33. Century Dict.

"Correction or explanation," as used in an amendment to a specification for a patent, under a statute, see Kelly *v.* Heathman, 45 Ch. D. 256, 260, 60 L. J. Ch. 22, 63 L. T. Rep. N. S. 517, 39 W. R. 91.

"Revision" and "correction."— Where a municipal charter authorized a property owner to call upon the city council to revise and correct errors committed in the proceedings had in assessing the cost of improvement against his property, the court said: "The words, 'revision and correction,' mean that the council may be called upon to review that which had been done and to make the proceedings conform to the law." Hutcheson *v.* Storrie, 92 Tex. 685, 696, 51 S. W. 848, 71 Am. St. Rep. 884, 45 L. R. A. 289 [*citing* Vinsant *v.* Knox, 27 Ark. 266, 272]. See also Cox *v.* Stevens, 14 Me. 205, 207, where under a militia act directing that the roll of the company should be annually revised, etc., and that the company should be paraded annually "among other things for the purpose of correcting the company roll," the court said: "Correcting and revising the roll . . . mean the same thing, in the sense in which these terms are used by the Legislature." Cox *v.* Stevens, 14 Me. 205, 207.

34. Black L. Dict.

35. **As used in reference to chastisement,** the term implies a preceding offense. Sampson *v.* Smith, 15 Mass. 365, 368.

36. 2 Bouvier Inst. 497.

"Correction" by master of a vessel see Sampson *v.* Smith, 15 Mass. 365, 368.

"There to be corrected," as used in a statute, relating to corporal punishment, see Rex *v.* Hoseason, 14 East 605, 608.

37. **Correction of certificate** on certification of case see 2 Cyc. 746, note 73.

Correction of mistake of court below in executing mandate see 2 Cyc. 608, note 62.

Correction of order by consent see 2 Cyc. 620, note 18.

38. **Correction by consent** of a bill to set aside an award see 3 Cyc. 356, note 91.

39. **Correction of change made in ignorance** in a note see 2 Cyc. 183, note 5.

Correction of clerical error in a corporation note see 2 Cyc. 207, note 42.

Correction of immaterial part of instrument see 2 Cyc. 212, note 73.

Correction of mistake in a conveyance see 2 Cyc. 203, note 23; 2 Cyc. 235, note 97.

Correction of mistake to conform to original intention see 2 Cyc. 148.

Correction of name without changing identity of person see 2 Cyc. 212.

40. **Correction of error in judgment** see 2 Cyc. 941, note 38.

Correction of judgment in an action for a penalty under a bond see 5 Cyc. 857, note 4.

41. Burrill L. Dict.

Thus a relative term is one which designates things which cannot exist one without the other. 1 Bouvier Inst. 37. "Father" and "son" are correlative terms. "Son" is the correlative of "father." "Right" and "duty" are correlative terms. Burrill L. Dict.

42. Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543, 557, 39 L. J. Ch. 505.

43. Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543, 557, 39 L. J. Ch. 505.

44. Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543, 571, 39 L. J. Ch. 505, where it is said: "Correspondence does not necessarily mean identity, it equally means adaptation, and it has various meanings to be gathered from the circumstances in which the word is used."

agree.[45] It also means the interchange of written communications.[46] (Correspondence: As Evidence, see EVIDENCE. Contracts by, see CONTRACTS.)

CORROBORATE. To strengthen;[47] to give additional strength; to make more certain;[48] to add weight or credibility to a thing;[49] to confirm by additional security, to add strength.[50] (See, generally, CRIMINAL LAW; EVIDENCE.)

CORROBORATION. The act of corroborating, strengthening, or confirming; addition of strength; confirmation.[51] (Corroboration: Newly-discovered Evidence, see NEW TRIAL. Of Accomplice, see CRIMINAL LAW. Of Confession, see CRIMINAL LAW. Of Witness, see WITNESSES. To Overcome Answer, see EQUITY. See also CORROBORATE.)

CORRUGATED. Wrinkled; bent or drawn into parallel furrows or ridges; as corrugated iron.[52]

CORRUPT.[53] As an adjective, unlawful;[54] dishonest, without integrity;[55] guilty of dishonesty, involving bribery, or a disposition to bribe or be bribed.[56] As a verb, to do an act for unlawful gain.[57] (See CORRUPTION.)

45. Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543, 557, 39 L. J. Ch. 505, where the lord chancellor denies that the proper meaning of the word "corresponding" is "harmonizing with, or being suitable to." He said: "I think such meaning is a secondary meaning only. A foot mark corresponds with the foot when it has been made by it. A copy of an instrument corresponds with the original when the wording and paging, and if possible the hand-writing agree. A lease corresponds with the counterpart."

46. Black L. Dict.

47. State *v.* Guild, 10 N. J. L. 163, 187, 18 Am. Dec. 404; Scheftel *v.* Hatch, 25 N. Y. Suppl. 240, 241, 53 N. Y. St. 655; Black L. Dict. [*quoted* in Still *v.* State, (Tex. Crim. App. 1899) 50 S. W. 355, 358].

48. Still *v.* State, (Tex. Crim. App. 1899) 50 S. W. 355, 358.

49. Black L. Dict. [*quoted* in Still *v.* State, (Tex. Crim. App. 1899) 50 S. W. 355, 358].

50. State *v.* Guild, 10 N. J. L. 163, 187, 18 Am. Dec. 404.

"Corroborated" used in connection with testimony see State *v.* Guild, 10 N. J. L. 163, 187, 18 Am. Dec. 404; Scheftel *v.* Hatch, 25 N. Y. Suppl. 240, 241, 53 N. Y. St. 655 [*quoting* State *v.* Guild, 10 N. J. L. 163, 187, 18 Am. Dec. 404]; Gabrielsky *v.* State, 13 Tex. App. 428, 439. And see Evans *v.* Evans, 41 Cal. 103, 108.

"Corroborating." — Meaning of term used in connection with "circumstances" see State *v.* Guild, 10 N. J. L. 163, 187, 18 Am. Dec. 404 (where it is said: "It becomes material . . . to settle what is meant by the qualification, 'corroborating,' annexed to the term 'circumstances.' The phrase clearly does not mean facts which, independent of the confession, will warrant a conviction, for then the verdict would stand not on the confession, but upon those independent circumstances"); State *v.* Buckley, 18 Oreg. 228, 233, 22 Pac. 838. Corroborating evidence is evidence *aliunde*, which tends to prove the prisoner's guilt independent of his declarations. State *v.* Buckley, 18 Oreg. 228, 233, 22 Pac. 838 [*quoted* in Gabrielsky *v.* State, 13 Tex. App. 428; Schwartz *v.* Com., 27 Gratt. (Va.) 1025, 21 Am. Rep. 365].

51. Webster Int. Dict.

52. Century Dict. And see Goodyear *v.* Cary, 10 Fed. Cas. No. 5,562, 4 Blatchf. 271, 1 Fish Pat. Cas. 424, construing the words "shirred or corrugated."

53. The word does not convey a precise idea. What it does express, though still in a vague manner, is the quantity — what it endeavors, though unsuccessfully, to express, is the quality — of the blame. Abbott L. Dict. [*quoting* 1 Bentham Ev. 351].

54. U. S. *v.* Johnson, 26 Fed. 682, 683.

55. Century Dict. [*quoted* in State *v.* Ragsdale, 59 Mo. App. 590, 603].

"Corrupt old tory."— In an action for slander, on account of the utterance of the words "keep a strict watch on him — he is a corrupt old tory," it was said "that the other qualities imputed, by the adjective 'corrupt,' represented the plaintiff as one possessing a heart of general depravity; and that the accompanying request, that he should be watched, implied an opinion that he was capable of disingenuousness, or artifice, to effect his sinister purposes. The joint application of the epithets 'corrupt' and 'tory,' has a tendency rather to qualify and limit, than to extend the former, by confining it to political feelings or sentiments." Hogg *v.* Dorrah, 2 Port. (Ala.) 212, 219.

"Corrupt or fraudulent motive" as used in a statute see State *v.* Norris, 111 N. C. 652, 16 S. E. 2, 4.

56. Century Dict. [*quoted* in State *v.* Ragsdale, 59 Mo. App. 590, 603].

"Corrupt bargain or consideration" as used in a statute in relation to elections see *Re* Kingston Election Case, 30 U. C. C. P. 389, 394.

57. Anderson L. Dict. [*quoted* in State *v.* Ragsdale, 59 Mo. App. 590, 603].

Distinguished from "procure."— In Henslow *v.* Fawcett, 3 A. & E. 51, 55, 1 Hurl. & W. 125, 4 N. & M. 585, 30 E. C. L. 46, where a statute prescribed a penalty against any person who shall "corrupt or procure" any elector to vote or forbear voting, and the offense charged was "corrupting," etc., Denman, C. J., said: "Procuring is one thing: it is essential that the vote should be given. Corrupting (which word is connected by the

CORRUPTION.[58] Something against law;[59] something forbidden by law, certain acts by arbitrators, election or other officers, trustees;[60] an act done wi intent to gain advantage not consistent with official duty and the rights of othe a champertous contract; a contract of usury;[61] any color of influence, of me relation of any kind, on the administration of justice;[62] inducing a violation duty by means of pecuniary considerations;[63] the act of an official or fiducia person who unlawfully and wrongfully uses his station or character to procu some benefit for himself or another person.[64] (See CORRUPT; CORRUPTLY; an generally, BRIBERY; EXTORTION; FRAUD.)

CORRUPTION OF BLOOD. See CONVICTS.

CORRUPTIO OPTIMI EST PESSIMA. A maxim meaning "Corruption of t best is worst."[65]

CORRUPTIVE. In old pleading, CORRUPTLY,[66] *q. v.*

CORRUPTLY. Viciously, or wickedly.[67] As defined by statute, a wrongf design to acquire or cause some pecuniary or other advantage to the pers guilty of the act or omission referred to, or to some other person.[68] (See CORRUP CORRUPTION; and, generally, BRIBERY; ELECTIONS; EXTORTION; FRAUD.)

disjunctive particle) is another; it seems to me to lie altogether in the act of the party giving the bribe." And Littledale, J., observed: "The words of the act are 'corrupt or procure;' and it seems to me that these two words mean different things." And see Sulston *v.* Norton, 3 Burr. 1235, 1237, 1 W. Bl. 317; Harding *v.* Stokes, 2 Gale 41, 5 L. J. Exch. 178, 2 M. & M. 233, 1 Tyrw. & G. 599.

58. A hard word, not always accurately understood; covering a multitude of official delinquencies, great and little. Wight *v.* Rindskopf, 43 Wis. 344, 351.

59. Bouvier L. Dict. [*quoted* in Chicago City R. Co. *v.* Olis, 192 Ill. 514, 61 N. E. 459].

"Simoniacal" corruption.— See Fletcher *v.* Sondes, 3 Bing. 501, 529, 11 E. C. L. 247, 1 Bligh N. S. 144, 4 Eng. Reprint 826; Mosse *v.* Killick, 50 L. J. Q. B. 300, 301, 44 L. T. Rep. N. S. 149, 29 Wkly. Rep. 522; Newman *v.* Newman, 4 M. & S. 66, 71, 1 Stark. 101, 16 Rev. Rep. 386, 2 E. C. L. 47.

60. Anderson L. Dict. [*quoted* in State *v.* Ragsdale, 59 Mo. App. 590, 603]. And see Adams *v.* Great North of Scotland R. Co., [1891] A. C. 31, 45, where, as used in a statute in reference to corruption, bribery, or falsehood, it was said that the word "corruption" should receive no other than its ordinary construction, and it cannot be taken to include irregular conduct on the part of an arbitrator with no suggestion of any corrupt motive.

61. Anderson L. Dict. [*quoted* in State *v.* Ragsdale, 59 Mo. App. 590, 603].

62. Wight *v.* Rindskopf, 43 Wis. 344, 351.

63. Abbott L. Dict.

64. Black L. Dict.

65. Wharton L. Lex.

66. Burrill L. Dict. [*citing* Woody's Case, Cro. Jac. 104].

67. Williams *v.* People, 26 Colo. 272, 274, 57 Pac. 701; U. S. *v.* Edwards, 43 Fed. 67. *Compare* State *v.* Stein, 48 Minn. 466, 470, 51 N. W. 474, where it being alleged that the defendant's testimony was wilfully and corruptly false, it was held that this was equivalent to alleging that he wilfully and knowingly testified falsely.

Distinguished from "dishonestly." Cooper *v.* Slade, 8 E. & B. 1151, 1160, E. C. L. 1151.

Distinguished from "wickedly," "immorally," etc., in Bewdley Election Petition, 19 L. T. Rep. N. S. 676, 678.

Distinguished from "wilfully" in William *v.* People, 26 Colo. 272, 274, 57 Pac. 701; U. S. *v.* Edwards, 43 Fed. 67; Rex *v.* Stevens, 5 B. & C. 246, 249, 11 E. C. L. 448. And see Rex *v.* Richards, 7 D. & R. 665, 671, 4 L. J. K. B. O. S. 155, 16 E. C. L. 313. See also Anonymous, Cro. Eliz. 201; Lembro *v.* Harper, Cro. Eliz. 147.

May imply motive.— Chicago City R. Co. *v.* Olis, 192 Ill. 514, 61 N. E. 459 [*quoting* Overtoom *v.* Chicago, etc., R. Co., 181 Ill. 3; 54 N. E. 898].

May import falsity.— State *v.* Smith, 4 Vt. 201, 212, 22 Atl. 604. But see Reg. *v.* Oxley, 3 C. & K. 317 [*quoted* in State *v.* Smith, 63 Vt. 201, 212, 22 Atl. 604].

"Fraudulently and corruptly."— In Wo sham *v.* Murchison, 66 Ga. 715, 719, it said: "These words, say this court in t case of Lake *v.* Hardee, 57 Ga. 459, 468, 'me more than mere illegal conduct; they me moral turpitude and intentional fraud, to passed upon by the jury from all the facts the case.' They mean actual fraud, actu intentional wrong-doing willful and corru dealing, a purpose to impose on his *cestui q trust*, and to benefit himself."

"Wilfully, knowingly, maliciously a falsely" may imply "corruptly." State *v.* Bixler, 62 Md. 354, 357.

68. Ariz. Pen. Code, § 7; Cal. Pen. Co § 7; Minn. Stat. § 6842; N. D. Rev. Cod § 7715; S. D. Pen. Code, § 810; Utah R Stat. § 4053.

An act may be corruptly done, though t advantage to be derived from it be not fered by another. Bouvier L. Dict. [quo in Chicago City R. Co. *v.* Olis, 192 Ill. 5 516, 61 N. E. 459].

CORS. Body,[69] *q. v.*

CORSEPRESENT. A Mortuary,[70] *q. v.*

CORSNED. A species of ordeal in use among the Saxons, performed by eating a piece of barley bread over which the priest had pronounced a certain imprecation.[71]

CORTES. The name of the legislative assemblies, the parliament or congress, of Spain and Portugal.[72]

CORVEE. In France, a duty imposed upon labor of working the highways.[73]

COSCEZ. A term applied in Domesday, to an inferior class of tenants.[74]

COSDUNA. In feudal law a custom or tribute.[75]

COSE. A corrupt form of Chose,[76] *q. v.*

COSEN or **COZEN.** In old English law, to Cheat,[77] *q. v.* (See Cosening; Cosin.)

COSENAGE or **COSINAGE.** In old English law, kindred; cousinship;[78] collateral relationship or kindred by blood; Consanguinity,[79] *q. v.* Also a writ that lay for the heir where the *tresail, i. e.*, the father of the *besail*, or great-grandfather, was seised of lands in fee at his death, and a stranger entered upon the land and abated.[80] (See Cosin.)

COSENING. An offense, mentioned in the old books, where anything was done deceitfully, whether belonging to contracts or not, which could not be properly termed by any special name.[81] (See Cosen.)

CO-SERVANT. See Master and Servant.

COSHERING. A feudal prerogative or custom for lords to lie and feast themselves at their tenants' houses.[82]

COSIN, COSYN, or **COSEN.** In old English law, a collateral relative by blood, as a brother, sister, uncle, etc.; any relative in the ascending line, above a great-grandfather.[83] (See Cosen; Cosinage.)

COSS. A term used by Europeans in India to denote a road-measure of about two miles, but differing in different parts.[84]

COST.[85] The amount paid, charged, or engaged to be paid for anything bought;[86] charge, expense, loss, detriment.[87] Also a contraction of *ceo est*, that

69. Burrill L. Dict.

70. Wharton L. Lex. [*citing* 2 Bl. Comm. 426; 2 Stephen Comm. 148].

71. If the accused ate it freely, he was pronounced innocent; but if it stuck in his throat, it was considered as a proof of his guilt. Burrill L. Dict. [*citing* 4 Bl. Comm. 345; Crabb Hist. Eng. L. 30].

72. Black L. Dict.

73. State *v.* Covington, 125 N. C. 641, 644, 34 S. E. 272, where it is said: "A grievance which contributed powerfully to their revolution of a century ago, since which time the roads have been worked by taxation."

74. Burrill L. Dict.

75. Black L. Dict.

76. Burrill L. Dict.

77. Burrill L. Dict. See also Middlemore's Case, 3 Leon. 171.

78. Black L. Dict.

79. Burrill L. Dict. [*citing* Coke Litt. 160*a*].

80. Black L. Dict. [*citing* Fitzherbert Nat. Brev. 221].

81. Black L. Dict.

82. Black L. Dict.

83. Burrill L. Dict.

84. Wharton L. Lex.

85. It is a word capable of a larger or narrower construction according to the subject-matter, and the circumstances of the particular case. Gray *v.* Harper, 10 Fed. Cas. No. 5,716, 1 Story 574.

Distinguished from "damages." — The word "cost" is of limited significance,— much narrower than "damages," for instance, which, in the case of laying out one railroad over and across another, has been held not to include compensation for the interruption and inconvenience to the business of the latter occasioned thereby. *In re* Newton, 172 Mass. 5, 10, 51 N. E. 183 [*citing* Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Lexington, etc., R. Co. *v.* Fitchburg R. Co., 9 Gray (Mass.) 226].

86. Webster Dict. [*quoted* in McCoy *v.* Hastings, 92 Iowa 585, 586, 61 N. W. 205].

Cost of an article at any particular place is the price given, and every charge which attended the purchase and the exportation, paid or supposed to be paid, at the place whence the article is exported. Goodwin *v.* U. S., 10 Fed. Cas. No. 5,554, 2 Wash. 493.

"Prime cost" is distinguished from "actual cost" in Goodwin *v.* U. S., 10 Fed. Cas. No. 5,554, 2 Wash. 493.

87. Brower *v.* Maiden, 4 Fed. Cas. No. 1,970, Gilp. 294.

"Cost of insurance" see Tillson *v.* U. S., 129 U. S. 101, 104, 9 S. Ct. 255, 32 L. ed. 636. See also, generally, Insurance.

is.[88] (See Cash Market Value; Compensation; Cost Price. See, generally, Costs.)

COSTAGES or CUSTAGES.[89] In old English law, costs.[90] (See, generally, Costs.)

COSTARD. A head. Also a kind of apple.[91]

COST-BOOK. A book in which a number of adventurers who have obtained permission to work a lode, and have agreed to share the enterprise in certain proportions, enter the agreement, and from time to time the receipts and expenditures of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares.[92] (See, generally, Mines and Minerals.)

COSTES. Costs.[93] (See, generally, Costs.)

COST, FREIGHT, AND INSURANCE. Words meaning cost of an article with commission and cost of premium of insurance and the freight.[94] (See, generally, Carriers; Insurance; Shipping.)

COST PRICE. The price paid for goods by a purchaser;[95] what is actually paid for an article;[96] the sum which the seller himself paid for the article.[97] (See Cash Market Value; Cost.)

"Cost of relief" as used in a statute see Dinning *v.* South Shields Union, 13 Q. B. D. 25, 48 J. P. 708, 53 L. J. M. C. 90, 50 L. T. Rep. N. S. 446.

"Cost of tuition" see State *v.* Hamilton, 69 Miss. 116, 10 So. 57. See also, generally, Schools and School Districts.

Election expenses.— Where a statute imposed on the borough auditor the duty of printing and distributing the ballots for the election of borough officers and certifying "the costs of such printing and distribution to the county commissioners for payment, as part of a county election expenses," the court said: "The distribution of ballots, and their preparation for distribution, as required by the law, involved both manual and clerical labor. The language, 'the cost of such . . . distribution,' necessarily implies payment for the time expended by the auditor." Corr *v.* Lackawanna County, 163 Pa. St. 57, 61, 29 Atl. 745, construing Pennsylvania act of June 19, 1891.

88. Burrill L. Dict.

89. Lord Coke derives this word from the verb *conster*, and that again from the verb *constare*; "for these costages must constare (appear) to the court to be legal costs and expenses." Burrill L. Dict. [*citing* 2 Inst. 288].

90. Burrill L. Dict.

91. Wharton L. Lex.

92. Black L. Dict.

The cost-book contains the names of all the shareholders, and the number of shares held by each is set opposite to his name. In a cost-book partnership, a shareholder may get rid of his shares, and with them his liabilities, so far as his partners are concerned, without their consent, either by transfer or simple relinquishment, provided the cost-book regulations do not prohibit such a course; in the former case the fact of transfer being entered by the purser in the cost-book, and in the latter notice being given to the purser of his having so relinquished his shares, and all his claims upon the mine. Wharton L. Lex.

93. Burrill L. Dict. And see Trewennarde *v.* Skewys, Dyer 55*b*.

94. English L. Dict. And see Wancke *v.* Wingren, 58 L. J. Q. B. 519.

The terms are very unusual, and are perfectly well understood in practice. Ireland *v.* Livingstone, L. R. 5 H. L. 395, 41 L. J. Q. B. 201, 27 L. T. Rep. N. S. 79.

95. Buck *v.* Burk, 18 N. Y. 337, 340.

96. McCoy *v.* Hastings, 92 Iowa 585, 586, 61 N. W. 205 [*quoting* Buck *v.* Burk, 18 N. Y. 337]; Anderson L. Dict.; Black L. Dict.

97. Herst *v.* De Comeau, 1 Sweeny (N. Y.) 590, 605, where it is said: "But it may refer to the sum paid to its original producer, or to some one of the numerous holders through whose hands it has passed between the original producer and the immediate seller."

The term is a relative one, and differs in its meaning according to the circumstances under which it is used: thus, the cost-price to an importer is one thing, to a jobber or middleman another, to a retailer another, and to a purchaser from a retailer still another. Herst *v.* De Comeau, 1 Sweeny (N. Y.) 590, 605.